ADMINISTRATIVE INJURIES

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ABSTRACT

*This Article seizes upon the precarious position of administrative agencies. As White House aides call for the "deconstruction of the administrative state" and judicial nominees flaunt their anti-*Chevron *credentials before the Senate Judiciary Committee, the thought of an impending test of New Deal reforms is no longer a matter of if, but when. This Article offers a new, more robust framework for courts to consider as litigants take aim at agencies' adjudicative role. Specifically, it addresses the longstanding, yet incredibly porous doctrine of public rights and suggests that a modest analytical supplement—administrative injuries—would go a long way toward preserving this critical agency function while simultaneously harmonizing public rights with well-established Article III doctrines of justiciability. This Article seeks to make a useful, immediate contribution to academic and policy discussions, as well as the litigation strategies of those tasked with defending the adjudicative role of administrative agencies.*

I. INTRODUCTION

Denise lives in Oakland and works in San Francisco. On a typical morning it takes her an hour to get to work. But today, Denise is running late, and she has a morning meeting with a big client. The meeting starts in thirty minutes, and traffic on the Bay Bridge is awful. As

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she waits her turn in the FasTrak queue, Denise looks to her right and notices the bypass lane for carpoolers. Fearing the repercussions of being tardy, she looks left, then right; and seeing no highway patrol officers around, Denise pulls into the carpool bypass lane and heads for the bridge. Just as Denise thinks she is home free, her heart sinks as she sees blue lights flashing in her rearview mirror. She pulls over to the side of the road, and a highway patrol officer walks to her car and writes her a ticket for violating the carpool lane law. They are both on their way in a matter of minutes.

The police practice of summarily ticketing traffic law violators is a commonly accepted one. But its uncontroversial reputation is something of a misnomer in the world of administrative law. Though we associate police officers as law *enforcers*, commonly accepted exercises of police power like this regularly verge into what the Administrative Procedure Act (APA)[1] would undoubtedly consider adjudicative.[2] Were the Federal Trade Commission to impose fines on businesses for antitrust violations with equal rapidity to that of the highway patrol officer, one would likely question the merits of such a process. A denial of Social Security benefits without an agency explanation of ineligibility would face similar criticism. Granted, the normative reasons for this contrast are numerous, socially accepted, and logically sound. Higher financial risks or increased evidentiary demands, for instance, reasonably explain the need for more process in certain settings but not in others. Yet all of these actions are adjudicative—at least in the administrative sense.

But what about in an Article III sense: do such adjudicative mechanisms of law enforcement amount to an exercise of "the judicial power of the United States"?[3] Perhaps not.

The dawn of the administrative state marked a pivotal moment in American history.[4] Before the rise of administrative agencies, Article III was thought to operate with relative simplicity: The judicial power

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1. *See* 5 U.S.C. §§ 551-559 (2012).

2. Put simply, the APA defines an "adjudication" as an "agency process for the formulation of an order." *Id.* § 551(7). An "order" includes "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). An order may impose a "sanction," which includes the "imposition of [a] penalty or fine." *Id.* § 551(10)(C). When a law enforcement officer issues a citation imposing a penalty or fine—which is subject to judicial review should the recipient choose to challenge the fine—the means by which an officer gathers evidence and determines that such a sanction is necessary is adjudicative.

3. U.S. CONST. art. III, § 1, cl. 1.

4. *See* Fed. Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.").

it conferred was exercised wholly and exclusively by the judicial branch.[5] The addition of a "fourth branch" thus threatened to upend the constitutional presumption of three coequal branches.[6] The Supreme Court in turn has struggled to find a constitutional home for regulatory agencies. At risk of oversimplification, the Court has done so by finding that certain exercises of executive, legislative, and judicial power by these entities are sufficiently quasi-executive/legislative/judicial to survive scrutiny.[7] It would appear that such quasi-ness leaves the constitutional separation of powers intact.

The Supreme Court's desire to define and cabin the seemingly judicial power of these non-Article III bodies stems from a valid concern. Article III of the Constitution vests "[t]he judicial power of the United States . . . in one Supreme Court, and in such inferior courts, as the Congress may, from time to time, ordain and establish."[8] And for good reason. Only Article III judges are constitutionally afforded the life tenure and compensation protection that the Founders deemed indispensable to the integrity of an independent judiciary.[9] The exercise of judicial power by administrative agencies thus poses a special challenge. Beyond the literal affront to Article III's text, such exercises of judicial power place these bodies at risk of precisely the type of abuse that inspired the inclusion of Article III in the constitutional scheme.

A major theory by which the Supreme Court has attempted to assuage these concerns has been its distinction of cases involving the

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5. *See id.* at 487-88.

6. *See id.* at 487 (stating that the administrative state "has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking").

7. *See id.* at 487-88 ("Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."); *see also* F. Scott Boyd, *How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida*, 7 ST. THOMAS L. REV. 287, 288 (1995) ("The rise of the administrative state has brought new complications to our quest for justice. Concluding that the complex world demands complex legislation, we have reluctantly condoned broad delegation of 'quasi-legislative' powers to administrative agencies who are supposed to fill in the details. Concluding that experience with general principles of law and equity do not give courts necessary expertise, we have similarly approved the delegation of 'quasi-judicial' powers." (footnotes omitted)).

8. U.S. CONST. art. III, § 1, cl. 1.

9. *See id.* cl. 2; Stern v. Marshall, 564 U.S. 462, 483 (2011) ("In establishing the system of divided power in the Constitution, the Framers considered it essential that 'the judiciary remain[] truly distinct from both the legislature and the executive.' " (citation omitted)); *see also* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (listing among its grievances the dependence of the judiciary upon the will of the British crown for its livelihood).

adjudication of "public rights" from those of "private rights."[10] At its most basic level, the argument proceeds with syllogistic ease: While resolution of private-rights cases requires an Article III court, adjudication of public rights matters does not. Because the rights adjudicated by administrative tribunals are public rights, agency adjudications are constitutional.[11] But the foundation of this legal fiction is hardly satisfying. Courts reason that public rights cases do not require an Article III court because the rights are revocable, but a right's revocable nature scarcely offers a basis for diminished constitutional protection.[12] The State's potential use of sovereign immunity is a similarly unreliable reasoning.[13] Nevertheless, these reasons remain the theoretical underpinnings of this dichotomization of legal rights.[14]

This Article furnishes a new foundation for distinguishing between public rights and private rights: administrative injuries. With the help of the examples above, this Article suggests that the appropriate distinction between public and private rights is one of justiciability. The constitutional permissibility of agency adjudications is due not to the underlying right's revocable nature or the State's potential immunity from liability, but instead, from to the absence of a ripe, concrete, Article III injury at that time. Only after the agency's "adjudicative"[15] process is complete has a claimant suffered a concrete "injury in fact" that is "fairly . . . traceable" to that agency and therefore "likely . . . [to be] redressed by a favorable decision" from an Article III court through judicial review.[16] Thus, the Constitution does not merely tolerate the initial adjudication of public rights by agencies; it demands nothing less. Without an administrative injury, a claimant in a public rights matter lacks a justiciable case or controversy. The adjudicative power that administrative agencies exercise relative to public rights matters is not "the judicial power of the United States." It is something else entirely.[17]

This Article proceeds in three parts. Part II explains the public rights rationale that the Supreme Court uses to justify agency

10. *See infra* Part II.

11. *See id.*

12. *See infra* Part III.B.

13. *See infra* Part III.A.

14. *See infra* Part III.

15. The author places the term "adjudication" in quotations to make an important distinction. As discussed in greater detail below, an agency adjudication is a creature of statute that arguably must be distinct from an adjudication that an Article III court performs in its exclusive exercise of "the judicial power of the United States." *See* U.S. CONST. art. III, § 1, cl. 1.

16. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

17. U.S. CONST. art. III, § 1, cl. 1. The author acknowledges that the traffic ticket example used in this Article would typically involve a State agency action that is bound neither by the APA nor the justiciability doctrines that limit federal jurisdiction. This Article proceeds as though state courts are bound by the same justiciability requirements.

adjudication of such matters. Part III discusses the two bases that are most often relied upon to support this rationale and explains why they fail to survive the analytical rigor demanded of any steadfast constitutional doctrine. Part IV presents the theory of administrative injuries: a completed agency adjudication is necessary to make public rights claims justiciable in an Article III court.

II. THE PUBLIC RIGHTS DOCTRINE

An understanding of the public/private rights distinction is essential to any assessment of the public rights doctrine's analytical foundation. Unfortunately, the text of Article III offers minimal guidance concerning the proper structuring of the federal judiciary. Aside from requiring "one Supreme Court" and establishing life tenure and salary protection for its judges, Article III largely leaves judicial organization to Congress and—for better or worse—to the courts themselves.[18]

A. The Dawn of Public Rights

The concept of public rights falls into the second category, finding its origins in the landmark case of *Murray's Lessee v. Hoboken Land and Improvement Co.*[19] There, the Supreme Court considered the Article III permissibility of a statute allowing the Treasury Department to issue and execute "warrant[s] of distress."[20] These warrants allowed for the liquidation of the property of tax collectors to satisfy balances found to be owed to the United States.[21] The challenger in *Murray's Lessee* argued that this process violated due process and undermined the constitutional separation of powers.[22] Specifically, he maintained that the issuance and execution of such warrants was an exercise of judicial power reserved to Article III judges.[23]

The Court disagreed. Noting the "nearly or quite universal use" of distress warrants both before and after the adoption of the Fifth Amendment, Justice Curtis quickly disposed of the Due Process claim as a long-accepted act of the executive.[24] Turning separately to the Article III issue, the Court rejected the argument that the statutory scheme providing for the issuance and execution of distress warrants had placed such matters exclusively within the province of the

18. *See* U.S. CONST. art. III.
19. 59 U.S. (18 How.) 272 (1856).
20. *Id.* at 274-75.
21. *Id.*
22. *Id.* at 275-76.
23. *Id.*
24. *Id.* at 277-80.

judiciary.[25] Though the law did permit debtors to seek judicial relief following the execution of such warrants, Justice Curtis noted an "essential element" missing from the challenger's argument.[26] Beyond the mistaken assumption that congressional will is irrelevant to whether a matter is judicial, the argument disregarded United States' status as a party.[27] The statute's provision of a judicial remedy for the unlawful execution of distress warrants was hardly necessary in light of the government's immunity from suit. By establishing a post-collection remedy, Congress was merely "plac[ing] the government upon the same ground which is occupied by private persons who proceed to take extrajudicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit."[28] In a word, the judicial remedy was an act of "legislative grace,"[29] not constitutional imperative. Justice Curtis continued:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[30]

And so, the legal fiction of public rights was born. Following its debut, however, this newly forged frontier would lay largely dormant for the better part of a century—that is, until President Roosevelt's New Deal would spark a public rights renaissance.

B. Digging for Bedrock

The New Deal started a conversation in which public rights promised to play a more lasting role. Its sweeping reforms drew particular concern about the force and scope of federal power, as well as its proper allocation among the coordinate branches.[31] The advent of

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25. *Id.* at 282-84.

26. *Id.* at 283.

27. *Id.*

28. *Id.* at 284.

29. Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 792 (1986).

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

31. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 425 (1987) ("The New Deal set out a different conception of legal rights, rejecting common

administrative agencies presented questions about the line dividing "the judicial power of the United States" from the adjudicatory role of these new regulatory bodies.[32] Yet as the following cases illustrate, an uncertain foundation has come to limit the public rights doctrine's reliability.

1. Pragmatism vs. Predictability

In 1932, the Supreme Court decided *Crowell v. Benson*.[33] There, the Court considered the constitutionality of an administrative scheme by which an agency would adjudicate workers' compensation claims.[34] Invoking *Murray's Lessee*, the Court made short work of the system's Article III legitimacy. Unlike the distress warrant framework at issue there, the workers' compensation claim in *Crowell* was a private-rights dispute between employee and employer.[35] Such cases, the Court concluded, must be resolved by an Article III court.[36]

Nevertheless, the *Crowell* Court explained that the legislative scheme satisfied this requirement.[37] Though initial adjudication by an administrative agency was required, and factual findings were to be treated as final by reviewing courts, Article III interests remained intact given federal courts' continued authority over questions of law and ability to review agency determinations of "jurisdictional facts."[38] This arrangement, the Court concluded, "reliev[ed] the courts of a most serious burden while preserving their complete authority to insure the proper application of the law."[39] But such a pragmatic gloss on *Murray's Lessee*'s more categorical framework would give the Court pause

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law and status quo baselines for deciding what constituted governmental 'action' and 'inaction'; it proposed a dramatically different conception of the presidency and a novel set of administrative actors; and it rejected traditional notions of federalism."); *id.* at 430 ("The New Deal was a self-conscious revision of the original constitutional arrangement of checks and balances, and some of the problems of modern regulation are a product of the myopic reaction of the New Deal reformers to the system of separated and divided powers.").

32. U.S. CONST. art. III, § 1, cl. 1.

33. 285 U.S. 22 (1932).

34. *Id.* at 36-37.

35. *Id.* at 37, 49-51.

36. *Id.* at 50-51.

37. *Id.*

38. *Id.* at 62-63 ("In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute."); *see id.* at 51-54 ("[T]he reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases.").

39. *Id.* at 54.

five decades later in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[40]

Northern Pipeline presented a special challenge concerning the authority of bankruptcy judges.[41] In the process of invalidating certain portions the Bankruptcy Act of 1978 as contrary to Article III, the Court specified "three narrow situations" in which an Article III court was not required—"each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."[42] The first of these exceptions was "territorial courts," which Congress created pursuant to its "complete power" under Article IV to govern the territories and, by logical extension, the District of Columbia.[43] The second exception was for military courts.[44] As with territorial courts, Justice Brennan observed for the four-justice plurality, Congress's "extraordinary control" over such tribunals could be readily inferred from Article I's grant of power to establish and regulate the nation's military forces, the Fifth Amendment's "express exception" for military cases, and Article II's recognition of the President as Commander in Chief.[45]

The plurality then turned to the third exception: the adjudication of public-rights matters by legislative courts and administrative agencies.[46] Though partially justified by the longstanding notion that the government may condition any waiver of sovereign immunity, public rights were also predicated on the separation of powers principle that certain issues, though judicial in appearance, had been constitutionally committed to one of the political branches.[47] The plurality declined to offer any definitive guidance for courts to discern the difference, except to say that such matters "must at a minimum arise 'between the government and others.' "[48] What the plurality did provide was a partial explanation of the theoretical basis for the doctrine's existence.

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40. 458 U.S. 50 (1982).

41. *Id.* at 50.

42. *Id.* at 64.

43. *Id.* at 64-65.

44. *Id.* at 66-67.

45. *Id.* at 66.

46. *Id.* at 67.

47. *See id.* at 67-68 ("The public-rights doctrine in grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently . . . judicial.' " (citation omitted)).

48. *Id.* at 69 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

The plurality offered two key justifications. The first, as noted above, was sovereign immunity: "[T]he Government may attach conditions to its consent to be sued," including the resolution of such disputes before non-Article III tribunals.[49] "But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government,"[50] Justice Brennan continued. Put differently, there are certain contexts, albeit undefined, that the Founders purportedly left Congress free to resort to a "less drastic expedient" to resolve such claims.[51]

The result, as several scholars noted following *Northern Pipeline*,[52] was an uncertain Article III terrain. While the identification of territorial and military courts was straightforward, the contours of the public rights doctrine remained elusive. Nevertheless, instead of solidifying those doctrinal boundaries three years later in *Thomas v. Union Carbide Agricultural Products Co.*, the Court chose a path of greater elasticity.[53]

Union Carbide involved an Article III challenge to a statutory scheme by which the Environmental Protection Agency (EPA) administered the registration of pesticides.[54] The law created a right by which initial registrants could recover compensation from "follow-on registrants," who benefited from the original registration data.[55] However, the law required claimants to submit their claims to binding arbitration.[56] Though the arbitration was between private parties, the Court chose to look "beyond form to the substance" of the statutory framework.[57] Noting the close resemblance between the compensation right here and other public rights, Justice O'Connor determined that Congress had the power "to authorize an agency administering a

49. *Id.* at 67-68 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283-85 (1856); *Ex parte* Bakelite Corp., 279 U.S. at 452).

50. *See id.* at 67.

51. *Id.* at 68.

52. *See, e.g.*, Young, *supra* note 29, at 850 ("The plurality's opinion in *Northern Pipeline* leaves us wondering about precisely what subset of litigation involving rights created by Congress constitutes the public-rights subset."); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 204 (1983) ("The *Northern Pipeline* decision creates serious and acute problems for Congress and for the future of all federal bankruptcy adjudication. Of considerably greater concern, however, are the implications for the conceptual basis on which to determine the proper scope of the 'judicial power' to be exercised by non-article III bodies." (footnote omitted)).

53. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985).

54. *Id.* at 568.

55. *Id.* at 571-72, 574-75.

56. *Id.* at 573.

57. *Id.* at 589.

complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication."[58] Meanwhile, although the law did not rely on the judiciary for its enforcement, the Court found that the scheme's provision permitting Article III review for "fraud, misconduct, [and] misrepresentation," as well as for "constitutional error" adequately respected the "appropriate exercise of the judicial function."[59] So long as Congress is acting within its Article I powers, Congress is free to "create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[60]

Concurring in the judgment, Justice Brennan supplemented the majority's holding with some prospective guidance.[61] Deeming the *Northern Pipeline* framework "sufficiently flexible to accommodate the demands of contemporary Government while preserving the constitutional system of checks and balances," Justice Brennan suggested that the compensation scheme here was in fact a public right.[62] While the arbitration was between private parties, the scheme by which the dispute was administered was effectively dominated by the federal government.[63] In a sense, the ability of "follow-on registrants" to use prior registration data could be considered a government service that requires a fee to compensate initial registrants for their efforts.[64] "As such it partakes of the characteristics of a standard agency adjudication [of public rights]."[65]

The public rights doctrine after *Union Carbide* remained something of an enigma. Though Justice Brennan sought to unambiguously classify the legislative scheme as a public rights matter, he again chose to forego providing any concrete doctrinal parameters. To the contrary, he introduced a flexibility that suggests the only limit on public rights is Congress's imagination.[66] And the Court's resolution of *Commodity*

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58. *Id.*

59. *Id.* at 592.

60. *Id.* at 593-94.

61. *Id.* at 594-601 (Brennan, J., concurring).

62. *Id.* at 600.

63. *See id.* ("[T]he dispute arises in the context of a federal regulatory scheme that virtually occupies the field.").

64. *See id.* at 600-01.

65. *Id.* at 601 (citation omitted).

66. *See id.* at 600-02 ("So long as this delegation is constitutionally permissible—an issue left open on remand—and judicial review to ensure that the arbitrator's exercise of authority in any given case does not depart from the mandate of the delegation, the Judiciary will exercise a restraining authority sufficient to meet whatever requirements Art. III might impose in the present context.").

Futures Trading Commission v. Schor[67] the following year would do little to level the landscape.

2. Schor*'s Sliding Scale*

Schor involved a challenge to the Commodity Futures Trading Commission's (CFTC) authority to adjudicate a broker's state law counterclaim against a claimant who sought reparations under the Commodity Exchange Act (CEA)—the statute that the CFTC is charged with enforcing.[68] Preferring contextual flexibility to doctrinal "coherence," the majority recognized three factors—"none of which has been deemed determinative"—by which to assess the CEA's Article III credentials.[69] These factors included:

> [T]he extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts[;] the origins and importance of the right to be adjudicated[;] and the concerns that drove Congress to depart from the requirements of Article III.[70]

From there, the Court found that the CFTC's initial adjudication of the broker's counterclaim amounted to what was at most a "*de minimis*" encroachment of Article III.[71] Writing once more for the majority, Justice O'Connor noted the agency's subject-matter expertise, the law's requirement of a district court order for enforcement of agency awards, the provision for *de novo* review of the agency's determinations, and the agency's generally limited adjudicatory power all as important checks against potential impingement.[72] She then turned to the private character of the broker's counterclaim, which was "incidental to, and completely dependent upon," the resolution of the claimant's reparations claim.[73] Though such claims are entitled to an Article III court, the statutory scheme's elective character, provision for significant Article III supervision, and appropriate legislative purpose made any remaining concerns of encroachment extraneous.[74]

Schor's impact on the public rights doctrine is critical. Justice O'Connor reiterated the relative unimportance of the public-private

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67. 478 U.S. 833 (1986).
68. *Id.* at 835-38.
69. *Id.* at 851.
70. *Id.* (quoting *Union Carbide Agric. Prods.*, 473 U.S. at 587, 589-93).
71. *Id.* at 856.
72. *See id.* at 852-53.
73. *Id.* at 856.
74. *See id.* at 853-55.

right dichotomy to Article III line-drawing.[75] So long as the agency's adjudicative function possesses an adequate level of "quasi-ness," the danger of encroachment is at its nadir.[76] Some scholars suggest that even public rights matters may require at least some Article III oversight post-*Schor*.[77] Though public rights still appear to be relegated to a "second class status"[78] in this sense, Justice O'Connor again declined to explain precisely which rights are properly considered public rights.

Now finding himself in dissent, Justice Brennan made one final attempt to pick up the pieces that remained of *Northern Pipeline*. He again outlined the "three narrow exceptions" to Article III's vestment of judicial power in the judiciary: territorial courts, courts-martial, and courts that adjudicate public rights.[79] Justice Brennan's framework "would limit the judicial authority of non-Article III federal tribunals to these few, long-established exceptions and would countenance no further erosion of Article III's mandate."[80] The damage was already done. With *Schor*, the Court appeared to forever foreclose Justice Brennan's notion of three neatly crafted exceptions in favor of a more pragmatic, functional assessment of the statutory scheme.

But Justice Brennan would get one more chance to shape the public rights landscape three years later. In *Granfinanciera, S.A. v. Nordberg*,[81] the Supreme Court was asked whether a party is entitled to a jury trial under the Seventh Amendment when a fraudulent money transfer claim is brought against them by a Chapter 11 trustee, even though they have not made a claim against the bankruptcy estate.[82] Responding to this question, Justice Brennan's majority opinion explained that while Congress may assign claims that are "closely *analogous* to common-law claims" to non-jury forums, its ability to do so is limited to matters involving public rights.[83] Thus, to answer the

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75. *See id.* at 853-54 ("[T]his Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights . . . . [T]he public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication." (internal quotation marks omitted)).

76. *See id.*

77. Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 511-12 (2006).

78. *Id.* at 511.

79. *Schor*, 478 U.S. at 859 (Brennan, J., dissenting).

80. *Id.*

81. 492 U.S. 33 (1989).

82. *Id.* at 36.

83. *Id.* at 52-53. Justice Brennan continued:

Seventh Amendment question, the Court first needed to determine whether the fraudulent conveyance claim involved public rights.[84] Conceding *Union Carbide*'s rejection of *Northern Pipeline*'s threshold test for public rights based on the government's presence as a party, Justice Brennan explained that some actions between private parties still involve public rights.[85] In such cases, the "crucial question" is whether the right, though "seemingly private," is nevertheless "so closely integrated into a public regulatory scheme" that agency adjudication is permissible, provided there is some Article III supervision.[86] Absent such integration, matters between private parties require adjudication by an Article III court.[87]

In a concurrence, Justice Scalia pushed back on the majority's expansive reading of the public rights doctrine.[88] Refusing to join that part of the opinion, Justice Scalia rejected the contemporary view that the government need not be a party to a public rights matter.[89] He began with the text of Article III, whose unambiguous vestment of judicial power in the judiciary "admits of no exceptions."[90] But alas, *Murray's Lessee* created one anyway—namely, that matters involving public rights may be assigned to non-Article III bodies if Congress so chooses.[91] Hoping to limit *Murray's Lessee* to a single bright-line exception, Justice Scalia offered a less-than-tepid prognosis:

> It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States. For central to our reasoning was the device of

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> [I]f a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. . . . Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.

Id. at 53-54.

84. *Id.* at 54.

85. *Id.*

86. *Id.* (internal quotation marks omitted).

87. *See id.* at 54-55.

88. *Id.* at 65 (Scalia, J., concurring).

89. *Id.* at ("In my view a matter of public rights, whose adjudication Congress may assign to tribunals lacking the essential characteristics of Article III courts, must at a minimum arise between the government and others. . . . Until quite recently this has also been the consistent view of the Court." (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982)).

90. *Id.* at 66.

91. *Id.*

> waiver of sovereign immunity, as a means of converting a subject which, though its resolution involved a "judicial act," could not be brought before the courts, into the stuff of an Article III "judicial controversy." Waiver of sovereign immunity can only be implicated, of course, in suits where the Government is a party. We understood this from the time the doctrine of public rights was born, in 1856, until two Terms ago, saying as recently as 1982 that the suits to which it applies "must at a minimum arise 'between the government and others.' "[92]

Finding no constitutional footing for the Court's departure from *Murray's Lessee* after *Northern Pipeline*, Justice Scalia rejected the Court's contemporary view that the constitutional separation of powers can be maintained by case-by-case, pragmatic assessments.[93] Such a fundamental constitutional theme "must be anchored in rules, not set adrift in some multifactored 'balancing test'—and especially not in a test that contains as its last and most revealing factor 'the concerns that drove Congress to depart from the requirements of Article III.' "[94]

3. In Search of an Anchor

Justice Scalia would later find limited solace in *Stern v. Marshall*.[95] Like *Granfinanciera*, *Stern* addressed the constitutional limits on the power of bankruptcy courts to issue final judgments on state-law counterclaims that "augment" the bankruptcy estate despite their tenuous relationship to the underlying bankruptcy.[96] Writing for the majority, Chief Justice Roberts found that the absence of Article III salary and tenure protections for bankruptcy judges prevented them from entering final judgment on such claims.[97] Although the Court compared this counterclaim to the one in *Granfinanciera*, it failed to distinguish it. The Chief Justice instead reiterated Article III's check on Congress's power to regulate bankruptcy proceedings: "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[98] In a slow pivot back toward *Northern Pipeline*,[99] the Court explained that the

92. *Id.* at 68-69 (quoting *N. Pipeline Constr. Co.*, 458 U.S. at 69).

93. *Id.* at 69-70.

94. *Id.* at 70.

95. 564 U.S. 462 (2011).

96. *Id.* at 499.

97. *Id.* at 469.

98. *Id.* at 499.

99. *See* Laura Ferguson, *Revisiting the Public Rights Doctrine: Justice Thomas's Application of Originalism to Administrative Law*, 84 GEO. WASH. L. REV. 1315, 1323 (2016) ("[Chief Justice Roberts's] emphasis on the independence of the federal judiciary may have signaled a new direction in the Court's jurisprudence: 'A statute may no more lawfully chip

counterclaim in *Stern* failed to pass muster under "any of the varied formulations of the public rights exception."[100] The right was not a product of legislative grace historically committed to the discretion of the political branches; rather, it was a function of a complex regulatory scheme—limited by voluntary consent of the parties, or "completely dependent upon" a regulatory agency adjudication.[101] Nor were bankruptcy courts "experts" at resolving common-law tort claims.[102]

But once more, the Court stopped short of offering the "concrete guidance" that its previous decisions admittedly lacked.[103] This case, after all, concerned "the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime."[104] To allow such a thing, the Chief Justice warned, would be a bridge too far.[105]

Concurring once more, Justice Scalia lamented the majority's reluctance to more definitively limit the public rights doctrine.[106] He warned that such a fact-intensive analysis "should arouse the suspicion that something is seriously amiss with our jurisprudence in this area."[107] In Justice Scalia's mind, only "a firmly established historical practice" should overcome the presumption that an Article III court must preside over a federal adjudication.[108] Those exceptions were territorial courts, courts-martial, and "true" public rights matters.[109] Though somewhat perplexing, especially coming from Justice Scalia, this qualifier likely referred to disputes in which the government was a party.[110] But the laundry list of Article III exceptions was not yet complete.

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away at the authority of the Judicial Branch than it may eliminate it entirely.' " (quoting *Stern*, 564 U.S. at 502-03)).

100. *Stern*, 564 U.S. at 493.

101. *See id.*

102. *Id.* at 493-94.

103. *Id.* at 494.

104. *Id.* at 494-95.

105. *See id.* at 495 ("If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous 'public right,' then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.").

106. *See id.* at 503-05 (Scalia, J., concurring).

107. *Id.* at 504.

108. *Id.* at 504-05.

109. *Id.* at 505.

110. *See id.* at 503 ("[A] matter of public rights . . . must at a minimum arise between the government and others." (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65 (1989) (Scalia, J., concurring)).

In its more recent decision in *Wellness International Network, Ltd. v. Sharif*,[111] the Court had an opportunity to place a firm limit on congressional delegations of adjudicatory power to non-Article III bodies. When a bitter lawsuit left Sharif holding the bill for more than half-a-million dollars in attorney's fees, he filed for bankruptcy.[112] Still hoping to recover its fees, Wellness made a claim against the bankruptcy estate and sought a declaratory judgment seeking a separate trust administered by Sharif to be treated as part of his bankruptcy estate.[113] Sharif neglected, however, to object on Article III grounds when the bankruptcy court granted the declaratory judgment.[114] The question before the Supreme Court, then, was whether Sharif's passive consent to the bankruptcy court's jurisdiction amounted to a constitutionally permissible waiver of his right to an Article III adjudicator.[115] The Court said it did.[116] Expounding upon *Schor*'s context-driven analysis, Justice Sotomayor elected to forego "formalistic and unbending rules," choosing instead to consider the "practical effect" of allowing individual litigants to waive Article III.[117] Given bankruptcy courts' strict statutory limitations, considerable Article III oversight, and concentrated legal expertise, the Court saw little harm in permitting such waivers to take place.[118]

Though the majority made no mention of public rights, Justice Thomas dedicated a considerable portion of his dissent to defining what he saw as the proper parameters of the decades-old, yet still elusory doctrine.[119] While the "[d]isposition of private rights to life, liberty, and property falls within the core of the judicial power," public rights lie somewhere beyond that core.[120] Noting the considerable uncertainty concerning its doctrinal parameters, Justice Thomas began with the historical understanding of public rights.[121] Unlike "the private unalienable rights of each individual," public rights are distinguished by their generality.[122] Such generality, he continued, relieved such rights from the need for an Article III adjudicator.[123] But that distinction has

111. 135 S. Ct. 1932 (2015).
112. *Id.* at 1940.
113. *Id.*
114. *Id.* at 1941.
115. *See id.* at 1939.
116. *Id.*
117. *Id.* at 1944.
118. *See id.* at 1944-46.
119. *See id.* at 1963-68 (Thomas, J., dissenting).
120. *Id.* at 1963.
121. *Id.* at 1964-66.
122. *Id.* at 1965 (emphasis omitted).
123. *See id.* ("[W]hile the legislative and executive branches may dispose of public rights

been "blurred" as the public-private rights dichotomy developed.[124] Citing myriad exceptions that the Court has recognized over the years, Justice Thomas characterized the status quo—epitomized by *Union Carbide*'s wishy-washy definition of public rights as those "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary"—as a response to doctrinal confusion.[125] In Justice Thomas's view, the proper antidote is the resurrection of the purportedly historical view.[126]

Yet his call for a return to original intent offers little clarity.[127] A return to the notion that public rights are defined by common *possession* as opposed to collective *valuation*[128] still leaves the question of identity largely unanswered. Moreover, the theoretical justifications for such a doctrine in the first place fall by the wayside. Such a shift would leave the proper scope of "the judicial power of the United States"[129] no less precarious than it currently is. Thus, of greater import and urgency, this Article contends, is a theoretical foundation upon which the notion of a public rights exception to Article III might rest. Without one, the identification of such rights is a fool's errand, and their historical understanding little more than an interesting piece of trivia.

III. AN UNSATISFACTORY STATUS QUO

This Part examines the two primary theoretical bases that have been advanced in defense of the public rights exception: sovereign immunity and the right-privilege distinction.[130] These justifications are

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at will—including through non-Article III adjudications—an exercise of the judicial power is required 'when the government want[s] to act authoritatively upon core private rights that had vested in a particular individual.' " (quoting Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 569 (2007)).

124. *Id.* at 1966.

125. *Id.* at 1967 (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94 (1985)).

126. *Id.* at 1967-68.

127. *See* Ferguson, *supra* note 99, at 1328-29 ("Although there is a broad conception of what the public rights doctrine encompasses, it is more difficult to identify its source. Justice Thomas's dissents do little to clarify this discrepancy.").

128. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 68 (1989) (Scalia, J., concurring) ("It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States.").

129. U.S. CONST. art. III, § 1.

130. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 952-53 (1988) (outlining three bases for the public rights doctrine that are "in tension to varying degrees with modern sensibilities"). Fallon mentions a third contemporary basis: administrative feasibility. *Id.* But this Article does not address

unsatisfactory. Sovereign immunity may explain Congress's power to create public rights, but it fails to resolve why sovereign immunity's availability in other situations does not beget similar results. Defining public rights as merely those finding their origins in legislative benevolence likewise leaves undefined what characteristics distinguish such rights from those statutory rights that the Supreme Court has historically treated as private. Finding no satisfactory answers, this Article offers an alternative theory in Part IV.

A. Sovereign Immunity

The idea of sovereign immunity as a basis for public rights hearkens back to *Murray's Lessee* itself. In order to sue the government, the sovereign must first waive its immunity. And when it does, the government may condition the waiver on the use of a non-Article III tribunal.[131] As shown in the previous Part, though, the presence of the sovereign is no longer a necessary predicate to being considered a public-rights matter.[132] As Kenneth Coffin observes, even before *Union Carbide*, the Court had begun "the process of unhinging the public rights doctrine from the theory of sovereign immunity."[133] Looking to the example of *Williams v. United States*,[134] in which the Court of Claims—which hears monetary claims against the United States—was found to rest outside the confines of Article III, Coffin notes the "judicial sleight of hand" by which Justice Sutherland used the presence of the federal government to the benefit of the Court's holding while simultaneously opening the door to a broader conception of public rights.[135] Rather than limiting the analysis to the government's status as a party, the Court went a step further. Because the Court of Claims oversaw matters "equally susceptible of legislative or executive determination, they are, of course, matters in respect of which there is no constitutional

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that view. The aim of this Article is to refine the doctrinal basis for public rights, which a purely pragmatic view inherently lacks. Accordingly, this Article's critique of the status quo is limited to the two doctrinally based views that remain popular theoretical justifications for the public rights doctrine today.

131. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283-85 (1856); *see also* Kenneth G. Coffin, *Limiting Legislative Courts: Protecting Article III from Article I Evisceration*, 16 BARRY L. REV. 1, 5 (2011) (discussing the original use of sovereign immunity to anchor public rights disputes to those which include the federal government as a party).

132. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 569 (1985) ("In essence, the 'public rights' doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is reduced.").

133. Coffin, *supra* note 131, at 8.

134. 289 U.S. 553 (1933).

135. Coffin, *supra* note 131, at 8-9.

right to a judicial remedy, and the authority to inquire into and decide them may constitutionally be conferred on a nonjudicial officer or body."[136] Even if the federal government is not a party to the suit, the Court seems to suggest that there may nevertheless be instances in which the Constitution has assigned decisionmaking power to one of the political branches. Indeed, earlier conceptions of public rights included claims by the government *against private citizens*.[137]

Though apparent obsolescence alone suffices to call the sovereign immunity theory into question, additional concerns persist. For instance, there is no explanation for the distinction between public rights matters in which the federal government is a party and *Bivens* actions against federal officials and agencies.[138] As agents of the United States, these individuals enjoy immunity—albeit to varying degrees[139]—as an extension of the logic that a suit against the sovereign's agent (when he or she has acted as such) is a suit against the sovereign itself.[140] Nevertheless, the availability of *Bivens* relief is not governed by the satisfaction of federally imposed conditions but by the degree of intentionality or purposiveness of the official's allegedly unconstitutional action.[141] The availability of judicial relief in this context is not

136. *Williams*, 289 U.S. at 579-80 (citations omitted).

137. *See* Fallon, *supra* note 130, at 952 n.210 ("The concept of sovereign immunity cannot account for all of the public rights doctrine, which historically involved certain claims by the government against private parties.").

138. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that federal officers and entities could be subject to suits for damages by way of an implied cause of action contained in the Fourth Amendment); *accord* Minneci v. Pollard, 656 U.S. 118, 123 (2012) (noting that "[*Bivens*] held that the Fourth Amendment implicitly authorized a court to order federal agents to pay damages to a person injured by the agents' violation of the Amendment's constitutional strictures"); *see also* Davis v. Passman, 442 U.S. 228, 243-45 (1979) (permitting *Bivens* actions pursuant to the Fifth Amendment); Carlson v. Green, 446 U.S. 14, 18-20 (1980) (Eighth Amendment).

139. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) (qualified immunity for presidential aides); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (absolute immunity for the President); Butz v. Economou, 438 U.S. 478, 507 (1978) (absolute immunity for executive officials); Kilbourn v. Thompson, 103 U.S. 168, 199-200 (1880) (legislative immunity for members of Congress and their aides).

140. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693 (1949) ("[I]n a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.").

141. *See* Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009) (discussing the need to "plead and prove that the defendant acted with discriminatory purpose" to establish a *Bivens* cause of action pursuant to the First Amendment or Fifth Amendment).

the result of "legislative grace."[142] It is a constitutional creature that exists independently of congressional prerogative.[143]

The unqualified language of Article III itself underscores one final inconsistency. If the judicial power "shall be vested" in federal courts,[144] then the availability of sovereign immunity is inconsequential to the proper forum in which such power must be exercised—any claim of immunity notwithstanding. While Congress is permitted to condition a waiver of sovereign immunity upon certain concessions (for example, foregoing punitive damages), a successful invocation of sovereign immunity still requires an exercise of judicial power. Regardless of one's conception of sovereign immunity,[145] the result is the same: presumably, a judicial act entering a final judgment for the United States.

The availability of sovereign immunity, therefore, neither offers a reliable framework by which to categorize public rights nor justifies their placement beyond the reach of "the judicial power of the United States."[146] Sovereign immunity's presence in the public rights equation generates more questions than it answers. Meanwhile, its absence from the Court's more contemporary doctrinal formulations[147] leaves one to wonder whether the conditional waiver of sovereign immunity plays a meaningful role at all.[148]

B. The Right-Privilege Dichotomy

The historical distinction between rights and privileges, while slightly more useful than the sovereign immunity rationale, is similarly dissatisfying with respect to doctrinal consistency. Indeed, its significance in the Supreme Court's due process jurisprudence has been

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142. *See* Young, *supra* note 29, at 792.

143. *See Iqbal*, 556 U.S. at 675 (discussing "implied causes of action").

144. U.S. CONST. art. III, § 1.

145. *See* Jessica Wagner, *Waiver by Removal? An Analysis of State Sovereign Immunity*, 102 VA. L. REV. 549, 560-68 (2016) (discussing the jurisdictional and substantive conceptions of sovereign immunity).

146. U.S. CONST. art. III, § 1.

147. *See, e.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94 (1985) (holding that a mandatory private arbitration scheme for compensation claims by initial pesticide registrants against subsequent filers did not violate Article III); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015) (permitting waiver of right to Article III tribunal for claims unconstitutionally assigned for final adjudication by bankruptcy courts).

148. This rationale, of course, presumes the legitimacy and internal consistency of sovereign immunity, which itself rests on precarious doctrinal footing. *See generally* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521-22 (2003) (discussing the historical development of, doctrinal gaps in, and need for reform of sovereign immunity "without reliance on the abstract or dignitary notions of sovereignty implicit in the very phrase 'sovereign immunity' ").

anything but stable.[149] And yet, though no longer a threshold test for constitutional protection, the right-privilege distinction continues to play some role in the amount of protection an interest is allotted—namely, how much and what type of process is due.[150] It is important, then, to consider what abiding influence, if any, it might have in the context of agency adjudications.

The right-privilege argument essentially divides interests into "rights" and "privileges." Somewhat tautologically, the former are said to exist "as a matter of right."[151] Examples include those rights enshrined in the Bill of Rights and the Fourteenth Amendment, such as life, liberty, property, and equal treatment under the law.[152] Privileges, on the other hand, are "interests created by the grace of the state and dependent for their existence on the state's sufferance."[153] These include economic and noneconomic interests alike, such as Social Security benefits, public employment, business licenses, or even entry into the United States.[154] Similar to the sovereign immunity rationale, the right-privilege distinction maintains that the legislatively revocable nature of privileges entitles their recipients to fewer procedural protections than those accorded to rights.[155] Accordingly, the adjudication of such interests by non-Article III tribunals poses no threat to the constitutional vestment of judicial power in Article III judges.

This view likewise lacks the substance of reliable doctrine. Three critiques make this apparent. First, as with the sovereign immunity rationale, the plain language of Article III suggests that it is the nature of the action—not the nature of the thing being adjudicated—that makes it "judicial."[156] An interest's revocability offers little insight into the nature of the action that administrative and other non-Article III bodies take—even if statutorily recognized as an adjudication[157]—

149. *See* Adams v. United States, No. 00–447 C, 2003 WL 22339164, at *10 n.13 (Fed. Cl. Aug. 11, 2003) (noting the rise, fall, and "partial return" of the right-privilege distinction).

150. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-45 (1985) (overruling the more categorical "bitter with the sweet" doctrine while endorsing "balancing of the competing interests at stake" to assess appropriate type and amount of process).

151. Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 71 (1982).

152. U.S. CONST. amend. XIV, § 1.

153. Smolla, *supra* note 151, at 71-72.

154. *Id.*; *see also* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-42 (1968) (providing a brief recapitulation of the right-privilege distinction as it concerns public sector employees).

155. *See* Smolla, *supra* note 151, at 72-73.

156. *See* U.S. CONST. art. III, § 1.

157. *See, e.g.*, 5 U.S.C. § 551(6)-(7) (2012) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing" and "adjudication" as the "agency process for the formulation of an order").

concerning that interest. The right-privilege dichotomy thus gives us no meaningful sense of the contours of Article III power.

Second, as with the sovereign immunity argument, the Supreme Court's contemporary pragmatism concerning the metes and bounds of public rights pays little mind to the right-privilege dichotomy. Though "the origins and importance of the right to be adjudicated"[158] does play a role in the Article III analysis, it appears to be a normative rather than a categorical one. The Court in *Schor* afforded the state law claim a presumption of Article III necessity given its private nature.[159] Yet the majority eschewed a bright-line approach in favor of a sliding-scale one, finding the incidental effect of an administrative adjudication of such a right too minor to forbid—its private nature notwithstanding.[160]

Finally, the doctrinal basis for the right-privilege distinction is itself incongruous with the concept of public rights recipients not being entitled to an Article III forum. The separation of constitutionally protected rights from lesser-protected privileges was an attempt to limit the reach of substantive due process.[161] While individuals are afforded constitutional protection of life, liberty, and property under the Fifth and Fourteenth Amendments, "no one has a constitutional right to government largess."[162] "This view," Professor Alstyne explains, "distinguishes the limited power of the state 'reasonably' to regulate activities conducted by private means without substantial assistance by government from the unlimited power of the state to regulate advantages supplied by government without obligation."[163] For example, the Constitution recognizes an individual's right to privacy that forbids a prohibition on the use of contraceptives[164] or undue interference with abortion access.[165] Even so, that right does not include an obligation to provide funding to indigent individuals who cannot afford these things.[166]

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158. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

159. *See id.* at 853.

160. *See id.* at 853-54.

161. *See* Van Alstyne, *supra* note 154, at 1439-42.

162. *Id.* at 1442.

163. *Id.*

164. *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972).

165. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 164 (1973).

166. Maher v. Roe, 432 U.S. 464, 479-80 (1977) (declining to extend *Roe v. Wade* to require states to fund abortions for indigent people); Harris v. McRae, 448 U.S. 297, 326-27 (1980) (same); *cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779-80 (2014) (conceding the existence of a compelling governmental interest in providing access, but not going so far as to recognize a constitutional right to contraception for women).

This distinction offers little guidance vis-à-vis public rights. If, for instance, Congress passed a statute entitling those whose incomes fall below a certain level to such funding, it is not clear that such an interest's status as a "privilege" permits Congress to place an alleged deprivation of that statutory interest beyond the reach of Article III courts.

Another example of this incongruity is Title VII of the Civil Rights Act of 1964,[167] which prohibits employment discrimination based on an individual's race, color, religion, sex, or national origin.[168] Notably, these protections derive not from substantive due process, but from the power of Congress to regulate interstate commerce.[169] Under the right-privilege rubric, the right to be free from discriminatory treatment in the workplace appears to be a "privilege." It does not inhere in the Fifth or Fourteenth Amendment right to due process—that is, employees do not have a constitutional right to federal protection against employment discrimination. Nevertheless, Congress has never used the potential revocability of Title VII to require claimants to forego adjudication by an Article III tribunal—just the opposite. Title VII requires claimants to exhaust administrative remedies by filing a charge with the Equal Employment Opportunity Commission (EEOC) and obtaining a right-to-sue letter.[170] But these are not limits on federal jurisdiction.[171] Moreover, the EEOC's role is not adjudicative; it is, at most, investigative and prosecutorial.[172]

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Neither the availability of sovereign immunity nor the classification of an interest as a "privilege" conclusively defines a public right. Granted, many public rights matters involve claims against the federal government. Yet, as shown above, some do not. Similarly, while public rights claims undoubtedly encompass a number of interests that do not inhere in constitutional liberty, there are other such "privileges" whose adjudication nevertheless require an Article III forum. But these are common characteristics, not doctrinal frameworks. There

167. *See generally* 42 U.S.C. §§ 2000e-e17 (2012).

168. *See id.* § 2000e-2.

169. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964).

170. 42 U.S.C. § 2000e-5(e).

171. *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

172. Administrative exhaustion is often a formality. Claimants who have already retained counsel can file an administrative charge with the EEOC and immediately request a Notice of Right to Sue in courts, which closes any investigation and forecloses the possibility of the agency bringing charges. *See Filing a Lawsuit*, EEOC, https://www.eeoc.gov/employees/lawsuit.cfm [https://perma.cc/34JH-GXVW].

remains, then, a need to more clearly define the parameters of public rights claims beyond these frequently recurring features.

IV. ADMINISTRATIVE INJURIES

Recall the story with which this Article began. Denise receives a citation for which she must pay a fine unless she successfully challenges it through the prescribed post-citation judicial process. Recall also the cognitive dissonance between this commonly accepted policing regime and the relative precariousness of an FTC adjudication against an alleged antitrust violator. Explanations for social acceptance of one and antipathy toward the other abound. People obviously prefer brief traffic stops. The amount and types of evidence used to prove such infractions are generally limited and uncontroversial, and the financial stakes are comparatively low. Surely then, this logic continues, the more high-stakes, bureaucratic processes of administrative agencies are categorically distinct—a usurpation of judicial power, maybe. Yet social wariness hardly resolves the constitutional question of where the line ultimately lies between the adjudication effective law enforcement requires and that which is reserved to Article III tribunals.

The theory of administrative injuries sands away at this friction. Beginning with Justice Thomas's description of public rights as " 'rights belonging to the people at large,' as distinguished from 'the *private* unalienable rights of each individual' " in *Wellness International*,[173] the theory of administrative injuries suggests that it is the absence of a justiciable "case or controversy" that makes public rights matters suitable for administrative (non-Article III) adjudication. This Part then concludes by suggesting that it is the particularizing force of a completed administrative action that converts a public right into a justiciable claim entitled to full Article III protection.

In his *Wellness International* dissent, Justice Thomas defined public rights by their generality.[174] Private rights, by contrast, belong to people qua people—namely, the "absolute" rights to life, liberty, and property enshrined by the Constitution.[175] "This distinction is significant to our understanding of Article III," he continued, "for while the legislative and executive branches may dispose of public rights at will––including through non-Article III adjudications—an exercise of the judicial power is required 'when the government want[s] to act authoritatively upon core private rights that had vested in a particular individual.' "[176] Such a characterization of public rights appears relatively

173. 135 S. Ct. 1932, 1965-66 (2015) (Thomas, J., dissenting) (quoting Lansing v. Smith, 4 Wend. 9, 21 (N.Y. 1829)).

174. *See id* at 1964-65.

175. *Id.* at 1965.

176. *Id* (quoting Nelson, *supra* note 123, at 569).

unconcerned with the presence or absence of the government as an original party to the dispute or even the revocability of any statute pursuant to which a claim might arise. Instead, the essence of a public right is its lack of particularity.

Herein lies the theoretical contribution of administrative injuries. If generality is the defining feature of public rights, as Justice Thomas suggests it historically is, it only seems fitting that an Article III court not consider it—at least not in its initial generalized state. The Supreme Court's limited definition of an Article III "case or controversy" and prudential doctrines of justiciability support this view. We cannot use Article III courts to solicit legal advice.[177] Their judgments may not be revised by Congress[178] or the Executive Branch.[179] And cases must be genuinely adversarial.[180] Article III courts guard against these concerns by using doctrines of justiciability, including standing, mootness, ripeness, and political questions. Here, the Court's standing, ripeness, and political question doctrines illustrate the non-justiciable nature of public rights in the first instance.

A. No Injury, No Standing

Article III courts may hear only those matters in which a claimant has alleged a "personal injury [that is] fairly traceable to the defendant's allegedly unlawful conduct and [is] likely to be redressed by the requested relief."[181] Of notable interest here is the injury requirement. A claimant must show that she personally suffered an "injury in

177. *See* Muskrat v. United States, 219 U.S. 346, 361-62 (1911) (declining to issue advisory opinions). *But see* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding provision of Voting Rights Act allowing states to seek declaratory judgments regarding the legality of proposed changes to the Act); N. Cheyenne Tribes v. Hollowbreast, 425 U.S. 649 (1976) (affirming statute allowing tribes to sue for declaratory judgment that re-vestment of land to tribes did not violate the Fifth Amendment).

178. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (holding that statute extending statute of limitations and reinstating cases dismissed with prejudice violated the constitutional separation of powers); *cf.* Glidden Co. v. Zdanock, 370 U.S. 530 (1962) (upholding reconstitution of the Court of Claims as an Article III court notwithstanding lack of judicial power to compel the United States to pay money judgments if it chooses not to do so).

179. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792) ("[B]y the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.").

180. *See* United States v. Johnson, 319 U.S. 302, 304 (1943) (dismissing case for lack of "genuine adversary issue between the parties, without which a court may not safely proceed to judgment"). *But see* United States v. Windsor, 570 U.S. 744, 761 (2013) (finding sufficient adversity between the challenger to the Federal Defense of Marriage Act and challenger to the Bipartisan Legal Advisory Group, which defended the law when the Obama Administration declined to do so); Evers v. Dwyer, 358 U.S. 202, 204 (1958) (upholding the test case challenging a bus segregation law).

181. Allen v. Wright, 468 U.S. 737, 751 (1984).

fact."[182] The Supreme Court defines this as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[183] Though there is no threshold for severity[184] or requirement of *economic* harm,[185] an injury to the general population falls short of an "injury-in-fact."[186] The same goes for a speculative injury.[187]

Now consider Denise. Suppose she actually had a passenger in her car that would have legally entitled her to use the carpool bypass lane. She arguably would have had a distinct, concrete interest in not being wrongfully pulled over by the officer. Nevertheless, it is commonly accepted that the ability of officers to respond to traffic violations in a summary fashion, as in this example, is essential for functional law enforcement. Yet the theory of administrative injuries suggests that a justiciable injury does not materialize until the citation is issued, however wrongfully.

The same logic holds with respect to the alleged antitrust violator facing an FTC enforcement action, the Social Security applicant following the claim submission and internal review process, and even the pesticide registrant in *Union Carbide* submitting to binding

182. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

183. *Id.* (citations omitted) (internal quotation marks omitted); *accord* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225 (2003) (finding that an injury need be " 'concrete,' 'distinct and palpable,' and 'actual or imminent' ") (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)); Warth v. Seldin, 422 U.S. 490, 501 (1975) (holding that an injury is "distinct and palpable").

184. *See* Flast v. Cohen, 392 U.S. 83, 105-06 (1968) (recognizing standing for taxpayer challenge to legislative expenditure as allegedly violating the Establishment Clause).

185. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."); *Lujan*, 504 U.S. at 562-63 (same); *Wright*, 468 U.S. at 756 ("[Plaintiffs'] children's diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but . . . one of the most serious injuries recognized in our legal system.").

186. *See* United States v. Richardson, 418 U.S. 166, 176-77 (1974) (finding no injury-in-fact based on "generalized grievance" that is "common to all members of the public" (citation omitted)); *cf.* Fed. Election Comm'n v. Akins, 524 U.S. 11, 24-25 (1998) (affirming injury's status as "concrete" despite being "widely shared" when injury was based on political group's failure to comply with public disclosure laws).

187. *See* Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) (refusing taxpayer standing based on relatively "remote, fluctuating and uncertain" interest in treasury funds); City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (denying standing for equitable relief given "speculative nature" of claim of future injury from police chokehold protocol); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1148 (2013) (refusing standing based on "highly attenuated chain of possibilities" that fails to show "certainly impending" injury). *But see* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (2014) (finding standing for equitable relief based on "sufficiently imminent" threat of future enforcement of false statement statute against group).

arbitration for determination of the proper allocation of fees. In each instance, the would-be claimant lacks an actual, individualized injury for which judicial redress might be sought. The company accused of antitrust violations remains in its original position until the agency completes its enforcement action. The same holds true for the Social Security claimant, whose request for benefits is not officially denied until the internal review process is complete and the final denial is signed by the Commissioner. Even the claimant in *Union Carbide*—whose claim was against a private party that used its registration data and thus bore a striking resemblance to a typical private rights claim—still lacked a concrete injury for which Article III relief might be sought until the administrative scheme finally deprived the company of an interest that the scheme aimed to provide.

The Supreme Court's decision in *Massachusetts v. Environmental Protection Agency*[188] warrants consideration on this point. There, the Court held that a state had standing to intervene in a suit in which petitioners sought review of an EPA order denying a petition to regulate greenhouse gases linked to global warming.[189] Though the "special solicitude"[190] afforded to states undoubtedly played a role in the Court's decision, the majority likewise acknowledged the existence of a "procedural right" for which the challengers to the EPA order were entitled to seek a remedy.[191] But such a right to challenge agency rulings was not jeopardized until the agency had acted. Indeed, agency action—or in *Massachusetts v. EPA*, inaction—caused the injury.[192]

This acknowledgment of procedural rights in the justiciability analysis bolsters the view that a concrete injury manifests itself only after the agency has completed its enforcement action. In challenging her toll violation ticket, Denise invokes her procedural right to review of the traffic officer's action. The same goes for the company facing antitrust penalties, the Social Security applicant facing a denial of benefits, and the pesticide registrant facing a denial of remuneration.

B. Almost, But Not Ripe

The Court's doctrine concerning ripeness further reinforces this view. Ripeness guards against judicial cognizance of injuries that have

188. 549 U.S. 497 (2007).

189. *Id.* at 510-14, 520-21.

190. *Id.* at 520.

191. *Id.* at 527-28; *see also* ASARCO Inc. v. Kadish, 490 U.S. 605, 618 (1989) (finding adverse state court judgment sufficient injury-in-fact to support standing in federal court).

192. *See Massachusetts*, 549 U.S. at 518 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

not yet materialized. It is a temporal analysis that weighs "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[193] In *Abbott Laboratories v. Gardner*, for example, drug manufacturers challenged a Federal Food and Drug Administration (FDA) rule requiring pharmaceutical companies to print a drug's "established name" on all labels and printed materials to help consumers make an informed choice between brand-name and generic products.[194] Noting the "purely legal" nature of the question—that is, whether the FDA correctly interpreted the statute that the regulation was designed to implement[195]—as well as the finality of the agency's action[196] and the significant costs associated with immediate compliance,[197] the Court found the challenge ripe for Article III review.[198]

Like standing, ripeness is particularly concerned with avoiding the adjudication of "hypothetical threats,"[199] which risks the grant of poorly tailored[200]—or even inconsequential[201]—relief. Courts cannot redress unripe injuries any more than a president can sign a bill into law that Congress has not passed. To do so would be to risk the erosion of the credibility upon which courts rely to effectuate their judgments. Ripeness is a temporal bulwark against advisory opinions, and thus, a key to institutional integrity.[202]

Turning again to the abovementioned examples, ripeness underscores the imperative of a completed agency action before a public rights matter may be deemed a "case or controversy." Though Denise has an interest in never being stopped by a traffic officer except when she is in fact violating the carpool-lane rule, the commonly accepted realities of law enforcement make it impossible to preempt legally

193. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967); *accord* Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974) ("[R]ipeness is peculiarly a question of timing . . . .").

194. *Abbott Labs.*, 387 U.S. at 138-39.

195. *Id.* at 149.

196. *Id.* at 149-52.

197. *Id.* at 153-54 (the regulation requires plaintiffs to make "significant changes in their everyday business practices").

198. *Id.* at 154.

199. *See* United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 89-90 (1947).

200. *See* O'Shea v. Littleton, 414 U.S. 488, 497 (1974) ("[W]e can only speculate whether respondents will be arrested, either again or for the first time, for violating a municipal ordinance or a state statute, particularly in the absence of any allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct.").

201. *See* Poe v. Ullman, 367 U.S. 497, 507 (1961) ("It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting.").

202. *See Abbott Labs.*, 387 U.S. at 148 ("[The ripeness doctrine's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . .").

erroneous enforcement before it occurs. It goes without saying that a court would be ill-equipped to award equitable relief to Denise before she was pulled over. The same goes for the company facing FTC enforcement. What relief might a court grant a company faced with an antitrust investigation before the FTC Commissioners issue a final determination? What if the enforcement action is ultimately dropped or the agency finds in the company's favor? There is no government-imposed injury for the court to redress. To the contrary, any judicial intervention at this juncture undermines both the effectiveness of agency enforcement and the court's ability to provide meaningful review of completed actions. Judicial intervention in the Social Security application process would be similarly troublesome. Though the application and internal review processes may bear notable resemblance to a judicial proceeding, it is ultimately a single action resulting either in a grant or denial by the Commissioner. And finally, the pesticide registrant seeking compensation is not deprived of that compensation until the arbitrator makes her final determination. Only when the administrative scheme has injured a participant does judicial relief stand to rectify a legal error in that process.

C. The Political Question of Agency Policy

One final doctrine affirms this conception of administrative adjudication as a necessary predicate to Article III intervention. The Court's political-question jurisprudence concerns itself less with the temporal status of a dispute than with the dispute's form. Unlike the other justiciability doctrines, a case presenting a political question is never justiciable, no matter how ripe or active the dispute or how great the personal or financial stake of the parties.[203] The judiciary essentially exists "to decide upon individual rights according to those principles which the political departments of the nation have established."[204] Political questions thus properly rest with the political branches—or in this case, their adjuncts. Of course, Article III hardly forestalls all disputes of political consequence. Indeed, judicial review requires courts to wade into the political thicket quite regularly. Saying "what the law is"[205] requires courts to regulate constitutional boundaries, which

203. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) (recognizing that courts lack authority to decide political questions).

204. United States v. Arredondo, 31 U.S. (6 Pet.) 691, 711 (1832) (quotations omitted); *accord* United States v. Boisdoré, 52 U.S. (11 How.) 63, 93 (1850) ("Our action is judicial. We have no authority to exercise political jurisdiction and to grant, as the governors of Spain had, and as Congress has."); *see also* Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 65-66 (1867) (rejecting Guaranty Clause challenge to congressional action).

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

undoubtedly carries "political implications."[206] Political questions entail something more.[207]

The Court provided a comprehensive, modern formulation of the doctrine in *Baker v. Carr*.[208] Before *Baker*, the Court had taken a case-by-case approach that left litigants uncertain of its contours. The Court thus took the case as an opportunity to distill the doctrine into a prospectively useful framework.[209] What emerged were six "analytical threads"[210] that together comprised the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[211]

Each of the Court's previous political question decisions involved at least one of these issues.[212] And this would be the rule going forward.[213]

1. Agency Action as Policy Determination

The theory of administrative injuries concerns itself with *Baker*'s third thread. Agencies are, most fundamentally, policy-making bodies. They exist not to create law, but to implement legislation in a manner that adheres to the congressional objective it was adopted to execute. Granted, the line between legislating and policymaking is a fine one. During the New Deal Era—which gave us administrative agencies—the Supreme Court wrestled to fit these seemingly new bodies into the constitutional scheme.[214] In fact, that struggle is still known to

206. INS v. Chadha, 462 U.S. 919, 942-43 (1983).

207. *See Zivotofsky*, 566 U.S. at 196 ("[Judicial review] will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.' " (quoting *Chadha*, 462 U.S. at 943 (citation omitted))).

208. 369 U.S. 186 (1962).

209. *See id.*

210. *Id.* at 211.

211. *Id.* at 217.

212. *See id.*

213. *See id.*

214. *See, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388, 421, 431 (1935) (rejecting the National Industrial Recovery Act's (NIRA) delegation of power to the President to institute

resurface from time to time.[215] Fortunately, this Article requires a degree of abstraction that avoids this increasingly granular tug-of-war. What matters here is this basic structure: (1) Congress decides to solve a problem by passing a law enlisting the assistance of an administrative agency; (2) that law necessarily contains an "intelligible principle" to which the agency may reasonably adhere without exercising legislative power; and (3) the agency sets the agenda for carrying out that mission.[216]

Agencies typically use two policy-making tools: rulemaking and adjudication.[217] Though the rulemaking function tends to embody the breadth typically associated with policy development, adjudication serves as both a necessary complement[218] and an independent source of agency policymaking.[219] The need for this flexibility is critical to administrative effectiveness. Where the issue is sufficiently foreseeable and comprehensible, agencies may see fit to promulgate a concrete, prospective rule.[220] Yet not every issue fits this neat, methodical mold. Other problems are dynamic, unpredictable, and thus ill-suited to the "rigidifying" approach of rulemaking.[221] In other words, adjudication may be the only effective means by which an agency might execute its policymaking objectives.

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the Petroleum Code); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-39 (1935) (rejecting NIRA's delegation of power to the President to create Code of Fair Competition); Yakus v. United States, 321 U.S. 414, 422, 425-26 (1944) (affirming delegation of broad powers for the President to establish price controls as "war emergency measure").

215. *See, e.g.*, Indus. Union Dept. v. Am. Petroleum Inst. (The Benzene Case), 448 U.S. 607, 641 (1980) (limiting power of Labor Secretary to set standards for benzene exposure); Mistretta v. United States, 488 U.S. 361, 379 (1989) (upholding power of U.S. Sentencing Commission to promulgate Federal Sentencing Guidelines); Whitman v. Am. Trucking Assocs., 531 U.S. 457, 474-76 (2001) (affirming EPA power under Clean Air Act to set air quality standards).

216. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409-10 (1928).

217. *See generally* Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970) (examining the interplay between rulemaking and adjudication in response to calls for procedural reform); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965) (evaluating the two primary processes of agency policymaking and suggesting that rulemaking has not been used to its full potential).

218. *See* Charles H. Koch Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 696-700 (2005); *see also* SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 92-93 (1943) (calling for agency to promulgate pre-enforcement "standards of conduct"); Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 675-77 (D.C. Cir. 1973) (affirming FTC rulemaking power to define standards for the statute it was created to enforce through adjudication).

219. *See* Koch Jr., *supra* note 218, at 696-700; *see also* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202-03 (1947).

220. *See Chenery II*, 332 U.S. at 202.

221. *See id.* at 202-03.

Such is the case with public rights matters. To be sure, though the Supreme Court has invoked *Baker* in several legal areas,[222] the ruling has largely lent itself to the analysis of the justiciability of vote-dilution matters under the Fourteenth Amendment.[223] Nevertheless, the Court in its review of agency adjudications of public rights closely reflects *Baker*'s call for judicial restraint when non-judicial policy expertise is needed. Enter *Chevron* and *Auer* deference.

2. Justiciability and the Need for Deference

The point at which congressional policymaking ends and "the judicial power of the United States" begins is hardly obvious.[224] Deferential doctrines like *Chevron* help preserve this crucial division of labor. Though it is currently facing an onslaught of judicial, academic, and even political criticism,[225] the two-step framework laid out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*[226] remains the law—And for good reason. When an agency interprets its organic statute, reviewing courts first ask whether the provision at issue is ambiguous, and if it is, whether the agency's interpretation is a reasonable one.[227] Put differently, unless Congress has spoken directly to the precise issue in question, *Chevron* directs courts to defer to agencies so long as their interpretations are reasonable.[228] Such deference is premised on agencies' critical roles as expert policymakers in their respective fields.[229] Even before *Chevron*, the Supreme Court understood that "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation

222. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (discussing foreign and diplomatic affairs); Nixon v. United States, 506 U.S. 224, 228 (1993) (discussing impeachment proceedings); INS v. Chadha, 462 U.S. 919, 941 (1983) (discussing deportation procedure).

223. *See, e.g.*, Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016); Vieth v. Jubelirer, 541 U.S. 267, 310 (2004); Branch v. Smith, 538 U.S. 254, 268 (2003); Davis v. Bandemer, 478 U.S. 109, 118 (1986).

224. *See* U.S. CONST. art. III, § 1.

225. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015) (foregoing *Chevron* in the face of a question of "deep economic and political significance") (internal quotation marks omitted); Michael Macagnone, *House Passes Bill Ending Chevron Deference*, LAW360 (Jan. 11, 2017, 8:55 PM), https://www.law360.com/articles/879235/house-passes-bill-ending-chevron-deference [https://perma.cc/ZD9D-DKPA]; Ilya Somin, *Gorsuch is Right About Chevron Deference*, WASH. POST (Mar. 25, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-defeence/?utm_term=.3ff731dfb191 [https://perma.cc/8CLS-2ZAY].

226. 467 U.S. 837, 842-43 (1984).

227. *Id.*

228. *See id.* at 844-45.

229. *See id.* at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government.").

of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[230] The Court affirmed this principle in *Chevron*.[231] When it comes to the proper execution of a "technical and complex" regulatory scheme, the policy disputes that inevitably arise are better left "to legislators or administrators, not to judges."[232]

Consistent with *Baker*'s call for restraint when faced with issues requiring "an initial policy determination" by a political body, *Chevron* deference recognizes agencies as at least a subdivision of the political sphere, and therefore entitled to similar respect.[233] Unlike judges—who are neither subject-matter experts nor elected officials—administrative agencies offer both specialization and (indirect) political accountability.[234] Though the Court, as the political question doctrine similarly recognizes, cannot avoid outright the reconciliation of adverse political interests, *Chevron* deference checks the impulses of judges who might otherwise seek to substitute their policy judgments for those of the experts selected by the political branches.[235]

The same logic undergirds the Court's analysis of agencies' interpretations of their own regulatory pronouncements, or *Auer*/*Seminole Rock* deference. In such cases, "the ultimate criterion is the

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230. Morton v. Ruiz, 415 U.S. 199, 231 (1974).

231. *See Chevron*, 467 U.S. 837 (1984). The wisdom or effectiveness of *Chevron* in fulfilling this aim is debatable, to be sure. Ever since the decision, the Court has struggled to maintain a consistent formulation of this seemingly simple doctrine. In applying the first step of *Chevron*, the Court has used traditional interpretive canons and special factors alike to find clarity where ambiguity seems inevitable. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("extraordinary cases"); Dep't. of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130-31 (2002) (textual clarity); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594 (2004) (purposive clarity). Meanwhile, step two's call for deference to reasonable interpretations has fostered minimal consensus among the justices. *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 395 (1999) (disputing reasonableness of FCC's "pick and choose" rule as interpretation of the Telecommunications Act); Rapanos v. United States, 547 U.S. 715, 755 (2006) (disputing the reasonableness of the Army Corps of Engineers' interpretation of "navigable waters" under the Clean Water Act). This does not even begin to cover the Court's more recent disputes concerning the scope of *Chevron*'s domain altogether. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (refusing to apply *Chevron* where Congress did not intend to give agency interpretations the "force of law"); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (extending deference to changes in agency interpretations, even if previously reached by a court); City of Arlington v. FCC, 133 S. Ct. 1863, 1874-75 (2013) (expanding *Chevron* to include statutory interpretations concerning agency jurisdiction). But this Article is not concerned with *Chevron*'s normative value. Rather, *Chevron* captures the Court's reluctance to involve itself with the substantive policy-related aspects of the administrative process.

232. *Chevron*, 467 U.S. at 864-65.

233. *Id.* at 863; *Baker*, 369 U.S. 186 (1962).

234. *See Chevron*, 467 U.S at 865-66; Pauley *ex rel.* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.").

235. *See Chevron*, 467 U.S. at 865-66.

administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[236] Like *Chevron*, *Auer* deference assumes that agencies are best positioned to resolve the ambiguities that require a certain degree of policy expertise.[237] This seems particularly logical when agencies are attempting to clarify the meaning of their own prior pronouncements. Though critics may be right to question *Auer*'s doctrinal wisdom,[238] its purpose remains closely intertwined with the Court's aversion to answering political questions. While it has taken some time to get a complete explanation,[239] the Court has ultimately acknowledged that *Auer* deference, like *Chevron* deference, respects agencies as political adjuncts better suited than judges at making politically divisive policy decisions.[240] It similarly appreciates the "unique expertise and policymaking prerogatives" that agencies possess relative to courts.[241] Given agencies' technical prowess and political accountability, it naturally follows that they are best positioned to say what they mean when their regulations need further explanation.[242]

As in *Chevron*, the Court in *Auer* is equally troubled by the political implications of revisiting the policy decisions of administrative

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236. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); *accord* Auer v. Robbins, 519 U.S. 452, 461 (1997) (agency interpretation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

237. Also, like *Chevron*, the *Auer* doctrine has been the subject of much disagreement on the Supreme Court in the last decade. *See generally* Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 KAN. L. REV. 633 (2014) (examining the Court's recent reformulation of *Auer* deference). Indeed, Justice Scalia, who wrote for the Court in *Auer*, later seized several opportunities to call for the complete abandonment of the doctrine before his death in 2016. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211-12 (2015) (Scalia, J., concurring); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616-23 (2013) (Scalia, J., concurring in part and dissenting in part). Nevertheless, as with *Chevron*, this Article is concerned less with the *Auer*'s staying power than it is with the doctrine's purpose of leaving undisturbed those initial policy judgments made by these adjunct political bodies.

238. *See, e.g.*, *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part) ("In any case, however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681-85 (1996) (calling for an independent judicial check on agency interpretations of their own regulations); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 371-74 (2012) (addressing *Auer*/*Seminole Rock*'s inadequacy).

239. Manning, *supra* note 238, at 629.

240. *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-68 (1980).

241. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991).

242. *See* Manning, *supra* note 238, at 630 ("[W]hen an agency interprets a regulation that it has promulgated (the usual situation), the Court has found the presumption of binding deference particularly justified because of the agency's superior competence to understand and explain its own regulatory text." (footnote omitted)).

agencies. This goes beyond the pragmatic considerations that assume a degree of primacy in these doctrines of administrative deference. Indeed, it is axiomatic that courts refrain from questioning these "initial policy determinations" that agencies in their adjudicative function necessarily reach.[243] By making these determinations non-justiciable, the political question doctrine likewise respects the non-judicial features of agency adjudications. In the specific context of reviewing agency adjudications, deferential doctrines like *Chevron* and *Auer* aim to preserve the Judiciary's role as guardian of process while minimizing, as much as possible, the allure of substituting one questionable policy judgment for another.

3. Spanning the Legal-Political Divide

Though admittedly far from perfect, these doctrinal structures—like those of ripeness and standing—underscore the non-justiciable nature of administrative claims on which the proper agency has not yet passed. By fulfilling the need for a non-judicial policy determination inherent in many agency adjudications, a completed agency action—properly cloaked in the Court's deferential analytical framework—sheds a case of the component that originally made it non-justiciable. Had a court taken it up in the first instance, the court would have necessarily ventured into the political realm delegated by Congress to the agency. The FTC would be less empowered to carry out its crucial policymaking mission to protect American consumers were it deprived of its initial adjudicative function. The same goes for the Social Security Administration. Parsing the individual situation of each benefit applicant allows the agency to shape policy by balancing its mission of providing financial protection to retirees, individuals with disabilities, and survivors with the political realities of limited revenue and high public expectations.

Once again, there is little daylight between these examples and Denise's situation. The officer who ultimately decides to fine Denise for taking the bypass lane must engage in a sophisticated calculation to which courts would be ill-suited. The officer must not only make the split-second assessment of whether Denise is indeed complying with or violating the law, but also consider the costs and benefits of enforcement in that situation. Enforcement could cause the officer to miss another, more effective means of implementing departmental policy against misuse of carpool lanes. Unlike a serial abuser who seizes every opportunity to take the bypass lane, Denise has a rather sympathetic story that leaves her less likely to become a repeat offender. These and other policy considerations are part of an officer's average workday. The inability to seize every possible opportunity to fulfill its

243. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

core mission forces law enforcers—from the local sheriff to the head of the Consumer Financial Protection Bureau—to make calculations that are cognizant of political realities from which courts should abstain until those determinations are at least initially settled.

Administrative injuries as an analytical framework recognizes this additional attribute of public rights that sovereign immunity and the right-privilege distinction fail to recognize. Namely, the interests inherent in policy judgments are, to borrow from Justice Thomas and Justice Scalia, held by the public more generally.[244] Only after those policy determinations have been made through the course of an individualized adjudication does the public nature of the right at issue sufficiently fade and get replaced with a private interest in procedural justice. In a word, the administrative injury *privatizes* the formerly public right.

In sum, standing, ripeness, and political questions comprise the essence of administrative injuries. First, these doctrines highlight both the normative and constitutional precarity of critiques which conflate agency adjudications with Article III judicial power. The absence of a concrete, articulable injury prior to the completion of an agency enforcement action would lay waste to the critical functions that the so-called administrative state has come to play in American life. Furthermore, judicial intervention prior to the manifestation of an administrative injury would threaten the legitimacy of courts' institutional role to "say what the law is."[245]

Second, these justiciability doctrines elucidate a common theoretical thread running through the Court's seemingly erratic jurisprudence on this issue. Though never explicitly referenced, the Court's deference to administrative schemes that have defied prior notions of sovereign immunity or the right-privilege dichotomy nevertheless appears to respect the notion that agency adjudications are more-or-less equivalent to commonly accepted notions of law enforcement. The agency, like the traffic officer, specializes in non-justiciable matters.

Third, through the lens of administrative injuries, these justiciability limits affirm the political reality of public rights that other explanations never fully acknowledged. What makes public rights "general"

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244. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1965 (2015) (Thomas, J., dissenting) ("[W]hile the legislative and executive branches may dispose of public rights at will—including through non-Article III adjudications—an exercise of the judicial power is required 'when the government want[s] to act authoritatively upon core private rights that had vested in a particular individual.' " (citations omitted)); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 68 (1989) (Scalia, J., concurring) ("It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States.").

245. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

is not their possession by everyone. For example, all people have a right to life—a seemingly private right subject to procedural due process protections.[246] Rather, the public nature of the right is in the broad public policy implications that each administrative action carries—no matter how mundane or seemingly individualized. The concept of administrative injuries does away with public and private rights as separate and distinct universes by revealing that they are really just points along the continuum of law and public policy upon which agencies merely serve as a catalyst.

D. Why Administrative Injuries Matter

As with all theoretical models, the lingering question is one of practical utility. Is the theory of administrative injuries a solution in search of a problem, or does it resolve—or at least begin to resolve—a point of friction in the law, and accordingly benefit the public to some degree? The recent uptick in public wariness toward administrative agencies suggests that it does.[247]

First, by comparing agency activities to the widely accepted practices of local law enforcement, administrative injuries demonstrate the important policy work that agencies perform in the American legal system. Like the traffic officer, agencies perform tasks for which neither courts nor legislators would prove an adequate substitute. While one would be justified to criticize agencies when they "promulgate mush,"[248] or similarly, to deplore the passage of vague statutes that leave agencies to perform lawmakers' primary duties, the proper response may well be a modest surgical fix, not the complete demolition of the administrative state.

Second, the theory of administrative injuries offers courts a more fulsome framework by which to analyze public rights matters. For too long, the Court has opted to refer to public rights as a self-evident and

246. *See* Smolla, *supra* note 151, at 72.

247. *See, e.g.*, PHILIP WALLACH, THE ADMINISTRATIVE STATE'S LEGITIMACY CRISIS (Center for Effective Public Management at Brookings, Apr. 2016), https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf [https://perma.cc/YY5H-5NQJ]; Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State"*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.b750f96edf78 [https://perma.cc/TMP9-K5KV]; Sean Moran, *20 Ways Trump Unraveled the Administrative State*, BREITBART (Apr. 11, 2017), http://www.breitbart.com/big-government/2017/04/11/20-ways-trump-unraveled-administrative-state/ [https://perma.cc/Q5RK-ZEQF]; Clyde Wayne Crews Jr., *Pulling the Administrative State Off Autopilot*, WASH. TIMES (May 2, 2017), http://www.washingtontimes.com/news/2017/may/2/reducing-regulations-will-help-business/ [https://perma.cc/V29W-9FLG].

248. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997), *abrogated by* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

self-defining concept that warrants little explanation. This doctrinal default has spawned varied and often conflicting understandings of public rights among the justices. The theory of administrative injuries speaks to those concerns expressed by the justices who have taken time to elaborate their public rights rationales while filling in the gaps left by existing explanations.

Third, the concept of administrative injuries carves out a useful backstop as both the Court and Congress set their sights on *Chevron*.[249] Even if doctrinal reform is the ultimate answer, it is important for judges, lawmakers, and the public alike to recognize *Chevron*'s political dimension. Doctrinal reform may prove useful, to be sure. But leaving courts to interpret the same statutes that agencies currently interpret and administer would cede an inordinate amount of policymaking power to the branch of government that lacks both the technical expertise and the political accountability of administrative agencies. Merely doing away with *Chevron* as some critics have suggested would shift that political accountability even further away from the elected officials ultimately responsible for creating and overseeing these agencies. Meanwhile, Article III's limits on the justiciability of political questions would likely prevent courts from venturing into the void left by *Chevron*'s sudden absence. The mushier the statute, the more politically rife (and less justiciable) the controversies it is likely to generate. Reformers would thus do well to exercise caution.

V. CONCLUSION

The theory of administrative injuries is hardly meant to resolve the public rights discussion. To the contrary, it aims to revitalize it. Though the notion that public rights do not require an Article III tribunal in the first instance is well-established, the Court's quest to define the contours of such rights has been slow-going (not to mention inconsistent) at best, and willfully obscurant at worst. This in turn has led to an uncertain constitutional footing for some of our nation's most vital institutions. This Article attempts to highlight a common theme in the Court's public rights jurisprudence by proposing a new lens

249. *See* Eric Citron, *The Roots and Limits of Gorsuch's Views on* Chevron *Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), http://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/ [https://perma.cc/8SV8-DBD3]; Connor Raso, *Congress May Tell Courts to Ignore Regulatory Agencies' Reasoning, But Will It Matter?*, BROOKINGS (Jan. 27, 2017), https://www.brookings.edu/research/congress-may-tell-courts-to-ignore-regulatory-agencies-reasoning-but-will-it-matter/ [https://perma.cc/UAP8-BTLN]; Steven Davidoff Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, N.Y. TIMES (Mar. 14, 2017), https://www.nytimes.com/2017/03/14/business/dealbook/neil-gorsuch-chevron-deference.html?_r=0 [https://perma.cc/8VW7-SEAP]; *see also* SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018) ("[W]hether *Chevron* should remain is a question we may leave for another day."); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1628 (2018) ("No party to these cases has asked us to reconsider *Chevron* deference. But even under *Chevron*'s terms, no deference is due." (citation omitted)).

though which we might assess the limits of administrative power. By revisiting longstanding and widely accepted functions of everyday law enforcement, this Article recasts administrative functions in a similar light. It begins by distinguishing simple adjudication from exercises of Article III judicial power; that is, while an exercise of judicial power involves adjudication, not all adjudications require an exercise of judicial power. Without going so far as to define the judicial power, the theory of administrative injuries proposes that the proper line between the two rests not with the composition of the parties to the original dispute or the judicial fiction of the right-privilege dichotomy, but with the formation of a justiciable injury.