ADJUDICATION IN THE POLITICAL BRANCHES

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Article III of the Federal Constitution vests "[t]he judicial Power of the United States" in courts that enjoy structural protections against the political process. Subject to a few qualifications, this language strongly implies that only such courts can exercise "judicial" power on behalf of the federal government.

Modern conventional wisdom maintains that Article III cannot be read so literally, because the federal government has always exercised considerable adjudicative authority outside the Article III courts. But this argument rests on unexamined assumptions about what "judicial" power is and when its use is necessary. In particular, the argument assumes that "judicial" power is necessary whenever the government proposes to adjudicate a litigable dispute in a binding way.

This Article advances historical evidence against the easy equation of adjudicative authority with "judicial" power. At least in the nineteenth century, whether adjudication required "judicial" power was thought to depend on the nature of the legal interests that the adjudication would bind. Governmental officials needed "judicial" power to dispose conclusively of an individual's legal claim to private rights that fit the template of life, physical liberty, or traditional forms of property. But "judicial" power was not considered necessary for governmental adjudicators to make authoritative determinations adverse to other legal interests, including legal interests held by the public as a whole and legal interests that jurists classified as mere "privileges" rather than core private "rights." Thus, the structural relationship among the branches of the federal government varied according to the substantive legal interests on which the government proposed to act.

After exploring historical evidence of this fact, Professor Nelson argues that it remains true today. Even in the modern administrative state, the public/private and right/privilege distinctions remain embedded in American separation of powers.

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INTRODUCTION

The Federal Constitution is written as if the “legislative Powers” vested in Congress,1 the “executive Power” vested in the President,2 and the “judicial Power” vested in the federal courts3 are distinct Platonic forms. But efforts by modern formalists to define these separate powers founder on the fact that all three branches can perform similar functions. Suppose, for instance, that Congress wants government officials to apply preexisting legal criteria to parcel out federal land among competing claimants. Under traditional understandings of the Constitution, Congress could simply handle the matter itself, investigating the facts of each case and passing private bills to effectuate its decisions. Alternatively, it could delegate some of the key determinations to an executive agency or leave them for the courts. Because each of the three branches can perform much the same task, efforts to understand the separation of powers in formalistic terms have struck many modern commentators as hopeless.4

The formalist approach seems more promising, however, when one focuses on a different kind of issue. Suppose that the federal government wants to incarcerate someone for a federal crime. For the government to do so in a way that withstands constitutional scrutiny, each of the three branches has a different role to play: Congress must have written a statute authorizing punishment, officials in the executive branch must prose-cute the defendant under that statute, and a court must adjudge the defendant guilty. While some overlap of functions can still occur, our vision of the constitutional separation of powers is substantially more formalistic when the government is trying to lock someone up than when the government is distributing public lands.5

This fact reveals an important link between issues commonly thought of as “structural” and issues commonly thought of as “substantive”: The responsibilities and relationships of the three branches of government are different when certain kinds of individual rights are at stake than when they are not.6 The basic intuition is simple. Historically, Americans

2. Id. art. II, § 1.
3. Id. art. III, § 1.
5. Cf. Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1011–40 (2006) (arguing that separation of powers doctrine should be more formalistic for criminal cases than for administrative matters, but suggesting that modern decisions and academic commentary do not reflect this insight).
have concluded that the protection of individual rights to person and property—core "private rights" of the sort that (on John Locke's influential account) government was instituted to safeguard—triggers different political calculations, and therefore requires different institutional arrangements, than the protection of "public rights" belonging to the body politic. When government deals with rights held in common by the public at large, it makes sense for government to be responsive to the people as a whole. In a host of different ways, our constitutional system has therefore put the political branches in control of public rights. But when government is dealing with core private rights, this political responsiveness has long struck Americans as undesirable. When core private rights are at stake, the relationship among the branches shifts, and the judiciary assumes an indispensable role.

In a prior article, Ann Woolhandler and I explored the link between these ideas and doctrines about standing to sue, which traditionally have helped to define the line between political and judicial power in our democracy.7 Throughout our history, standing doctrine has raised no bar to private litigants with individualized legal interests. At least in the absence of public authorization, however, American courts have generally refused to entertain private lawsuits about matters in which the whole body politic was concerned and in which every individual had the same legal stake. From the early Republic on, such matters were controlled instead by the political branches.

More recently, Professor Woolhandler has explained how the same ideas illuminate nineteenth-century understandings of the circumstances in which legislatures can and cannot adopt "retroactive" statutes.8 Generations of Americans assumed that once core private rights had vested in a particular individual, the allied requirements of due process and the separation of powers protected them against many forms of interference by the political branches. As nineteenth-century legal thinkers understood both the Federal Constitution and its state counterparts, statutes typically could not create new private liabilities for past conduct,9 or destroy accrued causes of action for past invasions of private rights to person or property,10 or abrogate judicial judgments awarding money damages to private litigants.11 But American constitutions were not understood to impose similar restraints on the political branches' control over public rights. At both the state and federal levels, legislatures could freely adopt

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10. See id. at 362.
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statutes retroactively burdening the communal rights of the people whom they represented.

This Article shows how the same framework reveals unexpected order in a notoriously tangled area of constitutional law. The basic question is straightforward: Under what circumstances does the Constitution permit adjudicative decisions made by Congress or executive agencies to enjoy the sort of finality that is typically associated with judicial decisions? In particular, to what extent can Congress empower officials who do not enjoy the structural protections of Article III, and who cannot validly exercise what the Constitution calls "[t]he judicial Power of the United States," to make factual findings that courts are bound to accept in subsequent litigation, or to resolve legal disputes involving private individuals in a way that will itself have legal consequences? This question goes to the heart of the modern administrative state; any accurate picture of our separation of powers requires some understanding of the matters that administrative agencies can adjudicate and the matters that only true courts can resolve. Despite its importance, though, scholars agree that the relevant case law is "as troubled, arcane, confused and confusing as could be imagined."12

The relevance of the public/private distinction to traditional ways of thinking about this subject is no secret. Both scholars and the modern Supreme Court are well aware of nineteenth-century precedents allowing legislatures or their delegates in the executive branch to adjudicate "public rights," but insisting that only entities with judicial power can authoritatively declare the loss of an individual's core "private rights" to life, liberty, or property.13 Time, however, has obscured the meaning of these categories. Although the Supreme Court still invokes "the 'public rights' doctrine,"14 it confesses its own uncertainty about what that doctrine cov-


ers, and its most recent cases suggest inconsistent answers. Many scholars, for their part, portray the doctrine as little more than a grab bag of miscellaneous results that have some historical roots but no underlying logic.

Part I of this Article tries to make sense of the patterns that history reveals. I make three main claims. First, early American lawyers had a particular understanding of the distinction between "public rights" and "private rights," and that understanding is coherent when considered on its own terms. Second, this version of the public/private distinction had considerable resolving power; it formed the basis for a framework that was used throughout the nineteenth century to separate matters that required "judicial" involvement from matters that the political branches could conclusively adjudicate on their own. Third, and contrary to the assumptions of many modern scholars, this traditional framework was perfectly consistent with the language of Article III.

Part II argues that the traditional framework is not simply of antiquarian interest. Its influence is stamped in the statutes that organize the modern administrative state; even during the New Deal, the traditional framework guided congressional decisions about the powers that could (and could not) be vested in administrative agencies. Its influence is also apparent in modern case law. Indeed, to the extent that the Supreme Court's current approach to these issues has any structure at all, that structure comes from the traditional framework.

To be sure, modern scholars have gravitated toward alternative theories about the adjudicatory powers that nonjudicial actors can wield. As

15. See N. Pipeline, 458 U.S. at 69 (plurality opinion) ("The distinction between public rights and private rights has not been definitively explained in our precedents.").

16. See Daniel J. Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2571 (1998) ("The Supreme Court's descriptions of the doctrine are sufficiently shifting and difficult to comprehend that one must doubt whether the doctrine has intelligible contours.").

17. See, e.g., Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 370 (5th ed. 2003) [hereinafter Hart & Wechsler] (observing that "the public rights category has never received a canonical formulation," and describing it simply by listing "three main classes of cases"—immigration matters, claims against the federal government, and "[d]isputes arising from coercive governmental conduct outside the criminal law"—that "[h]istorically . . . have formed the doctrine's core"); Martin H. Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197, 204-05 (acknowledging that "the public-private right dichotomy . . . does find a basis in Supreme Court precedent," but arguing that it is "wholly unwarranted by constitutional language, history, policy or theory"); 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, 111-20 (1988) (condemning dichotomy as "barren conceptual framework" that does not even have strong historical support); cf. James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 665 (2004) (surveying academic literature and concluding that "[s]cholars have been especially unkind to the public rights category").

18. See Redish, supra note 17, at 208 (arguing that use of public/private distinction in this context "contravenes the policies and language of article III"); see also infra note 257.
Part III explains, however, the leading academic theory simply submerges the structure of the traditional framework without actually jettisoning it. I argue that the persistence of that structure should not surprise us: The contrast between public rights and private rights is so deeply ingrained in American-style separation of powers, and so fundamental to our system of government, that it cannot plausibly be excised.

I. THE TRADITIONAL FRAMEWORK

Article III of the Federal Constitution strongly implies that neither Congress nor entities within the executive branch can exercise "[t]he judicial Power of the United States." Article III vests that power instead in true federal courts, staffed by judges who enjoy various structural protections against political control. But the Constitution does not specify exactly what "judicial" power is or when its use is necessary.

This Part discusses the principles that members of the Founding generation and their successors drew upon as they began to settle that aspect of the Constitution's meaning. To get our terminology in order, Part I.A introduces the concept of "core private rights"—legal entitlements that belonged to discrete individuals (rather than the public as a whole) and that were considered "rights" (rather than mere "privileges" that existed only at the sufferance of public authorities). It also discusses the historical link between courts and the protection of such rights. Part I.B then traces that link in the development of federal administrative law, which proceeded on the premise that the political branches could conclusively adjudicate legal interests controlled by the public, but that only "judicial" power could authoritatively declare that a competent private individual no longer retained core private rights previously vested in him. Part I.C investigates in more detail the extent of the judicial involvement that was deemed necessary when core private rights were at stake. Again, the public/private distinction proves crucial: The political branches could conclusively determine various "public matters," but the judiciary had to be able to resolve other kinds of factual issues for itself.

19. See U.S. Const. art. III, § 1 (specifying that judges of these courts "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"); see also id. art. II, § 2 (restricting congressional control over appointment of judges); id. art. I, §§ 2–3 (establishing difficult procedural mechanism for removal through impeachment and conviction).

A. Core Private Rights and the Need for "Judicial" Power

1. The Taxonomy of Public Rights, Private Rights, and Quasi-Private Privileges. — It is impossible to understand the development of American-style separation of powers without understanding the traditional taxonomy of legal interests upon which the government might act. That taxonomy was absolutely central to American legal thought both at the time of the Founding and throughout the nineteenth century.

From the outset, American lawyers thought it "quite natural" to distinguish legal interests that were vested in discrete individuals from legal interests that belonged to the public as a whole. Indeed, "the distinction between the private rights and interests of each individual[ ] and the public rights and interest of the whole" was said to be "inherent in the very body[ ] of every political society." To be sure, people recognized that different political societies draw this line in different places. Even within a single political society, moreover, the line is not an impassable barrier; particular legal interests, or at least particular legal interests of certain sorts, can be transferred from the public to a private person or vice versa. But at any given time, some legal interests will belong to discrete individuals while others will belong to the people at large.

To illustrate the category of "public rights belonging to the people at large," early American lawyers tended to point to three different kinds of legal interests: (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 "for the government and tranquillity of the whole." At any given time, the law recognized many such "public rights"—interests that enjoyed legal protection, but that belonged to "the whole community, considered as a community, in its social aggregate capacity."

The counterparts of "public rights" were "private rights." But the terminology of "rights" is confusing, because Anglo-American lawyers did
not treat all legal interests capable of being held by individuals as an undifferentiated mass. Inspired by Lockean political theory, they distinguished what I will call “core” private rights (which Lockean tradition associated with the natural rights that individuals would enjoy even in the absence of political society28) from mere “privileges” or “franchises” (which public authorities had created purely for reasons of public policy and which had no counterpart in the Lockean state of nature).

As elaborated by William Blackstone, whose Commentaries grounded the legal education of Founding-era Americans and remained enormously important throughout the nineteenth century, the foundational documents of British law recognized 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”;29 (2) the “right of personal liberty,” which entailed freedom from “imprisonment or restraint, unless by due course of law”;30 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.”31 Although Blackstone called these interests the “absolute” rights of individual Englishmen, he did not mean that they were unqualified or exempt from any form of public regulation. He called them “absolute” simply because they were not “relative”; they “appertain[ed] and belong[ed] to particular men[,] merely as individuals” rather than being “incident to them as members of society, and standing in various relations to each other.”32 Still, Blackstone unquestionably put these core private rights on a special plane. Just as Locke had argued that the “great and chief end” of government was to make individual life, liberty, and property more secure than they would be in the state of nature,33 Blackstone asserted that the maintenance and proper regulation of the “absolute” rights of individuals was “the first and primary end of human laws.”34

The category of “privileges” or “franchises” was different. Depending on how the legislature chose to structure particular “privileges,” they could operate just like private rights; while the legislature permitted them to exist, they could form the basis for private claims against other individuals, and they could command recognition from both judicial and executive officials. But unlike the core private rights listed by Blackstone (which had their roots in the individualistic state of nature), these entitlements were but means to carry out public ends; “they originated with the

29. 1 Blackstone, supra note 26, at *129.
30. Id. at *129, *134.
31. Id. at *129, *138.
32. Id. at *123.
33. Locke, supra note 28, § 124 (emphasis omitted).
34. 1 Blackstone, supra note 26, at *124.
state rather than the individual,"\textsuperscript{35} and even in private hands they amounted to mere "trusts of civil power to be exercised for the public benefit."\textsuperscript{36} As such, they were not understood to vest in private individuals in the same way as core private rights.

2. How the Taxonomy Bears on American-Style Separation of Powers. — In the late eighteenth century, when Americans were establishing written constitutions for both the fledgling states and the federal government, they drew heavily upon this preexisting taxonomy. Echoing Magna Carta, for instance, both the Federal Constitution and nearly all of its state counterparts explicitly forbade governmental authorities to deprive any individual of "life, liberty, or property" except "by the law of the land" or with "due process of law." These provisions plainly reflect the Lockean tradition of special solicitude for core private rights.

Even when the constitutional text did not so explicitly invoke that tradition, the traditional taxonomy informed how subsequent generations interpreted the text. Take, for instance, the Pardon Clause of the Federal Constitution, which gives the President "Power to grant Reprieves and Pardons for Offenses against the United States."\textsuperscript{37} If one knew nothing about the traditional taxonomy, one might deem this provision ambiguous about the scope of the President's authority: In addition to keeping offenders out of prison, can a presidential pardon shield them from civil liability for the harms that their crimes caused to the persons or property of private individuals? Throughout American history, however, even lawyers in the executive branch have agreed that the answer to this question must be "no": While it makes sense for the head of the executive branch to be able to surrender certain rights "which belong to the public" (such as the public's right to punish someone for federal crimes), the Pardon Clause should not be read as authorizing a political official "to release and acquit ... private rights."\textsuperscript{38} As the Supreme Court once put it, "An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."\textsuperscript{39}

In much the same way, the traditional taxonomy informed American understandings of the respective roles of the political branches and the judiciary in the constitutional separation of powers. The political branches of the state and federal governments were understood to hold sway over both public rights and whatever quasi-private "privileges" the

\textsuperscript{35} Woolhandler, Retroactivity, supra note 8, at 1022.
\textsuperscript{36} Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 632 (1853); see also id. at 631–33 (emphasizing "deeply marked" distinction between core private rights and these lesser entitlements, which "the political institutions of the country" had "conferred with a view to the public welfare").
\textsuperscript{37} U.S. Const. art. II, § 2.
\textsuperscript{38} Passenger Laws—Pardoning Power, 6 Op. Att'y Gen. 393, 403 (1854).
\textsuperscript{39} Angle v. Chi., St. Paul, Minneapolis & Omaha Ry. Co., 151 U.S. 1, 19 (1894).
legislature created for reasons of public policy. But when the government wanted to act authoritatively upon core private rights that had vested in a particular individual, courts and commentators alike agreed that an exercise of "judicial" power was usually indispensable.

To be sure, the relevant constitutional texts did not spell out these principles in detail, any more than the Pardon Clause spelled out its distinction between public and private rights. Given their understanding of the political theory underlying American constitutions, however, state and federal commentators from the Founding generation on confidently described the judiciary as "that department of the government to whom the protection of the rights of the individual is by the constitution especially confided."40 In the words of the distinguished judge and commentator Thomas Cooley, "the peculiar province of the judicial department"—its unique and indispensable function in our system of government—is "to adjudicate upon, and protect, the rights and interests of individual citizens."41 Whether this principle flowed simply from the limited nature of the powers vested in the political branches or from provisions like the Due Process Clause of the Fifth Amendment and its state counterparts,42 American constitutions were widely understood to require an opportunity for "judicial" proceedings when the government proposed to act upon core private rights. It was axiomatic that "[t]he legislative power . . . cannot directly reach the property or vested rights of

40. 1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia app. at 140, 357 (Philadelphia, William Young Birch & Abraham Small 1803); see also, e.g., Gaines v. Gaines, 48 Ky. (9 B. Mon.) 295, 301 (1848) (describing judiciary as "the tribunal appointed by the constitution and the law, for the ascertainment of private rights and the redress of private wrongs"); State ex rel. Attorney Gen. v. Hawkins, 5 N.E. 228, 232 (Ohio 1886) ("[P]ower to hear and determine rights of property and of person between private parties is judicial, and can only be conferred on the courts.").

41. Cooley, supra note 9, at 91 (citing cases).

42. See, e.g., Cohen v. Wright, 22 Cal. 293, 318 (1863) ("The terms 'due process of law' have a distinct legal signification, clearly securing to every person . . . a judicial trial, according to the established rules of law, before he can be deprived of life, liberty, or property."); Robert S. Blackwell, A Practical Treatise on the Power to Sell Land for the Non-Payment of Taxes Assessed Thereon 35–36 (Chicago, D.B. Cooke & Co. 1855) ("Upon a careful review of all the authorities, it may be safely affirmed as a principle of constitutional law, that the clause in question requires judicial . . . action, before any person can be deprived of his life, liberty or property."); 2 James Kent, Commentaries on American Law 15 (New York, William Kent 6th ed. 1848) (defining "due process of law" for this purpose as "law, in its regular course of administration, through courts of justice"); see also John Harrison, Substantive Due Process and the Constitutional Text, 83 Va. L. Rev. 493, 511, 522 (1997) [hereinafter Harrison, Substantive Due Process] (associating "much of due process doctrine as it developed in the nineteenth century" with premise "that only judicial power may effect a direct deprivation of life, liberty, or property"); Woolhandler, Retroactivity, supra note 8, at 1025 (agreeing that in nineteenth century, "the process that was considered 'due' for an authoritative disposition of core private rights involved 'judicial' application of the standing laws").
the citizen, by providing for their forfeiture or transfer to another, without trial and judgment in the courts.\textsuperscript{43}

By contrast, the political branches \textit{could} act on their own to abrogate \textit{public} rights. Courts certainly did not have to be involved for legislatures to authorize the expenditure of money from the public treasury or the disposition of other forms of public property administered by the government. Without any judicial involvement, legislatures could also surrender the public’s right to punish people for acts that had been unlawful when committed; although state and federal constitutions were understood to insulate core private rights against retroactive legislation, the same constitutions were widely understood to permit the retroactive repeal of penal statutes.\textsuperscript{44} Indeed, provisions like the Pardon Clause commonly gave an executive officer unilateral authority to set aside the public’s penal rights even after an offender had been duly convicted in court.

The political branches were also in charge of more tangible rights held directly by the people at large, such as the public’s right to use navigable waterways and other common highways. If the appropriate legislative body so desired, it could authoritatively permit private companies to construct bridges or dams that would hinder or even completely defeat navigation along particular rivers.\textsuperscript{45} Individual citizens were not thought to have any constitutional entitlement to go to court to challenge such dispositions of the public’s rights. Even in the absence of public authorization, in fact, someone who built a bridge or dam that invaded the public’s rights was not thereby opening himself to suit by each individual citizen. Unless a particular individual was suffering special damage of a

\textsuperscript{43} Newland v. Marsh, 19 Ill. 376, 382 (1857); accord, e.g., Smith’s Lessee v. Devecmon, 30 Md. 473, 481 (1869) ("The Legislature has no power to pass laws impairing or divesting vested rights . . . ."); Inhabitants of Medford v. Learned, 16 Mass. (15 Tyng) 215, 217 (1819) ("[N]o legislator could have entertained the opinion, that a citizen, free of debt by the laws of the land, could be made a debtor merely by a legislative act, declaring him one.").

\textsuperscript{44} See Woolhandler, Retroactivity, supra note 8, at 1027–28, 1031–32.

\textsuperscript{45} In the words of New York’s Chancellor Walworth:

The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large. They are not the private unalienable rights of each individual. Hence the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the people at large[,] provided they do not interfere with vested rights which have been granted to individuals.

\textsuperscript{43} Lansing v. Smith, 4 Wend. 9, 21–22 (N.Y. 1829); see also Brown v. Morris Canal & Banking Co., 27 N.J.L. 648, 654 (1858) (construing powers of municipal body that had granted applicant’s request for license to build wharf in front of shoreland that applicant claimed to own, and concluding that although this license protected applicant against suit by "the state or any person claiming under the public right of navigation," it did not establish that applicant was indeed shoreland’s true owner, because “the trial of title to lands between conflicting claimants” required judicial powers and modes of proceeding); id. at 650–51 (contrasting legislative control over "the public right of navigation" with "the settlement and determination of private rights").
sort not felt by other members of the public, whether to ask the courts to enjoin obstructions of a public waterway or public road was typically a decision for public officials in the executive branch of the relevant government.46

Under the prevailing view of the separation of powers in the nineteenth century, legislatures also enjoyed unilateral authority over the quasi-private “privileges” that they created for reasons of public policy. In the words of New York jurist John Savage, “it cannot be denied that the Legislature possess the power to take away by statute what was given by statute, except vested rights.”47 Thus, if a state legislature authorized individuals to bring qui tam suits on behalf of the public and to share in whatever recovery these suits yielded, the legislature could validly eliminate this authority at any time before judgment.48 During the pendency of the suit, the legislature could also give officers in the executive branch discretion to step in and supplant the qui tam relator.49 A similar analysis applied to tax exemptions, licenses, and other privileges that the legislature had gratuitously allowed private individuals to enjoy; as long as no contractual rights or vested interests in property were being abrogated, the legislature could repeal the statutes creating these privileges,50 and it could also authorize executive officials to revoke them on a more individualized basis. Likewise, the legislature could authorize officers in the executive branch to grant and revoke the privilege of government employment at their pleasure, without the need for “judicial” proceedings to review the resulting personnel decisions. With respect to all these matters, the legislature could structure the statutory privileges that it was conferring in such a way as to preserve their character as public trusts even when they were being exercised by private individuals.

In sum, as American-style separation of powers developed in the nineteenth century, the respective roles of the branches depended on the

46. See, e.g., Spooner v. McConnell, 22 F. Cas. 939, 947 (C.C.D. Ohio 1838) (No. 13,245) (“The United States through their law officer might well ask to have this nuisance, if it shall be one, abated; but the special and private injury to an individual is the only ground on which he can ask for relief against it.”); O’Brien v. Norwich & Worcester R.R. Co., 17 Conn. 372, 376 (1845) (“For such an injury [to the public right of free navigation,] it is for the government to interfere, and not a private individual. The court could then look at the rights of the whole community, and not . . . to those of a single individual.”); Barr v. Stevens, 4 Ky. (1 Bibb) 292, 293 (1808) (“[A] public nuisance is not the subject of a suit by a private individual, unless he has sustained some special injury thereby.”). See generally Woolhandler & Nelson, supra note 7, at 701–04 (discussing standing to seek judicial redress for invasion of public rights).

47. People ex rel. Fleming v. Livingston, 6 Wend. 526, 531 (N.Y. Sup. Ct. 1831).

48. See Woolhandler, Retroactivity, supra note 8, at 1032–34; accord, e.g., Pope v. Lewis, 4 Ala. 487, 488 (1842); Allen v. Farrow, 18 S.C.L. (2 Bail.) 584, 586 (1832).


50. See Cooley, supra note 9, at 383–84.
kinds of legal interests that were at stake. The political branches controlled purely public rights, and they could also retain unilateral authority over privileges that they allowed individuals to exercise as public trusts. When the government wished to take direct and adverse action against someone’s core private rights, however, an exercise of “judicial” power was necessary.

American jurists explicitly linked this arrangement to the different political considerations triggered by different kinds of legal interests. In the words of the Pennsylvania Supreme Court, the political process could be expected to procure the repeal of unjust laws that “bear on the whole community,” such as laws that squandered public funds or curtailed public rights without achieving offsetting public benefits. “But when individuals are selected from the mass,” and private rights that have already vested in them are attacked, “[t]hey have no refuge but in the courts.”

The bottom line is simple: The administration of core private rights was thought to involve different political considerations than the administration of public rights, and the constitutional separation of powers was thought to reflect those differences.

3. Two Objections. — Modern scholars might be tempted to scoff at the willingness of earlier generations to give the political branches relatively unfettered control over public rights and to require “judicial” involvement only when core private rights are at stake. Public choice theory, after all, has taught us that the political branches cannot always be trusted to manage public rights in the interest of the people as a whole. But this lesson would not have been news either to the leading Framers or to the subsequent generations that interpreted their handiwork. To appreciate the traditional framework’s willingness to let the political branches make unilateral dispositions of public rights, one need not make the naive assumption that the political branches will always represent the public well. One need only accept a comparative point: The political branches are not necessarily worse at representing the public than the courts would be. Far from rejecting this point, some of the most sophisticated modern scholarship in this area tends to support it.

A second objection to the traditional understanding of the separation of powers is more complicated. Modern scholars have little use for constitutional rules that turn on the distinction between “public rights” and “private rights,” in part because most of the legal rules that inform this distinction are not themselves of constitutional status. While Americans have always regarded certain rights to life, limb, and liberty (in the sense of freedom from physical restraint) as being ineluctably private, the Constitution does not itself fix the precise contours of those rights; whether I can plausibly claim that someone else’s conduct invades my

51. Ervine’s Appeal, 16 Pa. 257, 268 (1851).
53. See, e.g., The Declaration of Independence para. 2 (U.S. 1776).
core private rights to bodily integrity will depend to a considerable extent on statutes and common-law rules, not constitutional provisions. The same is true of property rights: determining whether a particular property right exists at all, and whether it belongs to the public or to a private person, inevitably requires reference to the ordinary statutes and common-law rules that define both the legal interests at stake and the manner in which they may be transferred or lost. The role that these subconstitutional rules play in the traditional framework might seem to undermine the framework's very coherence. Can it possibly make sense for the content of our constitutional doctrines about the separation of powers—which, after all, are supposed to constrain the statutes that the legislature enacts—to depend on the statutes that the legislature has already enacted?

In this respect, however, nineteenth-century understandings of the separation of powers are no different than a host of other constitutional doctrines that operate as brakes on legislative power but whose application requires reference to legal interests created by subconstitutional law. The Takings Clause and its counterparts in state constitutions, for instance, restrict the legislature's ability to take private property for public use, but their application in any particular case requires reference to the rules of subconstitutional law that determine whether legal rights protected by the clause have vested in one individual or another. In much the same way, it is perfectly coherent for constitutional doctrines about the separation of powers to require reference to subconstitutional rules that determine whether the legal rights on which the government is proposing to act have vested in a particular individual or instead belong to the public as a whole.

Indeed, this aspect of the traditional framework has a rigorous internal logic. The constitutional separation of powers is not about allocating property or other substantive rights within our society; the legal rules that govern those questions are primarily matters of either state law or subconstitutional federal law. The constitutional separation of powers instead affects the administration of those other legal rules. To the extent that the existing legal rules have given a particular legal interest to the public as a whole, one can plausibly advocate putting the political branches in charge of the disposition of that interest. But if the legal rules in place at a particular time have caused legal interests to vest in a single private individual, and if those legal interests fit a template of "rights" that warrant some protection against public expropriation after they have come to rest in private hands, then the political calculus is different. Even though it is still possible for such rights to be transferred away or forfeited, the judiciary may well be better suited than the political branches

to make authoritative determinations that the conduct of a particular individual has produced this result.\textsuperscript{55}

B. The Traditional Framework in Federal Administrative Law

If the traditional framework is not as incoherent as modern scholars sometimes assume, then its details deserve further study. This section explores nineteenth-century understandings of the interaction between the traditional framework (which identified matters whose authoritative adjudication required "judicial" power) and structural features of the Federal Constitution (which limited the entities that could exercise "judicial" power on behalf of the federal government). Part I.B.1 briefly discusses the constitutional prerequisites for an exercise of judicial power. Part I.B.2 then uses three prominent areas of federal administrative law to illustrate the perceived need for judicial involvement in the adjudication of core private rights, but not in the adjudication of public rights or quasi-private privileges created by the government for reasons of public policy. Part I.B.3 addresses the complicating factors of sovereign immunity, eminent domain, and tax collection.

1. Constitutional Prerequisites for the Exercise of "Judicial" Power. — As a matter of general constitutional law, common to state and federal constitutions alike, "judicial" power has long been associated with some basic procedural requirements. Early on, Chief Justice Marshall observed that a matter was subject to judicial decision only if it had "assume[d] such a form that the judicial power is capable of acting on it."\textsuperscript{56} Both in the states and in the federal system, that form generally required the presence (actual or constructive) of adverse parties who had been given some opportunity to be heard before the court rendered a final judgment that bound them. Proceedings that did not satisfy these minimal requirements were often said to be \textit{coram non judice}—not properly "judicial" at all.\textsuperscript{57} As a result, when the authoritative adjudication of some matter was understood to require "judicial" involvement, American legislatures could not satisfy this constitutional requirement simply by providing for the involvement of entities \textit{called} "courts"; the courts that were involved had to provide the basic accoutrements of judicial proceedings.

A number of state constitutions, however, said little else about the kinds of courts that the state legislature could establish. In these states, the legislature had broad control over the characteristics of the state's courts. If the legislature so desired, it could establish some special tribunals that had a more "informal character" than the state's other courts, but that still possessed "all the essential elements of a court" and could

\textsuperscript{55} See, e.g., Baggs's Appeal, 43 Pa. 512, 515 (1862) (indicating that "one of the principal purposes of the separation of legislative and judicial functions in the government" is to guard against "arbitrary governmental dealing with private rights").


therefore exercise "judicial" power without violating the state's constitution.\textsuperscript{58}

The Federal Constitution, by contrast, does not give Congress such unfettered control over the kinds of entities that can exercise "judicial" power on behalf of the federal government. After providing that "[t]he judicial Power of the United States[ ] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Article III goes on to specify that the judges of those courts must receive a guaranteed salary and enjoy tenure "during good Behaviour."\textsuperscript{59} Throughout the nineteenth century, jurists agreed that "Congress cannot vest any portion of the judicial power of the United States" in entities other than the courts that it has "ordained and established" in conformity with Article III.\textsuperscript{60}

Nineteenth-century lawyers did recognize two limited qualifications of this idea. The first concerned the court systems that Congress established for federal territories and (perhaps) the District of Columbia—discrete geographic enclaves that are not within the jurisdiction of any state and over which Congress has special authority.\textsuperscript{61} Although territorial courts concededly exercised "judicial" power,\textsuperscript{62} Chief Justice Marshall held that they did not have to conform to the requirements that Article III establishes for courts that exercise "the judicial Power of the [whole] United States."\textsuperscript{63} Some jurists reached the same conclusion about the local courts that Congress created for the District of Columbia.\textsuperscript{64} Accord-

\begin{itemize}
\item \textsuperscript{58} Griffin v. Mixon, 38 Miss. 424, 437 (1860).
\item \textsuperscript{59} U.S. Const. art. III, § 1.
\item \textsuperscript{60} Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330–31 (1816); accord, e.g., Ex parte Milligan, 71 U.S. (4 Wall.) 2, 121 (1866).
\item \textsuperscript{61} See U.S. Const. art. IV, § 3, cl. 2 (empowering Congress "to . . . make all needful Rules and Regulations" respecting federal territories); id. art. I, § 8, cl. 17 (empowering Congress "[t]o exercise exclusive Legislation in all Cases whatsoever" over what became District of Columbia).
\item \textsuperscript{62} Otherwise, indeed, Congress could not have authorized the Federal Supreme Court to conduct direct review of their decisions. Instead of simply reflecting the Court's appellate jurisdiction, a statute purporting to let the Court hear challenges to the actions of a nonjudicial body would have been an impermissible expansion of the Court's original jurisdiction. Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–76 (1803) (holding that Congress cannot authorize Supreme Court to exercise original jurisdiction over cases not listed in Original Jurisdiction Clause of Article III).
\item \textsuperscript{64} Compare United States v. More, 7 U.S. (3 Cranch) 159, 161 n.* (1805) (reporting Judge Cranch's majority opinion below, which concluded that Article III protects salaries of justices of the peace for District of Columbia), with id. at 164–65 n.* (reporting Chief Judge Kilty's dissenting opinion). This debate was not really settled until the twentieth century. Compare O'Donoghue v. United States, 289 U.S. 516, 534–50 (1933) (appearing to support Judge Cranch's view), with Palmore v. United States, 411 U.S. 389, 405–10 (1973) (upholding Congress's ability to create non-Article III courts to handle "distinctively local" matters for District of Columbia).
\end{itemize}
ing to one early opinion, these courts fell beyond the reach of Article III because the judicial power they exercised was that of "a particular territory" rather than "the whole of the United States."  

Article III was also deemed inapplicable to military tribunals, such as courts-martial (convened to adjudicate alleged offenses against military discipline) and military commissions (which "have been used . . . to try enemy belligerents for violations of the laws of war; to administer justice in territory occupied by the United States; and to replace civilian courts where martial law has been declared") 66. Like territorial courts, of course, these tribunals act upon core private rights to person and property, and they have long been understood to exercise "judicial" power. 67 At the time of the Framing, however, it was already common for nations to organize military tribunals that stood apart from the ordinary civilian courts, and the United States itself had done so. 68 In light of this history, the nineteenth-century Supreme Court understood Article III to address only the civilian judicial power. According to the Court, other provisions of the Constitution authorized Congress "to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations," and this power was conferred "without any connection between it and the 3d article of the Constitution." 69  

Whether nineteenth-century jurists were right or wrong to hold that Article III did not extend to military justice, and that Congress could set up court systems for the District of Columbia and federal territories without implicating the judicial power of the country as a whole, these holdings had special textual rationales that did not spill over into other areas. As a result, they were not thought to undermine the principle that the  

65. More, 7 U.S. (3 Cranch) at 163 n.* (Kilty, C.J., dissenting below). For a modern endorsement of this rationale, see Craig A. Stern, What's a Constitution Among Friends?—Unbalancing Article III, 146 U. Pa. L. Rev. 1043, 1068 (1998) (arguing that territorial courts "exercise[e] the judicial power of the territory, a polity other than the United States").  


67. See, e.g., President's Approval of the Sentence of a Court Martial, 11 Op. Att'y Gen. 19, 21 (1864) ("The whole proceeding from its inception is judicial. The . . . court . . . sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice . . ."); William C. de Hart, Observations on Military Law, and the Constitution and Practice of Courts Martial 14 (New York, Wiley & Halstead 1859) (declaring that military courts are "imbued or endowed with the like essence of judicial power" as civilian courts); see also Runkle v. United States, 122 U.S. 543, 557 (1887) (holding that President's role in reviewing proceedings of courts-martial is a "judicial" power that he must exercise personally). But see George B. Davis, A Treatise on the Military Law of the United States 15 (New York, Wiley & Sons 1898) ("Courts-martial are no part of the judiciary of the United States, but simply instrumentalities of the executive power.").  

68. See, e.g., United States v. Mackenzie, 30 F. Cas. 1160, 1163 (S.D.N.Y. 1843) (No. 18,313) (charge to a grand jury) (discussing history of courts-martial and emphasizing their "separation . . . from connection with the local courts").  

federal government can exercise "the [civilian] judicial Power of the [whole] United States" only through courts created and staffed in conformity with Article III. In conjunction with the concept of core private rights, which told jurists when "judicial" power was necessary, this principle shaped the development of federal administrative law. As the next subsection illustrates, there was widespread agreement that Congress could give federal administrative agencies conclusive adjudicatory authority over both public rights and quasi-private privileges, because the disposition of those legal interests did not require the use of "judicial" power. When core private rights were at stake, however, "judicial" power was necessary, and federal administrative agencies could not exercise it.

2. Federal Administrative Law and Core Private Rights. — For much of the nineteenth century, the most important field of federal administrative law concerned the disposition of public lands. Alternatively, Congress could (and did) establish "land offices" within the executive branch—administrative agencies that were charged with applying statutory criteria for the disposition of federal land. These agencies could not exercise "judicial" power on behalf of the United States, because they did not enjoy the structural protections of Article III. But as long as only public rights were at stake and no private individual had yet acquired any vested right to the land, judicial power in the constitutional sense was not necessary. With respect to the proper disposition of public lands, Congress could authorize nonjudicial officers in the executive branch to make final and conclusive determinations—determinations that had legal consequences and that both state and federal courts would have to accept in later litigation.


71. See, e.g., Burgess v. Gray, 57 U.S. (16 How.) 48, 62-63 (1854) ("Undoubtedly Congress may, if it thinks proper, grant a title in that form, and it has repeatedly done so."); Grignon's Lessee v. Astor, 43 U.S. (2 How.) 319, 344 (1844) (concluding that federal statute enacted in 1823 was "the direct grant of the fee which had been in the United States").

72. See Lewis v. Lewis, 9 Mo. 183, 188 (1845) ("Do the register and receiver [who made decisions within these agencies] hold their offices during good behavior? If not, then they are not inferior courts within the meaning of the Constitution; and no judicial power, according to the legal meaning of those terms, can be constitutionally vested in them.").

73. See id. at 188-89; accord, e.g., Smelting Co. v. Kemp, 104 U.S. 636, 640-41 (1881) (speaking of "the conclusive presumptions attending a patent for lands" issued by "that
Once private individuals could claim vested rights in the land, however, the executive branch's authority to act conclusively ran out. Even after the land office had issued a “patent” evidencing the conveyance of federal land to a private individual, the patent could be cancelled upon proof that it had been obtained by fraud or that a statute had reserved the lands in question from sale. But the government had to go to court to establish the grounds for cancellation; because claims of core private rights now hung in the balance, the land office could not itself make binding determinations of the relevant facts. As the Supreme Court put it, the cancellation of a land patent “is a judicial act, and requires the judgment of a court.”

Similar ideas applied when a private individual claimed to be the true owner of land that the United States also claimed to own. If the land office issued a patent purporting to transfer this land to a third party, the aggrieved individual could bring an appropriate lawsuit against the patentee, and the land office's determination that the United States had indeed owned the land would not bind the court. Again, the government could not conclusively resolve such claims of private right without an exercise of “judicial” power.

Because the land office could conclusively dispose of public rights but not preexisting private rights, its adjudicative powers were broader at the outset of its proceedings than at the end; once the land office's actions had caused property rights to “vest” in a private individual, neither the land office nor other executive officers could unilaterally retract what branch of the government to which the alienation of the public lands, under the law, is intrusted”).

The Supreme Court sometimes spoke of the land department's officers as “exercis[ing] a judicial function” with respect to matters that they adjudicated. Id. at 640; see also Woolhandler, Judicial Deference, supra note 70, at 216–21 (discussing preclusive effect of land office decisions and noting analogy between land office and true courts). This usage reflects the important association between “judicial” power and the capacity to act conclusively, but it was more colloquial than constitutional; the Court was well aware that the land office was “part of the administrative and executive branch of the government” and could not act conclusively upon core private rights that had already vested in private individuals. Smelting Co., 104 U.S. at 640–41.

74. United States v. Stone, 69 U.S. (2 Wall.) 525, 535 (1865); see also Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 83–87 (1871) (referring to courts' role "after the tide had passed from the government, and the question became one of private right"); cf. Foster v. Shaw, 7 Serg. & Rawle 156, 161 (Pa. 1821) (observing that state Board of Property "possesses no judicial power" and "has no legitimate power to vacate a patent, on the ground that it had been obtained by a forged conveyance").

75. See Smelting Co., 104 U.S. at 641 (distinguishing matters on which land office's determinations were conclusive from question whether property purportedly granted by land office really had "belonged to the United States"); Litchfield v. Register, 76 U.S. (9 Wall.) 575, 578 (1870) (refusing to enjoin federal land officers who were considering whether to grant land that plaintiff claimed to own, and observing that officers' determinations would not bind plaintiff: "After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts.").
it had done. Identifying the moment at which private rights vested was therefore crucial. Inevitably, it was also somewhat arbitrary; although every system that recognizes private property must develop rules to distinguish mere expectancies from vested rights, those rules do not flow ineluctably from first principles.

So-called "preemption" rights—statutory options to purchase tracts of federal land at a price set by federal law—illustrate both the line-drawing problem and its importance to nineteenth-century understandings of the separation of powers. Congress often awarded these purchase options to people who had settled upon the tracts in question or had improved them in particular ways. In 1800, for instance, a federal statute calling for the sale of certain public lands specified that "each person who, before the passing of this act, shall have erected, or begun to erect, a gristmill or sawmill upon any of the lands herein directed to be sold, shall be entitled to the preemption of the section including such mill, at the rate of two dollars per acre," as long as he or his heirs "produce[d] to the register of the land office satisfactory evidence that he or they are entitled thereto."76 According to Treasury Secretary Oliver Wolcott, Jr., the purchase options conferred by this statute were themselves property rights that had "vest[ed]" in private individuals upon the statute's enactment. Wolcott therefore believed that disputes about a particular individual's entitlement to such an option "will generally arise under such circumstances as to be susceptible of decisions only in the courts of law."77 Later opinions of the Attorney General, however, took the position that preemption rights were mere "privilege[s]" and that no core private rights vested in the purchaser until he had actually paid the purchase money in the manner required by law.78 Under nineteenth-century un-

76. Act of May 10, 1800, ch. 55, § 16, 2 Stat. 73, 78.
77. Letter from Oliver Wolcott, Jr., Sec'y of the Treasury, to Thomas Worthington (Aug. 21, 1800), excerpted in 2 General Public Acts of Congress, Respecting the Sale and Disposition of the Public Lands, with Instructions Issued, from Time to Time, by the Secretary of the Treasury and Commissioner of the General Land Office, and Official Opinions of the Attorney General on Questions Arising Under the Land Laws 221 (Washington, Gales & Seaton 1838) (explaining that while land office could act conclusively "[s]o far . . . as the public rights are concerned," only judicial power could conclusively determine competing claims to vested private rights). I am indebted to Henry L. McClintock, The Administrative Determination of Public Land Controversies, 9 Minn. L. Rev. 420, 423 (1925), for pointing me to this source. The complete text of Wolcott's letter appears in manuscript records kept at the Kelly Library of Emory & Henry College; I am grateful to reference librarians Jane Caldwell of Emory & Henry and Barbie Selby of the University of Virginia for tracking the letter down.

The particular statute that Wolcott was addressing dealt with lands in a federal territory rather than a state. Wolcott did not focus on the possibility that the land office might act "judicially" with respect to such land, apparently because he did not anticipate the view of territorial governance that the Supreme Court accepted in American Insurance Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828). See supra note 63 and accompanying text.

derstandings of the separation of powers, it followed that Congress could authorize executive officials (such as those in the land office) to resolve conflicting claims to these purchase options, without any need for judicial involvement.\textsuperscript{79}

Throughout the nineteenth century, the same sort of line-drawing exercises occurred across a range of topics in administrative law. In customs matters, for instance, federal statutes permitting the importation of goods from abroad were thought to create mere privileges rather than core private rights; so long as property remained outside the United States, no one had a vested right to import it. For nineteenth-century jurists, this fact had two corollaries. First, if Congress wanted to impose new tariffs, or even to forbid the importation of certain kinds of goods entirely, it did not have to make exceptions for goods that had been manufactured in the expectation that the prior laws would remain in effect; Congress could make the new laws applicable to all goods that had not yet entered American territory. Second, if Congress chose to permit the importation of goods subject to certain conditions, it could give executive officers final authority to determine whether those conditions were satisfied. In the words of Justice Story, Congress could provide "that all ad valorem duties should be ascertained by appraisement, as the condition upon which alone the importation of goods should be allowed," and it could make the appraisers' determinations "conclusive" for this purpose.\textsuperscript{80} By the same token, Congress could prohibit the importation of goods that fell below certain standards of quality, and it could authorize administrative officials to make conclusive determinations about whether would-be imports met those standards.\textsuperscript{81}

By the end of the nineteenth century, the Supreme Court had extended these conclusions from goods to people. In 1892, the Court held that alien immigrants had no vested private right to enter the United States, and that they therefore had no right to "judicial" determination of whether they satisfied the criteria that Congress had validly established for entry; instead, "the final determination of those facts may be entrusted by Congress to executive officers."\textsuperscript{82} The following year, the

\textsuperscript{79} See, e.g., Lewis v. Lewis, 9 Mo. 183, 188 (1845) (understanding Congress to have set up such a system, and deeming it permissible because "[t]he United States is the owner of the public lands" and can use administrative mechanisms to identify person to whom lands will be sold).

\textsuperscript{80} Tappan v. United States, 23 F. Cas. 690, 691 (C.C.D. Mass. 1822) (No. 13,749); accord, e.g., Passavant v. United States, 148 U.S. 214, 219 (1893); Rankin v. Hoyt, 45 U.S. (4 How.) 327, 335 (1845); McCall v. Lawrence, 15 F. Cas. 1234, 1235 (C.C.S.D.N.Y. 1855) (No. 8,672).

\textsuperscript{81} See Butfield v. Stranahan, 192 U.S. 470, 493–97 (1904) (describing application of prescribed standards to particular goods for purposes of importation as a "mere executive duty" that could be "finally settled" without exercise of "judicial" power).

\textsuperscript{82} Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892); see also Lucy E. Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law 31 (1995) (emphasizing Court's view that "[i]mmigrants applying for admission . . . sought a privilege, not a right").
Court asserted that even after alien immigrants had entered the United States, they had no vested private right to remain (at least if they "have not . . . taken any steps towards becoming citizens of the country"). It followed that the power to expel aliens after entry, no less than the power to turn them away at the border, "may be exercised entirely through executive officers" without the need for "judicial trial or examination."

By contrast, resident citizens of the United States did have a vested private right to remain in America. As a result, if residents whom the executive branch was proposing to deport as aliens claimed that they were actually citizens, and if they proffered evidence to that effect, Congress could not give the executive branch conclusive authority to make an adverse ruling. People in this position were "entitled to a judicial determination of their claims that they are citizens of the United States."

Even where core private rights were not at stake, of course, executive officials had to respect statutory privileges that had been granted to private individuals and that Congress had not authorized the officials to abrogate. Individuals who claimed that an executive officer had invaded such privileges could often use either statutory procedures or traditional forms of action to secure judicial review of their claims. In the resulting proceedings, courts would not be bound by the executive officials' determinations about matters that Congress had not committed to the officials' jurisdiction. Even with respect to matters within the officials' jurisdiction, moreover, background principles of statutory interpretation might persuade the courts that Congress had not meant to make the officials' determinations conclusive. But as long as core private rights were not at

83. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); see also id. at 723-24 (denying that Chinese laborers who entered pursuant to federal statutes or treaties thereby acquired "any right . . . to be and remain in this country, except by the license, permission and sufferance of Congress, to be withdrawn whenever, in its opinion, the public welfare might require it").

84. Id. at 713–14, 728; cf. Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 987–1020 (1998) (noting, as important qualification upon these statements, that aliens who were being detained in connection with their exclusion or expulsion could use habeas corpus "to keep executive adjudicators within their authority").

85. Ng Fung Ho v. White, 259 U.S. 276, 285 (1922). But cf. United States v. Ju Toy, 198 U.S. 253, 263 (1905) (indicating that no one outside America's borders has vested right to enter, and that Congress can therefore authorize executive officers to make conclusive determinations of would-be entrants' claims to United States citizenship).

86. See, e.g., United States v. Webster, 28 F. Cas. 509, 516 (D. Me. 1840) (No. 16,658) ("[N]o order or requisition, of an executive officer, can annul an act of the legislature, or defeat a right which has become vested under a positive law."); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 161–62 (1803) (denying executive branch's authority to withhold from William Marbury his statutory right to his commission).

87. See, e.g., Bates & Guild Co. v. Payne, 194 U.S. 106, 109–10 (1904) (suggesting, as a general rule, that "where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive," but that his actions "upon mixed questions of law and fact, or of law alone," ordinarily
stake, Congress could take steps to foreclose this sort of review if it so desired.

3. A Few Complications. — A few complicating factors require separate discussions. The first two—involving nonjudicial adjudication of individuals' claims upon the public treasury and of certain matters connected with the power of eminent domain—fit the larger framework fairly comfortably. The other, involving tax collection, is more naturally viewed as deviating from that framework. As we shall see, however, the deviation was limited in scope and grounded in historical practice.

   a. The General Relevance of Sovereign Immunity. — Modern Supreme Court opinions and academic commentary sometimes treat the disposition of private claims against the federal government as an exception to the ordinary principle that only Article III courts can exercise the "judicial" power of the United States. That, however, was not the nineteenth century's understanding. To be sure, many individuals' claims against the government were indeed resolved outside the Article III courts; while Congress could waive the government's sovereign immunity and provide for judicial resolution of such claims, it could also handle the claims entirely by itself or through executive agencies acting pursuant to congressional delegation. But this arrangement was possible only because, according to the traditional view, claims against the public treasury "do not require judicial determination."


   89. Ex parte Bakelite Corp., 279 U.S. 438, 451-53 (1929). Although Bakelite was correct about this aspect of the traditional framework, its history was probably wrong in a different respect. In particular, Bakelite misunderstood the status of the tribunal that Congress established in the nineteenth century to handle claims against the federal government.

   Everyone agrees that until 1863, Congress generally favored nonjudicial resolution of claims upon the public treasury. In 1855, Congress did create an entity called the "Court of Claims" to help investigate certain kinds of claims. Initially, though, this entity served purely as an aide to Congress and had no power to enter binding judgments on its own. If it concluded that the federal government should pay a particular claim, it simply reported its findings to Congress and drafted a private bill for Congress to consider enacting. See Act of Feb. 24, 1855, ch. 122, § 7, 12 Stat. 612, 613-14.

   Congress changed this system in 1863, revamping the Court of Claims and authorizing it to enter "final judgments" subject to appellate review in the United States Supreme Court. Act of Mar. 3, 1863, ch. 92, § 5, 12 Stat. 765, 765. At first, the new scheme did not work as Congress had planned; as interpreted by the Supreme Court, the 1863 statute gave the Secretary of the Treasury final say about whether to pay sums approved by the Court of Claims, with the result that the Court of Claims lacked true "judicial" power and the Supreme Court could not exercise appellate jurisdiction over it. See Felix Frankfurter & Wilber G. Katz, Cases and Other Authorities on Federal Jurisdiction and Procedure 13 (1951) (quoting records from Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865)); see also id. at 20 (criticizing this interpretation of 1863 statute). In 1866, however, Congress solved this problem by repealing the offending provision, clearing the way for the Court of
Contrary to some modern misconceptions, the reason for this conclusion was not simply that claims against the government implicated the public's ownership of money in the Treasury, with the result that public rights were at stake on one side of the dispute. The reason, instead, was that core private rights were not at stake on the other side. Because authoritative adjudication did not require "judicial" power unless core private rights hung in the balance, administrative resolution of claims against the government was not thought to offend the framework sketched out above.

It is easy to see how nineteenth-century jurists could have taken this view of many claims against the government. Claims that arose under benefit programs, for instance, were not thought to implicate core private rights in any way. So long as Congress chose to maintain the programs,

Claims to exercise "judicial" power and for the Supreme Court to review its decisions. See Act of Mar. 17, 1866, ch. 19, § 1, 14 Stat. 9, 9; see also De Groot v. United States, 72 U.S. (5 Wall.) 419, 427 (1867) (duly exercising appellate jurisdiction over Court of Claims).

Under the traditional framework, any civilian tribunal that exercised "judicial" power for the United States as a whole had to satisfy the structural requirements of Article III. See supra Part I.B.1. In keeping with this view, nineteenth-century jurists after 1866 repeatedly spoke of the Court of Claims as a regular Article III court. See United States v. Union Pac. R.R. Co., 98 U.S. 569, 603 (1879) (lumping together "the district courts, the circuit courts, and the Court of Claims," and noting that "Congress has . . . vested each of them with a defined portion of the judicial power found in the Constitution"); United States v. Klein, 80 U.S. (13 Wall.) 128, 144–45 (1872) (describing reconstituted version of Court of Claims as "one of those inferior courts which Congress authorizes . . . from which appeal regularly lies to this court"); see also Miles v. Graham, 268 U.S. 501, 509 (1925) (holding that Article III's salary provisions cover judges on Court of Claims). The structure that Congress had given the Court of Claims conformed to this idea. See Act of Mar. 3, 1863, §1, 12 Stat. at 765 (providing for judges of Court of Claims "to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behavior"); Act of Feb. 24, 1855, §1, 10 Stat. at 612 (making same provision using identical language). And while later Congresses purported to authorize the Court of Claims to issue some advisory opinions, see, e.g., Act of Mar. 3, 1883, ch. 116, §§ 1–2, 22 Stat. 485, 485, lawyers of the day argued that this legislation violated Article III. See Note, The Court of Claims and Congressional Review, 46 Harv. L. Rev. 677, 679 n.13 (1933) (concluding that before 1929 "it was generally assumed that the Court of Claims was a constitutional court").

In *Bakelite*, the Supreme Court disavowed its own past statements and opined that the Court of Claims was not really covered by Article III, even though it did exercise "judicial" power of a sort sufficient to let the Supreme Court hear appeals directly from it. *Bakelite*, 279 U.S. at 452–55. Four years later, the Supreme Court reiterated this view. *Williams*, 289 U.S. at 565–71. But Congress itself subsequently "pronounced its disagreement" with *Bakelite* and *Williams* by formally declaring the Court of Claims "to be a court established under article III." *Glidden Co. v. Zdanok*, 370 U.S. 590, 581 (1962) (plurality opinion) (quoting Act of July 28, 1958, ch. 253, § 1, 77 Stat. 226, 226); cf. 28 U.S.C. § 171 (2000) (reflecting changes made by Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, which reclassified Court of Claims but created a new Article III court, the United States Court of Appeals for the Federal Circuit, to stand between it and Supreme Court). Contrary to *Bakelite*’s view of the relevant history, I agree with Gordon Young that the nineteenth-century Congress would have expected Article III to cover the Court of Claims after 1866. See Young, supra note 13, at 842 n.360.
beneficiaries might have a statutory entitlement to continue receiving payments from the Treasury, but this entitlement was a defeasible "privilege" rather than a vested property right. Under the traditional framework, the disposition of such entitlements therefore did not require judicial involvement; Congress could itself adjudicate the eligibility of individual beneficiaries, and it could also commit eligibility determinations to nonjudicial tribunals.

Other claims against the government implicated not just quasi-private "privileges" but core private "rights," in that the claimant was seeking redress for injuries that governmental officials had caused to his person or property. The fact that even those claims were understood to "admit of legislative or executive determination"90 may seem inconsistent with the framework that I have described. But nineteenth-century jurists had a simple response to this challenge: Even if "judicial" power would be necessary to resolve a suit between the claimant and the individual officials who had invaded his core private rights, the claimant was seeking payment from the public treasury instead, and he did not have a vested private right to have the government indemnify its officials. As a result, adjudication of an individual's claims against the government did not require an exercise of "judicial" power.

Admittedly, this rationale invited some delicate questions about the proper treatment of suits against the officials themselves. At common law, "executive officials enjoyed no immunity whatsoever for acts that they were not authorized to perform by a valid statute"; if those acts invaded someone's rights to person or property, then the offending governmental official would be liable to the same extent as any other trespasser.91 Legislatures, moreover, did not necessarily have unlimited power to deviate from this baseline rule and confer immunity from such suits. At least some nineteenth-century courts held that when core private rights were at stake, legislatures could grant this sort of immunity only if they substituted some other adequate means of redress.92 But nineteenth-century

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90. Bakelite, 279 U.S. at 452.
91. Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 79 (1999); see also id. at 79–81 (noting some expansion of concepts of official immunity beginning in 1840s, but observing that even doctrine of this later period "did not protect an officer outside the bounds of statutory authority"); Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 414–32 (1987) (surveying Supreme Court's treatment of these issues).
92. See Griffin v. Wilcox, 21 Ind. 370, 372–73 (1863) (holding unconstitutional federal statute that purported to immunize federal officers from suits for false imprisonment); Bryan v. Walker, 64 N.C. 141, 146 (1870) ("The power of the Legislature to make a law shielding trespassers upon private property from liability in civil actions, is not now before us; but we are inclined to think that it has no more right to do so than it has . . . to destroy any other vested right."); see also Debates of the Virginia Convention (June 20, 1788), in 10 The Documentary History of the Ratification of the Constitution 1412, 1432 (John P. Kaminski & Gaspare J. Saladino eds., 1995) (reporting remarks by John Marshall, who denied that federal officers would be immune from suit for trespasses
jurists did not resolve whether a purely administrative procedure for securing redress from the government was a constitutionally adequate substitute for the traditional suit against individual officers: Could Congress validly immunize individual officers from liability for invading core private rights if it promised to pay valid claims out of the public Treasury and established an administrative forum to adjudicate those claims?93

Precisely because the answer to this question was unsettled, however, the doctrines associated with sovereign immunity were not major exceptions to the traditional framework described above. Consistent with those doctrines, treatise writers of the day could broadly assert that American constitutions conferred "the right to judicial procedure, investigation, and determination, whenever life, liberty, or property is attacked."94

b. The Power of Eminent Domain. — At first glance, the manner in which state and federal governments could exercise their powers of eminent domain might seem to reflect a greater deviation from the traditional framework. To be sure, state and federal constitutions alike were understood to let government authorities take private property only "for public use,"95 and many jurists refused to let nonjudicial officers conclusively determine whether that condition was satisfied; in the words of one court, "[w]hether the use is of a public or private nature can only be determined by a judicial inquiry."96 But property owners could not demand "judicial" proceedings on a variety of other questions that were also central to the government’s exercise of the power of eminent domain in individual cases. For instance, as long as the use to which the property would be put was indeed "public," courts would not second-guess the political branches’ determinations about which parcel of property to take for that purpose or about whether the benefit to the public really justified the political branches’ interference with private property. Questions of

93. Cf. Pfander, supra note 17, at 760 (suggesting negative answer).
95. See, e.g., In re Deansville Cemetery Ass’n, 66 N.Y. 569, 571 (1876) ("The right of taking the property of an individual without his consent is confined to those cases where the property is required for public use. Private property cannot be taken for private use even on making compensation.").
96. Id. at 572; accord Allen v. Inhabitants of Jay, 60 Me. 124, 138–40 (1872) (citing cases); Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 399 (1876) (asserting that "the decided weight of the authorities" supports this position); Tyler v. Beacher, 44 Vt. 648, 651 (1871) ("[T]he legislature has not the power to so determine that a use is a public use as to make the determination conclusive."); see also Talbot v. Hudson, 82 Mass. (16 Gray) 417, 422 (1860) (explaining that "the legislature have no power to determine finally upon the extent of their authority over private rights," because "[t]hat is a power in its nature essentially judicial").
this sort were said to be "of a strictly political character, not requiring any hearing upon the facts or any judicial determination."97

Still, state and federal constitutions alike required the government to pay "just compensation" for the property that it took by eminent domain. According to many nineteenth-century jurists, moreover, nonjudicial officers could not conclusively determine the amount of compensation that was required; a long line of cases indicated that the individuals whose property was taken by eminent domain had a right to "judicial" determination of the adequacy of the compensation proffered by the legislature or its agents.98 On this view, the power of eminent domain simply involved giving land owners one form of property for another, and the courts stood ready to supervise the equivalence of the exchange. The traditional association between core private rights and "judicial" power might require no more than that: As long as the judiciary ensures that the former property owner has been adequately compensated for his individual loss, perhaps the judiciary need not be involved in other aspects of the transaction (such as decisions about which piece of property is best suited for the public use that the government has in mind).

c. Summary Mechanisms for Collecting Tax Revenue. — Nineteenth-century cases about tax collection arguably made more inroads on the traditional framework. Those inroads are most prominently reflected in Murray's Lessee v. Hoboken Land & Improvement Co.,99 which acknowledged the traditional framework but recognized a special exception for taxation.

97. Cooley, supra note 9, at 538; accord E. R.R. Co. v. Boston & Me. R.R., 111 Mass. 125, 131 (1872) ("It belongs exclusively to the Legislature to determine whether the public benefit to be secured is sufficient to warrant the taking; and this is not a judicial question."); People ex rel. Herrick v. Smith, 21 N.Y. 595, 597-98 (1860) (agreeing that legislature did not have to make any "provision for a judicial contest" of these matters in individual cases); Ford v. Chi. & Nw. R.R. Co., 14 Wis. 609, 617 (1861) ("The propriety of taking property for public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents . . . ."). Judge Dillon summed up the doctrine as follows:

Of the necessity or expediency of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature, or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature, and not judicial.


98. See, e.g., Isom v. Miss. Cent. R.R. Co., 36 Miss. 300, 315 (1858) (holding under state constitution that authority to make such determinations "is a judicial, and not a legislative, power"); Cooley, supra note 9, at 357 (indicating that American constitutions restrained power of eminent domain by providing "that when specific property is taken, a pecuniary compensation agreed upon or determined by judicial inquiry must be paid"); accord Balt. & Ohio R.R. Co. v. United States, 298 U.S. 349, 364 (1936) ("Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment.").

Understanding the case requires some background. At the end of Samuel Swartwout's term as a federal collector of customs, Treasury Department officials audited his account and concluded that he had collected $1.3 million more in customs duties than he had remitted to the Treasury. As authorized by an 1820 statute regulating federal officeholders who "received the public money," the Secretary of the Treasury issued a distress warrant directing a federal marshal to levy upon Swartwout's property to recoup some of the shortfall. Although the Secretary issued this warrant without any judicial proceedings to verify the amount that Swartwout owed the government, Swartwout or his other creditors could have initiated such proceedings themselves; the 1820 statute permitted any person who "consider[ed] himself aggrieved by any warrant issued under this act" to "prefer a bill of complaint to any district judge of the United States," who in turn could "grant an injunction to stay proceedings on such warrant." Perhaps because the underlying audit was essentially correct, however, no one did so. Pursuant to the distress warrant, the federal marshal levied upon—and ultimately sold at auction—a parcel of land belonging to Swartwout. The title created by this sale eventually passed to the Hoboken Land and Improvement Company.

At roughly the same time, Swartwout was being sued in state court by two other creditors, James Murray and John Kayser, who won judgment by default. In execution of this judgment, a local sheriff purported to sell them (for a nominal sum) the same parcel of land that the federal marshal had already auctioned off. Murray and Kayser eventually launched an ejectment action against the Hoboken Land and Improvement Company, asserting that the federal government's distress sale had been a legal nullity and that Murray and Kayser were therefore the true owners of the land. The gist of their argument was that the federal government had been required to use "judicial" proceedings to establish Swartwout's debt to it, and that the distress warrant issued by the Secretary had lacked any legal effect because "[t]he secretary of the treasury cannot be constituted a court for the exercise of judicial power." In responding to this argument, the Supreme Court acknowledged that Article III prevented Congress from vesting any part of the federal

100. Act of May 15, 1820, ch. 107, § 2, 3 Stat. 592, 592.
101. Id. § 4, 3 Stat. at 595; see also Pfander, supra note 17, at 734, 736–37 (emphasizing this fact).
102. Instead of contesting the audit, Swartwout had left the country. Young, supra note 13, at 791. Before sailing, though, he had given his power of attorney to Henry Ogden, who soon executed an indenture acknowledging that "the said Samuel Swartwout is justly indebted to the United States of America in the sum of one million of dollars." Special Verdict at 41–43, Murray's Lessee, 59 U.S. (18 How.) 272 (Nos. 54–55), available at Supreme Court Records and Briefs 1561, 1581–82 (Thomson Gale Databases).
government's "judicial" power in Treasury officials. But the Court denied that the 1820 statute offended this principle. Congress could surely authorize the Treasury Department to audit its collectors' books, and Congress could also make the Department's determinations "final and binding" if no one took advantage of the statutory procedure for challenging them in court.

In dicta, the Court went farther, implying that Congress could have made the Department's audit the basis for the sale of Swartwout's property even if the 1820 statute had not given Swartwout any opportunity to challenge the audit in court. The Court conceded that authoritative disposition of a claim of indebtedness, culminating in the forced sale of property to satisfy the adjudged debt, ordinarily required "judicial" proceedings. But after a lengthy review of historical practice, the Court concluded that "due process of law" did not absolutely require "judicial" involvement when the government was trying to collect taxes, either from taxpayers themselves or from revenue officers like Swartwout. In the Court's words, "[i]mperative necessity has forced a distinction between such claims and all others."

The dicta in Murray's Lessee arguably meant that Congress could provide for property to change hands on the strength of the Treasury Department's distress warrants without ever permitting the property's former owner to contest the government's claims in court. The tax

104. See id. at 275 ("[I]f the auditing of [Swartwout's] account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power.").
105. Id. at 280–81.
106. Id. at 280.
107. See id. at 277 (noting that in England, "the law of the land" had always provided "a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues"); id. at 278–79 (adding that before Constitution was adopted, nearly all states used "the process of distress . . . for the collection of taxes," and distress warrants against property of "defaulting receivers of public money" were also common); id. at 279–80 (observing that "Congress, from an early period, and in repeated instances, has legislated in a similar manner," and advocating deference to "[t]his legislative construction of the constitution, commencing so early in the government, . . . continued throughout its existence, and repeatedly acted on by the judiciary and the executive").
108. Id. at 282.
109. Professor Pfander argues against this interpretation of Murray's Lessee. In his view, the Court said only that Congress did not have to provide a way for the former property owner to hale the government itself into court. As Professor Pfander reads the Court's dicta, if the 1820 statute had not permitted judicial review of the underlying audit before federal marshals executed the Treasury Department's distress warrant, then the alleged debtor would have been able to challenge the audit in a suit against the individual marshals who carried out the warrant's instructions. According to Professor Pfander, a distress warrant issued on the strength of an erroneous audit, against the property of someone who was not really indebted to the government, "would have provided the marshal with no immunity from suit for common law claims of trespass or conversion." Pfander, supra note 17, at 736 n.483.
revenues subject to collection through such nonjudicial mechanisms included not only moneys due from people who had voluntarily agreed to be revenue officers, but also moneys due from ordinary taxpayers. Later cases added that when Congress had provided for the underpayment of taxes to trigger monetary penalties or further taxes, Congress could let executive officers collect those sums too through administrative mechanisms.\footnote{110}

But even if the traditional power of taxation enabled the government to take authoritative actions adverse to core private rights without any “judicial” involvement, and even if the power of eminent domain was cut from the same cloth in some respects, these deviations from the tradi-

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This suggestion is certainly consistent with the traditional view, enforced by the Court in other contexts, that authoritative determinations of core private rights require “judicial” involvement. But it is hard to square with Murray’s Lessee itself. The Court explicitly observed that in the absence of statutory provisions affirmatively imposing liability on the marshal, “a public agent . . . cannot be made responsible in a judicial tribunal for obeying the lawful command of the government”; according to the Court, “both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process.” Murray’s Lessee, 59 U.S. (18 How.) at 283–84. In an attempt to cabin these statements, Professor Pfander asserts that the Court would not have considered the distress warrant to be “legal” process (or a “lawful” command) if it was “based on a mistaken assessment of liability” and if the alleged debtor had lacked any prior opportunity to challenge that assessment. Pfander, supra note 17, at 736 n.433. To judge from other passages in the Court’s opinion, however, the accuracy of the underlying audit would not have been an open question in the context of a suit against the marshal. See Murray’s Lessee, 59 U.S. (18 How.) at 285 (indicating that marshal could use distress warrant as “conclusive evidence of the facts recited in it, and of the authority to make the levy”); see also Hilton v. Merritt, 110 U.S. 97, 107 (1884) (invoking Murray’s Lessee to reject claim “that a denial of the right to bring an action at law [against an individual officer] to recover duties paid under an alleged excessive valuation of dutiable merchandise, is depriving the importer of his property without due process of law”).

If one is committed to the traditional idea that nonjudicial officers cannot authoritatively adjudicate core private rights, and if one refuses to read the dicta in Murray’s Lessee as recognizing any exceptions to that idea, a different argument might be easier to reconcile with those dicta. If Congress had provided no other avenue for the target of a distress warrant to get a court to examine the underlying audit, he might conceivably have been able to litigate this issue in an ejectment action against a subsequent occupant of the property. To be sure, the purchaser might well contend that a sale pursuant to legal process (here, the distress warrant) sufficed to convey good title even if the underlying audit had in fact been erroneous. But state courts provided some authority to the contrary. In Illinois, for instance, courts held that tax sales pursuant to summary process gave the purchaser only a “contingent” title to the land; the purchaser’s title would fail if the former owner established, in an ejectment action, that “the tax had been paid before the sale was made” or that “the land [was] not subject to taxation.” Rhinehart v. Schuyler, 7 Ill. (2 Gilm.) 473, 527 (1845); see also Baker v. Kelley, 11 Minn. 480, 499 (1866) (agreeing that “the plaintiff [in ejectment] had a right to show that either the assessment or sale was invalid,” and invalidating state statute purporting to cut off this right). The leading contemporary treatise on tax sales, published shortly before Murray’s Lessee, agreed that only “judicial” power could conclusively determine “the fact of the levy and non-payment of the tax.” Blackwell, supra note 42, at 37.

tional framework were quite limited. Whatever their precise contours, they did not spill over to the broad areas of governmental authority that nineteenth-century jurists grouped under the loose rubric of the "police power." 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."

C. The Issues That Courts Must Be Free to Examine When Core Private Rights Are at Stake

When core private rights were at stake, moreover, not just any sort of "judicial" involvement would do. Consider, for instance, the proper application of preexisting legal principles authorizing people who suffer injury as the proximate result of someone else's negligence to recover their damages from the tortfeasor. If an American legislature had enacted a statute declaring that A's negligence had proximately caused B to incur damages of $10,000 and authorizing B to bring suit against A for that sum, nineteenth-century jurists would universally have condemned the statute as an unconstitutional usurpation of "judicial" power and an attempt to deprive A of his property without "due process of law." As John Harrison has noted, that is true even though the statute explicitly made the transfer of property contingent upon "judicial" involvement, and indeed required "judicial" determination of certain key facts (such as "whether [the defendant] really is A [and the plaintiff] really is B").

When core private rights were at stake, courts had to be able to exercise their own judgment not just about who A and B were, but also about other relevant details of their individual interaction.

To be sure, the details that were relevant depended on the legal rules that the legislature had established. If the legislature chose to eliminate the defense of assumption of the risk in tort cases, for instance, future litigants would not have a right to "judicial" determination of facts bearing solely on that defense. But the legislature's power to eliminate the relevance of those facts for future disputes did not mean that the legislature could adjudicate those facts with respect to disputes that had already accrued, or that it could delegate the adjudication of those facts to executive officials. Insofar as the parties' core private rights were at stake, and insofar as the legal rules in effect at the time of the alleged tort had made assumption of the risk relevant to those rights, the litigants

113. See Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829) ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.").
114. Harrison, Substantive Due Process, supra note 42, at 518 n.78.
were entitled to "judicial" determination of the facts that bore on that defense in their particular case. This understanding dovetailed with nineteenth-century jurisprudence about the ways in which state and federal constitutions restricted retroactive legislation: Just as legislatures could not come along after the fact and retroactively redraw the lines that defined the parties' core private rights,\(^{115}\) and just as legislatures could not accomplish the same result by making conclusive declarations of where those lines had stood in the past,\(^{116}\) so too legislatures could not authoritatively apply the preexisting lines to individual cases or make binding determinations about exactly what had happened in those cases. Indeed, some judges asserted that legislative findings about the facts of individual cases (such as findings recited in the preambles to private acts) should not be "even prima facie evidence against private rights," lest "many individual controversies... be... drawn from the functions of the judiciary into the vortex of legislative usurpation."\(^{117}\)

But while the legislature could not conclusively determine what have come to be called "adjudicative facts" when core private rights were at stake, it retained primary authority over what have come to be called "legislative facts."\(^{118}\) Again, the contrast between these different kinds of factual questions (and the branches of government that take the lead in resolving them) tracks the public/private distinction. When drafting and enacting statutes, legislatures inevitably make factual determinations about the costs and benefits of different categories of human activity, the extent of various problems, the methods best calculated to address those problems, and many other questions of public moment. Even when people faced fines or imprisonment for violating the resulting statutes, nineteenth-century courts did not believe that litigants had a right to searching judicial review of the factual questions that bore on the wisdom of the legislature's policy choices; those questions were considered matters of public policy rather than private right. The primary factual questions that required "judicial" resolution instead involved the details of individual interactions.

Nineteenth-century rules of evidence reflect the same point. As we have seen, it was not the legislature's province to determine the facts of individual cases when core private rights were at stake; nineteenth-century courts held that "the legislature has no jurisdiction to determine facts touching the rights of individuals."\(^{119}\) But statutes and legislative

\(^{115}\) See Woolhandler, Retroactivity, supra note 8, at 1024–25.
\(^{116}\) See id. at 1029.
\(^{117}\) Elmondorff v. Carmichael, 13 Ky. (3 Litt.) 472, 480 (1823).
\(^{118}\) See Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 402–10 (1942) (describing "legislative facts" as "generalized information" of sort that "form[s] the basis for creation of law and determination of policy," and distinguishing "adjudicative facts" about details of individual interactions).
\(^{119}\) Parmelee v. Thompson, 7 Hill 77, 80 (N.Y. Sup. Ct. 1845); see also supra text accompanying note 117.
resolutions were widely understood to be good evidence of "the public matters[ ] which they recite." 120 For example, if a legislative resolution or the preamble to a public statute recited that two foreign countries were at war, courts would accept this fact without any further proof. 121

Much of the political question doctrine can be understood in the same terms. As Professor Harrison has noted, an important branch of that doctrine operated to identify factual questions on which courts would accept the political branches' determinations as binding. 122 Those questions almost invariably involved what nineteenth-century jurists called "public matters"—matters that primarily concerned a state or nation as a collective entity and that bore only incidentally on individual rights. 123

The 1839 case of Williams v. Suffolk Insurance Co. 124 illustrates both how these questions could arise in ordinary private litigation and how courts handled them. The defendant had issued insurance policies on two schooners embarking on a hunt for seals. Both ships proceeded to the Falkland Islands, where they were seized by officials representing the government of Buenos Aires (which claimed jurisdiction over the Falklands). The insurance company refused to cover the resulting losses, and the policyholder sued for breach of contract. In defense of its position, the insurance company argued that historical evidence and the law of nations supported the Buenos Airean government's claim of jurisdiction, that the two vessels' conduct had violated Buenos Airean law, and that the insurance contracts did not protect against losses occasioned by this sort of illegal activity. But the Supreme Court rejected this argument on the ground that the executive branch of the United States government had officially denied Buenos Airean authority over the Falklands, and it was not the judiciary's role to second-guess the executive's decision on "fact[s] in regard to the sovereignty of any island or country." 125 Because the executive branch's determination of those facts was "conclusive on the judicial department," the Court concluded without further exami-

120. 1 Simon Greenleaf, A Treatise on the Law of Evidence 567 (Boston, Little & Brown 2d ed. 1844).
121. Id.; see also Cooley, supra note 9, at 96 ("A recital of facts in the preamble of a statute may perhaps be evidence, where they relate to matters of a public nature, as that riots . . . exist in a certain part of the country; but where the facts concern the rights of individuals, the legislature cannot adjudicate upon them." (footnote omitted)).
122. See Harrison, Reconstruction, supra note 12, at 424 n.241 (discussing Luther v. Borden, 48 U.S. (7 How.) 1 (1849)).
123. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) (indicating that political questions of the sort that are not subject to judicial reexamination typically "respect the nation, not individual rights").
125. Id. at 420; accord Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.").
nation that Buenos Airean law did not govern seal hunting in the Falklands. In the absence of the restrictions that Buenos Aires had purported to impose, the seal trade was “free and lawful to the citizens of the United States”—a public right that “belonged in common to the citizens of the United States” and that all American vessels could exercise. The vessels in question therefore had done nothing wrong, and the insurance company was contractually obliged to cover their losses.

Nineteenth-century courts felt similarly bound to accept the political branches’ determinations of a host of other questions as to which each member of the American body politic had the same legal relationship (though not necessarily the same practical interest). Even when the proper disposition of individual rights in ordinary lawsuits turned on the answers to those questions, courts treated as authoritative the political branches’ decisions about the territorial boundaries between the United States and foreign sovereigns, about the identity of the legitimate government in a particular state or foreign country, or about whether particular treaties between the United States and other countries remained in force and continued to bind each nation. But Congress could not give the political branches similar power over the determination of individualized adjudicative facts when core private rights were at stake.

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127. Id. at 419, 421.
128. The classic citation is Foster v. Neilson:
If those departments which are entrusted with the foreign intercourse of the nation . . . have unequivocally asserted its rights of dominion over a [territory] of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is . . . more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of [that country's] legislature.
27 U.S. (2 Pet.) 253, 309 (1829); cf. United States v. Arredondo, 31 U.S. (6 Pet.) 691, 711-12 (1832) (reiterating that judiciary should “follow the action of the other departments of the government” on questions of this sort, but adding that Congress can deviate from this default rule and authorize courts to exercise independent judgment (emphasis omitted)).
129. See Luther v. Borden, 48 U.S. (7 How.) 1, 44 (1849) (“In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.”); see also id. at 42 (observing in dictum that if Federal Senate and House of Representatives decide to seat members appointed under authority of state government whose legitimacy has been disputed, this recognition of state government’s authority and republican character “is binding on every other department of the [federal] government, and could not be questioned in a judicial tribunal”).
130. See Terlinden v. Ames, 184 U.S. 270, 288 (1902) (addressing whether extradition treaty with Prussia remained in effect after creation of German Empire, and concluding that “the courts ought not to interfere with the conclusions of the political department”).
II. WHAT HAS (AND HAS NOT) CHANGED

Although the framework discussed in Part I prevailed throughout the nineteenth century, the twentieth century saw several important developments that cast doubt on its continued vitality. As Part II.A discusses, the traditional association between core private rights and "judicial" power survived the initial growth of federal regulatory agencies. In later years, however, the executive branch acquired ever more power over core private rights. Separate developments in due process jurisprudence also tended to blur the distinction between such rights and quasi-private "privileges," resulting in somewhat more judicial involvement in the administration of entitlement programs and somewhat less judicial involvement in the disposition of traditional property interests.

Yet despite these doctrinal changes, the traditional framework remains important. As Part II.B describes, many seemingly old-fashioned distinctions continue to inform the Supreme Court's doctrine: The disposition of public rights still does not trigger the same need for judicial involvement as the disposition of private rights that have vested in individuals, and Congress can authorize nonjudicial adjudication of the statutory privileges that it itself creates to a far greater extent than it can authorize nonjudicial adjudication of traditional rights to life, liberty, and property. Although modern case law has made the topic of nonjudicial adjudication murky, Part II.B concludes with a tentative summary of where things now stand—a summary in which the traditional framework continues to play a central organizing role.

A. The Traditional Framework in the Administrative Age

1. The Traditional Framework and the Initial Growth of Regulatory Agencies. — At the federal level, Congress's creation of the Interstate Commerce Commission in 1887 is usually regarded as the dawn of the modern administrative state.131 From the First Congress on, of course, it had been common for Congress to give the President or other executive officials broad authority to make certain kinds of decisions—how money in the public Treasury should be spent,132 which inventions were "sufficiently useful and important" to merit patents,133 who should receive grants of federal land,134 who should be licensed to trade with Indian
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tribes, and the like. But outside of the special fields of taxation and the regulation of foreign commerce, these delegations did not intersect much with core private rights; at the time that the executive branch was acting, the only vested rights in the picture belonged to the public as a whole. The new federal regulatory agencies that Congress established in the late nineteenth and early twentieth centuries were different, because the entities that they regulated already had vested rights to the property that the agencies were regulating.

But while the government plainly could not confiscate that property, the regulated entities did not have a vested right to be free from regulation of their future conduct. Nor did they have a right to be subject to regulation only by Congress and not by Congress's delegates in the executive branch. Although Congress could not delegate away its "legislative" powers by allowing administrative agencies to make law out of whole cloth, people had long found it difficult to draw clear lines between "legislative" and "executive" power, and the Supreme Court eventually announced a fairly lenient test: As long as Congress laid down "intelligible principles" to guide the agencies' discretion, the agencies would be deemed to be executing the directions provided by Congress rather than legislating new directions of their own. Within the limits suggested by this test, Congress could authorize administrative agencies to promulgate whatever substantive regulations Congress could itself enact by statute.

At least when the appropriate regulatory prescriptions depended upon individualized facts, moreover, either Congress itself or its delegates in the executive branch could act by particularized order rather than by general rule. When Congress authorized executive agencies to proceed in this way, the agencies often held individualized hearings that resembled judicial trials, and they issued orders that resembled the injunctive decrees of a court of equity. But orders of this sort were not thought to be the sole province of the judiciary. As long as the agencies were simply

135. Id. at 86 (discussing Act of July 22, 1790, ch. 33, 1 Stat. 137).
137. See, e.g., Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 15 (1825); see also Locke, supra note 28, § 141 (observing that when the people have conferred legislative power upon a particular entity, that entity "cannot transfer the power of making laws to any other hands," because power that the people have conferred is "only to make laws, and not to make legislators").
138. See 3 Annals of Cong. 238 (1791) (statement of Rep. James Madison) (suggesting that Congress cannot validly give President carte blanche about where to locate post roads, but acknowledging difficulty of "determin[ing] with precision the exact boundaries of the Legislative and Executive powers").
making rules for the future rather than assessing liability for the past, and as long as they were not otherwise invading core private rights, Congress could provide for their orders to have legal effect—the same legal effect, in fact, as particularized statutes enacted by Congress itself.

For a crisp example of this analysis, consider the Supreme Court's opinion in Union Bridge Co. v. United States.\textsuperscript{140} By statute, Congress had provided that "whenever the Secretary of War shall have good reason to believe that any . . . bridge . . . over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise," the Secretary (after "giving the parties reasonable opportunity to be heard") could direct the bridge's owners or operators to modify the bridge.\textsuperscript{141} Congress further made it a misdemeanor, punishable in federal court, for the recipient of a lawful order of this sort "wilfully [to] fail or refuse to . . . comply."\textsuperscript{142} In upholding this statute against constitutional challenge, the Court opined that Congress unquestionably "could have determined for itself" whether a particular bridge was unreasonably obstructing navigation, and could have backed up its decision with a specific statute requiring changes to that one bridge; such a statute, in the Court's view, would have been a perfectly valid exercise of Congress's authority to regulate interstate commerce. The Court thought it equally clear that if Congress did not want to conduct its own "investigations . . . as to each particular bridge," it could delegate that task to executive officials and authorize them to require prospective changes to the bridges that they identified as violating Congress's policies.\textsuperscript{143} As the Court asserted in a later case, Congress could provide for its delegatees' orders to have "the same force and effect . . . that would have been accorded to direct action by [Congress]."\textsuperscript{144}

Congress repeatedly acted upon this theory. In a host of areas, federal statutes articulated some general policies and deputized executive agencies to flesh them out by issuing "cease and desist" orders to particular entities on the basis of individualized adjudications.\textsuperscript{145} In keeping with the traditional framework, the agencies could not themselves im-

\textsuperscript{140} 204 U.S. 364 (1907).

\textsuperscript{141} River and Harbor Act of 1899, ch. 425, § 18, 30 Stat. 1121, 1153–54 (codified as amended at 33 U.S.C. § 502 (2000)) (adding that Secretary's notice "shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them").

\textsuperscript{142} Id. § 18, 30 Stat. at 1154.

\textsuperscript{143} Union Bridge Co., 204 U.S. at 386.

\textsuperscript{144} President of Monongahela Bridge Co. v. United States, 216 U.S. 177, 195 (1910) (indicating that when bridge's owner was prosecuted for defying order to modify bridge, judges should not conduct de novo inquiry into basis of order, but only into whether defendant had indeed defied it); cf. id. (leaving room for judges to conduct independent inquiry into whether order had invaded "the essential rights of property").

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prison or fine people who violated such orders; backward-looking remedies of this sort, touching upon core private rights, required "judicial" involvement. But while courts enforcing the agencies' cease-and-desist orders would exercise their own judgment about whether those orders had been violated, the orders themselves were prospective regulations tantamount to particularized statutes enacted by Congress, and courts were not supposed to conduct de novo review of the factual determinations that had gone into them. The relevant section in the Federal Trade Commission Act, for instance, provided that "[t]he findings of the commission as to the facts, if supported by testimony, shall be conclusive." 146

Tellingly, courts took a more plenary role when particular regulations were alleged to invade a company's core private rights. The rate regulation cases are good examples. Even during the *Lochner* era, legislatures could regulate the prices charged by "businesses affected with a public interest" (such as common carriers and utility companies). 147 Still, prevailing ideas of property rights protected these businesses against "confiscatory" regulations that denied them a reasonable rate of return on their property. 148 Because core private rights were at stake, moreover, legislatures could not require courts to accept nonjudicial determinations that a particular rate was not confiscatory. As the Supreme Court made clear, the concept of "due process" instead required "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." 149 Whatever one thinks of the Court's premise that prospective rate regulation can amount to the confiscation of private property, the conclusion that the Court drew from that premise was completely traditional: Despite the growth of regulatory agencies, people continued to believe that only "judicial" power can authoritatively resolve claims that the government is invading core private rights.

Congress itself acted upon this belief when defining the authority of the new regulatory agencies. As we have seen, Congress gave agencies

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4. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920); cf. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 50-54 (1936) (reiterating need for "independent judicial review [of this issue] upon the facts and the law," but emphasizing that "the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination").
considerable power to act with the force of law in regulating future conduct. That power fit the traditional framework, because the regulated entities did not have a vested right to avoid orders directed to the future. But Congress shied away from giving the agencies similar authority to resolve backward-looking claims for monetary relief; authoritative resolution of such claims required an exercise of "judicial" power, because it implicated property rights that had already vested in the regulated entities.150

The ubiquity of this contrast throughout the early development of modern administrative law is reflected in Ernst Freund's classic treatise Administrative Powers over Persons and Property, published some forty years after the birth of the new federal regulatory agencies. As Gordon Young has discussed in more detail,151 Freund specifically contrasted "administrative powers" with what he called "powers of a purely judicial type"—powers aimed at "remedial justice" rather than "public administration."152 While conceding that some states had recently provided for "administrative instead of judicial determination of workmen's compensation awards," Freund emphasized that this arrangement was "an anomaly" in American law and that it continued to inspire serious "[c]onstitutional doubt" in states that had not specifically amended their constitutions to countenance it. Indeed, Freund thought this arrangement so anomalous, and the contrast between "remedial justice" and "administrative powers" so widely respected in the rest of American administrative law, that he simply declared workers' compensation to be beyond the scope of his treatise.153

2. Crowell v. Benson and the Possibility of Factfinding "Adjuncts" in Judicial Proceedings That Do Not Trigger a Constitutional Right to Trial by Jury. — If Congress had not decided to mimic state workers' compensation sys-

150. See Young, supra note 13, at 814–15 (discussing distinctions that Congress drew when conferring powers upon Interstate Commerce Commission); Packers and Stockyards Act §§ 309, 315, 42 Stat. at 165–67, 168 (drawing similar distinctions). For a specific illustration, compare Hepburn Act § 5, 34 Stat. at 591 (permitting both Interstate Commerce Commission and individual parties to seek injunctions to enforce "any order of the Commission, other than for the payment of money," and limiting judicial review to whether "the order was regularly made and duly served"), with id., 34 Stat. at 590 (withholding any such conclusive effect from "order[s] for the payment of money," such as reparations orders in favor of customers who claimed to have been overcharged by carriers, and providing that judicial proceedings to enforce such orders "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated").

151. See Young, supra note 13, at 823–24.


153. Id. at 14. Freund also criticized Congress's decision to give the Interstate Commerce Commission a role in reparations proceedings against carriers, even though Congress had deliberately made that role quite limited. See id. at 13; cf. supra note 150 (describing statutory scheme).
tems in addressing the problems of injured longshoremen, matters might have remained in much the position that Freund described. In three controversial decisions, however, the Supreme Court effectively prevented state workers’ compensation laws from reaching longshoremen and other maritime employees,\textsuperscript{154} and in 1927 Congress reacted with a federal scheme modeled on those laws. The Longshoremen’s and Harbor Workers’ Compensation Act (LHWCA) required companies that employed maritime workers to pay set rates of compensation in connection with the disability or death of any employee “if the disability or death results from an injury occurring upon the navigable waters of the United States . . . and if recovery for the disability or death through workmen’s compensation proceedings may not validly be provided by State law.”\textsuperscript{155}

The Act went on to authorize some administrative adjudication of the liability that it created: If an employer disputed a worker’s claim for compensation, a deputy commissioner of the United States Employees’ Compensation Commission would hold an evidentiary hearing and decide whether to make an award.\textsuperscript{156} The deputy commissioner’s order was not self-executing; either party could contest it in a federal district court, and the order would have no effect if the federal judiciary concluded that it was “not in accordance with law.”\textsuperscript{157} But the statute did not make clear exactly what this standard entailed.

That issue came to a head when deputy commissioner Letus Crowell ordered Charles Benson to pay compensation at the statutory rates to a claimant who had hurt himself on Benson’s barge. Benson denied that the claimant was his “employee,” and he asked a federal district court to set aside Crowell’s order. The claimant argued that the court had to respect Crowell’s order if the administrative record contained “any evidence . . . on which he could have found liability,” but the district court—applying the traditional framework—held that this interpretation of the LHWCA would make the statute unconstitutional; with monetary liability hanging in the balance, Benson’s core private rights were plainly at stake, and Benson therefore had a right to independent “judicial” determination of the adjudicative facts.\textsuperscript{158} Indeed, the district court construed the

\textsuperscript{154} See S. Pac. Co. v. Jensen, 244 U.S. 205, 216–18 (1917) (holding that states lacked legislative authority to extend their workers’ compensation laws to stevedores); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 163–64 (1920) (holding that Congress cannot overcome this problem by authorizing application of state workers’ compensation laws to employees who suffer maritime injuries); Washington v. W.C. Dawson & Co., 264 U.S. 219, 222 (1924) (reaffirming \textit{Knickerbocker Ice}).


\textsuperscript{156} Id. § 19, 44 Stat. at 1435. Congress had originally created the Commission to handle claims upon the federal treasury by injured employees of the federal government. See Act of Sept. 7, 1916, ch. 458, 39 Stat. 742 (codified as amended in scattered sections of 5 U.S.C.).

\textsuperscript{157} Longshoremen’s and Harbor Workers’ Compensation Act § 21, 44 Stat. at 1436–37.

\textsuperscript{158} Benson v. Crowell, 33 F.2d 137, 140–41 (S.D. Ala. 1929).
LHWCA to entitle Benson to a "hearing de novo" at which the parties could present additional evidence. On the basis of the testimony at this hearing, the district court concluded that the injured claimant had not been Benson’s employee, and it therefore set aside the compensation order.

Both the Fifth Circuit and the Supreme Court affirmed this decision. But while the Fifth Circuit simply echoed what the district court had said, the Supreme Court limited its holding to so-called "jurisdictional" facts, such as whether the claimant had really been Benson’s employee and whether the injury had really occurred on navigable waters. With respect to facts of this sort, which implicated either constitutional limits on Congress’s own authority or statutory limits on the authority that Congress had validly given the deputy commissioner, the Court agreed that the district judge could hear new evidence and make de novo determinations. In elaborate dicta, however, the Court argued that the LHWCA required courts to give more deference to the deputy commissioner’s findings on other issues: With respect to nonjurisdictional facts, the district judge should simply ask whether the deputy commissioner’s findings had been “supported by evidence [in the administrative record] and within the scope of his authority.”

According to the Court, moreover, this statutory scheme was constitutional. The majority acknowledged that a private employer’s monetary liability to one of his employees was a question of “private right” whose authoritative adjudication required “judicial” proceedings. But the majority emphasized that Congress has considerable power to structure those proceedings and to regulate the mechanisms that courts use to ascertain facts. Although the Constitution restricts that power by giving many litigants the right to demand trial by jury, litigants have no such right in admiralty cases (including suits about injuries incurred on navigable waters), and Congress can therefore establish more innovative procedures for such cases; rather than putting factual determinations entirely in the judge’s hands, Congress can “‘give either party right of trial by jury, or modify the practice of the court in any other respect that it

159. Id. at 142.
161. See id. at 68.
162. See 285 U.S. at 54–64.
163. Id. at 46.
164. Id. at 50–51.
165. See U.S. Const. art. I, § 8, cl. 18 (empowering Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution” powers that Constitution vests in other branches of federal government, including judicial power conferred by Article III).
166. See id. art. III, § 2 & amend. VI (criminal cases); id. amend. VII (suits at common law).
deems more conducive to the administration of justice.'"167 The Court portrayed the LHWCA as just such a modification.168 On this view, the deputy commissioner was effectively part of the court's own factfinding process, and the Court concluded that his role did not exceed Congress's "authority to prescribe procedure in cases of injury upon navigable waters."169

The idea that the deputy commissioner's role was part and parcel of the "judicial" proceedings required by the Constitution, and simply reflected Congress's broad authority to regulate how the federal judiciary found facts in admiralty cases, was somewhat artificial. In *Crowell* itself, indeed, the majority recognized some limits on this idea.170 But whatever other limits one might recognize, Congress plainly has less power to prescribe innovative factfinding procedures for suits at common law (where the Seventh Amendment gives parties a constitutional right to demand trial by jury) than for admiralty cases and suits in equity (which the Seventh Amendment does not address). Thus, when Congress created the Federal Communications Commission in 1934, it did not treat *Crowell* as opening the floodgates to administrative factfinding in all kinds of cases. Instead, the Communications Act continued a pattern that Congress had established for prior regulatory agencies: It drew a sharp distinction between administrative orders calling for the payment of money (which could be enforced only through suits in district court that proceeded "like other civil suits for damages" and in which the Commission's underlying findings were simply "prima facie evidence") and other administrative orders (as to which the Commission's underlying findings, "if supported by substantial evidence," were to be "conclusive unless it shall clearly appear that [they] are arbitrary or capricious").171

Congress was more adventurous in the National Labor Relations Act of 1935, which authorized the National Labor Relations Board to entertain complaints that an employer had committed such "unfair labor practices" as firing an employee for advocating unionization. If the Board found in the employee's favor, it could order the employer not only to reinstate the employee but also to provide back pay; although such orders

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168. See id. at 51 (analogizing deputy commissioner's role to role that Congress could have given a jury).

169. Id. at 53.

170. The leading example is the majority's distinction between regular facts (as to which the district judge could be required to give the deputy commissioner's findings substantial deference) and "jurisdictional" facts that bore on Congress's constitutional authority to make Benson liable without fault for a workman's injuries (as to which Article III entitled Benson to de novo findings by the district court itself). If the majority had viewed the deputy commissioner as being part of the "judicial" process in exactly the same way that a jury might be, this distinction would not have been necessary.

were not self-executing, the Board could initiate proceedings to enforce them in a federal circuit court, and the court was supposed to accept the Board’s factual findings if they were “supported by evidence” in the administrative record.\textsuperscript{172} Under modern doctrine, of course, the disgorge-ment of back pay to wrongfully discharged employees is widely regarded as a form of equitable relief that does not trigger a constitutional right to trial by jury.\textsuperscript{175} But Congress’s authority to dispense with a jury trial for such claims was not so clear in the 1930s,\textsuperscript{174} and circuit judges divided about whether the Act violated the Seventh Amendment.\textsuperscript{175}

Ultimately, the Supreme Court resolved this issue in favor of the Act’s constitutionality. In doing so, moreover, the Court did not rely on the relatively narrow idea that back pay could be an equitable remedy. Instead, the Court stated more broadly that because claims seeking statutory remedies for violations of the Act were “statutory proceeding[s]” that were “unknown to the common law,” they were not “suit[s] at common law” within the meaning of the Seventh Amendment.\textsuperscript{176} Combined with \textit{Crowell v. Benson}, this rationale paved the way for administrative agencies to act as factfinding adjuncts to the federal judiciary on a broad array of statutory claims, including claims for monetary relief.\textsuperscript{177}

3. \textit{The Expansion of Nonjudicial Adjudication of Matters Involving Public Rights}. — In the 1970s, however, the Court revisited the meaning of the Seventh Amendment and held it applicable to many statutory causes of action that had not existed at common law.\textsuperscript{178} This broader understanding of the Seventh Amendment potentially cut back on the kinds of cases in which Congress could give primary factfinding responsibility to administrative adjudicators. But the Court cushioned this blow by inventing an

\begin{itemize}
  \item \textsuperscript{173} See, e.g., Broadnax v. City of New Haven, 415 F.3d 265, 271 (2d Cir. 2005).
  \item \textsuperscript{174} See National Labor Relations Board: Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. 849–50 (1935) (statement of James A. Emery, General Counsel, National Association of Manufacturers) (arguing that “so far as any order of the Labor Board is involved, in which the employer is required to make restitution in the form of wages or damages,” the Wagner bill would violate “the right of a jury trial granted by the seventh amendment”).
  \item \textsuperscript{175} Compare NLRB v. Mackay Radio & Tel. Co., 87 F.2d 611, 680–31 (9th Cir. 1937) (opinion of Wilbur, J.) (“An action for damages for a wrongful discharge of an employee is a form of action known to the common law . . . . Hence the act, so far as it authorizes the Board to assess damages without the intervention of a jury, is unconstitutional.”), with Agwilines, Inc. v. NLRB, 87 F.2d 146, 151 (5th Cir. 1936) (“Statutory provisions of this kind in the public interest are not considered as conferring common-law rights requiring trial by jury. They provide for public proceedings, equitable in their nature.”).
  \item \textsuperscript{176} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48–49 (1937).
  \item \textsuperscript{177} See Note, Application of Constitutional Guarantees of Jury Trial to the Administrative Process, 56 Harv. L. Rev. 282, 283 & n.5 (1942) (advocating broader view of Seventh Amendment, but acknowledging “majority view” that Amendment does not apply to cases involving “new special statutory rights”).
  \item \textsuperscript{178} See Curtis v. Loether, 415 U.S. 189, 194 (1974).
\end{itemize}
exception to the traditional framework for certain adjudications involving monetary claims against regulated entities.

Ironically, the statutory scheme that prompted this expansion of administrative power was the Occupational Safety and Health Act of 1970, which itself grew out of congressional dissatisfaction with the results created by previous expansions of administrative power at the state level. The Act required employers to comply with rules promulgated by the Secretary of Labor and to maintain workplaces “free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees.” The Secretary could cite employers who violated these duties and could assess monetary penalties of up to $1,000 for each violation (or more in the case of willful or repeated violations). An employer who contested the Secretary’s citation could demand a hearing before an administrative body called the Occupational Safety and Health Review Commission, and people aggrieved by the Commission’s decision could seek judicial review in a federal circuit court. The court, however, was confined to the administrative record and was required to accept the Commission’s factual findings “if supported by substantial evidence on the record considered as a whole.” In Atlas Roofing Co. v. Occupational Safety and Health Review Commission, the Supreme Court upheld this statutory scheme against an employer’s objection that it violated the Seventh Amendment because it substituted administrative determinations for findings that should be made in court and by a jury.

In order to reach this result, the Court had to say something other than what it had said in Crowell v. Benson. After all, if the Commission’s role rested on Congress’s power to prescribe the factfinding procedures used by courts, then the employer’s objection would have been correct. Even under the old understanding of the Seventh Amendment, actions in debt to collect statutory penalties had been held to trigger the constitutional right to trial by jury, and the modern Court would soon confirm that conclusion. A statute that eliminates any role for the jury,

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181. Id. §§ 9, 17, 84 Stat. at 1601, 1606.
182. Id. § 10, 84 Stat. at 1601–02.
183. Id. § 11(a), 84 Stat. at 1602.
moreover, cannot possibly be upheld as a permissible regulation of the procedures for conducting a jury trial.

Rather than casting the administrative hearing in *Atlas Roofing* as part of the judicial process, the Court therefore advanced a different argument: When the federal government is seeking to fine someone for violating "public rights," the Constitution does not require fully "judicial" determination of the relevant facts. Instead, Congress can assign at least "the factfinding function and initial adjudication" to an administrative agency. If and when the matter does get into court, moreover, Congress need not permit de novo reexamination of the agency's conclusions. As in *Atlas Roofing* itself, judicial involvement can be confined to appellate review in a circuit court that sits without a jury—even if the Seventh Amendment would have entitled the defendant to demand trial by jury in purely judicial proceedings.

This conclusion made significant inroads upon the traditional framework. Historically, only "judicial" power could authoritatively deter-

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188. See id. at 455; cf. id. at 455 n.13 (declining to address "whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings").
189. In an effort to deny the novelty of its holding, *Atlas Roofing* emphasized nineteenth-century cases about tax collection. As we have seen, however, the nineteenth-century Court drew a sharp "distinction between [tax] claims and all others." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 282 (1856). *Atlas Roofing* glossed over this distinction; the Court suggested that if the federal government's powers of taxation permitted authoritative administrative assessment of monetary penalties, so too must all the federal government's regulatory powers. See *Atlas Roofing*, 430 U.S. at 450-51, 456-57.

*Oceanic* also misused *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), which dealt with the powers of customs and immigration officials. In 1903, Congress had forbidden maritime transportation companies "to bring to the United States any alien afflicted with a loathsome or with a dangerous contagious disease." Act of Mar. 3, 1903, ch. 1012, § 9, 32 Stat. 1213, 1215 (codified as amended at 8 U.S.C. § 1322 (2000)). The relevant statute added that if the Secretary of the Treasury found "that any alien so brought to the United States was afflicted with such a disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time," then port officials should not grant clearance papers to the offending company's vessels until the company had paid the collector of customs $100 for each violation. Id. § 9, 32 Stat. at 1215-16. In *Oceanic*, the Supreme Court upheld this arrangement. The Court's holding, however, rested on the premise that ship owners had no vested private right to the issuance of clearance papers; instead of being a core private right, authority to sail on public waters was a quasi-private privilege. See *Oceanic*, 214 U.S. at 343 (reasoning that because Congress enjoyed "complete administrative control over the granting or refusal of a clearance," there could be no doubt of Congress's power "to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance as a means of enforcing the penalty"). The Court specifically distinguished administrative denial of clearance papers from "methods which were not within the competency of administrative duties, because they required the exercise of judicial authority." Id.; see also *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding that while Congress can let administrative officials make
mine individualized adjudicative facts in a way that bound core private rights; if core private rights were at stake on one side of a dispute, the mere fact that public rights were at stake on the other side did not open the door to nonjudicial adjudication. Indeed, that is precisely the structure of the standard criminal case—the paradigmatic example of a dispute that requires fully “judicial” determination.

Of course, Atlas Roofing did not hold that administrative agencies can take over the trial of criminal cases and can sentence defendants to death or prison for violating public rights. But Atlas Roofing did expand the potential role of administrative agencies in adjudicating disputes that pit public rights against core private rights to property. Thus, the innovation of Atlas Roofing was to drive a wedge between core private rights to life and liberty (which retain the full protections of the traditional framework) and traditional forms of property (which no longer require as much “judicial” involvement when pitted against public rights).

B. Where Things Stand Now

1. Some Disputes in the Modern Cases. — The Supreme Court’s cases since Atlas Roofing have centered on three issues: (1) the extent to which the right/privilege distinction continues to affect the need for “judicial” involvement in adjudication; (2) the scope of the category of “public rights” covered by Atlas Roofing; and (3) the circumstances in which parties can consent to administrative resolution of matters that would otherwise require judicial power. Because the modern cases are familiar to most readers, I will discuss them only briefly, focusing on how their ebbs and flows fit into the traditional framework.

The modern case law owes much to Justice Brennan, who plainly liked part of the traditional framework. In his plurality opinion in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., he agreed that the government must use “judicial” power in order to adjudicate what he called “[p]rivate-rights disputes,”[190] and he further agreed that the federal government generally can exercise “judicial” power only through courts created in conformity with Article III.[191] For Justice Brennan, it followed that federal administrative agencies can participate in the authoritative adjudication of private-rights disputes only as adjuncts to the real federal judiciary. According to his majority opinion in authoritative determinations about whether individual aliens have privilege of remaining in America, Congress “must provide for a judicial trial” when it wishes to enforce its immigration policies “by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property”).


[191] See id. at 63–66 (referring to “the constitutional command that the judicial power of the United States must be vested in Art. III courts,” though acknowledging that courts-martial, territorial courts, and District of Columbia courts are “not subject to that command”); cf. supra text accompanying notes 61–69 (explaining these exceptions).
Granfinanciera, S.A. v. Nordberg,\textsuperscript{192} moreover, the Seventh Amendment constrains the role that administrative agencies can play in that capacity. Insofar as private-rights disputes not covered by \textit{Atlas Roofing} are concerned, Congress can give administrative adjuncts significant factfinding powers (of the sort that they enjoyed in \textit{Crowell v. Benson}) only when the Constitution does not require trial by jury instead.\textsuperscript{193}

But while Justice Brennan embraced the traditional distinction between legal interests belonging to the public as a whole and legal interests belonging to discrete individuals, he was less fond of the traditional distinction between forms of private property that qualify as core private "rights" and statutory entitlements that qualify only as "privileges." As his opinion in \textit{Goldberg v. Kelly} suggests, Justice Brennan wanted to expand constitutional protections for the so-called "new property,"\textsuperscript{194} and he did not think that the need for "judicial" involvement should hinge on the traditional right/privilege distinction. In \textit{Northern Pipeline}, he therefore tried to redefine the concept of "[p]rivate-rights disputes" to include all legal disputes between private individuals, whether the legal interests at stake were core private rights or mere privileges. At least as he initially formulated his ideas on this subject, authoritative adjudication of any such dispute by the federal government apparently would have required an exercise of "judicial" power, and hence the involvement of an Article III court.\textsuperscript{195}

Later opinions have cut back on this aspect of Justice Brennan's project. The leading case is \textit{Thomas v. Union Carbide Agricultural Products Co.},\textsuperscript{196} which involved a statutory entitlement created by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Federal law forbids companies to sell pesticides that have not been properly registered with the Environmental Protection Agency, and successful registration requires evidence that the pesticide will not have "unreasonable adverse effects on the environment."\textsuperscript{197} Applicants seeking registration therefore submit substantial scientific data to the government. But if a prior applicant has already submitted data about a particular ingredient, later applicants whose pesticides use the same ingredient do not always have to submit new data of their own; as long as they offer to compensate the prior applicant, FIFRA often lets them refer to the data that the prior applicant

\textsuperscript{192} 492 U.S. 33 (1989).
\textsuperscript{193} See id. at 54-55 & n.10.
\textsuperscript{194} See 397 U.S. 254, 262, 267-71 (1970) (holding that when legislature creates statutory entitlements to welfare benefits and commits eligibility determinations to administrative agency, it cannot authorize agency to cut off any individual's benefits except on the basis of evidence adduced at a pretermination hearing at which putative beneficiary can confront and cross-examine adverse witnesses). See generally Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964) (laying groundwork for this conclusion).
\textsuperscript{195} See \textit{N. Pipeline}, 458 U.S. at 69-70 & n.25 (plurality opinion) (appearing to address all litigable matters to which government was not itself a party).
\textsuperscript{196} 473 U.S. 568 (1985).
submitted. FIFRA adds that if the prior applicant and the “follow-on” applicant cannot agree on the amount of compensation, either can initiate binding arbitration through the Federal Mediation and Conciliation Service, and the arbitrator’s decision will be “final and conclusive” in most situations. In Thomas, the Supreme Court held that the Constitution does not prevent Congress from vesting this adjudicative authority in arbitrators who lack the structural protections of Article III: “Congress has the power . . . to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication,” and the agency need not be confined to the role of a mere “adjunct” to the federal judiciary.

The Thomas Court did not draw clear lines for the future. In fact, Justice O’Connor’s majority opinion went out of its way to criticize “reliance on formal categories” that would constrain Congress without serving sensible purposes. Still, Justice O’Connor emphasized “the origin of the right” that Congress had committed to binding arbitration. The linchpin of her argument was that Congress can make the registration of pesticides contingent upon the submission of relevant data to the government, and Congress need not allow manufacturers to retain any continuing property interest in the data that they choose to submit; Congress can provide for later applicants to have free access to the data in the government’s files. If Congress chooses instead to condition such access on payment to the original applicant of a sum determined through nonjudicial means, Justice O’Connor saw no basis for the original applicant to protest. In nineteenth-century terms, the original applicant’s interest in compensation is a mere “privilege” that flows entirely from the statute.

In dicta, Justice O’Connor added that follow-on applicants who choose to piggyback on a prior application are also in no position to demand “judicial” adjudication of the fee for doing so. Even if they have

198. Id. § 136a(c)(1)(F)(iii) (permitting courts to overturn arbitrator’s decision only upon proof of “fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator”).
199. Thomas, 473 U.S. at 589.
201. Thomas, 473 U.S. at 587.
202. See id. at 584 (assuming that Constitution does not oblige federal government to protect confidentiality of “trade secrets” reflected in data that applicants disclose to government); see also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007 (1984) (“[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.”).
core private rights at stake (which was not entirely clear\textsuperscript{203}), follow-on applicants are under no compulsion to use data in the government’s files; if they do not want an arbitrator to decide what they owe for piggybacking on a prior application, they can simply submit their own data. As part of the paperwork for using someone else’s data, indeed, each follow-on applicant “explicitly consents to have his rights determined by arbitration.”\textsuperscript{204}

In \textit{Commodity Futures Trading Commission v. Schor}, Justice O’Connor drew out the implications of this point: Even with respect to matters that might otherwise require fully “judicial” resolution, Congress often can give agency adjudicators a significant role if the parties have consented to this method of dispute resolution. Mr. Schor, whose account with a futures broker had lost so much money that it was running a deficit, asserted that his broker had violated the federal Commodity Exchange Act and related regulations. Instead of suing the brokerage in court, Schor filed a reparations claim with the Commodity Futures Trading Commission (CFTC), which Congress had authorized to conduct initial adjudications subject to some judicial review. When the brokerage itself went to court to recover Schor’s debit balance, moreover, Schor sought to stay or dismiss the brokerage’s suit on the ground that the pending administrative proceedings could fully adjudicate the parties’ respective rights. In keeping with this argument, the brokerage voluntarily dropped its suit and simply asserted a counterclaim in the administrative proceedings. Schor seemed perfectly content with this procedure until the administrative law judge ruled in favor of the brokerage on the merits. After he lost, though, Schor wanted to argue that the agency could not validly adjudicate the brokerage’s state-law counterclaim in a way that had any legal consequences. Because Schor had “indisputably waived any right he may have possessed to the full trial of [the] counterclaim before an Article III court,”\textsuperscript{205} he was reduced to arguing that nonwaivable structural principles nonetheless prevented Congress from giving the CFTC authority over such claims. Under the circumstances, the Supreme Court saw no constitutional problem: “Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.”\textsuperscript{206}

To be sure, Justice Brennan’s plurality opinion in \textit{Northern Pipeline} had asserted that Congress can give federal administrative agencies less adjudicatory power with respect to legal interests created by state law than with respect to legal interests created by Congress itself.\textsuperscript{207} This distinc-

\textsuperscript{203} See \textit{Thomas}, 473 U.S. at 591–92 (reserving judgment about whether arbitral awards under FIFRA are debts that follow-on applicant has legal obligation to pay).

\textsuperscript{204} Id. at 592.

\textsuperscript{205} \textit{Schor}, 478 U.S. at 849.

\textsuperscript{206} Id. at 855.

tion, moreover, has a solid basis in both history and constitutional text. In connection with the administration of federal programs and the management of federal property, Congress unquestionably can let federal administrative agencies apply preexisting legal rules to individualized facts in ways that have significant legal consequences. For instance, Congress can put agencies that have no "judicial" power in charge of deciding which individual claimants satisfy the criteria that Congress has established for grants of public land or public money, which companies should be awarded government contracts, and which applicants qualify for the federal permits necessary to engage in certain kinds of activities. The reason that Congress can do so, however, is that these agencies do have "executive" power, and the adjudicatory tasks with which they are being entrusted are part and parcel of "executing" federal laws. Because the adjudicatory powers of federal administrative agencies must be tethered to the "execution" of federal law, Congress cannot give such agencies the more general adjudicatory authority that is often vested in true courts. To take an extreme example, it plainly would violate the Constitution for Congress to establish a federal administrative tribunal with conclusive authority to adjudicate run-of-the-mill diversity cases. Indeed, the unconstitutionality of any such measure is sufficiently clear that Congress has never tried to do so—despite longstanding concerns about the burdens that diversity cases impose on the Article III courts.

Schor did not reject this analysis. Although the Court upheld the CFTC's jurisdiction over state-law counterclaims submitted to it by consenting parties, the Court emphasized that this jurisdiction was "incidental to, and completely dependent upon," the CFTC's administration of federal law, and was "limited to that which is necessary" to permit the CFTC to adjudicate federal claims. These facts may well have been important to the outcome in Schor. To the extent that the authoritative adjudication of a dispute (even with the consent of the parties) entails some sort of governmental power, Congress probably cannot authorize federal administrative agencies to perform adjudicatory tasks that have nothing to do with the execution of federal law.

2. A Summary of Current Doctrine. — The upshot of the modern cases is famously difficult to summarize. But one feature of current doctrine

208. See Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1246 (1994) [hereinafter Lawson, Rise and Rise] ("Much adjudicative activity by executive officials—such as granting or denying benefits under entitlement statutes—is execution of the laws by any rational standard, though it also fits comfortably within the concept of the judicial power if conducted by judicial officers." (footnote omitted)).

209. Schor, 478 U.S. at 856; see also id. at 843 ("[S]uch jurisdiction is necessary, if not critical, to accomplish the purposes behind the [federal] program.").

210. Cf. id. at 853 (declining to recognize flat rule against administrative adjudication of state-law claims, but acknowledging that "a 'private' right for which state law provides the rule of decision . . . is . . . a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts").

211. See Hart & Wechsler, supra note 17, at 401.
is quite clear: At least in the absence of waiver, the Court continues to believe that the need for "judicial" involvement in particular adjudications depends on the nature of the legal interests that are being adjudicated.

There is little controversy, for instance, about the proper treatment of core private rights to life and liberty. Congress certainly can enact laws authorizing the incarceration or execution of people who commit particular crimes. But neither Congress nor its delegees in the executive branch can authoritatively determine that a particular individual has committed such a crime and has thereby forfeited his core private rights to life or liberty. Criminal defendants instead can demand "judicial" proceedings to determine the individualized adjudicative facts that establish their guilt. In general, moreover, the only entities that can exercise "judicial" power on behalf of the federal government are courts that enjoy the structural safeguards of Article III. Outside of federal territories, the District of Columbia, and the military, Congress cannot authorize any "non-Article III" tribunal to adjudicate a criminal case without the defendant's consent.

212. See N. Pipeline, 458 U.S. at 70 n.24 (plurality opinion) (taking it for granted that Atlas Roofing "does not extend to any criminal matters"); Lawson, Rise and Rise, supra note 208, at 1246–47 ("The conviction of a defendant under the criminal laws . . . is surely something that requires the exercise of judicial rather than executive power.").

213. See supra notes 61–69 and accompanying text (accounting for these exceptions).

214. Current law arguably makes some small inroads on this principle. Since 1996, Congress has purported to authorize federal magistrate judges (who lack the structural protections of Article III) to conduct trials and impose sentences upon unconsenting defendants for so-called "petty offenses." See 18 U.S.C. § 3401 (2000) (reflecting authority initially conferred by Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 202, 110 Stat. 3847, 3848–49); 28 U.S.C. § 636(a)(3)–(4) (2000) (same); see also 18 U.S.C. § 19 (defining "petty offense" to mean infractions and minor misdemeanors punishable by fines of no more than $5,000 and imprisonment for no more than 6 months). If the adjudication of these cases requires "judicial" power, and if the magistrates who preside at trial cannot be portrayed as mere adjuncts to the district courts that can review their judgments, then this statutory scheme is at least partially unconstitutional. The same might be true of the statutory provision purportedly empowering magistrate judges "to punish summarily by fine [of up to $5,000] or imprisonment [of up to 30 days], or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice." 28 U.S.C. § 636(c)(2), (5) (reflecting authority conferred by Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 202, 114 Stat. 2410, 2412–13); see Mark S. Kende, The Constitutionality of New Contempt Powers for Federal Magistrate-Judges, 53 Hastings L.J. 567, 590–95 (2002) (arguing that this provision is unconstitutional).

The one magistrate judge who has devoted sustained attention to this issue suggested that the trial of petty offenses has not traditionally been thought to require "judicial" power. See United States v. McCrickard, 957 F. Supp. 1149, 1154 (E.D. Cal. 1996). As evidence for that conclusion, he cited Shafer v. Mumma, 17 Md. 331 (1861), which allowed mayor's courts in Maryland cities to try defendants accused of violating minor municipal ordinances even though the Maryland Constitution vested "[t]he judicial power of this State" entirely in other tribunals. Md. Const. of 1851, art. IV, § 1. But Shafer did not necessarily rest on the idea that the trial of such cases does not require "judicial" power;
After *Atlas Roofing*, core private rights to traditional forms of property do not enjoy quite such robust protection. Current doctrine maintains that when "public rights" covered by *Atlas Roofing* are pitted against traditional forms of private property, Congress often can commit the initial adjudicatory decisions to an administrative agency. Even then, however, the agency's decision probably cannot conclusively establish an individual's monetary liability (or otherwise dispose of his core private rights to property) unless the individual has an opportunity for "judicial" review of whether (1) the decision comports with law and (2) the administrative record contains substantial evidence to support the agency's conclusions about each of the individualized adjudicative facts that the law makes relevant. When "public rights" in the *Atlas Roofing* sense are not at stake, moreover, Congress has even less authority to involve federal administrative agencies in the adjudication of vested private rights to traditional forms of property. Unless the individual property-holder consents to administrative adjudication, Congress can authorize federal agencies to participate in the dispositive adjudication of such matters only as "adjuncts" to the federal judiciary. Under current doctrine, the role that they can play in that capacity is limited both by Article III (which prevents them from exercising any of the "essential attributes of the judicial power") and by the Sixth and Seventh Amendments (which prevent them from exercising any serious factfinding authority with respect to matters that trigger a constitutional right to trial by jury).

Congress has more flexibility with respect to statutory entitlements that historically would have been treated as "privileges" rather than core private rights. At least when those entitlements owe their existence to federal law, Congress can commit their administration to executive officials of its rationales may simply have been that any judicial power being exercised by the mayor's courts was that of the relevant municipality rather than the state as a whole. See *Shafer*, 17 Md. at 336 (emphasizing that defendant "was punished for an offence against the decency and morals of Hagerstown, and not against those of the State"). This rationale does not suggest that Congress can let magistrate judges authoritatively adjudicate petty offenses against the United States (as opposed to petty offenses against a federal territory or the District of Columbia).

Even if one accepts their constitutionality, though, these aspects of current law reach only petty offenses involving very temporary deprivations of liberty. Everyone agrees that "judicial" power is necessary when the government wants to try and sentence an unconsenting defendant for more serious crimes.

Even if one accepts their constitutionality, though, these aspects of current law reach only petty offenses involving very temporary deprivations of liberty. Everyone agrees that "judicial" power is necessary when the government wants to try and sentence an unconsenting defendant for more serious crimes.

215. See *N. Pipeline*, 458 U.S. at 70 n.25 (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"); *TVA v. Whitman*, 336 F.3d 1236, 1259–60 (11th Cir. 2003) (elaborating upon this requirement); cf. Saphire & Solimine, supra note 17, at 139–44 (suggesting that the sort of judicial review described in the text should be seen as "constitutionally required minimum" even when core private rights are not at stake).


cials. If Congress so desires, moreover, it may well be able to bar courts from second-guessing the determinations that those officials reach, even with respect to individualized adjudicative facts.\footnote{219}

To be sure, modern doctrines of procedural due process regulate the delegation of administrative power over such entitlements. If a particular entitlement qualifies as "property" for purposes of those doctrines, and if Congress authorizes an administrative agency to terminate the entitlement in individual adjudications, Congress must institute some procedural safeguards to reduce the risk of arbitrary administrative action.\footnote{220} Still, those safeguards can operate entirely at the administrative level; although claimants 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.\footnote{221} Even under modern doctrine, then, the adjudication of an individual's claim to new property does not require "judicial" power.\footnote{222} Many statutory privileges, moreover, do not rise to the level of the new property, and hence need not trigger even the administrative procedures contemplated by modern doctrine.

As for legal interests that belong to the public as a whole, current doctrine remains quite clear. No exercise of "judicial" power is necessary for Congress and the executive branch to act with the force of law in

\footnote{219. See supra notes 201–202 and accompanying text (discussing Thomas v. Union Carbide Agricultural Products Co.).}

\footnote{220. See Merrill, supra note 54, at 922–30, 960–68 (explaining that under modern case law, legislature's decision to define the substance of a statutory entitlement in a particular way has consequences for procedures by which the entitlement may be administered).


222. Goldberg v. Kelly, 397 U.S. 254 (1970), is not to the contrary. Rather than holding that the authoritative disposition of certain privileges requires an exercise of "judicial" power, Goldberg simply held that administrative decisions to terminate welfare benefits must follow some procedures modeled on those used by true courts. To test this understanding of modern doctrines of procedural due process, consider how those doctrines would apply to a federal administrative tribunal that cannot exercise "judicial" power because its members serve for fixed terms, but that otherwise affords claimants all of the procedural protections that they would enjoy in a true court. If Congress were to give such a tribunal conclusive authority over certain claims to new property, the analytical framework of Mathews v. Eldridge, 424 U.S. 319 (1976), would presumably determine whether the Due Process Clause was satisfied. Even for the most highly protected private interests, though, that framework has never been understood to require life-tenured decisionmakers; otherwise, the disposition of cases in the ordinary state courts would frequently run afoul of the Federal Constitution. It seems inconceivable that a federal administrative tribunal modeled on a state judiciary, which supplies every imaginable procedural protection except a life-tenured bench, would be held inadequate under Mathews to adjudicate claimants' interests in new property.
surrendering the public's ownership of particular tracts of land, or society's interest in punishing people who have committed federal crimes, or the government's interest in the preclusive effect of judgments that the government has won in litigation against private individuals. Indeed, if an individual citizen purported to bring suit on behalf of the public as a whole, seeking "judicial" review of the political branches' disposition of these public rights, courts almost certainly would dismiss the suit for lack of standing. Within the limits of its enumerated powers, then, Congress can authorize the political branches to take actions that bind the public without any judicial involvement at all.

III. THE TRADITIONAL FRAMEWORK IN THE TWENTY-FIRST CENTURY

Modern scholars tend to downplay the idea that the need for "judicial" involvement in particular adjudications depends on the nature of the legal interests being adjudicated. Rather than attempting to draw lines between "public rights" and "private rights," or between legal interests created by Congress and other legal interests, many academics have gravitated toward a different framework that appears to take a more unified approach to the separation of powers.

As we shall see, however, the apparent simplicity of this approach is an illusion: Even while modern commentators purport to get beyond distinctions of the sort that the traditional framework draws, they have found it impossible to do so. Their understanding of the relationship between "political" and "judicial" power inevitably reflects the distinction between legal interests that belong to the public and legal interests that belong instead to individual citizens. Within the category of individualized interests, moreover, it inevitably reflects some additional distinctions between interests that enjoy relatively little protection against abrogation by the political branches and core private "rights" that can vest more securely in their individual owners.

223. Nearly all participants in the modern academic debate about standing agree that individual citizens cannot initiate litigation on behalf of the American public unless the public's representatives in Congress have authorized them to do so. See, e.g., Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1468 (1988) (indicating that this sort of "citizen standing" should be unavailable "in the absence of a clear statement from Congress"); Woolhandler & Nelson, supra note 7, at 701–04 (demonstrating historical roots of idea that private plaintiffs have no automatic right to seek judicial redress for invasion of public's rights). The modern debate about standing is simply about whether the Constitution permits Congress to confer this authority—not whether the Constitution entitles each individual to act as a private attorney general even in the absence of any public authorization.

224. For a notable exception, see Lawson, Rise and Rise, supra note 208, at 1247 (tentatively endorsing traditional view that judicial power is necessary for authoritative adjudication of individual rights to "life, liberty, or property" but not for authoritative adjudication of "mere privilege[s]").
A. Modern Scholarly Efforts to Devise a Unified Approach

Many modern scholars suggest that the lines drawn by the traditional framework are hard to reconcile with the text of Article III. In their view, when Article III vests "the judicial Power of the United States" in courts staffed by judges who enjoy life tenure and other structural protections, its literal language seems to mean that all "adjudication" conducted by the federal government must proceed in those courts.225

Of course, the same scholars are quick to acknowledge the impracticality of a sweeping and unqualified rule to this effect. In the words of the late Paul Bator, "[e]very time an official of the executive branch, in determining how faithfully to execute the laws, goes through the process of finding facts and determining the meaning and application of the relevant law," he is doing something "adjudicatory"—especially if any legal consequences turn on his decision.226 No realistic view of the separation of powers can possibly make such tasks entirely off limits to the executive branch. As Richard Fallon notes, moreover, such an absolutist position would be inconsistent not only with "the modern administrative state" but also with what we know about "the historical intent underlying article III" (as reflected in practices followed from the First Congress on).227

Modern scholars have therefore tried to develop an alternative framework that reflects the lessons of practical experience but that still "achieves a tolerable fit" with what they take to be "the letter and the spirit of the Constitution."228 In keeping with their premise that the letter of Article III reaches all "adjudication" by the federal government, so too does their proposed framework: No matter what the nature of the legal interests being adjudicated in a given case, Article III is said to require some sort of judicial involvement. In deference to practical reality, though, the scholars' framework gives Congress substantial discretion over both the timing and the extent of that involvement. In particular, Congress can commit most of the initial adjudicatory decisions to administrative agencies and other bodies that do not enjoy the structural protections of Article III, as long as Congress provides a mechanism for judicial review of the agencies' decisions.229 According to Professor Fallon,

225. See Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 916 (1988) [hereinafter Fallon, Legislative Courts] ("By nearly universal consensus, the most plausible construction of this language would hold that if Congress creates any adjudicative bodies at all, it must grant them the protections of judicial independence that are contemplated by article III."); id. at 918–19 (calling this position "Article III literalism," though rejecting it as impracticable).
228. Id. at 944.
229. See id. at 974 (advocating "a requirement of appellate review by an article III court in all cases decided by non-article III federal tribunals"); Saphire & Solimine, supra note 17, at 138–39 (advocating similar requirement); see also Redish, supra note 17, at 226–28 ("If in every case falling within the judicial power there exists an opportunity for
who is the leading exponent of this “appellate review theory,” Article review in an article III court, it would seem that the constitutional requirement that the judicial power ‘be vested’ in these courts is fully satisfied.”).

230. See Pfander, supra note 17, at 666 (properly highlighting Professor Fallon’s “leading account”). Because the appellate review theory of Article III has emerged as the strongest rival to the traditional framework, and because Professor Fallon has offered the most careful elaboration of that theory, my discussion will focus on his work. To the extent that other appellate review theorists offer different perspectives, however, a few words about their distinctive features might be useful.

Professor Redish’s version of appellate review theory is driven in part by his peculiar interpretation of the text of Article III. According to Professor Redish, when Section 1 restricts the kinds of entities that can exercise “judicial Power” on behalf of the federal government, it uses the phrase “judicial Power” to mean the power to adjudicate cases and controversies of the sort listed in Section 2. See Redish, supra note 17, at 226 (asserting that Section 2 “describes” the judicial power that Section 1 vests in federal courts). Professor Redish therefore suggests that if a matter comes within one of the categories listed in Section 2, Congress cannot authorize a federal administrative agency to adjudicate it in a conclusive way; regardless of the kinds of legal interests at stake, the agency’s decision must be subject to reasonably searching review in a true Article III court. On the other hand, if a matter lies beyond the reach of Section 2, Congress has more leeway to authorize agency adjudication. See id. at 226–27, 208–09.

These distinctive features of Professor Redish’s argument rest on his premise that Section 2 effectively defines the phrase “Judicial Power” in Section 1. That premise, however, strikes me as implausible. For one thing, it implies that the phrase “judicial Power” has a substantially different meaning in the Federal Constitution than in state constitutions of the same vintage. In addition, it risks producing a truly bizarre result: The fact that federal administrative agencies cannot exercise “judicial Power” would not prevent them from adjudicating ordinary lawsuits between citizens of the same state about state-law contract or property rights. In my view, the idea that suits involving such rights might be adjudicated in the executive branch of the federal government, rather than in the state courts, is antithetical to the design of Article III.

Professors Saphire and Solimine have also advocated a version of appellate review theory. To the extent that their version differs from Professor Fallon’s, they seem to believe that whenever Congress vests “adjudicatory” authority in an administrative agency, Congress must “make[] available article III review of that tribunal’s factual and legal determinations.” See Saphire & Solimine, supra note 17, at 139–44 (tentatively suggesting that Article III court must stand ready to review legal determinations de novo and factual determinations under something akin to “substantial evidence” standard). This conclusion, however, is surely driven by the paradigm cases that they have in mind; for reasons developed by Professor Fallon and others, it is inconceivable that the Constitution requires an opportunity for “judicial” involvement every time a governmental official applies law to fact in a way that has legal consequences. See Fallon, Legislative Courts, supra note 225, at 964. I very much doubt that Professors Saphire and Solimine actually disagree with Professor Fallon on this point.

Professor Pfander’s recent contribution to the discussion offers a novel textual defense of non-Article III adjudication, but is generally sympathetic to the results suggested by Professor Fallon. Professor Pfander argues that as a textual matter, the provision of Article I empowering Congress “[t]o constitute Tribunals inferior to the supreme Court” need not be read as referring only to the “inferior Courts” that Article III addresses; the “Tribunals” that Article I contemplates may cover a broader set of entities than the “Courts” in which Article III vests “[t]he judicial Power of the United States.” Pfander, supra note 17, at 671–89 (internal quotation marks omitted) (quoting U.S. Const. art. I, § 8, cl. 9; id. art. III, § 1). Professor Pfander further argues that this reading supplies a “textual predicate” for Congress’s power to create adjudicative bodies whose members
III presumptively demands that the reviewing courts be able to exercise de novo judgment about questions of law and about factual disputes on which constitutional rights turn, but Congress usually can require courts to give great weight to the agencies' other factual determinations.  

On the surface, this understanding of Article III appears to eliminate the dichotomies on which the traditional framework depended. Indeed, Professor Fallon specifically asserts that "private rights do not merit treatment sharply distinct from public rights," and he also suggests that the right/privilege distinction should not affect the need for appellate review in an Article III court. While he is too careful a scholar to endorse a one-size-fits-all approach, and while he explicitly acknowledges that the judicial role required in particular settings may depend on the importance of the interests at stake, the traditional categories do not play a visible role in his analysis. 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.235

On closer inspection, however, Professor Fallon's understanding of Article III does not actually transcend the public/private distinction. Although he casts his approach as a theory about "adjudication" by the federal government, he does not mean that concept to extend to "every application of law to fact by a federal official or administrative agency"; instead, he associates it with the authoritative resolution of what Article III calls "cases."236 He does not fully articulate his understanding of that term, but he plainly believes that even a concrete dispute between different parties need not be classified as a "case" unless at least one of the parties has private interests of a particular sort at stake. For Professor Fallon as for nineteenth-century theorists, Article III does not require Congress to involve the judiciary in the application of law to fact when only public rights hang in the balance; even if different officials within the government disagree about the proper disposition of some right belonging to the public as a whole, and even if Congress could authorize the judiciary to resolve this dispute,237 Professor Fallon explicitly says that Congress does not have to treat the matter as a "case" that necessitates any sort of judicial involvement.238 Thus, he agrees with the traditional framework that the political branches can conclusively dispose of legal interests belonging to the public as a whole without any exercise of "judicial" power (and hence without any participation by Article III courts).239

Even with respect to individualized legal interests, Professor Fallon's theory of Article III adjudication does not avoid the need to recognize

235. See, e.g., Pfänder, supra note 17, at 667, 671 (referring to "clarity and simplicity" of appellate review theory and describing it as "our most elegant theory"); see also David Scott Coward, Note, The Adjudicatory Power of the FSLIC over Claims Involving Savings and Loans in FSLIC Receivership, 88 Colum. L. Rev. 1325, 1356 n.199 (1988) (criticizing Professor Fallon for "fail[ing] to recognize the nature of the claim involved as an integral part of article III jurisprudence").

236. Fallon, Legislative Courts, supra note 225, at 965; see also id. at 963 n.262 (summarizing his thesis as follows: "[I]f a 'case' is adjudicated in a federal tribunal at all, the language of article III fairly compels at least appellate review in an article III court.").


238. See Fallon, Legislative Courts, supra note 225, at 962 ("[P]ublic rights disputes about the application of law to fact, although susceptible of being classified as 'cases' and committed to judicial resolution, need not be so treated; at Congress's option, they may instead be committed to administrative determination." (footnote omitted)); cf. id. (noting only one qualification to this statement: "If . . . the responsible administrative officer commits a coercive violation of legal rights [by which Professor Fallon presumably means rights belonging to a private entity rather than the public as a whole], a constitutional 'case' will arise at the moment of the violation . . . .").

239. Elsewhere, Professor Fallon does advocate a "norm of mandatory appellate jurisdiction in an article III court" even for "public rights cases." Id. at 971. In context, however, he is using that phrase to refer to cases in which public rights are pitted against certain kinds of legal interests belonging to private individuals. See, e.g., id. at 978–79.
different categories of legal interests that trigger different levels of "judicial" involvement. To be sure, he does seem inclined to lump "old" and "new" forms of private property together. For both types of interests, his theory understands Article III to require an intermediate level of judicial involvement—somewhat less than the traditional framework required for the adjudication of core private "rights," but somewhat more than current case law requires for the adjudication of mere "privileges." When one leaves the realm of property, though, Professor Fallon’s theory loses its unitary nature; he recognizes some categories of private interests that require near plenary judicial involvement and others that require no judicial protection at all.

At the upper end of the spectrum, private interests in life and natural liberty surely require more judicial protection than Professor Fallon would accord to property interests. Few people believe that Congress could validly establish an administrative tribunal to conduct the initial adjudication of all prosecutions for federal crimes, with federal courts being obliged to enforce the resulting sentences as long as the agency’s decisions are supported by substantial evidence in the administrative record and are not tainted by errors of law. Thus, Professor Fallon himself suggests that Article III or the Due Process Clause might require de novo judicial proceedings "when important liberty interests—such as the interest in avoiding incarceration...—are at stake." This position flows inevitably from Professor Fallon’s interpretive method, which seeks to accommodate “the doctrinal, social, and administrative structures that history has bequeathed us.” After all, allowing federal administrative agencies to adjudicate ordinary criminal cases on the same basis that agencies currently handle disputes about broadcast licenses or pilots’ certificates would violate longstanding understandings of our constitutional arrangements—understandings that have persisted for more than two centuries and that remain uncontroversial in current doctrine. But if Professor Fallon does indeed resist administrative adjudication of criminal cases, he continues to read a right/privilege distinction into the constitutional framework for the separation of powers. Although he downgrades traditional forms of private property, an individual’s interests in life and natural liberty remain core private rights even in his framework, and the government cannot authoritatively declare their forfeiture without fully “judicial” determinations of the relevant adjudicative facts.

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240. See id. at 991 (criticizing Supreme Court’s holding in Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)); see also id. at 963 (acknowledging uncertainty in modern precedents about Congress’s ability to “cut off all judicial review of the administration of an entitlement program,” but arguing that Court should resolve this uncertainty in favor of requiring some judicial involvement).

241. See id. at 989 & n.395; see also id. at 952 n.208 (“[C]riminal cases traditionally have been regarded as requiring judicial resolution . . .”).

242. Id. at 934.
At the opposite end of the spectrum, Professor Fallon also implicitly recognizes a separate category of private interests that matter to individuals and are respected to some degree by the law, but that do not qualify as life, liberty, or property (whether old or new). Under both the traditional framework and his approach, the government can authoritatively dispose of those private interests without any "judicial" involvement at all. As Professor Fallon puts the point, "not every hope, frustration, want, or concern mandates the availability of a hearing, judicial or otherwise."

Imagine, for instance, that Congress forbids companies to enter a certain regulated industry without first getting a permit from a federal administrative agency. If Congress specifies criteria for the issuance of such permits, the statutory scheme presumably gives qualified applicants a form of new property, and Professor Fallon’s approach would entitle them to some sort of judicial review in the event that the agency denies their applications. But if the agency grants an application, the only private interests that are harmed may well belong to the applicant’s competitors (who are at risk of losing customers). If Congress so desired, it could certainly authorize those competitors to seek judicial review of the agency’s decision to issue the permit. But if Congress opts not to give the competitors any such cause of action, they will have no recourse; just as Congress can empower the agency to act conclusively with respect to the public rights at stake, so too Congress can empower the agency to act conclusively with respect to the competitors’ private interests in avoiding the financial harm of a new entrant in their market. As a matter of federal constitutional law, the authoritative disposition of that sort of private interest—which is neither a core private right nor even a statutory entitlement that qualifies as “property” for purposes of procedural due process—has never been understood to require an exercise of "judicial" power, and nothing in Professor Fallon’s framework would change that conclusion.

The bottom line is that the modern “appellate review” theory reads at least as many categories into Article III as the traditional framework does. On the one hand, Professor Fallon seems inclined to agree with the traditional framework that the authoritative adjudication of core private rights to life and liberty requires fully "judicial" determination of all individualized adjudicative facts. On the other hand, Professor Fallon also agrees that Congress can authorize adjudicators in the executive branch to bind many types of interests without any "judicial" involvement at all. Only with respect to private property (which he treats as an intermediate category) are there any apparent differences between Professor Fallon’s understanding of Article III and the understanding reflected in either the traditional framework or current doctrine: Professor Fallon seems tempted to treat old and new forms of property the same, giving

243. Id. at 964.
them less judicial protection than core private rights to life or liberty but more judicial protection than other private interests.

Whatever the merits of this proposal (which I discuss in the next section), the "appellate review" theory is no more unified than the traditional framework; it too puts different kinds of legal interests into different boxes that require different levels of judicial involvement. Indeed, the structural similarity between Professor Fallon's approach and the traditional framework tends to confirm the basic message of Parts I and II of this Article: Distinctions among different kinds of legal interests are so deeply entrenched in American separation of powers that modern scholars cannot plausibly avoid them. Under any approach that tries to accommodate either historical understandings (discussed in Part I) or current practice (summarized in Part II), the relationship among the branches will vary according to the nature of the legal interests at stake.

B. Property Interests and Article III

My primary goal has been to highlight the connection between American-style separation of powers and the types of private legal interests that are at stake in particular adjudications. Readers who accept my argument will not criticize the traditional framework for reading categories into Article III, because all plausible understandings of the line between political and judicial power do the same thing.

But while the change that Professor Fallon proposes does not avoid the need for such categories, it does call for a shift in the categories that we recognize. For the sake of completeness, this section therefore considers Professor Fallon's proposal to reclassify property interests. As compared to both the traditional framework and current doctrine, his approach would downgrade constitutional protections for traditional forms of property; he would extend *Atlas Roofing* and permit federal administrative tribunals to play a significant role in the adjudication of all disputes about property interests (at least insofar as the execution of federal law is involved). At the same time, he would upgrade constitutional protections for statutory entitlements. In his proposed system, whether a private property interest qualifies as "old" or "new" property, a federal administrative adjudication declaring its loss or nonexistence would not be conclusive unless Congress provided an opportunity for appellate review in an Article III court. The scope of the appellate review that Professor Fallon envisions, moreover, would not necessarily depend on whether old or new property is at stake.

At first glance, this idea may appear to reflect the logical evolution of modern case law. But modern developments have not actually undermined the distinction between old and new forms of property to nearly the extent that scholars of a previous era advocated. To the contrary, that distinction continues to pervade modern constitutional law. In the

244. See Reich, supra note 194.
specific context that we are considering, moreover, it makes considerable sense. Even if courts decide to require some form of "judicial" involvement in the administration of statutory entitlements, it would be perfectly logical for them to continue to require more judicial involvement in the adjudication of traditional property rights.

1. The Continuing Importance of the Distinction Between Old and New Property. — In support of his proposal, Professor Fallon notes that the traditional distinction between old and new property has weakened over time, and he describes his approach as "an understanding of article III that keeps pace with other aspects of constitutional law." If one is seeking an interpretation of Article III that coheres with other aspects of constitutional law, however, one probably would recognize some continuing distinctions between traditional forms of property and mere statutory entitlements.

Across a range of different constitutional doctrines, entitlements to government benefits continue to receive substantially less protection than traditional forms of property. To be sure, the Constitution is understood to impose some restraints on the reasons for which the government can withhold particular kinds of government benefits. But the government is subject to considerably more restraints when it deals with traditional forms of property. In the realm of free expression, for instance, Congress can direct the National Endowment for the Arts to withhold government subsidies from individual artists for reasons that would violate the First Amendment if used as the basis for fines or other deprivations of old property. Much the same can be said about the free exercise of religion; while states obviously cannot fine people for pursuing vocational religious instruction, modern doctrine allows states to deny public scholarships to otherwise eligible applicants who would use the

245. Fallon, Legislative Courts, supra note 225, at 966–67 (referring to "the erosion, although not the evisceration, of the right/privilege distinction"); see also id. at 952 (suggesting that "the historic distinction between ‘rights’ and ‘privileges’" does not reflect "good sense"). Although these passages refer to the right/privilege distinction, I take them to be focusing primarily on the distinction between old and new property. As noted above, Professor Fallon himself embraces a fairly crisp right/privilege distinction; he seems willing to treat private interests in life and liberty in the same way that nineteenth-century jurists treated core private "rights," and he is also happy with the way that nineteenth-century jurists treated "privileges" that do not qualify as property in any sense (such as the hopes or expectations fostered by government programs that involve too much discretion to generate entitlements). In between these two categories, though, he wants to recognize an intermediate one that encompasses both old and new forms of property.

246. See Woolhandler, Retroactivity, supra note 8, at 1060–61; cf. Fallon, Legislative Courts, supra note 225, at 966 n.278 (acknowledging that "the right/privilege distinction is not as moribund today as it appeared during the early 1970’s").

247. See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998) ("[A]lthough the First Amendment . . . has application in the subsidy context, . . . the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.").
money for such studies. Likewise, although statutes depriving identifiable classes of people of government benefits are subject to scrutiny under the Bill of Attainder and Ex Post Facto Clauses, courts are less willing to find the necessary "punitive intent" in statutes withholding benefits than in statutes imposing fines.

Most important for our purposes, the distinction between old and new property remains central to modern doctrines about what the political process can and cannot take away from individuals. In addition to being protected against arbitrary deprivation by executive actors through the doctrine of procedural due process, traditional forms of property are protected against uncompensated "takeings" even by the legislature itself; once they have vested in an individual, the legislature cannot abrogate them unless it substitutes "just compensation" in an amount that a court deems adequate. New property enjoys much less protection against the political process. No matter how long an entitlement program has been operating, a statute repealing it and eliminating future benefits does not amount to a taking of the sort covered by the Fifth or Fourteenth Amendments. In this respect, noncontractual 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.

2. Normative Concerns. — Of course, even if the desire for consistency across different doctrinal areas does not really support treating old and new forms of property alike for purposes of Article III, one might favor this reform for other reasons. The Lockean view that the individual is anterior to political society, and that the fundamental object of government is to render more secure the core private rights that have analogs in the individualistic state of nature, will not strike communitarian or collectivist critics as an adequate reason to elevate traditional forms of property over new property. By the same token, arguments based on historical understandings of Article III will not persuade readers who favor a more present-oriented approach to constitutional interpretation.


249. See, e.g., Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 853 & n.10 (1984) (noting that even after Goldberg v. Kelly "the mere denial of a noncontractual government benefit" does not impose "the burdens historically associated with punishment," and indicating that statute withholding federal financial aid from students who have not registered for draft is therefore less likely to be considered bill of attainder than statute depriving its targets of traditional forms of property (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960))); Butler v. Apfel, 144 F.3d 622, 626 (9th Cir. 1998) (invoking Flemming to uphold federal statute making incarcerated felons ineligible for social security benefits).

250. See Richard A. Epstein, No New Property, 56 Brook. L. Rev. 747, 761–62 (1990) (assuming consensus on this point); Merrill, supra note 54, at 958 & n.273 (citing cases).
Indeed, the traditional framework’s willingness to distinguish between old and new forms of property might seem contrary to the framework’s own rationale. One of the traditional framework’s animating ideas is that the protection of individualized legal interests requires different institutional arrangements than the protection of public rights: The political process is designed to manage the interests of the body politic, but courts are better suited to protect the rights of individuals who have been “isolated from the mass, in injury and injustice.”251 As we have seen, the traditional framework used this argument to explain the constitutional association between “judicial” power and the protection of traditional forms of property that have vested in discrete individuals. But the same argument might seem equally applicable to new property. After all, an individual who is singled out for the denial of welfare benefits has been “isolated from the mass” in much the same way as an individual whose core private rights are at stake.

As Stephen F. Williams has noted, however, there are important differences between traditional forms of property and entitlements to future government benefits, and those differences tend to support the longstanding view that the former should vest in individuals more securely than the latter. To begin with, traditional forms of private property—including not only rights in tangible things but also “individuals’ ownership of their selves, their talents, and the resulting wealth”—are better suited to “serve as counterweights to government” and to “operate as an external check on government’s expansive tendencies.”252 One should not overstate this point: Owners of traditional forms of property obviously depend upon government and the legal process to safeguard their private rights. But the relationship between the individual and the state is likely to be different when the government “establishes general rules under which individuals, engaging in production and exchange, create wealth that the state protects from the incursions of others”253 than when individuals derive their wealth from the government itself. If one is interested in “individual independence from the state”254 (and the history of human freedom suggests that one should be), then traditional forms of property may well play a role that the new property cannot. As a means of protecting that role, it is perfectly logical for our constitutional system to provide heightened judicial protection for traditional forms of property.

Traditional forms of property differ from statutory entitlements in another important respect, too. A constitutional regime in which traditional forms of property can vest securely in individuals, in such a way as

251. Ervine’s Appeal, 16 Pa. 257, 268 (1851).
253. Williams, supra note 252, at 10.
254. Id. at 13.
to block legislative confiscation except upon the payment of just compensation in an amount determined by "judicial" process, is likely to encourage private individuals to invest in productive activities and to create more private wealth. But a constitutional regime that extends the same vesting rules to a recipient's eligibility for welfare benefits will not have the same incentive effects. Even if new property of this sort were otherwise equivalent to old property, private individuals cannot create it by their own labor; instead of reflecting ordinary market forces, the supply of statutory entitlements is fixed by Congress. As a result, constitutional reforms giving increased protection to statutory entitlements that are structured in certain ways may actually discourage the creation of such entitlements. If an individual's interest in continuing to receive a particular government benefit qualifies as private property whenever Congress has established nondiscretionary criteria for the benefit, and if the consequence of this classification is that individuals have a constitutional right to "judicial" determination of whether they meet the statutory criteria, then cost-conscious members of Congress may hesitate to establish further benefit programs of this sort; instead of giving anyone an entitlement to benefits, future statutes might avoid creating property interests by making the administration of benefit programs more discretionary. As Judge Williams and other commentators have argued, a constitutional regime of this sort thus gives Congress artificial incentives to delegate unfettered discretion to administrative officials—a perverse result if the regime's goal is to safeguard individuals from arbitrary administrative treatment (which is the legal academy's primary rationale for expanding judicial protection of new property).

In sum, there are perfectly good reasons for modern doctrine to retain its longstanding distinction between old and new forms of property. Not only are the two forms of property likely to generate different relationships between the individual and the government, but the market for creating statutory entitlements works differently than the market for creating traditional forms of property. It is far from clear that private individuals would be better off if the Federal Constitution were read to require the same judicial role in the protection of new property as in the protection of traditional forms of property.

255. The same can be said of what Richard Epstein calls "the old forms of new property," such as patents and copyrights. Epstein, supra note 250, at 754. Though unknown to the Lockean state of nature, intellectual property rights "have close parallels to classic common law rights in land and chattels"; the system of property rights that the government has set up "protect[s] . . . the exertion of labor," facilitates private exchange, and "honors the old verities that lie at the root of a common law system of property rights." Id. at 754–56; cf. id. at 760–62 (contrasting what Professor Epstein calls "new 'new property,'" such as welfare rights).

256. See Williams, supra note 252, at 14.
CONCLUSION

The modern legal academy has little patience for taxonomy. Both law reviews and teaching materials therefore suggest that the literal language of Article III brooks no distinctions among different kinds of adjudicatory tasks: The adjudication of any litigable matter is said to require "judicial" power, and only Article III courts can exercise such power on behalf of the United States. Thus interpreted, the letter of Article III is both wildly impractical (because executive officials and even legislatures inevitably perform many adjudicatory tasks that could be submitted to courts instead) and at war with history (because executive agencies have been authorized to resolve certain kinds of litigable matters from the First Congress on). To save the Constitution from itself, modern scholars have struggled to develop more sensible approaches that fit our institutional history but that can still be reconciled with the apparently all-encompassing language of Article III.

If one accepts the traditional framework, however, Congress's long-standing practice of assigning adjudicatory tasks to nonjudicial actors is perfectly consistent with the letter of Article III. Executive officials charged with administering federal law do not trench on the unique province of the judiciary whenever they apply the law to individualized facts in ways that carry some legal consequences. As a historical matter, adjudicatory tasks of this sort have been thought to require "judicial" power only when core private rights hang in the balance.

Even today, indeed, it is impossible to understand our separation of powers without reference to such categories. No one thinks that Article III prevents Congress from authorizing executive officials to surrender a public right on the basis of their own adjudicatory decisions; the executive branch is not thought to be exercising "judicial" power when it decides that a particular individual did not commit a federal crime and should not be prosecuted, or that one of the government's suppliers has satisfied its contractual obligations and should be paid from the public treasury. Likewise, the government does not need to use "judicial" power when it adjudicates private interests that do not rise to the level of life, liberty, or property (whether new or old). If Congress wants to do so, for instance, it can authorize federal prison officials to mete out minor forms

257. See, e.g., Erwin Chemerinsky, Federal Jurisdiction 217-18 (4th ed. 2003) (suggesting that early statutes letting executive officers determine claims to veterans' benefits conflicted with clear language of Article III); Donald L. Doernberg et al., Federal Courts, Federalism and Separation of Powers 280 (3d ed. 2004) (asserting that "[m]odern administrative agencies . . . operate inconsistently with the literal language of Article III" because "[t]hey often adjudicate disputes regarding the application of federal laws and regulations"); Hart & Wechsler, supra note 17, at 380 (referring to "the natural literal import of Article III that if Congress creates any federal tribunals at all, the judges of those tribunals must enjoy the guarantees of independence supplied by life tenure and protection against reduction in salary"); Saphire & Solimine, supra note 17, at 195 (suggesting that "all congressionally created non-article III adjudicatory institutions" are in tension with letter of Article III).
of discipline to offending inmates without any judicial involvement, on the basis of administrative hearings that are conclusive for this purpose. 258

Statutory entitlements that amount to new property require separate analysis, because they trigger the modern doctrine of procedural due process. In general, though, purely administrative procedures can satisfy that doctrine. Congress might not be able to prevent federal courts from reviewing the systemic adequacy of the administrative procedures that Congress has established, and the Supreme Court might someday hold that the judiciary must be able to review certain constitutional issues that can arise in individual adjudications. 259 But whatever doubts exist on that score, modern doctrine strongly suggests that the conclusive disposition of other aspects of claims to new property does not require "judicial" power.

At the opposite end of the spectrum of private interests, the authoritative adjudication of an individual's core private rights to life or liberty plainly does require "judicial" power. While Congress can authorize the executive branch to detain criminal suspects temporarily, a prisoner who alleges that he is being held in indefinite executive custody can ordinarily seek habeas relief from an Article III court. If it is true that he has received no judicial process, moreover, the court is supposed to order either his release or his judicial trial. 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.

Vested private rights to traditional forms of property once enjoyed the same level of protection. 260 Under modern doctrine, though, they have a somewhat lesser station. After Atlas Roofing, federal administrative

258. Cf. Sandin v. Conner, 515 U.S. 472, 482–87 (1995) (holding that even when regulations have "codif[ied] prison management procedures in the interest of uniform treatment," so that prison officials have legal duty to refrain from acting in certain ways unless they find certain facts, those duties do not automatically give rise to interests protected by Due Process Clause).

259. See Weinberger v. Salfi, 422 U.S. 749, 762 (1975) (suggesting that federal statutes purporting to make administrative adjudications of interests in new property conclusive even as to constitutional issues would present "a serious constitutional question"); see also Webster v. Doe, 486 U.S. 592, 601–05 (1988) (construing reviewability provisions of Administrative Procedure Act and unreviewability provision of National Security Act in such a way as to avoid this question); Johnson v. Robison, 415 U.S. 361, 366–67 (1974) (similarly construing statutory provision limiting judicial review of administrative decisions about veterans' benefits). But see Webster, 486 U.S. at 612–15 (Scalia, J., dissenting) (cataloguing various contexts in which nonjudicial actors have final say about constitutional claims, and arguing that it would be perfectly constitutional for Congress to preclude all judicial review of President's decision to dismiss CIA officer).

260. See, e.g., Taylor v. Porter, 4 Hill 140, 147 (N.Y. Sup. Ct. 1843) ("[T]he same measure of protection against legislative encroachment is extended to life, liberty and
agencies that have no "judicial" power can now adjudge private businesses guilty of regulatory violations that carry monetary penalties, and Congress can require true courts to enforce the agencies' decisions as long as the administrative record contains substantial evidence to support the administrative findings. In the enforcement of federal regulatory schemes, then, administrative agencies can be authorized to deprive people of vested rights to property without fully "judicial" determinations of the individualized adjudicative facts. This authority is not crucial to the modern administrative state, and it is certainly possible that the current Court will eliminate it by overruling *Atlas Roofing*. Yet even if *Atlas Roofing* remains the law, Congress presumably cannot commit the adjudication of monetary liability entirely to nonjudicial adjudication; unless the defendant consents to some other arrangement, "judicial" power appears to be necessary at least at the appellate stage. The adjudicatory powers that *Atlas Roofing* permits executive officials to wield, moreover, apply only when the officials are seeking to enforce public rights. In other settings, current doctrine coincides with the traditional framework: Only "judicial" power can authoritatively determine, in a way binding upon future courts, the individualized adjudicative facts establishing that a particular individual is liable for money damages or does not enjoy some other traditional form of property to which he lays claim.

The longstanding association between "judicial" power and private rights reflects a straightforward intuition: It is fine for the political branches to take the lead in representing the public, but courts are better suited to make legal determinations about the core private rights of individuals. This intuition is sure to strike modern readers as simplistic. But experience has not proved it wrong. In any event, it is the foundation of American-style separation of powers. As a matter of both historical practice and current doctrine, the line between political and judicial power in our democracy depends crucially on the private interests at stake.

property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others.

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261. This development has gone hand in hand with the erosion of traditional restrictions on retroactive legislation. Just as modern doctrine continues to bar nonjudicial adjudication of a criminal defendant's guilt, so too the Constitution continues to bar Congress from retroactively invading vested private rights to life or liberty. See U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."). But the parallel doctrines that once prohibited the retroactive imposition of civil liability have grown weaker over time. See Woolhandler, Retroactivity, supra note 8, at 1054.