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Public Rights, Private Privileges, and Article III

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PUBLIC RIGHTS, PRIVATE PRIVILEGES, AND ARTICLE III

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This Article addresses the constitutional justification for adjudication by executive agencies that rests on the presence of a public right. The public rights rationale originated in the nineteenth century and was for many decades the dominant explanation for the performance of adjudicative functions by executive agencies. The U.S. Supreme Court most recently relied on that rationale in Oil States Energy Services v. Greene's Energy Group *in 2018. In light of the Court's interest in the nineteenth century system, this Article explores that system in depth and seeks to identify the ways in which it authorizes and limits executive adjudication.*

The nineteenth century system focused on public rights, private rights, and private privileges. Courts protected the private rights they found in the primary law, including federal statutes that created such rights. Private privileges, unlike private rights, could be affected by the unilateral exercise of a proprietary right of the government—that is, by the exercise of a public right. The interest in receiving a payment from the Treasury was a classic example of a private privilege, provided Congress had not given the private recipient a judicially enforceable claim to it. When the Executive Branch administered the government's own legal interests according to the law, it often performed a function that resembled adjudication. That function was nevertheless an exercise of executive power because executive officials act for the government as proprietor and contracting party. Executive adjudication thus was permissible under the older system when Congress

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created the relation of public right and private privilege. Whether Congress may do so depends, like other questions concerning congressional power, on the scope of Congress's enumerated powers. This Article identifies the questions concerning congressional power that must be answered in order to decide when Congress may create the relations that underwrite executive adjudication under the older system and shows that the scope for that form of decision-making may be quite broad. One constitutional rule is notably absent from the list of constraints: the vesting of the judicial power in the courts by Article III. The constitutional function of the courts is to protect rights. Under the older system, whether a private person has a right with respect to any specific interest depends on the primary law, not Article III. The judicial power took public rights, private rights, and private privileges as it found them.

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I. INTRODUCTION

Each of the Constitution's first three articles begins by vesting one of the great powers of government in a distinct institution or officer.[1] Legislative, executive, and judicial powers are separated. A well-known constitutional difficulty arises because important components of the government seem to combine the three. Federal agencies whose heads are appointed and removable by the President often have statutory authority to issue regulations that have the force and effect of law and thereby perform a function resembling that of Congress.[2] Agencies are also often authorized to make decisions in specific disputes that will receive significant deference if they are challenged in court and thereby perform a function that resembles that of the courts.[3]

In recent years, controversy has arisen again about executive performance of legislative and adjudicative functions. Some of the Justices have expressed considerable concern about so-called non-Article III adjudication. Recent cases have brought to the forefront a rubric under which the U.S. Supreme Court has often addressed executive adjudication: the distinction between public and private rights. In *Oil States Energy Services, L.L.C. v. Greene's Energy Group, L.L.C.*,[4] the Court upheld a form of executive adjudication on the ground that the interests involved were public and not private rights.[5] The Court spoke through Justice Thomas, who has expressed serious skepticism about executive performance

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[1] U.S. CONST. art. I, § 1 (vesting all legislative power granted in Congress); U.S. CONST. art. II, § 1 (vesting executive power in a President of the United States); U.S. CONST. art. III, § 1 (vesting the judicial power of the United States in one supreme court and such inferior courts as Congress may establish).

[2] *See*, *e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (applying regulation implementing the Clean Air Act adopted by the Administrator of the Environmental Protection Agency).

[3] *See*, *e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (approving adjudication by agency subject only to limited judicial review).

[4] 138 S. Ct. 1365 (2018).

[5] *Oil States* involved "inter partes review" of a patent by the Patent and Trademark Office. Under that process, once a patent has been issued a non-patentee can petition the Patent and Trademark Office for review and possible cancellation of the patent. Petitions can lead to a proceeding before the Patent Trial and Appeal Board, an adjudicatory body within the Patent and Trademark Office composed of Administrative Law Judges. The petitioner and the patent owner participate in adjudicatory proceedings before the board. Its decisions are subject to review by the Federal Circuit, which decides legal issues de novo and affirms factual findings that are based on substantial evidence. *Id.* at 1371–72.

of adjudicatory functions and has discussed the public rights rationale in earlier opinions in which he did not speak for a majority.[6]

The principle that executive adjudication is permissible with respect to public rights is not a new one. In his separate opinions, Justice Thomas has relied on recent scholarship by Professor Caleb Nelson that explores in depth an older way of understanding both the distinction between public and private rights, and the legal principles governing executive decision making that used it.[7] That understanding, as Nelson shows, was standard in the nineteenth and earlier twentieth century and continues to influence the Court through both its older cases and its ongoing attention to the distinction between the two kinds of rights.

This Article further explores the older system that Nelson has recovered and that apparently has considerable appeal for many Justices today. The system's central principle was that executive officials could perform adjudicatory-type functions when they made decisions with respect to public rights. Such decisions affected private positions that were not rights but instead were privileges in the old juxtaposition between the two. This Article's central thesis is an explanation for that principle: when acting with respect to public rights and private privileges, executive officials were performing the characteristic executive function of exercising the government's own proprietary rights. Although executive decisions

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[6] Dissenting in *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1316 (2015), Justice Thomas wrote, "[b]ecause federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights. Under our Constitution, the 'judicial power' belongs to Article III courts and cannot be shared with the Legislature or the Executive." Later in that Term of the Court, he raised the same issue in *Wellness International Network, Ltd. v. Sharif*: "Our precedents reveal that the resolution of certain cases or controversies requires the exercise of [judicial] power, but that others 'may or may not' be brought 'within the cognizance of [Article III courts], as [Congress] deem[s] proper.'" 135 S. Ct. 1932, 1963 (2015) (Thomas, J., dissenting) (first alteration added) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856)). Justice Thomas went on to explain, "[d]isposition of private rights to life, liberty, and property falls within the core of the judicial power, whereas disposition of public rights does not." *Id.*

[7] Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007). In *B & B Hardware*, Justice Thomas, citing Nelson's article, wrote, "[a]nd some historical evidence suggests that the adjudication of core private rights is a function that can be performed only by Article III courts, at least absent the consent of the parties to adjudication in another forum." 135 S. Ct. at 1316 (Thomas, J., dissenting) (citing Nelson, *supra*, at 561–74). He also cited Nelson in *Wellness International*, 135 S. Ct. at 1964 n.2 (citing Nelson, *supra* note 7, at 575–76).

as to private privileges had effects similar to those produced by judicial proceedings, executive officials making such decisions were exercising executive, not judicial, power. Judicial involvement in those decisions was no more constitutionally required than is judicial involvement in the decision whether to enter into a government contract. Under the older system, the government's own proprietary interests gave it no control over private legal interests that were rights and not privileges, so with respect to those interests only courts could affect private parties through genuine adjudication.

From that account of the older system flow two conclusions that may be surprising. The first is that Congress's power to provide for executive adjudication under the older approach derives from, and is as broad as, its ability to create the relation of public right and private privilege. Congress may be able to do so in a wide range of situations, so the older system may not constrain executive adjudication as much as it may seem to. Whether Congress may do so depends on the considerations that usually determine the scope of congressional power: the internal limits of enumerated federal power and the external constraints imposed by affirmative limitations.

The second—and possibly surprising—conclusion is that the courts' exclusive possession of the judicial power was not a constraint under the older system of executive adjudication. That system did not rest on the principle that because courts possess the judicial power, they must decide finally with respect to some legally protected interests, whereas Congress may choose between executive and judicial adjudication as to other legally protected interests. Rather, the nineteenth century system assumed that judicial power has the same relationship to all legally protected interests. The important distinction was found in the executive power. Because executive officials administer public rights—that is, the proprietary interests of the government—they may affect private interests that qualify as privileges without exercising judicial power. The limits of executive adjudication were set by the limits of Congress's ability to establish the primary legal relation of public right and private privilege. The older system did not assume that the judicial power has a core defined by certain interests and a periphery defined by other interests that might or might not be brought within judicial cognizance. The judicial power operated

with respect to rights, and the question of whether an interest was protected by a right, or was instead a privilege, depended on the primary law.

Part II of this Article discusses the Court's recent encounters with adjudication by executive agencies, the appearance in the cases of the distinction between public and private rights, and the renewed interest in the older understanding of those concepts by some of the Justices today. It also distinguishes the specific problem of adjudicatory decisions by executive officials from other parts of the larger problem of so-called non-Article III tribunals, a category that includes the courts of the federal territories and the District of Columbia.

Part III addresses the older system of executive adjudication that turned on the difference between private rights and private privileges. It describes that system and then provides an explanation of it that results from the interaction of the distinction between private rights and privileges on one side, and between executive and judicial power on the other. A private privilege was a private interest that could be affected by an operation of the proprietary-type rights of the government. Because the actual exercise of the government's proprietary rights is in the hands of executive officials, executive power may exercise public rights and affect private privileges. Because courts enforce rights but do not protect privileges, which by definition are interests that may be affected by someone else without the consent of the party whose only claim is a privilege, courts have no role with respect to privileges. Under the older system, Congress could give the courts any role it chose regarding public benefits by creating rights against the government that run to private people, but it had complete discretion in doing so.

In light of the rationale for the older system of executive adjudication, Part IV shows how it can give rise to that form of adjudication in a range of situations, including, as in *Oil States*, situations that involve disputes between private parties. Part V then identifies categories of constitutional constraint on Congress's ability to provide for executive adjudication using the rationale that rests on public rights and private privileges. As is generally true with respect to powers of Congress, those constraints are found in both the internal limits on enumerated power and the external limits imposed by affirmative restrictions. Article III's allocation of

the judicial power exclusively to the courts, I argue, is not a constraint in this connection.

Part VI notes the possibility that a return to the older system, in which executive adjudication depended on relations of public right and private privilege, might not constrain administrative government as much as some of its advocates may think. I argue that the limited constraining effect of structural norms often results from their trans-substantive character, which is one of their basic features.

II. THE COURT'S ARTICLE III CASES AND RENEWED INTEREST IN PRIVATE RIGHTS

A. PUBLIC AND PRIVATE RIGHTS IN RECENT ARTICLE III CASES

For many decades the U.S. Supreme Court has grappled with the constitutional issues that arise when a federal institution other than an Article III court makes a decision based on the application of law to fact, where that institution's conclusion will not be subject to de novo consideration in an Article III tribunal.[8] The Court under Chief Justice Marshall discussed the status of the courts of the federal territories, which functioned much like state courts but many of which did not have life-tenured judges.[9] The problem of adjudication outside the Article III courts continued to come before the Court.[10]

In 1982, in *Northern Pipeline Co. v. Marathon Pipe Line Co.*,[11] the Court considered the constitutionality of the bankruptcy courts that Congress had established in the Bankruptcy Reform Act of 1978. The judges of those courts did not serve for life, and the courts were authorized to decide a wide range of issues subject to only limited review by Article III courts.[12] *Northern Pipeline* involved a

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[8] By an Article III court or tribunal, I mean a case-deciding institution staffed exclusively by life-tenured judges appointed pursuant to Article III of the Constitution that uses juries when required to do so.

[9] Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 512 (1828) (noting authority of Florida territorial court).

[10] *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 85–86 (1932) (discussing adjudication before the U.S. Employment Commission).

[11] 458 U.S. 50 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in Wellness International*, 135 S. Ct. at 1939.

[12] *Id.* at 53–55.

claim under state law, not a question of federal bankruptcy law. Northern Pipeline had filed for bankruptcy reorganization and, as allowed by the Bankruptcy Act, brought a proceeding in the bankruptcy court against Marathon Pipe Line, seeking damages for breach of contract, warranty, misrepresentation, coercion, and duress.[13] The Court concluded that Article III barred that jurisdiction but produced no opinion for the majority.

Speaking for four of the Justices in the majority, Justice Brennan sought to find the pattern in the Court's precedents. The United States, as amicus curiae in support of the Act's constitutionality, had argued that under the Court's cases, "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends."[14] According to the Solicitor General, that power included specialized areas such as bankruptcy law.[15] Justice Brennan responded that "when properly understood, these precedents [relied on by the Solicitor General] represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts."[16] Instead, "they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the [assertion of congressional power] was consistent with, rather than threatening to, the constitutional mandate of separation of powers."[17] Two of those narrow, exceptional situations involved territorial courts and courts-martial.[18] The third, and the subject of current controversy and this Article, were cases "in which [the] Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving 'public rights.'"[19]

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[13] *Id.* at 56. As Justice Brennan pointed out, Marathon Pipe Line asserted state-created private rights. *Id.* at 71.

[14] *Id.* at 62 (quoting Brief for the United States at 9, *N. Pipeline*, 458 U.S. 50 (Nos. 81-150, 81-546), 1982 WL 607231, at *9).

[15] *Id.*

[16] *Id.* at 63–64.

[17] *Id.* at 64.

[18] *Id.* at 64–66.

[19] *Id.* at 67.

The historical practice underlying the Court's concept of public rights adjudication was the subject of a major study published by Professor Caleb Nelson in 2007.[20] As he explained, under nineteenth and early twentieth century doctrine, executive officials could make decisions based on the application of law to fact that would be subject to limited or no review in Article III courts when the legal interests at stake fell into certain categories.[21] As recounted in more detail below, Nelson found that executive adjudication was permissible with respect to public benefits and so-called public franchises, like corporate charters, but not with respect to what he calls "core private rights."[22] Ordinary private interests based on property and contract were leading examples of core private rights.

The Court recently has again noted the distinction between public and private rights in discussing its cases that rely on the presence of the former. Writing for the Court in *Stern v. Marshall*,[23] Chief Justice Roberts wrote that its decisions have "contrasted cases within the reach of the public rights exception" with those involving matters of private right.[24] In *Oil States*, the Court, through Justice Thomas, explained that "[w]hen determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between 'public rights' and 'private rights.'"[25] He found that the *inter partes* review of patents at issue in that case "falls squarely within the public-rights doctrine."[26] Justice Breyer concurred, adding that in his view the Constitution makes the presence of a public right a sufficient but not necessary condition for agency adjudication that is subject to only limited judicial review.[27] Justice Gorsuch dissented: he rejected the

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[20] Nelson, *supra* note 7.

[21] *Id.* at 563–64 (highlighting that the U.S. Supreme Court recognized "precedents allowing legislatures or their delegates in the executive branch to adjudicate 'public rights'").

[22] *Id.* at 566–68 (discussing the development of the distinction between public and private rights in nineteenth century practice based on how American lawyers viewed different legal interests).

[23] 564 U.S. 462 (2011).

[24] *Id.* at 489.

[25] Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C., 138 S. Ct. 1365, 1373 (2018) (citing Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 32 (2014)).

[26] *Id.*

[27] *Id.* at 1379 (Breyer, J., concurring) ("The conclusion that inter partes review is a matter involving public rights is sufficient to show that it violates neither Article III nor the Seventh Amendment. But the Court's opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies.").

argument that patents are "a species of public franchises" and therefore subject to cancellation by the executive.[28] Public franchises are one of the categories of public as opposed to private rights that Professor Nelson finds in nineteenth century practice.[29]

B. AGENCY ADJUDICATION AND THE BROADER ARTICLE III PROBLEM

This Article concerns a problem often referred to as non-Article III adjudication. This problem arises in many contexts, and the U.S. Supreme Court's cases have generated a welter of concepts and terminology. The specific piece of that problem examined here is what is sometimes called agency adjudication involving public rights.

This Article is not about institutions and officers like bankruptcy courts. Bankruptcy judges are examples of decision makers who may usefully be said to be within the judicial branch but who are neither life-tenured judges nor juries. Bankruptcy courts are denominated by statute as units of the federal district courts.[30] Their judges are appointed by the courts of appeals[31] and may be removed by the Circuit Councils of their circuits.[32] Their decisions are reviewed by courts staffed by life-tenured judges.[33] Bankruptcy judges are subordinate officers within the court system. Constitutional questions concerning their permissible authority thus are like those concerning the functions that may be assigned to the clerks of the federal courts, or the relations between judges and juries.

This Article is also not about the courts of the territories or the District of Columbia. The territories and the District have general-purpose governments that function almost identically to those of the states, and those governments have courts as the states do.[34] A recurring question about the constitutional system is

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[28] *Id.* at 1385 (Gorsuch, J., dissenting).

[29] *See* Nelson, *supra* note 7, at 567 (explaining how public franchises were seen as public rights by Anglo-American lawyers in nineteenth century practice).

[30] 28 U.S.C. § 151 (2012) (describing how bankruptcy courts are designated).

[31] *Id.* § 152(a) (detailing appointment).

[32] *Id.* § 152(e) (describing removal).

[33] *Id.* § 158 (providing that district court judges may hear appeals from bankruptcy courts).

[34] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–65 (1982) (discussing earlier opinions approving non-Article III courts in federal territories and the District), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984,

whether and how the three-way division of federal power created by Articles I, II, and III operates in the territories and the District.[35] Territorial and D.C. courts are part of that larger problem. The judges of the D.C. Court of Appeals do not serve with life tenure and that is a constitutional problem.[36] The Mayor of the District is not appointed pursuant to the Appointments Clause.[37] The D.C. City Council is not Congress.[38] Those are constitutional problems too—and of the same kind. They are about federal power generally, not about Article III specifically.

Nor will I address the constitutional status of courts martial and military commissions. That courts martial are consistent with the Constitution is clear; the Fifth Amendment refers to cases in the land and naval forces, thereby alluding to the courts martial that try them.[39] Why the Constitution allows them is another question—one I will not try to resolve. Military commissions are less clearly contemplated by the Constitution, though the U.S. Supreme Court has accepted them in certain circumstances.[40] I will not explore whether those decisions are correct.

This Article does not address the entire problem of non-Article III adjudication, but it does have an important implication for one standard way of formulating that problem as a whole. The rationale for executive adjudication with respect to public rights and private privileges does not much resemble the rationale for the courts of the territories and the District. In the older system of executive adjudication, executive officials performed a function resembling

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Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

[35] *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 856–58 (1990) (examining the three-way division of federal power in the context of territorial governance and highlighting the recurrence of constitutional questions brought forth in territories).

[36] *See* Palmore v. United States, 411 U.S. 389, 410 (1973) (holding that D.C. courts may impose criminal punishment although not staffed by life-tenured judges).

[37] *See* Act of Dec. 24, 1973, Pub. L. No. 93-198, 87 Stat. 774, § 421 (providing for the election of the D.C. Mayor).

[38] *See id.* § 401 (providing for the election of the D.C. City Council).

[39] U.S. CONST. amend. V (providing that a grand jury is not required "in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"). The leading early case finding courts martial constitutional is *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

[40] *See*, *e.g.*, *Ex parte* Quirin, 317 U.S. 1, 2 (1942) (holding that military commission sitting in the United States may impose sentence of death on members of the enemy military convicted of spying).

that of the courts but did so by exercising public rights. Courts do not exercise public rights: they do not act on behalf of the government as owner, for example, by dispensing the government's funds as an owner would. When courts give judgment against the government requiring a money payment, they act as they would with respect to a private party. An agency decision concerning public rights is not federal adjudication outside of the Article III courts the way a decision by the D.C. superior court is.[41]

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[41] As explained in more depth below, when courts accept an executive exercise of a public right, they do not thereby defer to executive fact-finding or law-identification the way an appellate court defers to a lower court's findings of fact. The justification for executive adjudication that I will explore is not based on the claim that executive officers can be final as to law or fact the way one court can be final relative to a later court. There are at least two rationales in support of limited judicial review of executive decisions that can reasonably be characterized as deference by the courts. One involves rules of evidence. Congress might enact, or a court might adopt, a principle that courts should use an evidentiary presumption that agency decision makers were correct in their findings of fact. Whether such evidentiary principles are consistent with the courts' constitutional role, I will not address. Second, genuine non-judicial finality as to fact and law is found in the U.S. Supreme Court's political question doctrine. As that doctrine reflects, sometimes the U.S. Constitution confers on some non-judicial actor the authority conclusively to apply law to fact. The leading examples are the Senate's role as judge of impeachments and each House of Congress's role as judge of the elections of its own members. *See* Nixon v. United States, 506 U.S. 224, 226 (1993) (holding that the Senate's decision in an impeachment trial is binding on the courts); Roudebush v. Hartke, 405 U.S. 15, 19 (1972) (explaining that the Senate's decision regarding a contested election is "unconditional and final"). Those grants of adjudicatory power are readily seen as limited exceptions to the exclusive vesting of judicial power in the Article III courts. In other situations, the U.S. Supreme Court has found that a political decision maker's application of law to fact is entitled to absolute deference by the judiciary. Recognition of states and their governments is the leading example. *See, e.g.*, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 147 (1912) (noting that Congress's conclusion that a state's government is republican and lawful is absolutely binding on the courts). That aspect of the political question doctrine can be justified as a resolution of a difficulty that arises when law and political judgment, the usual grounds of decision of the courts and the political branches, are inextricably intertwined. When the President decides whether some foreign entity is a state, for example, he applies law to fact and at the same time makes policy judgments; political questions are political, not in the sense of being partisan, but in the sense of resting on normative principles about public authority. Law and politics are both involved and are inseparable in recognition decisions, and if the President encroaches on the judicial power in making such a decision, the courts would encroach on the executive power in doing so. Often a reasonable solution to that problem is to recognize that the two kinds of judgments (legal and political) are inseparable and that keeping the courts from making the political judgment is very important. Under those circumstances, a principle of absolute deference by the courts when the issue comes before them is called for. That principle may derive from the U.S. Constitution itself or from non-constitutional law. *See* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 505–09 (2017) (reasoning that inability to separate legal and political judgments supports parts of the political question doctrine).

III. EXECUTIVE ADJUDICATION AS AN EXERCISE OF EXECUTIVE POWER

This Part provides an explanation of the nineteenth century system of executive adjudication that Professor Nelson has recovered and that recently has drawn interest from several Justices. I first describe that system in Section A. Then, in Section B, I derive the system from the interaction between different kinds of interests and the different powers of government. The kinds of interests are public rights, private privileges, and private rights. The powers of government are executive and judicial. As I will explain, executive adjudication was constitutionally permissible because the exercise of public rights to affect private privileges was within the executive and not the judicial power, just as making a contract on behalf of the government is an executive and not a judicial act. Public rights are the proprietary rights of the government. Private privileges are private interests that are not themselves rights and that are liable to be affected by an exercise of a public right; the interest in a gratuitous payment from the Treasury is a classic example of a private privilege. Finally, Section C discusses the ways in which Congress can provide for executive adjudication by creating the relation of public right and private privilege between the government and private people.

A. EXECUTIVE ADJUDICATION IN THE NINETEENTH CENTURY SYSTEM

The older system of executive adjudication rested on a few basic principles. Before seeking their legal foundations, I will briefly describe them.

The first principle is that Congress had very broad discretion in deciding whether to grant certain benefits to private people. It could decide whether to grant veterans' pensions that were not required by contract, and it could decide whether to award franchises, such as permission to operate a bridge over a navigable river.[42] If

[42] As Nelson explains, "[c]ourts certainly did not have to be involved for legislatures to authorize the expenditure of money from the public treasury or the disposition of other forms of public property administered by the government." Nelson, *supra* note 7, at 570. The same was true with respect to franchises and permissions to engage in some activity: "If the appropriate legislative body so desired, it could authoritatively permit private companies to construct bridges or dams that would hinder or even completely defeat navigation along particular rivers." *Id.*

Congress decided not to grant a benefit, any disappointed seeker thereof had no judicial recourse against that decision.[43]

Next, rather than granting benefits directly by statute, Congress could adopt general rules according to which executive officials would dispense them. Those rules could give the implementing officials substantial discretion or none at all.[44] When executive discretion was substantially limited, implementing officials performed a function that was quite similar to that of courts and that reasonably could be called executive adjudication. In those circumstances, the executive applied general rules to particular factual situations and acted as the rule required in that situation.[45] Like a court, an official often would implement a legal conclusion with an act that changed the legal position of a private person—for example, by transferring public lands to a new, private owner.[46]

When Congress set out rules by which executive officials were to dispense benefits, it could decide on the extent of judicial involvement.[47] It might leave private beneficiaries of the law with no judicial recourse at all; it also might provide for what today would

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[43] *Id.* at 569–70 (noting that only courts could affect private rights but Congress by itself could decide on the disposition of public rights such as Treasury funds).

[44] In 1794, for example, Congress directed the Secretary of War to place on the invalid pension list those persons he found clearly within the provisions of an earlier act regarding pensions. Act of June 7, 1794, ch. 52, 1 Stat. 392, 392–93. That Act called for the application of law to fact with no policy discretion. *Id.* A few years earlier, Congress authorized the President to set the compensation of excise officials at amounts he deemed "reasonable and proper," provided his decisions were within a specified range. Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 199, 213 (authorizing the President, up to stated limits, "to make such allowances to the said supervisors, inspectors, and to the deputies and officers by them to be appointed and employed for their respective services in the execution of this act, to be paid out of the product of the said duties, as he shall deem reasonable and proper").

[45] Courts in the nineteenth century understood that executive officials dispensing private privileges could be exercising an adjudicative function by applying law to fact although they did not exercise the Article III judicial power. *See*, *e.g.*, Smelting Co. v. Kemp, 104 U.S. 636, 640–41 (1881) (noting that land office exercises a "judicial function" and is part of the administrative and Executive Branch of the government).

[46] *See* Nelson, *supra* note 7, at 577–78 (describing conclusive application of statutory rules to particular private claims by federal land office officials). As Nelson stresses, Congress's discretion concerning benefits did not carry over to executive officials who had to carry out the law: "Even where core private rights were not at stake, of course, executive officials had to respect statutory privileges that had been granted to private individuals *and that Congress had not authorized the officials to abrogate*." *Id.* at 581 (emphasis added).

[47] *See id.* at 613 ("Congress can authorize the political branches to take actions that bind the public without any judicial involvement at all.").

be called deferential judicial review.[48] For example, it could give private beneficiaries access to the writ of mandamus.[49] On mandamus, a court could compel the performance of a non-discretionary official duty in favor of a private person. It could order, for example, that a copy of a commission be delivered as required by statute.[50] Mandamus could not be used to direct the performance of a discretionary duty, however.[51] As a result, if the only private recourse was through mandamus, exercises of discretion by the executive would be final. Discretion included not only policy judgments, but also the application of law to fact in contestable situations.[52] Congress could also provide that the courts would correct all executive errors and give relief to private beneficiaries with no deference to the prior executive determination.[53]

Perhaps the most important feature of the older system was a distinction between different kinds of interests. Congress could not

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[48] *See id.* at 572 ("The political branches controlled purely public rights, and they could also retain unilateral authority over privileges that they allowed individuals to exercise as public trusts.").

[49] *See id.* at 584 ("Congress could itself adjudicate the eligibility of individual beneficiaries, and it could also commit eligibility determinations to nonjudicial tribunals.").

[50] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803) (noting that withholding such a commission was "violative of a vested legal right").

[51] A leading nineteenth century example is *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840). Congress had directed the Secretary of the Navy to pay pensions to the widows of naval officers under specified circumstances and had also provided a pension specifically for Susan Decatur, the widow of Commodore Stephen Decatur. *Id.* at 513–14. Susan Decatur sought a writ of mandamus that would direct the Secretary to pay both pensions. *Id.* at 514. The Attorney General advised the Secretary that, under the statutes, Mrs. Decatur could elect either the specific or general pension, not both. *Id.* The Court concluded that the official act involved was discretionary and not ministerial because judgment concerning the meaning of the statutes involved discretion, so mandamus was not available. *Id.* at 515–16. The Court stressed that the limits on mandamus did not mean that the Secretary's decision would be binding on the courts in a proceeding where they were under no such limitation. *Id.* at 515. The limits on judicial review of an executive decision concerning disposition of public funds thus turned on the limits of the judicially enforceable private rights that Congress had created, not on the conclusion that executive officials exercised adjudicatory powers to which courts should defer as they would to other courts.

[52] *Id.* at 515–16.

[53] A classic counterpoint to *Decatur v. Paulding* is *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524 (1838). In *Kendall*, the Court concluded that Congress had imposed on the executive a ministerial duty to make a credit to the account of specified postal contractors, and that the contractors were entitled to mandamus to the Postmaster General in a jurisdiction where mandamus was available. *Id.* at 613–14. Because mandamus was available to enforce only non-discretionary ministerial duties, mandamus cases called on the courts to decide whether the legislature had granted the executive discretion or had imposed unconditional duties enforceable by the courts.

provide for executive adjudication with respect to what Nelson calls "'core' private rights."[54] Defined with reference to Lockean political theory, core private rights were legal rights patterned on rights that people had in the state of nature and that did not depend on government.[55] Ordinary private rights of personal security and liberty of movement, and of property, were leading examples.[56] As Nelson points out, not all legal relations between private people were core private rights.[57] Some inter-private relations were based on so-called franchises, such as the right to operate a bridge. Franchises were given to private people and good against other private people if a monopoly had been granted, but they were given in the public interest and were not simply private rights.[58]

B. PUBLIC RIGHTS, PRIVATE PRIVILEGES, AND EXECUTIVE POWER

This Section derives the basic principles of the nineteenth century system from the interaction of the differences between rights and privileges and between executive and judicial power.

1. Private Rights, Public Rights, and Private Privileges.

Public rights as understood in the nineteenth century system were ownership-type interests of the government or the public at large which were administered by the government.[59] Like any owner, the government can take some steps that affect the legal position of another but do not violate that other person's rights or require the other's consent.[60] For example, property owners may freely decide whether to make a gift of their property. The decision not to make the gift inflicts no legally cognizable harm, but it does make the other person worse off compared to the decision to make the gift. Ownership rights thus are related to the interests of others

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[54] Nelson, *supra* note 7, at 567.

[55] *Id.* ("Inspired by Lockean political theory, [Anglo-American lawyers] distinguished what . . . [Nelson] call[s] 'core' private rights (which Lockean tradition associated with the natural rights that individuals would enjoy even in the absence of political society) from mere 'privileges' or 'franchises' (which public authorities had created purely for reasons of public policy and which had no counterpart in the Lockean state of nature)." (footnote omitted)).

[56] *Id.* (discussing Blackstone's account of core private rights).

[57] *Id.*

[58] *Id.* at 567–68.

[59] *See id.* at 570 (describing treasury funds and government-owned real estate as examples of public rights).

[60] *See id.* at 570–71 (discussing how the political branches could act to revoke public rights and privileges).

that are not themselves legally protected.[61] In the older terminology, those interests were called privileges.[62] Public rights correlated with private privileges.[63]

As Nelson explains, the concept of public versus private rights in the nineteenth century reflected the distinction between "legal interests that were vested in discrete individuals" and "legal interests that belonged to the public as a whole."[64] Classic nineteenth century public rights cases demonstrate how the rights of the public related to private people's interests that were not themselves rights.[65]

At the head of the list of public rights cases is a profoundly influential nineteenth century decision about executive adjudication and Article III that referred to public rights: *Murray's Lessee v. Hoboken Land & Improvement Co*.[66] In a frequently quoted passage, Justice Curtis, writing for the Court, says:

> [W]e 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

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[61] *See id.* (describing rights that are not legally protected).

[62] *See id.* at 571 (explaining that privileges were private interests that were gratuitously granted by the legislature and could be recalled because they were not vested rights).

[63] *See id.* at 572 ("The political branches controlled purely public rights, and they could also retain unilateral authority over privileges that they allowed individuals to exercise as public trusts.").

[64] *Id.* at 566 (explaining the distinction between public and private rights).

[65] *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283–84 (1855) (discussing public rights, the separation of powers, and how the government compares to private persons); Pennsylvania v. Wheeling & Belmont Bridge Co. (Wheeling Bridge II), 59 U.S. (18 How.) 421, 431 (1855) (discussing private rights and the obstruction of public rights).

[66] 59 U.S. at 284 (discussing public rights and the separation of powers). Justice Brennan in *Northern Pipeline* began his discussion of public rights cases with *Murray's Lessee*. 458 U.S. 50, 63 (1982) (discussing how past cases still support judicial power being vested in the courts), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

> may not bring within the cognizance of the courts of the United States, as it may deem proper.[67]

Justice Curtis's opinion is an important source of the principle that public rights are connected to the separation of powers and that Congress has discretion in that connection with respect to the roles of the executive and the judiciary.[68]

The public right involved in *Murray's Lessee* was a proprietary interest of the government: its claim as creditor against a government employee who had collected large amounts on the government's behalf and had not remitted the money to the Treasury.[69] After auditing the accounts of Samuel Swartwout, Collector of the Port of New York, in 1838, the Treasury Department concluded that Swartwout owed the United States more than $1,000,000 in tariff payments that he had received and not passed on.[70] The Solicitor of the Treasury used the statutory debt collection tool of a distress warrant to seize and sell assets of Swartwout, including the real estate at issue in *Murray's Lessee*.[71] Under the statute, the distress warrant was the kind of collection process that did not require judicial involvement.[72] The question before the Court was whether the non-judicial collection procedure used by the Solicitor to collect the government's debt had legal effects in the absence of any judicial proceeding.[73] If the distress warrant was effective, the party in *Murray's Lessee* claiming title through the Marshal's sale would prevail.[74] If the distress warrant was ineffective, on the other hand, another creditor of Swartwout, who sought recovery against the same real estate but acted after the distress warrant had been issued, would have superior title.[75]

The Court concluded that the distress warrant had effect even though it was not and could not be an exercise of judicial power,

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[67] 59 U.S. at 284 (emphasis added).

[68] *Id.*

[69] *Id.* at 275 (explaining that the solicitor of the treasury issued a warrant for a balance of over $1,000,000).

[70] *Id.* (stating the exact amount to be $1,374,119.65).

[71] *Id.* at 274–75 (issuing the distress warrant under an act of Congress).

[72] The distress warrant created a lien on Swartwout's real estate, giving rise to a Marshal's sale that purported to vest title to one of the claimants to the property at stake in *Murray's Lessee*. *Id.* at 272.

[73] *Id.* at 275–76.

[74] *Id.* at 274.

[75] *Id.* (describing competing claims to the real estate formerly held by Swartwout).

having been issued by an executive officer.[76] Justice Curtis agreed that an action in court against a debtor like Swartwout was one of Congress's options in providing for collection of debts owed the government.[77] The real question was whether it was the only option.[78] It was not, he concluded, pointing to other modes by which one private person can collect a debt owed by another.[79] "The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extra-judicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit."[80] Having explained that the United States was exercising a legal power conferred on it as a creditor, Justice Curtis went on to make his famous statement that while Congress could not "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" or "bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."[81] There were also "matters, involving public rights" which might be susceptible of judicial determination, but might or might not be brought before the "cognizance of the courts" by Congress.[82] Public rights were the ownership interests of the

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[76] *Id.* at 275 (explaining that the distress warrant would have been void had it been "an exercise of the judicial power of the United States").

[77] *See id.* at 276 ("That the warrant now in question is legal process, is not denied.").

[78] To show that the distress warrant could not be effective without judicial involvement,

> [i]t is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party within the meaning of the second section of the third article of the Constitution.

Id. at 280–81.

[79] *Id.* at 283 ("Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both. An instance of extra-judicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents.").

[80] *Id.* at 284. Justice Curtis made clear that the government's position as creditor was similar to that of a private person. *Id.* at 283–84. The government has sovereign immunity and may limit a private party's redress after it has used a summary collection process. *Id.*

[81] *Id.* at 284.

[82] *Id.*

government.[83] Those included its rights as creditor and as owner of the public lands.[84]

Justice Curtis's comparison of debt collection with grants of public lands is especially instructive with respect to the private interests that may be affected by the exercise of public rights.[85] Both of the private interests involved in those situations are privileges in the conceptual scheme underlying the nineteenth century system of executive adjudication. In both contexts, the government in its proprietary capacity may take an action that affects the interest of a private person but does not violate the private person's legal rights. As to land grants, the private interest is in receiving a benefit, which the government could confer or not. In *Murray's Lessee*, the government as creditor could decide whether to take action adverse to Swartwout's interest but not violative of his rights. His interest in forbearance by the government from using its non-judicial remedy was like the interest in receiving a grant: both could be affected by a government act that was consistent with the private person's rights but not necessarily in the private person's interests.

Another case from the 1850s shows the wide range of ownership interests that qualified as public rights and illustrates the connection between public rights and private interests that are not rights.[86] That case was the second of two U.S. Supreme Court decisions involving the contest between Pennsylvania and the Wheeling Bridge Company.[87] The bridge company had constructed a bridge over the Ohio River at Wheeling (then in Virginia).[88] The bridge obstructed steamboat traffic on the Ohio, interfering with voyages to and from Pittsburgh.[89] Pennsylvania sued the bridge company in the Court's original jurisdiction, arguing that the bridge

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[83] *Id.*

[84] *Id.* ("Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus, it has been repeatedly decided in this class of cases that, upon their trial, the acts of executive officers, done under the authority of Congress, were conclusive either upon particular facts involved in the inquiry or upon the whole title.").

[85] *Id.* at 276–78.

[86] *See generally Wheeling Bridge II*, 59 U.S. (18 How.) 421 (1855).

[87] *Id.*

[88] *Id.* at 430.

[89] *Id.* at 429.

was an obstruction of interstate commerce and therefore a nuisance.[90] Pennsylvania asserted not a sovereign interest but the interest a private person might have: the Commonwealth had made substantial investments in docks and other facilities at Pittsburgh, and reduced river traffic decreased the value of those investments.[91] The Court agreed with Pennsylvania and issued an injunction requiring that the bridge be raised or removed.[92]

In response to that decision, Congress adopted a statutory provision authorizing the bridge and declaring it a post road.[93] When Pennsylvania sought enforcement of the injunction in the U.S. Supreme Court, the bridge company replied that the injunction should be lifted because the bridge was no longer a nuisance under the law.[94] In *Wheeling Bridge II*, a decision that remains important for the relations between legislative and judicial power, the Court said that Congress could change the applicable substantive law with its power to regulate commerce, and so could make a nuisance into a non-nuisance.[95] When the substantive law changed, the injunction that enforced it should adapt, lest lawful conduct be restrained.

The Court then addressed the objection that the statute was void because it would annul a private right created by the injunction.[96] Judgments could create such rights, the Court agreed, and legislation could not affect them.[97] The Wheeling Bridge cases were different. The bridge's "interference with the free navigation of the river constitute[d] an obstruction of a public right secured by acts of Congress."[98] Private parties specially affected by the obstruction

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[90] Pennsylvania v. Wheeling & Belmont Bridge Co. (Wheeling Bridge I), 54 U.S. (13 How.) 518, 557 (1851).

[91] *See id.* at 560 ("When a State enters into a copartnership, or becomes a stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders, or partners. And so in the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual.").

[92] *Id.* at 626–27 ("[T]he complaint has a just and legal right to have the navigation of said river made free.").

[93] *Wheeling Bridge II*, 59 U.S. (18 How.) at 429.

[94] *Id.*

[95] *See id.* at 431 (finding the power to regulate commerce among the states brings with it "the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation").

[96] *Id.*

[97] *Id.* ("[Congress cannot annul] adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of courts to enforce it.").

[98] *Id.*

could maintain lawsuits, but the private right to sue "arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under the regulation of Congress."[99] A private damages judgment would create a private right, but the injunction the Court had granted depended on violation of the public right, and because of the new legislation there was no interference with that right.[100]

Wheeling Bridge II illuminates several aspects of nineteenth century thinking about public rights. First, it shows that public rights included interests short of full title, like the public right of navigation, a servitude.[101] Second, Congress was able to act on behalf of the public through its power to regulate interstate commerce.[102] Congress could decide which interferences with navigation were permissible and which were impermissible.[103] By regulating conduct, Congress could exercise an owner's power to give or withhold permission to take action that would be inconsistent with the owner's interest. When Congress gave permission to the bridge company, it restricted another permission—the public's liberty to navigate.[104] Just like an owner, Congress could restrict its own—that is, the public's—freedom of action by granting freedom of action to someone else.[105] Control of interstate commerce, a form of conduct, thus enabled Congress to act on behalf of the public as an owner. Third, private parties (which for these purposes included the State of Pennsylvania) participated in the public's right on terms set by Congress, which controlled that right.[106] That participation was subject to change by Congress, and prospective changes did not divest any private right.[107]

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[99] *Id.*

[100] *See id.* at 431–32 (holding that "[t]he decree before us . . . stands upon the same principles[] and is unaffected by the subsequent law").

[101] *See* Nelson, *supra* note 7, at 566 (discussing servitudes as public rights).

[102] *Id.* at 596.

[103] *Id.*

[104] *See id.* at 570 (citing Lansing v. Smith, 4 Wend. 9, 21–22 (N.Y. 1829)) (explaining Congress's power to regulate navigation rights at the expense of individual use of public waters).

[105] *See id.* ("If the appropriate legislative body so desired, it could authoritatively permit private companies to construct bridges or dams that would hinder or even completely defeat navigation along particular rivers.").

[106] *See Wheeling Bridge II*, 59 U.S. (18 How.) 421, 431–32 (1855) (explaining that Congress had authority to regulate the public right of navigation and private parties must adhere to Congress's determination).

[107] *Id.* at 432.

As *Wheeling Bridge II* shows, public rights could be used to confer benefits, which were not rights, on private people. Navigation was a benefit for private people under the legal control of someone else.[108] It could be affected by Congress in the exercise of its control over the public right of navigation.[109] *Wheeling Bridge II*, like *Murray's Lessee*, shows how the exercise of public rights affects private people.[110]

Another important example of a public right, which Nelson discusses, is public land.[111] Congress could grant public lands by statute.[112] It could also set up a system by which such grants were to be made by executive officials.[113] If Congress created a system to distribute public lands, it could change that system with respect to lands that had not been distributed.[114] Once a particular parcel was granted to a private person, ownership of it was a private right, protected from divestment.[115]

Like participation in the public right of navigation, other benefits consisting of bundles of legal interests with respect to ongoing activities were subject to cancellation. Tax exemptions for a business, if they had not become vested rights through contract, could be withdrawn.[116] So could permissions to operate a business combined with a monopoly, again provided that no contractual right had been created.[117]

The older practice thus identified a category of private interests that the government could affect in its discretion. That discretion meant that those interests, though often quite important, were not rights in the sense of a public or private right—they were not

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[108] *See* Nelson, *supra* note 7, at 570 (noting Congress's ability to grant private parties the right to affect navigation).

[109] *Id.*

[110] *See generally Wheeling Bridge II*, 59 U.S. (18 How.) 421 (holding an act of Congress which allowed reconstruction of a bridge over public waters was not an unlawful obstruction of the public right of navigation).

[111] *See* Nelson, *supra* note 7, at 566 (identifying title to public land as a "public right[] belonging to the people at large").

[112] *Id.* at 577.

[113] *Id.*

[114] *Id.* at 571 ("[I]t cannot be denied that the Legislature possess the power to take away by statute what was given by statute, except vested rights." (quoting People *ex rel.* Fleming v. Livingston, 6 Wend. 526, 531 (N.Y. Sup. Ct. 1831))).

[115] *Id.* at 578.

[116] *Id.* at 571.

[117] *See id.* (explaining the right of legislatures to bestow privileges on private individuals and retract such privileges before contractual or property rights have vested).

themselves legally protected.[118] Those interests were affected by the exercise of public rights, which were ownership interests, but of the public.[119] As a creditor of Swartwout, the government could decide whether to use its right of extrajudicial debt collection.[120] Having created the public right of navigation through its regulation of commerce, Congress could decide on the content of that right and thereby affect private people who were allowed to participate in the servitude held by the public.[121] As owner of the public lands, Congress could distribute them.[122]

The private interests that were not rights were private privileges as that term was used in the older system.[123] A private privilege in this context is thus a private interest that may be affected by the unilateral, non-consensual exercise of a public right.[124] Private privileges are correlated with the legal powers that come with public rights; the interest in receiving a federal land grant can be affected by, and so is correlated with, the government's power to dispose of the public lands, a power that comes with ownership.[125] Because the government as owner has an owner's liberty to exercise its rights,

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[118] *See id.* ("[L]egislatures also enjoyed unilateral authority over the quasi-private 'privileges' that they created for reasons of public policy.").

[119] *Id.* at 572.

[120] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

[121] *See Wheeling Bridge II*, 59 U.S. (18 How.) 421, 431 (1855) (explaining "[t]he regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistent with the continuance of the bridge").

[122] *See* Nelson, *supra* note 7, at 577–78 (discussing the congressional disposition of public lands).

[123] *See id.* at 567 (distinguishing rights and privileges). The older terminology also could be more particularized, picking out franchises as a specific kind of private privilege.

[124] *See id.* at 572 ("The political branches controlled purely public rights, and they could also retain unilateral authority over privileges . . . ."). Privileges are usually understood as interests in favorable treatment. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) (noting the words "right" and "privilege" are often defined similarly, including "the investiture with special or peculiar rights" (citing United States v. Patrick, 54 F. 338, 348 (M.D. Tenn. 1893))). Public rights, like private rights, can be exercised in ways both favorable and unfavorable to others. For example, in *Murray's Lessee*, the government's public right as creditor would have an adverse effect on a private person when it was used. That possibility can be squared with the assumption that privileges are interests in benefits by describing the privilege in such situations as an interest in forbearance. The interest of a tenant at sufferance is like that: a tenant at sufferance may remain in the premises until the landlord exercises the right to demand that the tenant vacate.

[125] *See* Nelson, *supra* note 7, at 566 (commenting on Congress's power to dispose of public lands by virtue of ownership).

potential beneficiaries themselves are not entitled to demand that public rights be exercised in a way favorable to them.[126] Private privileges are thus the opposite of rights, private and public.[127] A right-holder is protected by the duties of others with respect to the interest in question: property owners can require that non-owners not trespass.[128] Right-holders are also protected in many ways from non-consensual changes in their legal positions: non-owners may not transfer others' interests, for example.[129]

The concept of a private privilege must be used with care in describing particular situations. Consider, for example, the situation in which Congress has provided by statute for the payment of veterans' pensions that are not required by contract. If the statute requires that executive officials make payments as prescribed but does not give beneficiaries any judicially enforceable claim against the United States, the interest in receiving payments under the statute will be a privilege and not a right. If the statute provides for judicial enforcement, then the private interest will be a right. In either case, however, Congress will remain free to repeal the statute as to future payments.[130] As a result, if a statute provides for judicial enforcement of benefits, private beneficiaries have rights under the statute but no right that the statute continue. Their interests will be rights in one respect and privileges in another. A federal bondholder, by contrast, has a right in a less qualified sense. Even if Congress eliminates the appropriation for paying the debt, the government's obligation to pay it will remain

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[126] *See id.* at 567–68 (explaining that potential privileges do not vest control in individuals in the same way as private rights).

[127] *See* Hohfeld, *supra* note 124, at 32 ("[A] privilege is the opposite of a duty, and the correlative of a 'no-right.'").

[128] *See id.* (noting that an owner's right that no one enter without permission correlates with other people's duties not to enter).

[129] In analytic terms, a private person with a privilege relative to the government has no right that the government exercise its power in some way and is liable to a change in legal position resulting from the government's exercise of that power. Correlatively, the government has power to affect the private person and a liberty to exercise that power (which means no duty not to exercise it). *See* RESTATEMENT OF PROPERTY §§ 1–4 (AM. LAW INST. 1936) (defining rights and correlative duties and powers and correlative liabilities to the exercise of power).

[130] *See, e.g.*, Nelson *supra* note 7, at 571 ("[I]t cannot be denied that the Legislature possess the power to take away by statute what was given by statute, except vested rights." (quoting People *ex rel.* Fleming v. Livingston, 6 Wend. 526, 531 (N.Y. Sup. Ct. 1831))).

because the obligation of a contract is distinct from the remedies available to enforce it.[131]

The most easily understood examples of public rights and corresponding private privileges involved material assets that were the property of the government, like Treasury funds and public lands. Like a private owner, Congress was free to transfer those assets or retain them as it chose.[132] If title was transferred, the asset became a private right in the new owner. Until a transfer was made, however, private people had no rights with respect to the asset, and hence no legally enforceable claim to it.[133] That was true as to future transfers and remained true if Congress created a program of grants; such programs could be discontinued with no violation of private rights.[134]

Less tangible benefits were legally more complicated. An especially important form of intangible benefit was a license. When Congress used a regulatory power to impose a general prohibition that could be relaxed through a license, it put the government in the position of a private owner who could demand that others not interfere with the owner's interest or could relax that demand.[135] Private owners could have rights of that kind with respect to tangible assets, like real estate, and intangibles, like patents; for example, the licensing system for the Indian trade operated like a patent.[136] A category of conduct was prohibited, and a right-holder could enforce that prohibition and release others from it.[137]

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[131] *See, e.g.*, Mason v. Haile, 25 U.S. (12 Wheat.) 370, 378 (1827) (holding that elimination of imprisonment for debt is permissible under the Contract Clause of the U.S. Constitution because it operates only on the remedy of the contract, not the obligation under it).

[132] *See* U.S. CONST. art. IV, § 3, cl. 2 (enabling Congress to "dispose of" the territory and other property of the United States).

[133] *See* Nelson, *supra* note 7, at 566 (noting that public funds and public property were public rights); *id.* at 568–69 (describing how political branches controlled the disposition of public rights).

[134] *See id.* at 571 (discussing how Congress could revoke ongoing grants of public rights).

[135] As Chief Justice Marshall explained in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Congress exercised its commerce power over the coasting trade, *id.* at 211–12, and gave licenses, which he defined as "permission or authority" to engage in the trade, *id.* at 213.

[136] *See* Act of July 22, 1790, ch. 33, 1 Stat. 137 (repealed 1809) (forbidding trade with the Indian tribes except with a license granted by the government).

[137] *See* Nelson, *supra* note 7, at 566 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *7) (explaining that public rights included the intangible right to compliance with laws that secured the public good).

A similar arrangement was involved in *Wheeling Bridge I*.[138] The law governing interstate commerce created a public servitude of navigation, with which a bridge might interfere.[139] Congress, through its commerce power, could determine the content of that servitude, and so decide whether a bridge over a navigable river interfered with it, as a physical obstruction can unlawfully interfere with an easement.[140] Once the servitude was in place, Congress could allow the public at large to participate in it.[141] As *Wheeling Bridge II* shows, the servitude remained a public right, and participation was not a private right.[142] In similar fashion, a private owner can give permission to another private person to use it, and that permission can be revoked with no legal harm inflicted.[143]

Just as the character of public rights as rights of ownership explains why some private interests were nothing more than expectancies in favorable treatment, the understanding of public rights and private privileges explains the other crucial category Professor Nelson identifies: core private rights. Core private rights were based on the rights enjoyed in the state of nature of Lockean political theory.[144] In Lockean theory, civil society was instituted

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[138] 54 U.S. (13 How.) 518, 558 (1851) (holding that Pennsylvania was entitled to a decree requiring an obstructing bridge be removed or elevated because Congress afforded a right to the public that the navigation of the Ohio River not be obstructed).

[139] *See Wheeling Bridge II*, 59 U.S. (18 How.) 421, 435 (1855) ("[C]ongress had acted upon the subject and had regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same . . . .").

[140] *Id.* at 431.

[141] *See* Nelson, *supra* note 7, at 566 (describing how public rights included servitudes, such as navigation of rivers and passage on public roads, that could be used by the public but were collectively, not privately, held).

[142] 59 U.S. (18 How.) at 431.

[143] *See* WILLIAM B. STOEBUCK & DALE WHITMAN, THE LAW OF PROPERTY 438 (3d ed. 2000) (distinguishing a license, which may be revoked at any time, from an easement, which is an estate in land that lasts for a specified time or perpetually). In giving permissions, Congress could grant stronger or weaker interests, as a private person could. While it might give just a permission to engage in some conduct, it could also give a private person an interest more like a leasehold. Leaseholds entail not only a right in the lessee to use the leased property, but also the right to exclude third parties. *Id.* at 255 (noting that a leasehold is an estate in land bringing right to possession). Congress could give a franchisee an enforceable monopoly, allowing the franchisee to engage in some conduct, forbidding others from doing so, and allowing the franchisee to enforce that prohibition as long as the franchise continued. Nelson, *supra* note 7, at 567.

[144] *See* Nelson, *supra* note 7, at 567 (noting that core private rights were associated with the rights that individuals would enjoy in the state of nature).

largely to make those rights more secure.[145] A right found in the state of nature could have no component of government ownership because there is no government in the state of nature.[146] As long as the law of civil society recognized private legal advantages that had that feature, they were wholly private and not public.[147] By contrast, with franchises, like a bridge monopoly given to a private person in the public interest, the government might well have a component of ownership, like an ongoing power to revoke the franchise.[148] The state of nature has no government-granted bridge monopolies, nor invention patents.

2. Powers of Government and Public and Private Interests.

In the nineteenth century system of executive adjudication, public rights were ownership interests of or controlled by the government, and private privileges were private interests in the favorable exercise of public rights.[149] The system rested on the interaction between the correlative concepts of public rights and private privileges on one hand, and aspects of the three powers of government on the other.[150] That system allowed absolute finality in the political branches with respect to public rights and, therefore, with respect to the private positions that could be affected by unilateral exercises of those public rights.[151] That conclusion followed from the rights-privilege distinction and certain assumptions concerning each of the powers of government.

A principal assumption of the nineteenth century system concerned the executive power. A core function of the executive is to

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145 *See id.* (describing John Locke's argument that "the 'great and chief end' of government was to make individual life, liberty, and property more secure than they would be in the state of nature" (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 368 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690))).

146 *See* LOCKE, *supra* note 145, at 294 ("*Civil Government* is the proper Remedy for the Inconveniences of the State of Nature . . . .").

147 *See* Nelson, *supra* note 7, at 567 (distinguishing core private rights, which "individuals would enjoy even in the absence of political society," from privileges or franchises, "which public authorities had created purely for reasons of public policy").

148 *See, e.g.*, *id.* (examining how franchises "could operate just like private rights" as long as "the legislature permitted them to exist").

149 *See, e.g.*, Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 796 (1986) (emphasizing the public versus private distinction in discussing historical views of non-Article III adjudication).

150 *Id.* at 830 (citing Nebbia v. New York, 291 U.S. 502, 525, 531–39 (1934)).

151 *Id.* at 818–19.

exercise the proprietary rights of the government itself according to law.[152] Executive officials manage government property and enter into contracts for the United States.[153] When payments are to be made to private people, either pursuant to a contract or gratuitously, executive officials withdraw funds from the Treasury and transfer them to payees.[154] Executive officials follow the law in doing so, but the actual transactions are carried out by the Executive Branch. In performing those functions, executive officials are doing no more than their core work of carrying out the law and conducting the operations of the government.[155]

Often, the actions of the executive in exercising the government's proprietary rights will have effects on private people. Private people may receive or be denied payments, they may be given or denied access to government property, and the government may contract with them or decline to do so. When a government decision affects a private person, but is not subject to any duty that runs to an affected private person, the private position is that of a privilege.[156] The exercise of a public right that affects a private privilege may have an important practical effect on the private party, but under the nineteenth century system those practical effects do not turn a

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[152] For example, the Secretary of Veterans Affairs is authorized by statute to exercise the government's rights with respect to real property in performing official functions. *See* 38 U.S.C. § 8103 (2012) (identifying that the Secretary may construct, alter, or acquire sites for medical facilities for veterans); *id.* § 8106(a) (providing that the Secretary may carry out construction of medical facilities by contract).

[153] Managing government property is such a central function of the Executive Branch that today there is an executive agency, the General Services Administration, devoted to the task. *See* 40 U.S.C. § 301 (2012) (establishing the General Services Administration); *id.* § 501(b)(1)(A) (providing that the Administrator of General Services is responsible for supplying property needed by executive agencies in the performance of their functions). In similar fashion, there is an executive official whose function is to oversee and coordinate the procurement activities of the rest of the Executive Branch. *See* 41 U.S.C. § 1101 (2012) (creating the Office of Federal Procurement Policy in the Office of Management and Budget to "provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies").

[154] *See* 31 U.S.C. § 3321 (2012) (identifying officials who are authorized to disburse public funds available for expenditure by executive agencies).

[155] In his important study of the development of non-Article III adjudication, Professor Gordon Young explains that antebellum courts, in giving conclusive force to some executive decisions that applied law to particular facts, "simply viewed the actions as executive action, and treated them as valid activity by that branch of government." Young, *supra* note 149, at 796 (emphasizing that executive decisions in situations involving public rights were valid activity of the executive because that branch of government is charged with exercising the ownership rights of the government).

[156] Nelson, *supra* note 7, at 567.

privilege into a right. Executive adjudication through the exercise of public rights, with correlative effects on private interests that are not rights, is thus an unproblematic exercise of executive power.

The nineteenth century system also rested on an assumption about the legislative power. When public rights and private privileges were at stake, Congress could decide whether the courts were to be involved, and if so to what extent.[157] It could leave executive action wholly to the executive or provide for limited or full judicial review.[158] The absence of judicial involvement, however, did not mean executive discretion. If a statute called for a benefit to be conferred, the relevant executive officials were required to pay it.[159] That is how executive officials can be said to have engaged in adjudication: they applied law to specific facts and acted accordingly. When they did so without judicial involvement, they were in a sense final.

The older system thus assumed that Congress was able to impose duties on executive officials that could not be enforced by private people, including, in particular, the beneficiaries of favorable use of government proprietary interests. That kind of arrangement is familiar from private law. For example, a principal may direct an agent to make a gratuitous payment to a third party without creating any claim by the third party against either agent or principal.[160] Under those circumstances, the agent does have a duty,

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[157] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

[158] *Id.* at 283–84.

[159] In *Butterworth v. Hoe*, 112 U.S. 50 (1884), a private suit to compel issuance of a patent, the U.S. Supreme Court recognized that executive officials must perform their duties and that those duties are enforceable by private suit when Congress so decides. Concerning the Secretary of the Interior's duties related to the issuance of patents, "[i]f the Secretary is charged by law with the performance of such a duty, he is bound to fulfill it." *Id.* at 57. The Court then distinguished between duties that run to "the public alone" and those that Congress has decided run to private people who have "acquire[d] by law a personal interest in the performance" of official acts. *Id*. As to whether Congress had provided for private enforcement in any particular statute, the Court stated, "[e]ach case must be governed by its own text, upon a full view of all the statutory provisions intended to express the meaning of the legislature." *Id.* at 56–57.

[160] *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981) (noting that a contract creates a duty to intended beneficiaries who are not parties and that may be enforced by them); *id.* § 302 (detailing that intended, as opposed to incidental, third-party beneficiaries are identified by the intention of the contracting parties). The result is that the parties control whether a third party beneficiary is intended or incidental, and no duty runs to an incidental beneficiary.

but it runs only to the principal and can be enforced only by the principal.

Any judicially enforceable private rights concerning the exercise of public rights would run against the government itself, so it is natural to think of Congress's power as deriving from sovereign immunity and the ability to waive it. Justice Curtis in *Murray's Lessee* described Congress's ability to provide for judicial involvement in terms of waiving sovereign immunity.[161] As Nelson has pointed out, however, more is involved here than just sovereign immunity, narrowly speaking.[162] To prevail in court, a plaintiff must have what would today be called a cause of action. Put in nineteenth century terms, the question whether a plaintiff had a cause of action was the question whether the plaintiff had a right for which there was a judicial remedy.[163] Congress's control over the availability of judicial review thus depended not only on its power to waive sovereign immunity but, more fundamentally, on its power to create primary private rights and remedies to enforce them when the executive exercises public rights. Although Justice Curtis wrote in terms of waiving immunity in *Murray's Lessee*, he may have been referring more broadly to providing for relief against the government.[164] The crucial point is that the nineteenth century system assumed that legislative power could detach the duties of executive officials that ran to the United States from duties of the

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[161] *See Murray's Lessee*, 59 U.S. (18 How.) at 283 ("It is equally clear that the United States may consent to be sued[] and may yield this consent upon such terms and under such restrictions as it may think just.").

[162] Because public benefit programs, for example, were privileges and not core private rights, Congress could decide whether to continue them. That decision was not simply a matter of waiving sovereign immunity; it concerned the existence of the primary right. *See* Nelson, *supra* note 7, at 583–84. Before Congress enacted the Social Security Act, the question whether it had waived sovereign immunity with respect to claims for Social Security benefits could not arise.

[163] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154 (1803) (asking whether Marbury has "a right to the commission he demands," whether "the laws of his country afford him a remedy," and whether that remedy is "a mandamus issuing from this court"). Provision for a judicial remedy against the government included a waiver of sovereign immunity, as mandamus enforces the specific duties of government officers. *Id.* at 168–69.

[164] As Professor Young explains, when the government granted a benefit in the nineteenth century, "[p]roceedings against the government for damages required a granted privilege of suing the government." Young, *supra* note 149, at 797. The privilege of suing the government includes, but is not limited to, a waiver of sovereign immunity.

United States to private beneficiaries that could be judicially enforced.[165]

Neither of those assumptions about executive and legislative power should be surprising. Executive officials administer government assets. Legislatures make law, including the law governing executive administration of government assets and the primary and remedial rights of private people against the government. More surprising may be the older system's assumptions concerning judicial power. That system did not require judicial power to operate differently as to different legal interests. In particular, the judicial power did not entail any mandatory role for the courts with respect to core private rights. Rather, the older system was consistent with a conceptualization of the judicial power that draws no distinctions between core private rights and other rights, and the older system also draws no distinctions among legal rules dealing with public and private interests. It was consistent with the assumption that executive decisions applying law to fact do not bind courts the way an earlier judicial decision does. The different treatment of rights and privileges, and in particular the different treatment of public benefits and what Nelson calls core private rights, follows from the operation of executive power. That operation does not require that executive officials' decisions applying law to fact bind later courts the way one court binds another.

Just as legislative power can be seen simply as the authority to make and change legal rules, judicial power can be conceived simply as the authority independently and conclusively to apply legal rules, whatever they may be. Under this conceptualization, courts apply legal rules to resolve disputed issues of law and fact. They do so independently—that is, without regard to any earlier decision by any non-judicial government actor. As Chief Justice Marshall put it, they say what the law is.[166] When the case calls on them to do so, they also apply the law of remedies. Their remedies often change the legal relations of parties, for example by giving the defendant an obligation to pay damages to the plaintiff. Only courts can

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[165] The question of statutory construction that the Court confronted in *Butterworth v. Hoe*, 112 U.S. 50, 50 (1884), was whether Congress intended that the plaintiff be able to enforce the duties of the Commissioner of Patents and the Secretary of the Interior.

[166] *Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the duty of the judicial department to say what the law is.").

change legal relations in that way. Once a court has decided a case, its judgment is binding on the parties and, for that reason, on later courts as called for by the law of preclusion.[167]

The older system did not require that the executive exercise or share any of the judicial power as just described. In administering public rights, executive officials acted in a way that private individuals act in exercising private rights. Officials decided how legal rules applied to particular factual situations, just as a private person might. Agents, for example, routinely have to determine their legal obligations to their principals in order to know how to act. Executive officials could change the legal positions of private people but not by applying the law of remedies to conclusions about primary relations. Instead, they changed private legal relations the way a grantor does in making a gift, or the way the holder of a call under a contract does by exercising the call. In doing so, they did not collaterally bind future courts the way a court does. Rather, the actions that executive officials took that courts were required to respect were of the same kind as the acts that private owners took that courts were required to respect. If a private owner gave or refused a license to enter property, the courts would give that decision effect. Similarly, when executive officials exercised public rights, the courts would give those decisions effect. When courts took into account exercises of rights (private or public), they were not treating those exercises of rights as binding decisions by earlier courts.

All the courts had to do under the older system was apply the law. If the law gave a private person a right and remedy against the government with respect to the exercise of a public right, they would act accordingly. If not, they would not act. If the remedy was limited, as mandamus was, the courts would inquire as much as the remedy required. A court deciding whether to grant mandamus would decide for itself whether the executive decision in question was ministerial or discretionary.

Courts distinguished between rights and privileges only as a result of applying the law. If a private party was subject to the unilateral exercise of a public right—that is, if the private party had a privilege and not a right—the courts would give no relief. For the same reason, they would also give no relief to a private plaintiff with

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[167] RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1980) (stating that a valid judgment is binding on parties in future litigation).

a purported claim under a contract with another private party that the court found had never been made. Plaintiffs with no rights are not entitled to remedies. A private person with a privilege but no right relative to the potential exercise of a public right would have no remedy for an unfavorable exercise of the right.

The role of core private rights that Professor Nelson observes in the older system did not require any special role with respect to them for the judicial power.[168] As far as the courts were concerned, one right was like another. The difference involved the executive power. Government ownership—a public right—was a predicate for executive adjudication because administration of public rights is an executive function. Executive officials administer public (not private) rights, and so they do not control the interests secured by the latter.[169] Being wholly private, core private rights had no element of government ownership. That is why they were not subject to executive adjudication.

In any legal system, the role of the courts will depend on the content of the law. A legal system that does not feature a private right of reputation, and the rules that constitute such a right, will not have defamation lawsuits for courts to decide. A legal system that does not have private rights to government benefits will not have lawsuits about government benefits, even if the executive is dispensing them pursuant to rules that create no private rights. In the nineteenth century system of public rights and private privileges, the role of the courts depended on choices Congress made. Congress decided on the executive's use of public rights and on private judicial remedies concerning executive decisions.

The older system thus posited an exclusive role for the courts—one that executive adjudication through the exercise of public rights did not invade. That role was independently and conclusively to determine the content of a party's rights and to change legal positions pursuant to the law of remedies. Executive officials administering public rights and affecting private privileges did neither of those things.

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[168] *See* Nelson, *supra* note 7, at 571–72 ("[A]s American-style separation of powers developed in the nineteenth century, the respective roles of the branches depended on the kinds of legal interests that were at stake.").

[169] *See id.* at 572 ("The political branches controlled purely public rights, and they could also retain unilateral authority over privileges that they allowed individuals to exercise as public trusts. When the government wished to take direct and adverse action against someone's core private rights, however, an exercise of 'judicial' power was necessary.").

The overall structure of government power posited by the nineteenth century system did have a role for the courts that was exclusive for practical purposes and an area where executive and judicial power overlapped for practical purposes. That area of practical overlap was defined by Congress's power in two respects. When Congress could put the government in the position of an owner of certain rights, it could provide that executive officials would exercise ownership rights with no judicial involvement. It could also give private people judicially enforceable claims against the government regarding the exercise of the government's ownership rights. When it did the former, Congress created the relation of public right and private privilege. When it did the latter, it created private rights but in general retained the ability to withdraw them as to the future.[170] The potential scope of public rights, the exercise of which was not subject to judicially enforceable duties running to private people, defined Congress's ability to choose between executive and judicial decision-making because the executive power administers public rights.

The nineteenth century system of executive adjudication results from principles about each of the three powers of government. The legislative power determines the duties of executive officials concerning government assets and the rights of private people against the government. The executive power administers the assets of the government according to law. The judicial power decides cases on the basis of law, vindicating legal rights but giving no relief with respect to interests that are not legally protected. That system gave to each power its own role, with no exercise by any institution of another's power.

IV. THE POTENTIAL SCOPE OF EXECUTIVE ADJUDICATION

This Part will discuss the potential scope of executive adjudication under the older system. That scope derives from the basic principle that executive officials adjudicate by administering the government's own legal rights pursuant to law. The scope is

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[170] The government's ownership interests, over which Congress exercised the authority of future withdrawal, were "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." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

substantial, mainly for three reasons. First, the government's legal rights include the power to grant permissions to engage in otherwise-prohibited conduct. Second, benefits conferred through the administration of public rights, including permissions, can be conditioned on past conduct by private beneficiaries and on expectations regarding their future conduct. Third, benefits, including permissions, can be conferred in exchange for a change in a private party's legal position—for example, the acceptance of obligations under a contract.

One implication of the foregoing principles is that executive officials can perform functions that closely resemble the determination of disputes between private parties. *Oil States* is one example of that arrangement.[171]

This Part will first consider executive adjudication in which the interested parties are a private person and the government.[172] Then, this Part will turn to the use of public rights to provide for inter-private adjudication by executive officials.[173] The purpose of this Part is to identify categories of possible executive adjudication under the older system, not to explore the categories in depth.

A. CASES BETWEEN THE GOVERNMENT AND OTHERS

The administration of public rights and private privileges can be arranged to create strong incentives regarding private conduct. The exercise of public rights can therefore operate as a form of regulation, just as environmental statutes regulate conduct with the threat of civil penalties and the criminal law regulates conduct with the threat of fines or imprisonment.

Offering, granting, and withholding federal funds was a classic use of public rights under the nineteenth century system and is a central role of the federal government today. Some spending is conditional but not in a way that is likely to have much effect on behavior. The prospect of Social Security old-age payments does not cause aging. Other spending conditions, however, are designed to and do change incentives regarding conduct. Deciding whether the conditions have been met thus has effects quite similar to deciding

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171 *See* Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C., 138 S. Ct. 1365, 1365 (2018) (permitting a form of executive adjudication based on the public nature of the interests at stake).

172 *See* discussion *infra* Section IV.A.

173 *See* discussion *infra* Section IV.B.

whether a criminal law has been complied with. Executive adjudication concerning the disbursement of federal funds is thus a powerful form of regulation. Under the nineteenth century system, it could be done without judicial involvement.

Today, for example, institutions of higher education receive financial support conditioned on compliance with anti-discrimination rules.[174] Violation of those rules can lead the government to terminate funding.[175] The threat of termination is a powerful incentive, similar to those created by the criminal law. Under the older system, Congress could give executive officials the last word in administering the funding statutes, thereby enabling them to administer a powerful system of rules that influenced private conduct.[176] As the provision of federal funding specifically to educational institutions shows, that kind of benefit can also be conditioned on expectations about future conduct such as those created by the mission of an institution.[177]

Public rights also include the power to give permission to engage in conduct that otherwise would conflict with the rights of the public or the government.[178] The current system of broadcast regulation rests on the premise that, as it is often put, the airwaves are a public asset that no private person owns.[179] Private people thus may not

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[174] *See* 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). A leading case interpreting that provision involved the University of Chicago, a recipient of federal funding. *See* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (holding that the plaintiff, alleging sex discrimination in admission to medical universities, had a private right of action under that particular provision).

[175] The regulations implementing the ban on race discrimination by recipients of federal funds contemplate termination of funding as one response to racial discrimination. *See* 45 C.F.R. § 80.8(a) (2018) ("If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance, or by any other means authorized by law.").

[176] *See* Nelson, *supra* note 7, at 571 (describing the nineteenth century view of administrative powers).

[177] *See, e.g.*, 20 U.S.C. § 1138 (2012) (authorizing the Secretary of Education to make grants to "institutions of higher education" to "improve postsecondary education opportunities").

[178] *See* Nelson, *supra* note 7, at 566 (defining public rights).

[179] *See* 47 U.S.C. § 301 (2012) ("It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."). The

broadcast without permission in the form of a license.[180] Grants of such permission are made by an administrative agency pursuant to rules Congress establishes.[181] Violation of rules applicable to licensees can lead to suspension of a license.[182]

Like a private person, the government can obtain additional rights by contract. For example, in return for their compensation, federal employees often agree that they will not disclose classified information that they obtain in connection with their duties.[183] That obligation extends beyond the term of employment itself, and the government can enforce it through appropriate proceedings.[184]

The ability to acquire additional rights opens up additional possibilities for executive adjudication. In *Oceanic Steam Navigation Co. v. Stranahan*, the Court applied the nineteenth century system to uphold a penalty imposed by the executive.[185] The Collector of the Port of New York had assessed a penalty on a steamship company for failing to comply with health regulations.[186] Clearance from the port was conditioned on payment of the penalty.[187] Under the statute, the courts were not involved in the assessment or collection of the penalty; it was a matter of "administrative competency."[188] As the Court understood, clearance was very valuable to the steamship company, so it had strong

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statute reiterates the principle that broadcasting is a matter of public and not private right. *See id.* § 304 ("No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.").

[180] *See id.* § 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.").

[181] *See id.* § 303(*l*) (setting out the authority of Federal Communications Commission to issue broadcast licenses).

[182] *See id.* § 303(m) (detailing the suspension of licenses).

[183] *See* Snepp v. United States, 444 U.S. 507, 508 (1980) (describing Central Intelligence Agency (CIA) employee's agreement not to disclose classified information).

[184] *See id.* at 513 (enforcing an agreement by former CIA agent not to disclose classified information without authorization).

[185] 214 U.S. 320 (1909).

[186] *See id*. at 331–32 (describing the fine to be assessed for bringing an alien into the country contrary to rules regarding health).

[187] *See id.* (disallowing clearance while fines were unpaid).

[188] *See id.* at 339 (finding that under the statute "the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, not requiring a resort to judicial power for their enforcement").

incentives to pay the penalty.[189] Aware of the force of that incentive, the Court approved the system of executive adjudication; clearance was a privilege, not a right.[190] Congress thus could create a form of executive adjudication by conditioning a benefit on compliance with the result of that adjudication.

Under the system that the Court endorsed in *Oceanic Steam Navigation Co.*, the private party involved knew the outcome of the executive dispute-resolution process. Had the penalty been $1,000,000, clearance might not have been worth it. The reasoning of that case suggests that Congress could have gone further. It could have required, for example, that to be eligible for clearance the steamship company had to agree to abide by the outcome of the penalty process. That prior agreement would have given the government a new legal interest—its contractual right to require payment of the penalty—that executive officials could have administered with limited or no judicial involvement. Under an arrangement of that kind, the steamship company would have had to decide *ex ante* whether the benefit of clearance was worth the potential cost of the penalty.

B. EXECUTIVE RESOLUTION OF DISPUTES BETWEEN PRIVATE PARTIES

Oil States involved a dispute between private parties concerning the validity of a patent. The Court concluded that patents are public rights for Article III purposes, putting them in the category of

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[189] *See id.* at 329 (noting that failure to depart on time would have caused steamship company "the most serious pecuniary loss consequent on its failure to carry out many other contracts").

[190] *See id.* at 339 (discussing several earlier cases that the Court described as holding "that it was within he competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power"). One of those earlier cases was *Buttfield v. Stranahan*, 192 U.S. 470 (1904), which found complete congressional power, and an absence of private rights, in the field of foreign commerce:

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution.

Id. at 493.

franchises that Professor Nelson identifies in the nineteenth century system.[191] A franchise is a bundle of legal advantages, given by the government in pursuit of the public good, that includes rights as against other private people.

In the nineteenth century system, franchises remained subject to modification by the government that granted them, absent a genuine contract to the contrary.[192] In the account of that system presented here, the power to modify franchises is a public right. As such, it may be exercised by the legislature directly or by the executive pursuant to law. If the power is given to the executive, the legislature may decide whether executive decisions are to be reviewed by the judiciary at the behest of private parties.

When private parties contest the validity of a patent, the power to revoke the patent if it is found to be invalid is a dispute-resolution power given to the executive. *Oil States* thus illustrates one configuration in which public rights and private privileges can be arranged so as to support executive adjudication: when the outcome of the adjudication is *itself* a change in a private privilege associated with a government grant. A modern case with elements of the nineteenth century system, *Thomas v. Union Carbide*,[193] marks another path by which a combination of rights and privileges can lead to executive finality. In that case, as in *Oceanic Steam Navigation Co.*, private access to a privilege was tied to compliance with resolution of an inter-private dispute by a non-Article III adjudicator.[194]

In the statute at issue in *Union Carbide*, Congress sought to streamline the process of pesticide registration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) by allowing subsequent registrants to rely on scientific data submitted by previous registrants.[195] To deal with the objection that prior registrants' proprietary information would be unconstitutionally taken if it were simply made available to others, Congress provided that subsequent registrants would have to compensate prior registrants.[196] If the parties were unable to agree on compensation, their dispute would be arbitrated, with limited judicial review of the

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191 Nelson, *supra* note 7, at 559.
192 *Id.* at 570–71.
193 473 U.S. 568 (1985).
194 *Id.*
195 *Id.* at 571–73.
196 *Id.* at 573–75.

arbitrator's decision.[197] The benefit of permission to engage in regulated conduct—to register pesticides under FIFRA—was the inducement to enter into the arbitration system, and potential withdrawal of that benefit was a sanction for failing to comply with arbitral awards.[198] Subsequent registrants had the further inducement of another government benefit: access to prior registrants' data.[199] The Court approved the requirement of arbitration.[200] It explicitly left open the question whether arbitral awards could be directly judicially enforced, or were enforceable only by loss of access to registration.[201] The Court thus recognized, but did not pass on, the possibility that access to a benefit—registration under FIFRA—might be used to induce an *ex ante* change in legal position that would empower an arbitrator the way an ordinary contract of arbitration does. The arbitrator in *Union Carbide* was another private person.[202] Giving arbitral authority to an executive official would have presented no problem under the nineteenth century approach, as shown by *Oceanic Steam Navigation Co.*[203]

Both *Oceanic Steam Navigation Co.* and *Union Carbide* contain elements of a system of inter-private executive adjudication based on the nineteenth century understanding of executive power with respect to public rights and private privileges. Justice O'Connor wrote for the Court in *Union Carbide* as well as in *Commodity Futures Trading Commission v. Schor*,[204] a case that goes further in endorsing executive adjudication. Today, that case is a leading example of anti-formalist reasoning concerning Article III because Justice O'Connor explicitly rejected a categorical and rule-based

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197 *See id.* at 571–75 (describing the statutory system of registration, submission of data, compensation by later registrants, and binding arbitration).

198 *See id.* at 589 (noting that Congress "has the power to condition issuance of registrations or licenses on compliance with agency procedures").

199 *Id.* at 572–73.

200 *Id.* at 571.

201 *Id.* at 591–92.

202 *See id.* at 590 (contrasting "civilian arbitrators" with "agency personnel").

203 In *Union Carbide*, the Court described the use of a private arbitrator as a substitute for a similar arrangement involving only a federal agency. *Id.* "Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants fees to cover the cost of data and could have directly subsidized FIFRA data submitters for their contributions of needed data." *Id.* The use of private arbitrators "collapses these two steps into one" and "surely does not diminish the likelihood of impartial decisionmaking, free from political influence." *Id.*

204 478 U.S. 833 (1986).

approach to those issues, instead balancing a number of factors.[205] Despite Justice O'Connor's rejection of categorical rules, *Schor* is readily justified under the nineteenth century system. In important respects, Justice O'Connor's reasoning in *Schor* resembles the Court's approach in *Oceanic Steam Navigation Co.*, which turned on access to a privilege administered by the executive. In *Schor*, as in *Oceanic Steam Navigation Co.*, the Court found that a private party had consented to agency adjudication.

Schor involved the dispute settlement system that Congress set up as part of its regulation of commodities brokers. Schor was a customer of ContiCommodity, a broker.[206] As authorized by the statute, Schor brought a reparations proceeding based on federal law before a Commodity Futures Trading Commission (CFTC) Administrative Law Judge (ALJ), seeking monetary recovery from ContiCommodity for its alleged statutory violations.[207] ContiCommodity had a claim under state law for the unpaid balance of Schor's account, which it presented as a counterclaim in the CFTC proceeding.[208] After losing before the CFTC ALJ on both his claim and ContiCommodity's counterclaim, Schor argued that the CFTC lacked statutory authority over the counterclaim.[209] When the CFTC decision came before the Court of Appeals for the D.C. Circuit, the court at oral argument raised for the first time the question of whether the agency could decide the counterclaim, with only limited judicial review, in light of Article III.[210]

The Supreme Court found that "Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court."[211] He forewent a judicial proceeding on his claim, to which he was entitled, knowing that the CFTC would assert jurisdiction over ContiCommodity's counterclaim and demanded that ContiCommodity proceed on its counterclaim before

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[205] The constitutional inquiry, Justice O'Connor wrote, "is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'" *Id.* at 847–48 (quoting *Union Carbide*, 473 U.S. at 587).

[206] *Id.* at 837.

[207] *See id.* ("In conformance with the congressional goal of promoting efficient dispute resolution, the CFTC promulgated a regulation in 1976 which allows it to adjudicate counterclaims 'aris[ing] out of the transaction or occurrence . . . set forth in the complaint.'").

[208] *Id.* at 838.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 849.

the agency.[212] Justice O'Connor described that decision as a waiver of any constitutional right to an Article III tribunal. She also said that Schor "effectively agreed to an adjudication by the CFTC of the entire controversy by seeking relief in this alternative forum."[213]

The latter formulation makes especially clear how an arrangement like that in *Schor* could arise under the older system of executive adjudication. Parties can by agreement confer on a third party, like an arbitrator, legal authority to resolve their dispute and determine the obligations arising out of their agreement to arbitrate.[214] When private people make a contract to arbitrate, they give one another a right to demand compliance with the arbitrator's award.[215] They also change the legal relations that will be the subject of any lawsuit, substantially replacing interests that would have been subject to adjudication with liability to arbitration.

The arrangement in *Schor* thus can be explained as transactions in which the government acquires a new proprietary interest with the consent of private parties. That interest is a power to bind parties the way an arbitrator does. It is acquired in return for a government benefit. For Schor, the benefit was access to the CFTC dispute resolution process, which was designed to be less costly than litigation.[216] Once the government acquires a power like a private arbitrator's, the executive may exercise that power the way it exercises any other proprietary right of the government. The exercise of public rights by the executive thus can produce results quite similar to the adjudication by a court of a suit between private parties. Producing those results, however, requires only executive and not judicial power. Private parties cannot add to the constitutional powers of government officials, but they can engage in transactions, like contracts, that give the government new legal powers in its proprietary capacity.[217]

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[212] *Id.* at 849–50.

[213] *Id.* at 850.

[214] *See, e.g.*, 9 U.S.C. § 2 (2012) (explaining that specified agreements to arbitrate shall be "valid, irrevocable, and enforceable," except insofar as subject to revocation as is any contract).

[215] *See id.* § 9 (explaining the process through which a party may seek judicial confirmation of an arbitral award).

[216] *Schor*, 478 U.S. at 844 (explaining that CFTC reparations proceedings are designed to provide an efficient and relatively inexpensive forum for the resolution of disputes).

[217] Executive adjudication based on public rights under the older theory thus is not confined to cases in which the government is a party. Rather, the key question is whether a private

The ways in which administration of public rights can be used to enable executive adjudication are only part of the story. The next Part turns to the constraints the Constitution puts on Congress's ability to establish the relations of public right and private privilege that underlie that mode of decision making.

V. CONSTITUTIONAL CONSTRAINTS ON EXECUTIVE ADJUDICATION BASED ON PUBLIC RIGHTS AND PRIVATE PRIVILEGES

Under the nineteenth century system, Congress can provide for executive adjudication by creating public rights that can then operate on private privileges. That does not mean that Congress may do so just as it pleases. This Part explores the constitutional constraints that apply when executive adjudication is to be justified on the older understanding of the relation between executive and judicial power. Those constraints may arise from the internal limits on Congress's enumerated powers, the affirmative restrictions on those powers, and the structural provisions with which Congress must comply. Using that typology, this Part identifies possible sources of constraint and argues that Article III itself is not one. I seek to set out broad categories, not to list all the particulars that fall within those categories.

A. INTERNAL LIMITS ON ENUMERATED POWERS

Congress is not an omni-competent legislature, vested with legislative power that extends to all possible subjects. Rather, the Constitution gives it only some powers. The principle of enumerated

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party has been affected as to a privilege by the exercise of a corresponding public right, and that question can come up in a dispute between private parties as it did in *Oil States Energy Services, L.L.C. v. Greene's Energy Group, L.L.C.*, 138 S. Ct. 1365 (2018). Justice Brennan's plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* thus erred in stating that a case involving public rights must arise "between the government and others," at least insofar as it referred to the older rationale based on the difference between rights and privileges. 458 U.S. 50, 69 (1982) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015)). For the same reason, and to the same extent, Justice Scalia erred when he endorsed that principle in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65 (1989) (Scalia, J., concurring in part and concurring in the judgment), and the Court was right to reject it in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 586 (1985), although Justice O'Connor's opinion for the Court does not fully embrace the nineteenth century rationale based on rights and privileges.

congressional power has important implications for Congress's ability to provide for executive adjudication by creating relations of public rights and private privileges. If Congress lacks a power adapted to that purpose, it cannot create that relationship. Potential limits of the enumerated powers operate along two dimensions. One concerns the scope of federal authority; the other concerns the question of whether any particular authority can bring about the legal arrangement that underlies executive adjudication under the older system.

1. Federalism and the Source of Private Rights.

The Court in *Northern Pipeline* did not produce a majority opinion.[218] Justice Brennan proposed a general scheme, but Justices Rehnquist and O'Connor found a narrower ground closely connected to the particular tribunals involved in the case.[219] The Bankruptcy Reform Act of 1978 gave the new bankruptcy courts jurisdiction to hear cases brought by the estate of a bankrupt party against its creditors.[220] As Justice Rehnquist emphasized, those cases did not involve claims under the Bankruptcy Code or any other federal law.[221] They were ordinary private-law claims mainly founded in state law.[222]

A fundamental, sometimes underappreciated, feature of American federalism is that federal law is interstitial. It operates only in specific areas.[223] Whether that is now true because of the Constitution or just because of choices Congress has made, it remains true. In particular, the vast bulk of basic private law is that of the states.[224] As *Northern Pipeline* illustrates, rights of property and contract generally are found in state law, as are those of domestic relations.[225]

State-law private rights are private for purposes of the nineteenth century theory of executive adjudication. They have no

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[218] *N. Pipeline*, 458 U.S. at 89.

[219] *Id.* (Rehnquist, J., concurring) (finding a narrower ground than that discussed in the plurality opinion).

[220] *Id.*

[221] *Id.* at 89–90.

[222] *Id.*

[223] Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 495 (1954) (describing how, in general, federal law "assumes and accepts" the basic legal framework created by state law).

[224] *Id.* at 491–92 (discussing how basic private law is state law).

[225] *Id.*

component of government ownership; in particular, no component of federal government ownership. Absent a proprietary-type interest of the United States, executive officials cannot affect private people by exercising those interests. Without that predicate, they cannot make particular decisions under the legal rules governing public rights.

When the nineteenth century system was developed, that aspect of American federalism was strong and was seen as based in the Constitution.[226] It therefore represented a substantial restriction on Congress's ability to create the relations needed for executive adjudication. Congress did not make the rules under which private people became owners, so it could not inject any federal ownership interest into their legal positions at the outset. Congress chartered only a few corporations, so most corporate privileges were not franchises subject to congressional control.[227] Federal public rights, like control over navigation on interstate rivers or of the franchises of the Banks of the United States, were very much the exception and not the rule.

Even today, an attempt by Congress to federalize a large area of private law would be subject to serious constitutional objection. A federal statute replacing the state law of real property, for example, with a uniform federal rule would stretch federal power possibly past its breaking point.[228] Today, the U.S. Supreme Court is concerned with maintaining some limits on congressional power

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[226] For example, in the *Trademark Cases*, the Court explained that prior to the passage of the first Trademark Act by Congress trademarks were created by state law. *In re* Trade-Mark Cases, 100 U.S. 82, 92 (1879). Creation of trademarks, the Court concluded, was not within Congress's enumerated powers. *Id.* Trademarks are not patents or copyrights, and the Trademark Act was not confined to the use of trademarks in the forms of commerce that Congress may regulate. *Id*. at 93–96. Insofar as Congress cannot create a form of property, intellectual or otherwise, it cannot retain a public right that makes a related private interest a privilege.

[227] After chartering the First and Second Banks of the United States by statutes specific to them, Congress in the 1860s enacted a series of National Banks Acts, *e.g.*, Act of June 3, 1864, ch. 106, 13 Stat. 99 (enacting the National Bank Act of 1864), which were general incorporations statutes confined to banks. *See* Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (chartering the First Bank of the United States); Act of Apr. 10, 1816, ch. 44, 3 Stat. 266 (creating the Second Bank of the United States). Congress has never adopted a truly general corporate law that gives federal charters to business corporations without regard to their purpose.

[228] The Court found in *United States v. Lopez*, 514 U.S. 549 (1995), that a statute punishing possession of a firearm within a specified distance of a school exceeded Congress's power under the Commerce and Necessary and Proper Clauses. The Court's decision seems to reflect a conviction that some line should remain between local and national matters.

and rejecting the implication that Congress may legislate wherever it sees fit. A complete federalization of some basic area of private right would almost certainly be seen as a repudiation of the principle of enumerated congressional power altogether. Because Congress is limited in its power to supply the law that establishes basic private rights, it is limited in its power to provide that those rights have an element of public ownership in their inception. The patents at issue in *Oil States* were an exception to a general principle about the legal origin of private rights in the constitutional system.[229]

2. Creating Relations of Public Right and Private Privilege When an Enumerated Power Is Available.

Today, as when the older system was dominant, Congress does have some powers that enable it to establish the United States as a right-holder and private people as potential recipients of privileges. Whether any particular power can bring about that result and in what applications will depend on factors specific to the power and the application involved.

Congress can create the relationship of public right and private privilege in two main ways. The first, and more familiar in this regard, involves powers by which Congress makes private people better off relative to a baseline of congressional inaction. Grants of land are an example, and the interest in receiving a land grant was a well-known privilege in the nineteenth century.[230] The second main way to create that relationship involves powers by which Congress imposes a general prohibition from which specific permissions may be carved out.[231] Licensing, such as broadcast licensing, takes the latter form: broadcasting without a license is forbidden, and a license is a benefit.

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[229] *See generally* Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C., 138 S. Ct. 1365 (2018).

[230] *See* Nelson, *supra* note 7, at 577 (noting that nineteenth century courts recognized Congress's authority to transfer publicly owned land to private individuals).

[231] *See id.* at 571 (explaining how Congress may repeal statutes that create a private privilege and Congress may revoke or grant the privilege on an individual basis). This relationship between public rights and private privilege was at work in *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). There, the Court upheld a statute which prohibited the transportation of aliens with an infectious disease and directed port officials to deny clearance papers to companies that violated the statute until a $100 fine was paid. *Id.* at 343.

a. Powers to Grant Benefits.

Today, Congress gives out trillions of dollars in federal funds in forms that would qualify as privileges under the nineteenth century system. Social Security benefits are a leading example, and their constitutionality rests on the contestable conclusion that Congress may spend federal funds to promote the general welfare.[232] The U.S. Supreme Court's current position, announced in *United States v. Butler*,[233] is the so-called Hamiltonian view, according to which Article I, Section 8 does convey authority to spend for the general welfare.

Upon embracing the Hamiltonian view, the Court also adopted an internal limitation that Hamilton himself had adopted: the welfare to be promoted must be meaningfully general rather than local.[234] While that principle likely has little importance for the creation of privileges and executive adjudication, another announced in *Butler* is important here. The *Butler* Court emphasized that the power to spend is not a substitute for powers to regulate conduct that Congress lacks.[235] When *Butler* was decided, Congress did not have power to regulate agricultural production, so the principle had practical significance in that case.[236] While the Court's more permissive doctrine of congressional regulatory power has substantially moderated the consequences of *Butler*, any internal limits on the spending power that remain are important for executive adjudication.[237] Government spending is a

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[232] *See* Helvering v. Davis, 301 U.S. 619, 640 (1937) (upholding the constitutionality of Social Security old-age benefits).

[233] 297 U.S. 1, 65 (1936) (noting that Congress may spend for the general welfare).

[234] *Id.* at 67 (endorsing the conclusion that spending must be for general and not local welfare).

[235] *See id.* at 68 ("We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.").

[236] *See id.* (stating that regulation of agricultural production is "beyond the powers delegated to the federal government").

[237] In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court concluded that Congress's powers to regulate commerce and carry that power into execution enabled it to regulate agricultural production.

quintessential public right, and the interest in receiving gratuitous payments from the government is a quintessential private privilege.

To students of twenty-first century constitutional law, *Butler* may seem to present a problem of unconstitutional conditions similar to those presented by cases like *South Dakota v. Dole*,[238] or *National Endowment for the Arts v. Finley*.[239] In *Dole*, the Court assumed that the spending power is subject to an affirmative limitation found in the independent sovereignty of the states that protects them from federal coercion.[240] In *Finley*, the spending power was assumed to be subject to an affirmative limitation imposed by the First Amendment.[241] In both situations, an external restraint functioned as a limit on an enumerated power. *Butler* may appear to be similar, with the external restraint coming from another aspect of federalism—the states' retention of regulatory authority not granted to Congress.

Another way to understand the issue presented in *Butler*, however, is that the Court decided a question concerning the reach of a power. The Court in *Butler* read the spending power in light of the larger system of enumerated powers into which it fit.[242] The purposes to which the spending power reaches, *Butler* suggests, are to be sought for in light of the limited reach of other powers.[243] As that way of thinking suggests, a power with which benefits can be conferred can have a principle of unconstitutional conditions built into it, rather than imposed by another provision that overrides it.

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[238] 483 U.S. 203 (1987) (addressing federal government spending that was conditioned on state enactment of minimum drinking age).

[239] 524 U.S. 569, 569 (1998) (deciding questions posed by grants available for works of artistic excellence with artistic merit).

[240] *See Dole*, 483 U.S. at 211 ("Our decisions have recognized that . . . the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937))). While the Court found that the spending program in *Dole* was not coercive, *id.*, it concluded that the Medicaid expansion at issue in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 580–82 (2012), constituted an impermissible coercion.

[241] The Court in *Finley* considered and rejected the argument that the spending restriction at issue was unconstitutional viewpoint discrimination under the First Amendment. 524 U.S. at 580.

[242] *See* 297 U.S. 1, 66 (1936) ("[W]hile, therefore, the power to tax is not unlimited, its confines are set in the clause that confers it . . . .").

[243] The Court in *Butler* reasoned that the Agricultural Adjustment Act invaded the reserved powers of the states because it exceeded Congress's enumerated powers. *Id.* at 68. That way of thinking incorporates aspects of both affirmative restriction and internally limited power.

Any limits on the purposes of the spending power are also limits on executive adjudication. It is plausible, for example, that the power to spend for the general welfare does not include buying all the soft drink bottling facilities in the country to bring them under federal ownership. Congress and the courts have become used to the idea that the spending power can be used to encourage and subsidize many forms of activity, such as art in *Finley*.[244] They have seldom confronted the question whether it can be used to bring some activity under federal proprietary control. The answer may well in general be that it may not. If the power is limited along those lines, so is Congress's ability to provide for executive adjudication.

Cash grants from the federal government are an important interest that, under the nineteenth century approach, qualifies as a privilege. Congress has other powers with which it grants material benefits. Two are especially notable because they were well-established features of the constitutional system well before a general spending power was accepted. The U.S. Constitution explicitly authorizes Congress to dispose of the territory and other property of the United States; both land grants and sales were thoroughly familiar to the framers.[245] As *Oil States* shows, the power to grant patents is also a central part of congressional authority, one that has been exercised from the very beginning.[246]

In the nineteenth century, Congress's power to condition land grants was an important tool of policy. States were given lands that they were expected to sell, with the proceeds going to create and fund colleges and universities.[247] The extent to which the United States could retain an ownership interest, the way the lessor does under a lease, depends on an important detail of the power to dispose of the property of the United States: is a transaction in

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[244] *See Finley*, 524 U.S. at 587–88 ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.").

[245] U.S. CONST. art. IV, § 3 (dictating that Congress has power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"); *see also* Nelson, *supra* note 7, at 577 (discussing the nineteenth century creation of administrative structures to distribute federal lands).

[246] Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C., 138 S. Ct. 1365, 1378 (2018).

[247] *See* 7 U.S.C. §§ 301–09 (2012) (codifying statutes providing for grants of land to states to support public universities).

which an ownership interest is retained a disposition? Very likely it is. The important point here is to see the question. A power to make only grants of the fee interest would be importantly restricted.

The possibility that the patent power is restricted to unconditional grants, with no retained interest, was raised at oral argument in *Oil States*.[248] An important question in that case was whether the Constitution requires that patents be once-and-for-all grants, so that the interest in receiving one is a privilege but a patent once granted is a right.[249] The U.S. Constitution authorizes Congress to promote science and useful arts "by securing for limited times to authors and inventors the exclusive *right* to their respective writings and discoveries."[250] During the argument, Justices Kennedy and Gorsuch raised the question whether the text's reference to securing rights indicates that a patent, once granted, becomes a private right in the inventor.[251] The Court's opinion, in which Justice Kennedy joined, concluded that patents remain public rights once granted.[252] In the Court's view it apparently is possible to secure a right by giving one that contains an important element of ongoing public control.

Congressional powers to confer material benefits thus may give the legislature an all-or-nothing choice or limit it to making grants in certain forms that do not include an ongoing federal ownership interest. Whether any such power enables Congress to create the relation of public rights and private privilege is thus a question about the content of that power, which may depend on the purpose it is designed to serve.

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[248] Transcript of Oral Argument at 20, *Oil States*, 138 S. Ct. 1365 (No. 16-712).

[249] *Oil States*, 138 S. Ct. at 1375–78 (discussing the public nature of patent rights).

[250] U.S. CONST. art. I, § 8, cl. 8 (emphasis added) (dictating Congress's intellectual property powers).

[251] At argument, counsel for respondent, the party supporting adjudication by the Patent and Trademark Office, suggested that patents are not private rights because they are "not granted for purposes of the inventor" and that, while they benefit the inventor, "the paramount public purpose that is imbedded in every patent is the advancement of the progress of science." Transcript of Oral Argument, *supra* note 248, at 39. Justice Gorsuch, mentioning Justice Story, commented that "once it's granted, it's a private right belonging to the inventor." *Id.* Justice Kennedy noted "that's the constitutional provision" and, after Justice Gorsuch interjected "yeah," added "securing for limited times authors and inventors the exclusive right, securing to them, not securing to the public." *Id.* at 39–40.

[252] *Oil States*, 138 S. Ct. at 1375–76 (discussing the public nature of patent rights).

b. Regulatory Powers, Prohibitions, and Licensing.

Licenses are benefits, measured against a prohibition on unlicensed activity. A very early form of federal licensing was in the first Indian Nonintercourse Act, adopted in 1790.[253] Congress imposed a general prohibition on trade with the Indian tribes.[254] It gave the executive authority to grant licenses for that trade, and gave the President broad discretion in setting the terms of licenses.[255] The prohibition that made licenses necessary rested on the Indian commerce power, and was valid only if that power was broad enough to sustain the general prohibition. Under the nineteenth century system, licenses were privileges. As such, they could be granted or denied by the executive pursuant to applicable rules, with as much or as little judicial involvement as Congress found appropriate.[256]

Licenses, and the possibilities for executive adjudication that come with them, are possible only if Congress has a power with which to impose a prohibition that makes a license necessary.[257] The first step in deciding whether Congress has such power is to decide whether Congress may regulate the activity involved at all.[258] Only if rules about radio broadcasting come within one of Congress's powers may it regulate broadcasting by imposing a general prohibition, permission to depart from which requires a license.[259]

The next step is less familiar: given that Congress may make rules about some kind of conduct, may it make the rules that establish a public right and support a licensing system? This kind of question came before the Court in *Hammer v. Dagenhart*.[260] The Child Labor Act forbade the transportation in interstate commerce of goods made with child labor; it did not directly regulate production.[261] A firm could hire all the child laborers it wanted to,

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[253] Act of July 22, 1790, ch. 32, 1 Stat. 137 (prohibiting trade with the Indian tribes absent a license from the federal government).

[254] *Id.*

[255] *Id.*

[256] *See* Nelson, *supra* note 7, at 571 (discussing the nineteenth century practice allowing the legislature to give executive officers the authority to revoke statutorily created privileges on an individualized basis).

[257] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824) (conducting a preliminary examination as to whether Congress had authority under its commerce power to regulate maritime navigation before upholding a federal law licensing "vessels in the coasting trade").

[258] *Id.*

[259] *See* 47 U.S.C. § 301 (2012) (banning unlicensed broadcasting).

[260] 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[261] *See id.* at 268 n.1 (quoting the Child Labor Act).

and have them make whatever it wanted, without violating federal law. The law was designed to be an exercise of the commerce power proper, not a law necessary and proper to carrying the commerce power into execution; it was a rule about interstate trade in goods, which is plainly commerce among the several states.[262]

Nevertheless, the majority concluded that the Act exceeded Congress's power.[263] "The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States."[264] Making goods and mining coal, the Court said, "are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof."[265]

Justice Holmes's answer in dissent addressed the issue that is relevant to executive adjudication. He rejected any claim that the power to regulate did not include the power to prohibit.[266] He then argued that the policy principles on which that power was to be exercised were entirely up to Congress.[267] Justice Holmes likely realized that his reading of the commerce power would support a licensing system. He almost certainly was aware that it would support executive adjudication. His Court had held that executive decisions regarding the exclusion of aliens could be made absolutely final because Congress had complete control over the admission of aliens, who had no right to enter the country.[268] Plenary power

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[262] *See id.* at 217 ("The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages.").

[263] *Id.* at 276.

[264] *Id.* at 271–72.

[265] *Id.* at 272 (citing Delaware, Lackawanna & Western R.R. Co. v. Yurkonis, 238 U.S. 439 (1915)).

[266] *Id.* at 277–78 (Holmes, J., dissenting) ("It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid.").

[267] *See id.* at 280–81.

[268] *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892) (holding that Congress may admit aliens on such conditions as it sees fit, may authorize courts to investigate facts concerning their eligibility to enter the country, or may entrust "final determination" of facts to executive officers).

supported executive adjudication in a regime of public right and private privilege.[269]

Any regulatory power that can be used for any purpose Congress chooses can support licensing with executive adjudication. If Congress may impose a prohibition for any reason, it may impose a prohibition for the reason of putting the government in the position of a property owner for purposes of the activity in question. Even a power that is not that sweeping can sometimes support executive adjudication. Two licensing systems, one old and one new, provide examples. Congress in the 1790s might well have concluded that disputes related to trade could disrupt peaceful relations with the Indian tribes, at a time when maintaining peace was vital to national security. Keeping the peace would have been a legitimate use of the Indian commerce power.[270] Under those circumstances, subjecting the Indian trade to very close federal regulation by banning it, subject to licensing, was a way to foster pacific relations.

Similar reasoning justifies the licensing system involved in *Thomas v. Union Carbide*.[271] Pesticides can be hazardous, shipping them poses serious risks, and Congress is charged with regulating interstate shipment in general. Extensive regulation is a reasonable step.[272] When the problem is risk, licensing has an important advantage. The requirement of a license is itself easily enforced, and completely excludes unlicensed operators. No inquiry into the risks they pose is necessary. More complicated rules designed to deal with risk, and the enforcement efforts that those rules may call for, can be concentrated on licensed operators.

Licensing commerce puts the government in the position of an owner, with a right to exclude and a power to give permission. The Indian Nonintercourse Act and FIFRA may not look like federal ownership, but they function much like intellectual property, giving one party the right that some specified conduct not take place

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[269] *See id.* at 660 ("[A]nd in such a case . . . in which a statute gives a discretionary power to an [executive] officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts.").

[270] *See* THE FEDERALIST NO. 3 (John Jay) (arguing that a single national government, in its dealings, would be less likely to provoke the Indian tribes than a multitude of state governments).

[271] 473 U.S. 568 (1985).

[272] *See id.* at 589 (noting that Congress has the power, under Article I, to condition the issuance of licenses on compliance with agency procedures under a complex regulatory scheme).

without its permission.[273] The current system of broadcast regulation reflects a choice of public, rather than private, ownership of an intangible asset that is a crucial input to an important business.[274] Any time Congress seeks to create that form of regulation, the constitutional question is whether its control over the activity involved extends to creating what amounts to public ownership. Whether any particular regulatory power is capable of creating relations of public right and private privilege in that fashion depends on the purposes to which the power may be put.[275]

B. CONSTITUTIONAL LIMITATIONS AND EXECUTIVE ADJUDICATION

Internal limits on congressional power remain an important part of constitutional doctrine, but today they likely take second place to affirmative limitations. Those limitations too can restrict Congress's ability to create relations of public right and private privilege, and so restrict its ability to provide for executive adjudication on the rationale of the nineteenth century system. This

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[273] The Patent Act provides that patents "shall have the attributes of personal property." 35 U.S.C. § 261 (2012). Patent holders have a right against infringement, which is a statutorily defined kind of act that harms the patentee's interest in the patent but does not consist of physical interference with an object the patentee owns. *Id.* § 271 (defining infringement as making, using, offering to sell, selling, or importing into the United States any patented invention).

[274] *See* 47 U.S.C. § 301 (2012) (providing for private use but not ownership of the channels of radio transmission). Public ownership with licensing to private operators is not the only way to manage the scarcity of radio frequencies. Another is private property. *See* R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 15–17 (1959) (discussing "the idea of using private property and the pricing system in the allocation of frequencies").

[275] The Court has recently found some limits on Congress's power to condition access to interstate commerce. In *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), the Court found that a requirement that raisin growers transfer a specified portion of their crop to a federal raisin reserve constituted a taking of property that required just compensation. The Court rejected the argument that Congress could condition permission to engage in commerce on agreeing to limit sales in that fashion. *Id.* at 2430. Its opinion distinguished regulation of the sale of pesticides, as in *Thomas v. Union Carbide*, 473 U.S. 568 (1985), from regulation of the sale of raisins:

> Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special government benefit that the Government may hold hostage to be ransomed by the waiver of a constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack.

Horne, 135 S. Ct. at 2430–31. Exactly what principle of unconstitutional conditions the Court meant to rely on is hard to say. It may be that Congress's regulatory power over harmful substances is greater than its regulatory power over healthful snacks, or that a condition that requires surrender of personal property is impermissible.

survey of potential limits on executive adjudication is designed to identify categories of relevant constitutional limitations. For that reason, it is organized, not by particular limitations like the First Amendment, but by the ways in which the Constitution restricts the steps Congress might take to create the legal relations needed for executive adjudication.

1. Limitations Protecting Freedom of Conduct and Choice.

Licenses are an important form of private privilege, and they relieve their holders from prohibitions. Therefore, constitutional limitations that inhibit prohibitions on conduct also limit licensing.[276] Affirmative limitations that affect the congressional powers used for licensing are not so easy to find, however. The U.S. Constitution secures U.S. citizens substantial freedom to move throughout the United States.[277] It does not secure liberty to transport unregistered rodenticides from state to state. Congress may not ban and license religious worship as such, but that constitutional principle is not likely to restrict any system of executive adjudication that Congress is likely to adopt. No affirmative limitation operates generally in favor of freedom to engage in interstate commerce, so much of the executive adjudication that could rest on licensing commerce is not limited by constitutional protections of liberty of conduct. One possible exception to that generalization is both important and illustrative of the difficulties that can arise in this context: regulation of broadcasting.

As discussed above, the current system of broadcast regulation rests on a form of public ownership: liberty to broadcast, which is the use of an intangible asset, is generally restricted, and allowed only with a license. That arrangement puts the government in the position of owner of the intangible asset, and private people in the position of someone with a revocable permission to use another's property. Broadcasting is regularly used for communication, and, for that reason, broadcasting facilities bear a functional resemblance to printing presses. A general ban on broadcasting

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[276] By a constitutional protection of freedom of conduct, I mean a rule like the First Amendment, which protects particular activities like speech. Protection of liberty in the sense of freedom of movement, so-called natural liberty, is dealt with later. *See* discussion *infra* Section IV.B.2.b.

[277] *See* Saenz v. Roe, 526 U.S. 489, 498 (1999) (finding that the right to travel throughout the country is rooted in the U.S. Constitution).

thus may seem like a straightforward violation of the First Amendment, and a system of licensing may seem like a classic and straightforward violation.[278] But the freedom of the press does not entail liberty to use printing facilities that are owned by the government any more than it entails liberty to use printing facilities owned by another private person. American constitutional liberty is negative in that its extent depends on the resources that private people command, whether those resources be a meeting hall or a newspaper.[279] Whether the First Amendment limits Congress's power to establish a regime of complete or partial public ownership of an important medium of communication—the liberty to broadcast—is a difficult question. Because rules about ownership of resources are in an important sense prior to rules about freedom of speech and press, that question is not answered by the fact that a ban on unlicensed broadcasting is to some extent a ban on unapproved communication.

Because constitutional protections of liberty are generally negative in that they take for granted the rules that determine private parties' control over resources, it may often be the case that a constitutional protection of liberty does not constrain Congress's ability to create a system of public rights and private privileges. That is not to say that affirmative restrictions in favor of liberty of conduct never impose such constraints, but it does mean that Congress may well have substantial scope to create the preconditions for executive adjudication even when constitutional liberty is at issue.

2. Constitutional Protections of Life, Natural Liberty, and Property.

When Congress imposes a general ban on some conduct and provides for licenses to engage in that conduct, it puts the

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[278] Rejection of licensing has long been a leading feature of the Anglo-American concept of freedom of the press. *See, e.g.*, John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 412–13 (1983) (discussing press licensing as classic violation of freedom of the press).

[279] In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court held unconstitutional a Florida statute that required newspapers to print replies by candidates for office to comments the newspaper made about them. The Court found that the statute restricted the newspaper's freedom of speech, even though it was designed to facilitate speech by candidates. Underlying *Tornillo* is the assumption that freedom of speech is freedom to use one's own resources, not those of another. *See* Lillian R. BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1820–21 (2010) (exploring the connection between negative constitutional rights and private property).

government in a position like that of an owner. Sometimes the government acts to acquire ownership rights in a more familiar sense, as when it acquires real estate. The U.S. Constitution limits Congress's power to acquire ownership. It does so in familiar restrictions concerning unconsented acquisitions of property. It also does so in the less familiar but basic context of physical control over individuals' persons. Such control is found in the rights to life and to freedom of movement—the latter often called natural liberty to distinguish it from liberty to engage in some form of conduct like religious worship. Insofar as the U.S. Constitution limits Congress's power to make the government an owner, it limits Congress's power to provide for executive adjudication.

a. Property.

In several ways, the U.S. Constitution protects private interests that are or closely resemble private property. Today's constitutional doctrine limits government in favor of both private property and government benefits that are similar to it, although those limitations are not identical as to the two kinds of private interest. Insofar as the U.S. Constitution limits Congress's control over the property-like interests of private persons, it may also limit Congress's ability to create the relation of public right and private privilege that underlies executive adjudication in the nineteenth century system.

i. Private Property and Takings.

The most familiar way in which Congress can establish public ownership is to acquire title to, or an interest in, an existing asset. When Congress directs the executive to purchase real estate, that real estate can be administered as a public right by the executive. Purchases with federal funds are limited by any internal limits on the spending power. Acquisition through eminent domain or direct legislative action is subject to affirmative limitations.

As Nelson explains, nineteenth century courts distinguished between franchises and what he calls core private rights, like basic rights of property and contract.[280] Franchises, like a monopoly to operate a bank or a bridge, were given by the government for public purposes and subject to change by the government; they did not

[280] Nelson, *supra* note 7, at 566–68.

become vested rights. Core private rights, by contrast, originated with no element of public ownership, because they were seen as analogs in civil society of rights that would exist without government.[281] Once core private rights arose, they were vested and protected against divestment by legislative action.[282] Combined, those principles meant that the rights known to the private law arose as private and not public, and the government could not make them wholly or partly public. Because executive adjudication was possible only with respect to public and not private rights, only the courts could adjudicate with respect to the latter.

That limit on Congress's power to create relations of public right and private privilege no longer operates. While Lockean theories of the content of the private law remain important, no such theory can today be confidently assumed in understanding existing legal rules. Two important features of the current constitutional system, however, combine to impose important limits on Congress's ability to use public rights to support executive adjudication.

The first is federalism. Congress may be able to arrange the law governing patents so that a patent originates with a component of public ownership. In similar fashion, Congress may be able to retain a reversionary interest for the United States when it grants federal real estate. As long as private rights are generally found in state and not federal law, however, Congress cannot keep those rights from having no component of federal ownership when they first arise. Whether under current doctrine Congress could federalize the private law is, as noted above, quite doubtful, even in light of the broad powers that doctrine endorses.[283] Until Congress takes such a drastic step, private rights will mainly be state-law rights and so will come into existence without any aspect of public ownership, or at least federal public ownership. The federal structure thus performs the function that the Lockean conception of private rights performed in the older system.[284]

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[281] *See id.* (discussing the difference between core private rights and franchises in their relation to the Lockean state of nature).

[282] In Corwin's phrase, the principle that the legislature could not simply take property by decree was the basic doctrine of American constitutional law, the foundation of what today would be called substantive due process. *See* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 247–48 (1914) (noting that protection of vested rights of property was a fundamental principle of antebellum constitutional law).

[283] *See* discussion *supra* Section V.A.1.

[284] As far as executive adjudication is concerned, the crucial aspect of the older system was that core private rights were private and not public. How that came to be was not critical.

Second, although constitutional protections of private property are not as robust as they were when the nineteenth century system of executive adjudication prevailed, the Takings Clause still has considerable force.[285] Any attempt by Congress to acquire public ownership of existing assets without payment would run afoul of it. Straightforward acquisition of title would constitute a taking under any interpretation of the Clause. The U.S. Supreme Court has been notoriously unable to explain when a regulation of the use of property goes so far that it qualifies as a taking under the Clause.[286] The difficulties the Court has encountered would not arise were legislation to be predicated on acquisition of ownership by the government, as it would have to be to support executive adjudication under the older system.[287] It is hard to see how Congress could simultaneously claim to have established public ownership for purposes of Article III and, at the same time, claim not to have acquired private property for public use for purposes of the Takings Clause.

ii. Government Benefits and Requirements of Judicial Review.

In recent decades, the U.S. Supreme Court has treated government benefits—so-called "new property"—the way it treats ordinary private property for purposes of many substantive constitutional norms.[288] By doing so, the Court has rejected an older approach, according to which adverse government decisions

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[285] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The Clause remains a significant limitation on government power, despite the decline in judicial protection of property rights as compared to the nineteenth century. For an example of the Clause's continued vitality, see *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015).

[286] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' . . . this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))).

[287] The Court's famously unclear statement that "if regulation goes too far it will be recognized as a taking" assumes the far end of the spectrum that clearly constitutes a taking is acquisition of ownership. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[288] *See*, *e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 65 (1990) (holding that freedom of expression protections limit the government's power to condition public employment on partisan affiliation).

regarding benefits did not violate affirmative limitations like the First Amendment. While on the Supreme Judicial Court of Massachusetts, then-Judge Holmes provided a famous formulation of the older principle: a police officer could be fired for political activity, even though he could not have been jailed for it, because although he might have a right to talk politics, he had no right to be a policeman.[289] In its capacity as employer, the government could act on grounds forbidden to it as sovereign by acting on the privilege of public employment.

Executive adjudication concerning public benefits raises a related question, one having to do with the structure of government and, in particular, access to court. Constitutional limitations fit smoothly into a system of litigation devised for ordinary private rights. For example, if the government seeks to punish a private person through a criminal prosecution, constitutional objections to the legal rule being enforced come before the court.[290] When government officials inflict or threaten private harm in the course of their official activities, affected parties can test the limits of their authority by asserting their private rights against the officials.[291] The rules concerning access to judicial remedies that come with the

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[289] McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892), *abrogated by* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996). A New Bedford police officer had solicited a political contribution in violation of a municipal regulation forbidding police officers to do so. Then-Judge Holmes wrote:

> [T]here is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.

Id. at 517. A few years later, then-Judge Holmes took the same approach to the government's rights as property owner that he took to its rights as employer. Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895). In that case, Davis was convicted of making a public speech on the Boston Common without a permit. *Id.* at 113. Upholding the conviction, then-Judge Holmes wrote:

> As representative of the public, [the government] may and does exercise control over the use which the public may make of such places . . . . For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.

Id. at 113.

[290] *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (finding that the criminal defendant successfully raised a First Amendment objection to the Flag Protection Act).

[291] *See*, *e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (holding that a public official who threatens to invade private rights without justification is subject to an injunction).

private right involved bring any constitutional questions before the judiciary.

Matters concerning access to judicial remedies are more complicated with respect to government benefits. A central principle of the older system of executive adjudication was that Congress could give executive officials the task of dispensing benefits without creating any judicially-enforceable private rights.[292] Absent such a right, a private person claiming to have been damaged by an unconstitutional feature of the benefit program would have no way to bring the issue before a court. The problem was compounded, although not created, by sovereign immunity. A judicial order to confer a benefit would run against the United States, not against an official personally, and would be barred without the sovereign's consent.[293]

If Justice Holmes's approach to substantive constitutional limitations and public benefits applied across the board, the second question would not arise. No exercise of the government's rights as proprietor, and hence no decision not to give a benefit, would run afoul of constitutional protections of liberty of conduct. The U.S. Supreme Court has long rejected Justice Holmes's view, and its doctrine today contemplates that a decision not to grant a benefit may be unconstitutional.[294]

The Court has, to some extent, assimilated government benefits to private property for purposes of substantive constitutional limitations. It has not systematically worked out the implications of that way of treating benefits for access to court. The Court has, however, expressed doubts about the constitutionality of precluding judicial review of constitutional questions concerning benefits like employment.[295] If judicial involvement is constitutionally required when the U.S. Constitution limits Congress's power concerning the

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[292] *See* discussion *supra* Part III.

[293] *See* discussion *supra* Part III.

[294] *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (finding that a restriction on the use of federal funds by the Legal Services Corporation was unconstitutional under the First Amendment).

[295] In *Webster v. Doe*, 486 U.S. 592 (1988), the question was whether a statute precluded judicial review, within the meaning of the Administrative Procedure Act, over the decision to fire a CIA employee. The Court concluded that judicial review was precluded with respect to the employee's statutory claims, but not his constitutional claim. *Id.* at 601, 603–04 ("Nothing in [the relevant provision] persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section.").

government's proprietary-type rights, then, for one reason or another, the nineteenth century principles concerning executive adjudication do not apply.

Because the Court has not much adumbrated the grounds for thinking that judicial involvement may sometimes be mandatory when benefits are involved, it is not clear how to fit any such requirement into the framework of the older system of executive adjudication. One way to do so is to say that when the Constitution's substantive limitations operate on the government in its proprietary capacity, they create private legal interests that function as private rights.[296] That account has considerable appeal. A public right is one as to which the legislature has discretion, as a private owner does. When the Constitution limits that discretion, the conditions for a public right are not met.[297] Constitutional limitations in favor of liberty of conduct operate in favor of private people, as is reflected in their description as constitutional rights. If a right is held by a private person, it is not held by the public.

b. Life and Natural Liberty.

In general, individuals have legally protected interests with respect to their persons. Physical invasions of bodily integrity and physical restraints are largely unlawful.[298] Bodily integrity and freedom of movement, the latter often called natural liberty to distinguish it from freedom to engage in particular forms of conduct like speech, are private rights. For Congress to subject those interests to public ownership would be a step too drastic to describe in legal terms. A law along those lines might, for example, prohibit people from leaving their dwelling places without government permission. That would make freedom of movement a privilege and not a right. Just how the courts would respond is very difficult to

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[296] To preserve the principle that Congress in general retains discretion as to whether to create benefits at all, it may be slightly better to say that substantive constitutional limitations operate to restrict Congress's power to arrange a program so that it creates no private rights, while Congress retains the discretion to decide whether to have such a program at all.

[297] The nineteenth century approach to benefits and substantive limitations, exemplified in then-Judge Holmes's opinions, may rest on the converse reasoning: when the government acts as a proprietor, the U.S. Constitution does not limit its discretion. *See* cases cited *supra* note 289.

[298] *See* Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 269 (1990) ("At common law, even the touching of one person by another without consent and without legal justification was a battery.").

say, in part because it is difficult to imagine their reaction to circumstances that might lead Congress to adopt such a law. It is easier to say that the vast bulk of judges today if presented with a law like that as a hypothetical would say the law is unconstitutional, although they might differ as to the reason. The reason might involve the Due Process Clause, but the result is more easily predicted than the grounds for it.[299]

If life and natural liberty as private rights have substantial substantive constitutional protection, Congress's ability to make those interests the subject of public rights is substantially restricted. The conclusion that Congress's power is restricted in such a way has implications, not just for the unlikely possibility of legislation making bodily integrity and freedom of movement into public rights, but perhaps more importantly for understanding the view that the courts' special role is to protect life, liberty, and property. The Due Process Clause of the Fifth Amendment requires due process for deprivations of life, liberty, or property, and in the nineteenth century due process was routinely equated with judicial process.[300] According to the explanation of the older system presented in this Article, the concept of judicial power gives the courts no special connection to any particular kind of legal rule or legal right. All rights are treated the same, including public rights that are exercised by the executive and that have effects on private people.

As to property, the association of the courts with those three categories is readily reconciled by the principle that all rules are the same as far as the scope of judicial power goes. Property means private property, and public rights end where private property

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[299] In *Cruzan*, the Court found in its prior cases "a constitutionally protected liberty interest in refusing unwanted medical treatment." *Id.* at 278. The Court's response to the quite limited invasion involved in involuntary medical treatment suggests that there would be a stronger response to an attempt by Congress to make those basic private rights into public rights. A more natural source for the principle of self-ownership might be the Thirteenth Amendment. U.S. CONST. amend. XIII (forbidding slavery and involuntary servitude).

[300] *See generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (noting that the due process clauses require that legislatures act generally and prospectively, whereas courts act specifically and retrospectively); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 506–09 (1997) (discussing how direct legislative deprivations were seen as being without due process because legislatures do not act on the basis of existing law like courts do).

begins. With respect to life and liberty, the association of courts with those interests can also be explained in simply definitional terms. If the Due Process Clause refers to the specific private rights of life and liberty found in the positive law, rather than the non-legal interests in life and liberty the law protects, then like other private rights they are not subject to executive adjudication. That conclusion follows, however, not because courts have a special role in protecting the interests in life and liberty, but because their function is to protect all rights found in the positive law.

As the likely unconstitutionality of legislation transforming life and liberty into public rights suggests, the principle that courts protect life and liberty may also arise from substantive constitutional protections of life and liberty. Insofar as the U.S. Constitution secures private rights concerning those interests, it prevents the change in legal relations that underlies executive adjudication with respect to them: if substantively protected, life and liberty cannot be made privileges subject to public rights. With executive adjudication ruled out, the only way the government can operate on the interests involved is through the sole institution that can change private rights by applying the law of remedies: the judiciary. Once again, the courts' exclusive role results, not from a principle concerning the judicial power, but from limitations on the legislative power and a resulting limitation on the functions that can be assigned to the executive.[301]

C. ARTICLE III AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The constitutional structure can operate as an external limit on congressional power because Congress must work through that structure, and individuals are sometimes said to have rights as a result. The Due Process Clause of the Fifth Amendment is formulated as an affirmative restriction and concerns the decision-making processes of government.

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[301] Although the government does not have and probably cannot have an owner's control of the bodily integrity and natural liberty of private people, matters are different with respect to members of the armed forces. They have a general obligation to go where they are told and risk their lives if necessary. A group of 300 soldiers, for example, might be ordered to hold a pass at all costs. The legal relations between the government and members of the armed forces raises the possibility that courts martial can be justified as executive adjudication concerning public rights. I will not explore that possibility in this Article.

1. Rights to Judicial Hearings under Article III and Unconstitutional Conditions.

According to the explanation of the older system presented here, the allocation of responsibility between the executive and the judiciary did not reflect the principle that only courts could adjudicate finally with respect to core private rights. Rather, that allocation resulted from the executive's ability to administer public rights and the actual allocation of interests between public and private control. That allocation of interests reflected both choices the legislature had made, and the limits on the choices it was allowed to make. If Congress had the power to provide for some public benefit with or without judicial involvement in its distribution, and chose not to involve the courts, executive officials would in effect have the last word. If Congress created a private right against the government, the courts would enforce it. If Congress could not or did not establish a relationship of public right and private privilege, the courts would enforce private rights just as they enforce all rights.

Under that interpretation of the older system, Article III's grant of judicial power to the courts does not identify any interest that must be the subject of decision by the courts. Article III, however, might be thought to impose a limitation on Congress's ability to create public rights because it creates a right to adjudication by the federal courts and limits Congress's ability to condition receipt of benefits on waiver of that right. Justice O'Connor raised that possibility in *Schor*, when she concluded that Schor had "waived any right [he] may have possessed to the full trial of [ContiCommodity's] counterclaim before an Article III court."[302] Her formulation does not entail that Schor had such a right but does show how it is possible to think in terms of one and waiver of one. The principle that some conditions on benefits are unconstitutional means that some demands for waivers are impermissible.

To apply the concept of waiver of a right to the identification of an unconstitutional condition, it is necessary to describe the right correctly. Under the older system of executive adjudication, Article III certainly did not create a right that all decisions applying law to fact be made by courts. Nor did it create a right that all functionally

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[302] Commodity Futures Trading Comm'n v. Schor, 478 US. 833, 849 (1986).

final decisions be made by courts. Executive exercises of public rights could in effect be final, although their finality did not come from any preclusive effect such as a judicial judgment had. According to the interpretation of the older system presented here, Article III uniquely empowered the courts it created to apply the primary and remedial law independently and conclusively to disputes before them. Whether any specific dispute was before them depended on the content of the primary law, including the pattern of public and private rights that law established.

So understood, Article III gives private people a right to adjudication of their rights by courts. It does not determine what their rights are. As a result, Article III does not create any right to a judicial determination that is independent of the arrangement of rights established by the primary law. In the absence of a constitutional right, no problem of unconstitutional conditions arises. If a private person and the government enter into a transaction that is otherwise permissible given Congress's enumerated powers and the affirmative limits on them besides Article III, the role of the federal courts will reflect the result of that transaction. When Schor consented to CFTC adjudication of his claim and ContiCommodity's counterclaim, he changed his primary legal relations.[303] In return for the benefits of administrative dispute resolution, he became liable to an exercise of a power conferred on the CFTC with his consent, a power to create obligations to ContiCommodity, or in his favor should he prevail. When private people rearrange their legal positions with respect to one another and the government, their new positions have new consequences for judicial involvement. The Article III courts will enforce the rights they have after that rearrangement just as they enforced the rights that existed before. Because Article III looks to legal rules, rather than non-legal interests, any right it creates runs to the enforcement of whatever legal rights a person already has.

2. Procedural Due Process and Executive Adjudication.

In today's doctrine concerning executive adjudication, the Due Process Clause of the Fifth Amendment enters at two points. First, it imposes certain procedural requirements on executive decision making when the decisions involved constitute deprivations of life,

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[303] *Id.*

liberty, or property as those concepts are used in the doctrine. The exact procedural requirements—the process that is due—vary depending on the private and governmental interests at stake.[304] Second, like Article III, the Due Process Clause may require some judicial involvement with respect to some deprivations.[305]

In the nineteenth century system, the Due Process Clause worked differently. Only courts could give due process, so deprivations by the executive were categorically forbidden.[306] That was not a problem for executive adjudication, because the lawful exercise of a public right did not deprive anyone of a private right. The modern doctrine of procedural due process is thus probably not consistent with the assumptions of the older system about the Due Process Clause. According to today's procedural due process doctrine, executive officials *can* effect deprivations of life, liberty, or property with due process of law, and any deprivations they bring about must come with due process.[307] Today's procedural due process cases are thus inconsistent with one feature of the older system. Under the nineteenth century approach, Congress had complete control over the procedures the executive used in exercising public rights, just as it had complete control over judicial supervision of executive decisions. The contemporary Court rejected the older system when it rejected the argument that the process due for deprivation of rights created by statute is the process set out in the statute.[308]

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[304] *See* Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (articulating the now-standard formulation of the test with which executive decision making is evaluated for compliance with the procedural aspect of the Due Process Clause of the Fifth Amendment).

[305] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 447–48 (1944) (concluding that the limited form of judicial review provided by the emergency price control system of World War II was consistent with the Due Process Clause of the Fifth Amendment). The Court upheld the statutory system and so perhaps did not, strictly speaking, hold that due process required some judicial involvement, but its inquiry shows that the question of whether it did was a serious one. *Id.*

[306] *See* sources cited *supra* note 300 (pointing to equation of due process with judicial process in nineteenth century).

[307] The premise of the inquiry in *Mathews*, for example, was that denial of disability benefits constituted a deprivation of property. 424 U.S. at 341–42; *see also* Goldberg v. Kelly, 397 U.S. 254, 261–63 (1970) (discussing the termination of benefits as a deprivation of property under the Due Process Clause of the Fourteenth Amendment).

[308] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (concluding that the Due Process Clause of the Fourteenth Amendment prescribes minimum procedures for termination of public employment). The Court in *Loudermill* rejected the view of a plurality of Justices in *Arnett v. Kennedy*, 416 U.S. 134 (1974), according to which the government's power to define the substance of rights it creates, like the rights of public employees, brings

Current procedural due process doctrine can be reconciled with the nineteenth century system's principles regarding the role of the courts as long as the requirement of due process is confined to the decisional processes of executive officials and does not include access to the judiciary as part of due process. Compliance with procedural requirements found in the Constitution could be made a prerequisite for the validity of executive exercises of public rights as against private privileges. Procedural requirements imposed on the executive are consistent with finality as far as the courts are concerned for decisions that followed the required procedure. Such a system, combining older and newer parts of due process concepts, would need a reading of the Due Process Clause that could accommodate it. One reading along those lines would give both deprivation and due process different applications to the executive as opposed to the courts. For the executive, deprivations would include some exercises of public rights with adverse effects on private interests that are not rights, and due process would consist of some decisional method designed to enable correct decision making. For the courts, deprivations would consist of adverse acts with respect to rights, not privileges, and due process would be the familiar accoutrements of the judicial way of doing business.

VI. SEPARATION OF POWERS AND THE ADMINISTRATIVE STATE

The Court's renewed interest in a reading of Article III that focuses on private rights is part of a broader skepticism among some justices, judges, and commentators concerning the constitutional underpinnings of contemporary administrative government. Just as agencies are accused of exercising judicial power by resolving some disputes, so agencies are accused of doing so when they receive

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with it the power to define the procedures under which those rights may be terminated. 470 U.S. at 539–41.

> [The] Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.

Id. at 541. *Loudermill* thus rejected the older system. *Id.*

so-called *Chevron* deference.[309] *Chevron*, according to one standard reading, calls on courts to defer to agency interpretations of the law.[310] Justice Thomas has challenged any such deference on the grounds that it invades the constitutional role of the courts, who are to interpret the law for themselves.[311] Recent years have also seen renewed interest in the problem of delegation of legislative power to executive agencies. The criticism is that just as only courts are allowed to decide disputes, only Congress may make and change legal rules because only Congress has legislative power.[312]

In the current debate over Article III, the approach that focuses on the categories of public and private rights is associated with a more restrictive view of administrative government. Justice Thomas, the principal advocate of a restrictive view, wrote for the Court in *Oil States* and focused on the status of patents as private rights.[313] Justice Breyer, who does not adopt a restrictive stance, denies that executive adjudication is necessarily impermissible when private rights are at stake.[314] In his dissent in *Stern v. Marshall*, Justice Breyer rejected both the majority's restrictive conclusion regarding adjudication by bankruptcy courts and the majority's categorical methodology taken from Justice Brennan's plurality opinion in *Northern Pipeline*.[315]

The older system of executive adjudication, with its distinctions between private and public rights and private rights and privileges, relied on categories. Courts enforced rights, and privileges were, by definition, not legally protected. That system came from a time of much smaller government. I have argued that it can readily be explained with a conception of the judicial power that does not itself affect the status of interests as rights or privileges. The constitutional rules that determine whether Congress may create

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309 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (stating that courts are to defer to reasonable agency constructions of statutes that the agency administers).

310 *Id.* at 844 (discussing the impact of *Chevron* on agency deference).

311 *See, e.g.*, Michigan v. E.P.A., 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (arguing that judicial power requires that courts exercise independent judgment in interpreting law).

312 *See id.* at 2712–13 (claiming that agency law-making invades legislative power vested in Congress by Article I).

313 Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C., 138 S. Ct. 1365 (2018).

314 Stern v. Marshall, 564 U.S. 462, 512 (2011) (Breyer, J., dissenting).

315 *Id.* at 506.

the relationship of public right and private privilege come from elsewhere.

Perhaps even more striking is that today's understandings of the scope of congressional power support a broad scope of executive adjudication under the older system. Where Congress may forbid and then license an activity, it has the tools to create relations of public right and private privilege. The broad power over economic activity that Congress enjoys under prevailing understandings of its constitutional authority enables it to regulate in that mode across many contexts. As *Thomas v. Union Carbide* indicates, health, safety, and the environment are leading examples. Indeed, licensing the interstate transport of pesticides does not even require an expansive reading of the commerce and necessary and proper powers. It requires only that Congress's power over actual interstate transportation of goods be as broad as Justice Holmes said it was in his dissent in *Hammer v. Dagenhart*.[316] Regulation of interstate financial activities through licensing goes back, not just to the nineteenth, but to the eighteenth century. The First Bank of the United States received a franchise—permission to conduct banking activities throughout the country—that was a privilege under the nineteenth century system.[317] Around the time it chartered the First Bank, Congress imposed a licensing requirement on all transactions falling within one of the three heads of its commerce power.[318]

One implication of the reasoning presented in this Article is that the independent constraining effect of separation of powers on administrative government is less than some may think. The principle that only courts may adjudicate as to private rights reaches as far as private rights. How far private, as opposed to public, rights reach is to some extent up to the legislature. Some proponents of separation of powers as a protection of private interests might be disappointed with that conclusion, but it is an inherent limitation of government structure as a mode of constraint. Powers of government are to a large extent trans-substantive. That gives them force because they operate in all substantive contexts.

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[316] *See* 247 U.S. 251, 277–78 (1918) (Holmes, J., dissenting) (commenting on the scope of Congress's power with respect to interstate transportation of goods), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[317] *See* Act of Feb. 25, 1791, ch. 10, 3 Stat. 191–94 (incorporating the Bank of the United States and promising not to incorporate another for twenty years).

[318] *See* Act of July 22, 1790, ch. 33, 1 Stat. 137 (repealed 1809).

But it also limits their constraining effect. A judicial power that can apply legal rules without regard to their content must take those legal rules—for example, those that set out rights and privileges—as it finds them.