

## The Adjudicative State

Adam B. Cox & Emma Kaufman

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### INTRODUCTION

Over the last decade, the Supreme Court has advanced a new vision of the administrative state. In a series of cases, the Roberts Court has begun to unravel the New Deal settlement in which administrative agencies, insulated from partisan politics, regulate large swaths of American life.<sup>1</sup> These developments have received considerable attention from legal scholars. On the right, academics welcome the Court's effort to legitimate an unaccountable bureaucracy.<sup>2</sup> On the left, critics argue that the Court is undoing a hundred years of progress in which lawmakers found better ways to administer government as the country matured.<sup>3</sup>

The basic terms of this debate are well-settled: one is either for or against the formalist turn in administrative law. And for the most part, this conversation focuses on the regulatory side of the administrative state. Adjudication rarely features in disputes over the Supreme Court's administrative law jurisprudence. In the dominant paradigm, administrative tribunals are bit players in a bigger story about the Court's effort to rein in the civil service.

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<sup>1</sup> Part I traces this arc, which began in 2010 with *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, and culminated last Term in *West Virginia v. EPA*, 597 U.S. \_\_\_\_ (2022).

<sup>2</sup> See, e.g., PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017); Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821 (2018).

<sup>3</sup> See, e.g., Julian D. Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

But adjudication is no small part of the federal bureaucracy. Judges in administrative courts decide millions of cases each year, often with extraordinarily high stakes.<sup>4</sup> Resolving individual claims is at least half of what the administrative state does, and making sense of agency adjudication—defending it, restructuring it—is a key piece of the ideological movement that is underway in administrative law.<sup>5</sup> To overlook adjudication is to miss a critical part of the bureaucracy’s output and a crucial piece of the Court’s intellectual project.

This piece situates adjudication in debates about the future of administrative law. It argues that administrative courts expose an underappreciated conflict in the Supreme Court’s administrative law jurisprudence—in particular, tension between the Court’s commitment to unitary executive theory and its embrace of a formalist conception of separating government functions. The two commandments of administrative law in the Roberts Court are to give the President control over the executive branch and to isolate power in the proper branch of government.<sup>6</sup> These goals align when it comes to regulation. Whether it promotes democracy or deregulation, the jurisprudence is coherent.

But the two tenets of the Court’s jurisprudence are on a collision course when it comes to administrative courts. Under the Court’s approach to the unitary executive, agency courts should be subjected to presidential control. Yet following through on the Court’s separation-of-functions formalism would require shifting the work of agency tribunals to Article III courts, where judging belongs. One precept of the Court’s new administrative law would require administrative courts to be democratized. The other would require them to be abolished.

Recognizing this conflict raises serious questions about whether the Court’s jurisprudential project makes any sense, even on its own terms. It also complicates conventional accounts of contemporary administrative law. The Roberts Court is widely described as anti-bureaucratic, but that label fits poorly when it comes to the adjudicative state. As we will explain, the Court is extremely unlikely to dismantle administrative courts and shift their work to the Article III judiciary. Instead, the Court appears bent on championing what one might call presidential adjudication, at least for the vast majority of agency tribunals.<sup>7</sup> In this respect, the Roberts Court is not so hostile to bureaucracy. To the contrary, the Court defends and depends upon a vast adjudicative state to resolve millions of legal claims outside of Article III. Ultimately, focusing on adjudication reveals a Court that sometimes favors bureaucratic administration and is more internally conflicted than the deregulatory narrative suggests.

We come to these conclusions by way of immigration law. Drawing on our background in the field, this piece uses immigration courts to demonstrate the contradiction at the heart of the Court’s jurisprudence and to imagine how the Court’s worldview might play out. Immigration offers an illuminating example for administrative law because it is a domain in which “administration” is often synonymous with adjudication and political control of courts has long been the norm. In fact, the Court’s ascendant approach of presidential adjudication will, in effect, make immigration courts a model for the rest of the administrative state.

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<sup>4</sup> ADMIN. CONF. OF THE U.S. & STANFORD LAW SCHOOL, JOINT PROJECT ON FEDERAL ADMINISTRATIVE ADJUDICATION, CASELOAD STATISTICS, <https://acus.law.stanford.edu/> (August 1, 2022) [hereinafter ACUS-STANFORD STUDY].

<sup>5</sup> See *infra* Part II (examining recent developments in public rights doctrine).

<sup>6</sup> See *infra* Part I (identifying the new rules of administrative law).

<sup>7</sup> Cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

Immigration is also a field in which the politics of formalism are nuanced. A separation of powers jurisprudence that would eliminate administrative courts would be a boon for immigrants' rights, and deference to administrative agencies is not obviously leftist when the agency in question is Immigration and Customs Enforcement. Immigration thus puts the adjudicative side of the administrative state into perspective. That perspective, we argue, can help to advance debates about how the Supreme Court is transforming administrative law.

## I. THE NEW RULES OF ADMINISTRATIVE LAW

The Supreme Court's attack on the administrative state is premised on two ideas. First, the Court has adopted a rigid conception of the separation of powers in which the three branches of the federal government have distinct functions and boundaries, which federal judges are supposed to police. Second, the Court has embraced a strong version of unitary executive theory, which requires direct presidential control of agency administration.<sup>8</sup> These two ideas represent the emergence of a new and highly interventionist approach to structural constitutional law. Together, they have laid the groundwork for a fundamental reconstruction of the national government.

It is worth emphasizing the word *new* in this account. As others have observed, the Court's recent administrative law cases are neither textualist<sup>9</sup> nor originalist.<sup>10</sup> Instead, they are the realization of a novel political theory, derived from freestanding ideas about how American government should work.<sup>11</sup> Below, we bring those lines of thought together and distill the core beliefs animating this new brand of administrative law.

### 1. *Separate Functions*

The first pillar of the Court's administrative law jurisprudence is an atomized understanding of the separation of powers. Two decades ago, Elizabeth Magill distinguished between two different conceptions of the separation of powers: a "separation-of-functions" theory that emphasized the need to isolate judicial, legislative, and executive power in the proper branch of government; and a "balance-of-powers" theory that stressed the need to integrate departments to promote healthy competition between government actors.<sup>12</sup> The first theory is especially concerned about combining multiple powers—say, legislative and executive power—in a single branch. For those in the separation-of-functions camp, there is an identifiable and coherent difference between the three types of government power, and the Constitution requires a clean organizational chart: the right people, doing the right activities, in the right branch.

This theory has ascended in administrative law. The Roberts Court has aligned itself with separation-of-functions ideology, most prominently in cases concerning the nondelegation doctrine.

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<sup>8</sup> See Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. \_\_\_\_ (2022) (identifying and critiquing these ideas); Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (tracing these developments).

<sup>9</sup> *West Virginia*, 597 U.S. \_\_\_, at 28 (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it.").

<sup>10</sup> Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 86-87 (2020).

<sup>11</sup> *Id.* Scholars have critiqued these developments along various dimensions. See, e.g., notes \_\_\_\_ to \_\_\_\_\_. See also Julian D. Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

<sup>12</sup> Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

That doctrine holds that Congress may not delegate legislative authority to the executive. Until recently, the conventional wisdom was that the nondelegation doctrine was dead, or at least on life support, lingering in the law as an avoidance canon and an academic obsession.<sup>13</sup> Over the last few years, however, this account has been challenged by the Court's eagerness to revive nondelegation, not just as a narrow principle of statutory interpretation but as a full-blown constitutional rule.

At first, the revival of the nondelegation doctrine—which, its critics would point out, is really the invention of a doctrine<sup>14</sup>—was a leitmotif in debates about *Chevron* deference.<sup>15</sup> In disputes over whether courts should defer to an agency's understanding of a statute, some *Chevron* skeptics framed their objection in constitutional terms, as an outgrowth of anxiety about excessive delegation of lawmaking authority. In his 2015 concurrence in *Michigan v. EPA*,<sup>16</sup> for example, Justice Thomas questioned the idea that statutory ambiguity constitutes an implicit grant of policymaking power to an agency, a view that he argued “raised serious separation of powers questions.”<sup>17</sup> Justice Thomas worried not just that *Chevron* deference permitted agencies rather than courts to expound the law; he also feared that the doctrine gave agencies lawmaking power constitutionally reserved to Congress. Meanwhile, some of *Chevron*'s supporters adopted the same framework to defend deference as constitutionally mandatory, arguing that agencies in a political branch were better-positioned than courts to make “the policy decisions inherent in the resolution of statutory ambiguity.”<sup>18</sup>

At the time, this was an unusual way to talk about *Chevron*. When the early *Chevron* debate veered into separation of powers law, it usually focused on whether agencies usurp judicial power when courts defer to bureaucrats' views on a statute.<sup>19</sup> But disputes over *Chevron* deference set the stage for the nondelegation doctrine's revival in two ways. First, some jurists—including Justice Thomas in *Michigan*—suggested that agencies exercise *legislative* power when they construe ambiguous statutes.<sup>20</sup> On this view, which has gained traction in recent years,<sup>21</sup> the constitutional problem with *Chevron* is not that agencies are interpreting laws; it's that they are making policy decisions that belong to Congress. Opposition to *Chevron* deference thus becomes one way to enforce the nondelegation doctrine.

Second, and more fundamentally, the ongoing dispute over *Chevron* deference invited the Court to draw sharp distinctions between the types of government power that agencies possess. The *Chevron* debate has endured for decades, transforming a straightforward case into “the most cited [precedent] in history.”<sup>22</sup> Over time, that debate encouraged the Court to characterize bureaucratic activity as essentially judicial, legislative, or executive. As judges and academics disputed the proper standard of

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<sup>13</sup> John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2001 SUP. CT. REV. 223 (2001); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

<sup>14</sup> *Id.* at 1722 (arguing that “nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism”). If this is right, the doctrine never existed to be revived.

<sup>15</sup> *Chevron U.S.A., Inc. v. National Resource Defense Council*, 467 U.S. 837 (1984).

<sup>16</sup> 576 U.S. 743 (2015).

<sup>17</sup> *Id.* at 761 (Thomas, J., concurring).

<sup>18</sup> David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 213 (2001) (collecting sources espousing this view). Barron and Kagan rejected this position, and Justice Thomas's, arguing that “separations-of-powers law usually neither prohibits nor requires *Chevron* deference.” *Id.* at 222.

<sup>19</sup> See, e.g., Ann Woolander, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 200 (1991) (describing *Chevron* as a transfer of judicial power to agencies).

<sup>20</sup> 576 U.S. at 761 (Thomas, J., concurring). See also Glicksman & Levy, *supra* note \_\_, at 16.

<sup>21</sup> Gillian Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 4 (2019).

<sup>22</sup> Justice John Paul Stevens & Linda Greenhouse, *A Conversation with Justice Stevens*, 30 YALE L. & POL'Y REV. 303, 315 (2012).

review in administrative law cases, the Court began to crystallize a constitutional theory in which distinct branches of government do fundamentally different things. This theory made *Chevron* seem less palatable, no matter which type of power agencies exercise when they construe statutes. And it paved the way for a more full-throated endorsement of the nondelegation doctrine.

That moment seems to have arrived, in the guise of the “major questions doctrine.” When it was first introduced in 2000, the major questions doctrine was a narrow exception to *Chevron* deference in cases involving questions of great “economic and political magnitude.”<sup>23</sup> If a case implicated an exceptionally important policy issue—banning cigarettes,<sup>24</sup> the fate of Obamacare<sup>25</sup>—the Court would interpret the relevant statute on its own, without heeding the agency’s view. This version of the major questions doctrine (if it was a doctrine at all) focused on agencies’ interpretive authority: not whether an agency possessed the power to act, but whether its view on a statute should get primacy over a court’s. The basic idea was that the legal fiction supporting *Chevron*—the claim that statutory ambiguity is an implicit grant of interpretive discretion to executive branch officials—was untenable when significant policy choices were on the line. So, in a very small set of cases, the Court would not defer.

Recently, however, the major questions doctrine has turned into something more substantive. In the past year, the Court has stayed the federal vaccine mandate and dramatically curtailed EPA’s regulatory authority on the ground that a major question was at stake.<sup>26</sup> In those cases, the Supreme Court treated the major questions doctrine less as an exception to *Chevron* deference than as a hard limit on agencies’ policymaking power. There appear to be schisms within the Court about just how limiting this new doctrine should be. For some—Chief Justice Roberts is one—the major questions doctrine functions as a clear statement rule, requiring Congress to be explicit when it wants an agency to make big policy decisions.<sup>27</sup> For others, including Justices Gorsuch and Alito, the doctrine seems to be even more robust, closer to an actual bar on Congress giving agencies the authority to make policy decisions.<sup>28</sup> Whatever the difference between these two views, both are species of the nondelegation doctrine, motivated by a desire to shift power toward Congress.

The rise of the nondelegation doctrine does not come as a surprise. The Court’s conservative wing has signaled its support for the doctrine in recent years,<sup>29</sup> and the addition of Justices Kavanaugh and Barrett made that position the majority view. Perhaps the only real surprise is how much bite nondelegation now has. For years, scholars have wondered—and doubted<sup>30</sup>—whether the Court would follow through on its ambitions with nondelegation and other doctrines that curtail administrative action. In the wake of last Term’s major questions cases, the answer to that question is yes.<sup>31</sup> The nondelegation doctrine has surfaced, not yet in a case flatly invalidating a statute as unconstitutional, but as a constitutionally-required doctrine of statutory interpretation that achieves

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<sup>23</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). See Cass R. Sunstein, *There are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 482 (2021).

<sup>24</sup> *Brown & Williamson*, 529 U.S. at 120.

<sup>25</sup> *King v. Burwell*, 576 U.S. 473 (2014).

<sup>26</sup> *Nat’l Fed. of Indep. Bus. v. OSHA*, 142 S.Ct. 661 (2022); *West Virginia*, 597 U.S. \_\_\_\_.

<sup>27</sup> *Id.* at 19 (Roberts, J.).

<sup>28</sup> *Id.* at 4 (Gorsuch, J., concurring) (“The major questions doctrine works . . . to protect the Constitution’s separation of powers . . . [I]mportant subjects must be entirely regulated by the legislature itself.” (internal quotations omitted)).

<sup>29</sup> See, e.g., *Gundy v. United States*, 588 U.S. \_\_\_, 139 S.Ct. 2116 (2019); *Burwell*, 576 U.S. at 473; *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302 (2014).

<sup>30</sup> See, e.g., Metzger, *supra* note \_\_\_, at 4-5 (“[I]t remains unclear (and in my view unlikely) whether a majority will materialize for a major doctrinal recalibration on delegation . . .”).

<sup>31</sup> *West Virginia*, 597 U.S. \_\_\_\_.

the same goal. As with *Chevron*—which the Court has sidelined, and maybe even overruled *sub silentio*<sup>32</sup>—the revolution has unfolded quietly. But this is a revolution nonetheless.

The through-line in all of these doctrinal developments is a commitment to separation-of-functions formalism. The Court’s skepticism about *Chevron* deference and its enthusiasm for the major questions doctrine both stem from a deeper belief that judges need to organize a chaotic federal government: to identify different sorts of state power, and to prevent spillover between them. The current Court has taken a particularly blunt approach to this task. In contemporary administrative law, government activity must be boiled down to its essence—lawmaking or judging, lawmaking or law enforcement. State power can never be two things at once. This jurisprudence transforms what Magill described two decades ago as an undercurrent in constitutional theory into the dominant intellectual framework of administrative law.<sup>33</sup> For the Roberts Court, the government consists of three hermetically-sealed branches, and the judge’s job is to put power in the proper place.

## 2. Outcome Control

The second pillar of new administrative law is a robust conception of presidential administration. Here, the intellectual reference point is unitary executive theory. That “bracingly simple” theory holds that, because the President alone is vested with executive power, Congress cannot insulate executive branch actors from presidential control.<sup>34</sup> Unitary executive theory’s birth in the Reagan era<sup>35</sup> and entrenchment in conservative judicial thought<sup>36</sup> are well documented. Scholars have said less, however, about the theory’s recent transformation. Over the past decade, unitary executive theory has morphed from a stance on the President’s removal authority into a much bolder philosophy of executive power.

One can understand this development as a shift from *personnel* to *outcome* control. The classic version of unitary executive theory focused on the President’s power to control who worked in the executive branch: to hire and fire people as he saw fit. The key precedent for proponents of this theory is *Myers v. United States*,<sup>37</sup> the 1926 case vindicating the President’s power to fire a Postmaster, which became the canonical citation for expansive removal power. The aberration is *Humphrey’s Executor v. Federal Trade Commission*,<sup>38</sup> the New Deal precedent that upheld the constitutionality of independent agencies. In first-generation unitary executive theory, the critical question was when Congress could restrict the President’s ability to prune the executive branch. This debate was all about appointments and removals—personnel decisions.

This approach to unitary executive theory has shifted during the Roberts Court. We saw the first hints of a transformation in *Free Enterprise Fund v. PCAOB*,<sup>39</sup> which held that agencies with two layers

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<sup>32</sup> See Metzger, *supra* note \_\_, at 4 (noting that “the Court has itself has not relied on *Chevron* deference since 2014.”). Last Term, after debating whether to overrule *Chevron* during oral argument in *American Hospital Association v. Beccerra*, the Supreme Court issued an opinion that ignored the doctrine entirely. 596 U.S. \_\_ (2022). After *Beccerra*, it is difficult to imagine the Court reversing an opinion for failure to defer to an agency’s statutory interpretation.

<sup>33</sup> Magill, *supra* note \_\_.

<sup>34</sup> Sunstein & Vermeule, *supra* note \_\_.

<sup>35</sup> *Morrison v. Olson*, 487 U.S. 654 (1988) (Scalia, J., dissenting).

<sup>36</sup> See Sunstein & Vermeule, *supra* note \_\_ (tracing the history).

<sup>37</sup> 272 U.S. 52 (1926).

<sup>38</sup> 295 U.S. 602 (1935).

<sup>39</sup> 561 U.S. 477 (2010).

of tenure-protected officers violate the separation of powers. Then, in *Seila Law v. CFPB*,<sup>40</sup> the Court held that an independent agency with a single director does too. These cases signaled a new understanding of executive power. Like their predecessors, *PCAOB* and *Seila Law* asked when the President can fire people. But if they were about personnel control, these cases were awfully fascinated with institutional design—with sociological questions about agency organization and effective leadership. Between 2010 and 2020, unitary executive theory started to develop into a debate about how to structure agencies to ensure that the President can control the outcomes of bureaucratic activity. The Court began to emphasize not just the President’s power to choose personnel, but his ability to effectuate policy preferences through an optimally-designed institution.

On this view, the Constitution not only limits the scope of the federal civil service. It also requires streamlined institutions, responsive to presidential control. And—here, of course, lies the rub—the blueprint for those institutions comes from the Supreme Court. The most striking thing about the second phase of unitary executive theory is how thoroughly it enmeshes the Court in redesigning the executive branch. Where before the Court would invalidate an appointment or weaken a tenure provision, today it will reorganize an agency.

This trend reached its zenith in *United States v. Arthrex*,<sup>41</sup> a case about the constitutionality of a tribunal nestled within the Patent and Trademark Office called the Patent Trial and Appeal Board (PTAB). The PTAB is staffed by judges who specialize in patent disputes. According to the Court, the problem with the PTAB was that these judges could issue decisions that the agency’s Director, a presidential appointee, could not reverse. The PTAB could thus “bind the Executive branch,” even though its judges were not appointed by the President and could not be fired at will by the agency’s director.<sup>42</sup> Although the Director possessed many other statutory tools to control the Board and shape its decisions, the Supreme Court concluded that the PTAB wielded too much power for anyone other than a political appointee. So the Court held that the agency’s Director must, as a matter of constitutional right, possess the power to review and revise each and every one of the PTAB’s decisions.

*Arthrex* is particularly remarkable for its remedy. The case came to the Court as a classic hiring-and-firing puzzle: administrative patent judges are not chosen by the President; and they enjoy tenure protection.<sup>43</sup> One versed in unitary executive theory would have expected these to be the “problems” to solve. But the Court took a different path, subjecting the judges’ decisions to review by a political appointee rather than clarifying which personnel the President gets to choose. Rather than tinkering with appointments doctrine, the Court restructured the agency to facilitate political control of a tribunal’s decisions.<sup>44</sup> This is peak outcome control: forget who can be hired and fired. The question is whether the President’s politics can be realized in the executive branch, and the goal is to overhaul agencies to ensure that the President and his political appointees can directly control decisions made by bureaucrats.

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<sup>40</sup> 591 U.S. \_\_\_, 140 S. Ct. 2183 (2020).

<sup>41</sup> 594 U.S. \_\_\_ (2021).

<sup>42</sup> *Id.* at 19.

<sup>43</sup> 594 U.S. \_\_\_, at 22.

<sup>44</sup> The Court had seven votes for this approach: the conservative wing—save for Justice Gorsuch, who described the Court’s remedy as a “policy choice”—along with liberal wing, in begrudging agreement having lost on the merits. *Id.* at 5 (Gorsuch, J., dissenting in part).

This is a different conception of unitary executive theory than one that begins and ends with the Appointments Clause. Presidential power now extends well into an agency's hierarchy, beyond surface-level political appointees and simple questions about personnel control. For the Roberts Court, to be executive is to control the output of Article II institutions, not just their composition. The President may hire and fire, of course; but he must also be able direct policy through nimble institutions and receptive subordinates. In this iteration of unitary executive theory, a stubborn or creaky bureaucracy is just as unconstitutional as a statute limiting the President's power to fire people at will.

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These, then, are the new rules of administrative law. The federal government has sharply-defined branches with distinctly different roles. And presidential power permeates Article II. In this worldview, the judge's job is to tidy up government—to separate powers horizontally, and to integrate executive power vertically. Judges are janitors, sorting the messiness of modern government. Sometimes, moreover, they are architects, redesigning institutions in a better mold.

As we noted at the outset, and Justice Kagan recently observed, this worldview is not especially concerned with the Constitution's text.<sup>45</sup> After all, there is only so much one can derive from the verb “vest.”<sup>46</sup> Nor is this jurisprudence particularly originalist, although it does devolve into debates about practice at the founding.<sup>47</sup> Rather, contemporary administrative law is best understood as a purification project—a philosophical exercise built on an idealized conception of how our tripartite system of government is supposed to function.<sup>48</sup>

According to the Court's conservative majority, this purification project is driven by the goal of ensuring that policy choices are made by elected officials rather than unaccountable bureaucrats. Democracy, we are told, is what unites the Court's nondelegation and executive power cases. This explanation raises some immediate questions about what exactly the Court means by democracy.<sup>49</sup> Moreover, critics of the Court's project have questioned whether lofty democratic ideals are really responsible for recent holdings; for skeptics, the Court's hostility toward administrative agencies appears to be driven more by deregulatory than democratic aims.<sup>50</sup> Both the Court's supporters and its critics, though, tend to view separation of functions theory and unitary executive theory as two

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<sup>45</sup> See note \_\_\_\_.

<sup>46</sup> U.S. CONST. art. I, § 1, art. II, § 1, Cl. 2; art. III, § 1.

<sup>47</sup> See, e.g., *West Virginia v. EPA*, 597 U.S. at 17 (Gorsuch, J., concurring); *Id.* at 29 (Kagan, J., dissenting).

<sup>48</sup> See Sunstein & Vermeule, *supra* note \_\_\_, at 86 (arguing that *Seila Law* is “frankly Dworkinian”).

<sup>49</sup> For example, the Court's own account of its theory sometimes focuses less on politically responsive decisionmaking and more on the democratic value of cumbersome collective decisionmaking procedures. In nondelegation cases, the standard argument is that policymaking should be cumbersome: “lawmaking made hard” yields high-quality laws that reflect deep agreement. See, e.g., *West Virginia*, 587 U.S. at 19 (Gorsuch, J., concurring) (“When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives.”). In removal power cases, on the other hand, the argument runs the other way: policymaking ought not be too hard, lest the president be unable to implement his mandate. See, e.g., *Seila Law*, 140 S.Ct. at 2204 (“The Framers deemed an energetic Executive essential . . . . Accordingly, they chose not to bog the Executive down with the habitual feebleness and dilatoriness that comes with a diversity of views and opinions” (internal citations omitted)). These lines of doctrine are built on conflicting ideas about the values that democracy serves.

<sup>50</sup> See, e.g., notes \_\_\_\_ to \_\_\_\_.



strands of a unified approach to the administrative state, one whose institutional ambition is to strip power from the American bureaucracy.<sup>51</sup>

The individual Justices treat the Court’s project as coherent, too. The voting patterns in recent cases fall into two camps, those for and against new administrative law. The most ardent supporters of separation-of-functions theory—Justice Alito, Justice Thomas, and Chief Justice Roberts—are also the staunchest proponents of presidential outcome control. Conversely, those most opposed to concentrated presidential power, Justices Breyer and Sotomayor, are also most skeptical of neatly separating legislative and executive functions. Everyone, it seems, believes that the new rules of administrative law are complementary, if not correct. Part II questions this consensus.

## II. THE ADJUDICATION CRISIS

The trouble with the unified account of the Court’s administrative law jurisprudence is that it overlooks one of the administrative state’s core functions. Adjudication is central to what the administrative state does. Administrative judges decide millions of cases a year, dwarfing the output of the federal judiciary.<sup>52</sup> Debates over adjudication gave rise to administrative agencies and to the model of judicial review that now dominates administrative law.<sup>53</sup>

Yet adjudication has been mostly missing from discussions of the Court’s separation of powers jurisprudence.<sup>54</sup> Instead, regulatory policymaking—and the Court’s deregulatory ambitions<sup>55</sup>—have been front and center in critiques of the ascendent formalism in administrative law. This focus has obscured an important fact: for adjudication, the two tenets of the Court’s jurisprudence are on a collision course. Rather than working in tandem, separate functions theory and unitary executive theory threaten to pull administrative law apart. This conflict becomes clear when one contemplates each theory’s implications for the future of administrative courts.

### A. Presidential Adjudication

Consider first the purified theory of the unitary executive. Part I described an evolution in the Court’s approach to executive power, from personnel to outcome control. As we explained, unitary executive theory initially focused on the President’s authority to hire and fire executive branch officials. When it came to adjudication, this debate centered on the selection of administrative judges. Presidential power expanded over time: while most administrative judges were long hired by professional staff, the Court recently required appointment by the President or an agency head.<sup>56</sup> Yet even as executive power grew, the debate remained within the confines of the Appointments Clause. That paradigm ended with *Arthrex*, which held that—as a matter of separation of powers law—a

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<sup>51</sup> One notable exception is Robert Glicksman & Richard Levy’s work on administrative adjudication, which recognizes the conflict in the Court’s jurisprudence. See Glicksman & Levy, *supra* note \_\_\_. Our project expands on their illuminating account.

<sup>52</sup> See *infra* note \_\_\_.

<sup>53</sup> See *infra* Part IV.A. (discussing this history); see also Peter Conti-Brown, Yair Listokin, & Nicholas R. Parrillo, *Towards an Administrative Law of Central Banking*, 38 YALE J. REG. 1, 4-5 (2021) (noting that “administrative law conventionally centers itself on judicial review of agency action”).

<sup>54</sup> See Barnett, *supra* note \_\_\_, at 1645 (“Scholarly attention to adjudication has, at best, been fleeting.”) For an exception, see Glicksman & Levy, *supra* note \_\_\_.

<sup>55</sup> See Metzger, *supra* note \_\_\_, at 3.

<sup>56</sup> 138 S.Ct. 2044 (2018). See JACK BEERMANN & JENNIFER MASCOTT, DRAFT RESEARCH REPORT ON FEDERAL AGENCY ALJ HIRING AFTER *LUCLA* AND EXECUTIVE ORDER 13843, ADMIN. CONF. OF THE U.S. (2019).

political appointee needed authority to review and overturn decisions made by an administrative tribunal.<sup>57</sup>

After *Arthrex*, political control of adjudication is not just permissible. It may be constitutionally required. Scholars concerned about this conclusion have advocated a narrow reading of the case.<sup>58</sup> They point out that *Arthrex* could be limited to its facts or to a particular statutory scheme.<sup>59</sup> *Arthrex* also leaves unanswered whether personnel and outcome control are substitutes—that is, whether the Constitution is satisfied so long as a politician can fire *or* overturn an administrative judge. It is not obvious that the President needs the power to do both in order to ensure accountability in the executive branch.

But there is little reason to expect the Court to take the narrow path. In other contexts, the Justices most committed to increasing the President’s control over the bureaucracy have expressed deep skepticism about the idea that mechanisms of control could ever be adequate substitutes for one another. Take, for example, *Free Enterprise Fund*, in which the Court concluded that officials on the Public Company Accounting Oversight Board—which sits within the SEC—could not have tenure protection because the SEC’s commissioners were insulated from removal.<sup>60</sup> In that case, Chief Justice Roberts doubted that any of the tools of control wielded by the SEC over the PCAOB could serve as a substitute for the power to fire board members. The tools in the SEC’s possession were, as Justice Breyer took pains to point out in dissent, quite numerous.<sup>61</sup> Perhaps most telling, they included the power to review and revise any policy adopted by the Board. If that power was not an adequate substitute for the power to fire board members in *Free Enterprise Fund*, it is far from clear why the power to fire agency judges would be considered a substitute for the power to review their decisions in other contexts.

Thus, it seems likely that *Arthrex* marks not an end-point but the beginning of new line of Article II doctrine holding that the President possesses power to review and direct decisions made by any executive branch official.<sup>62</sup> Even if the Court goes no further than it did in *Arthrex*, the developments that culminated in that case already put us in a world radically different than the one we recently inhabited. Just a few years ago, most agency adjudicators were appointed by career staffers and had independence safeguarded by statutes and norms that gave them, rather than political appointees, the final word within the agency as to the proper resolution of a particular dispute.<sup>63</sup> Now both of those forms are insulation are unconstitutional. The Court has effectively ended the competitive civil service

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<sup>57</sup> See Part I.B. (discussing *Arthrex*).

<sup>58</sup> See, e.g., Rebecca Eisenberg & Nina Mendelson, *Limiting Agency Head Review in the Design of Administrative Adjudication*, YALE J. REG., Notice & Comment Blog, Feb. 15, 2022, <https://www.yalejreg.com/nc/symposium-decisional-independence-06/>,

<sup>59</sup> *Id.*

<sup>60</sup> 561 U.S. 477 (2010).

<sup>61</sup> *Id.* at 527-28 (Breyer, J., dissenting) (listing ways in which “the statute provides the [SEC] with full authority and virtually comprehensive control over all of the Board’s functions”).

<sup>62</sup> See *infra* Part III (explaining how the Attorney General’s power to review immigration cases becomes the power to direct immigration precedent, and thus, to control case outcomes).

<sup>63</sup> See BEERMAN & MASCOTT, *supra* note \_\_; see also CHRISTOPHER J. WALKER & MATTHEW LEE WEINER, AGENCY APPELLATE SYSTEMS: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 31 (Dec. 14, 2020), <https://www.acus.gov/report/final-report-agency-appellate-systems>.

for administrative judges.<sup>64</sup> And it has subjected individual judges' decisions to review and redetermination by political officials<sup>65</sup>.

This result is a startling repudiation of the constitutional settlement that got us so much agency adjudication in the first place. During the early decades of the twentieth century, the growth in agency adjudication was, for many lawyers and judges, among the most troubling developments of the burgeoning administrative state. As Dan Ernst and others have chronicled, securing impartiality and fairness in administrative adjudication was central to lawmakers' ultimate (uneasy) acceptance of a project that located so much federal adjudication in agencies rather than in Article III courts.<sup>66</sup> The Administrative Procedure Act codified this settlement. It prohibited administrative judges who presided over in-person, on the record hearings from participating in an agency's investigating or charging functions—even for matters unrelated to the case before the judge. Furthermore, the APA required that those judges receive tenure protection and banned *ex parte* communication within agencies.<sup>67</sup> In other words, the APA cemented an idea of an internal separation of functions within agencies that mapped to the external separation of functions that was among the most distinctive features of the American constitution.<sup>68</sup>

At the time, the Supreme Court wholeheartedly embraced this settlement. Surveying the broad purposes of the APA just a few years after the Act became law, the Court wrote that the fundamental “administrative evil sought to be cured or minimized” by the APA was “the practice of embodying in one person or agency the duties of prosecutor and judge.”<sup>69</sup> The “evil” of this practice was that it undermined the *impartiality* of adjudication. As the Supreme Court saw it, adjudicators' freedom from political influence, pressure, or control was the backbone of the new administrative state.<sup>70</sup>

The Court thus characterized the APA as a compromise concerned, first and foremost, with the independence of administrative courts. This characterization can sound foreign to modern ears. As we elaborate in Part IV, adjudication has receded from the foreground of administrative law, and thus from accounts of the administrative state. But administrative judges were central to the Supreme Court's conception of the APA in 1950. In the first wave of litigation after the statute's enactment, the Court understood the APA as an effort to create an impartial judiciary outside of Article III.

As important as the Court's characterization of the APA settlement was the context in which the Court invoked it. The account above comes from *Wong Yang Sung v. McGrath*, a case in which a Chinese

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<sup>64</sup> After *Lucia* held that SEC ALJs were officers under the Appointments Clause, the Trump Administration issued Executive Order 13843 exempting ALJs from the Office of Personnel Management's competitive hiring process. The Biden Administration has maintained this exemption. See Executive Order No. 14029 (May 14, 2021); see also Paul R. Verkuil, *Recent Developments: Presidential Administration, the Appointment of ALJs, and the Future of for Cause Protection*, 72 ADMIN. L. REV. 461, 463 (2020); BEERMAN & MASCOTT, *supra* note \_\_ (tracing the decline of the competitive civil service after *Lucia*). Absent a flurry of congressional action shifting to Article III judges the task of selecting agency adjudicators, this new system of selection is mandatory.

<sup>65</sup> Even if the Court concludes that the capacity to fire an executive branch official *is* an adequate substitute for review power, its new theory of administrative law would require Congress to revise countless statutes to convert tenure-protected administrative judges into at-will workers. Any way you cut it, this theory has radical implications.

<sup>66</sup> DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014).

<sup>67</sup> 5 U.S.C. § 554(d).

<sup>68</sup> See Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 262-64 (2016).

<sup>69</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

<sup>70</sup> *Id.* at 41-44 (quoting at length the studies and committee reports leading up to the passage of the APA).

ship worker argued that his deportation hearing was procedurally defective because the Immigration and Naturalization Service had failed to implement the strict separation of functions demanded by the APA's requirements for formal adjudication.<sup>71</sup> Wong had little hope under immigration statutes, which said nothing about a hearing of any kind before deportation. Yet the Supreme Court reasoned from general principles of due process that a hearing was required. And if a hearing was required, the Court concluded, the APA required that it be before an impartial adjudicator. Immigration inspectors, who might preside over hearings one day and prosecute cases in such hearings the next, exemplified the "comingling of functions" that the APA had been designed to prevent.<sup>72</sup>

Political control of adjudication turns this constitutional settlement on its head. Even more surprising, it is also a stark departure from unitary executive tradition. For as long as unitary executive theory has existed, its adherents have recognized an exception to presidential control when it comes to adjudication.<sup>73</sup> James Madison himself drew such a distinction in his discussions of the comptroller of the Treasury, whom Madison thought could be insulated from presidential removal because he exercised quasi-judicial functions.<sup>74</sup> Justice Scalia reserved the possibility that adjudication was exceptional in his *Morrison v. Olson* dissent, the founding document of unitary executive theory.<sup>75</sup> Even Elena Kagan, who coined the now-ubiquitous phrase "presidential administration" in her article extolling the virtues of increased White House control over the bureaucracy, was reluctant to extend her theory to adjudication.<sup>76</sup>

Indeed, the opinion typically held up as the canonical articulation of unitary executive theory, *Myers v. United States*, itself accepted that adjudication is different.<sup>77</sup> *Myers* contains an important passage that appears to exempt "quasi-judicial" activity from presidential control.<sup>78</sup> After concluding that the President could fire his Postmaster, Chief Justice Taft explained that the President's authority over the executive branch was not absolute: "[I]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or

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<sup>71</sup> 339 U.S. 33 (1950).

<sup>72</sup> *Id.* at 44.

<sup>73</sup> See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013) ("Commentators widely agree that presidential direction is highly constrained in th[e] domain [of adjudication].").

<sup>74</sup> Jed Handelsman Sugarman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORD. L. REV. 2085, 2095 (2021) (citing Letter from James Madison to Thomas Jefferson (June 30, 1789), reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 890, 891 (Charlene Bangs Bickford & Kenneth R. Bowling eds., 2004)).

<sup>75</sup> 487 U.S. at 725 (Scalia, J., dissenting). The *Morrison* dissent questioned how sharp the distinction between judicial and executive functions is. But Justice Scalia relied on that distinction to defend executive power over "obviously" executive activities like criminal prosecution.

<sup>76</sup> See Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2480 (2017) ("Kagan herself stops short of advocating for presidential influence in formal adjudication").

<sup>77</sup> Chief Justice Roberts' opinion in *Seila Law* highlights the now-canonical status of *Myers* among contemporary supporters of unitary executive theory. In his majority opinion, the Chief treats *Myers* as providing both the doctrinal authority for a strong unitary executive theory and well as the conceptual framework governing the application of the theory. *Seila Law*, 140 S.Ct. at 2191-92.

<sup>78</sup> *Myers*, 272 U.S. at 135. See Sunstein & Vermeule, *supra* note \_\_, at 102 ("[T]he *Myers* Court recognized that adjudicatory authority is distinctive, in the sense that its exercise might be immunized from presidential influence or control."); Richard J. Pierce, Jr., *The Court Should Change the Scope of the Removal Power by Adopting a Purely Functional Approach*, 26 GEO. MASON L. REV. 657, 670 (2019).

control.”<sup>79</sup> This passage has long been understood to distinguish adjudication from other executive branch functions, as the one activity that *can*—and should, in Taft’s view—be insulated from politics.

*Arthrex* rejects this proposition, extending presidential power to a new domain. Moreover, it does so in a case that was explicitly about administrative judges. The politicization of administrative judging cannot be explained away as the unforeseen implication of some overly categorical rule crafted by the Court in a case about the control of prosecutors or regulators. *Arthrex* drives home that a majority of the Court intends to politicize all of Article II, including administrative courts. This outlook puts modern administrative law in serious tension with the precedent from which unitary executive theory was born.

### B. Article III Essentialism

The Court’s separation of powers formalism points toward a radically different conclusion. Rather than requiring political control of adjudication located within administrative agencies, it would require that most administrative adjudication be moved to Article III courts.

Recall the separation of functions theory we described in Part I. This approach to separation of powers law aims to reduce government activities to their essence and to isolate power in the proper branch of government. Congress is supposed to make the laws. The Executive is supposed to enforce the laws. The Judiciary is supposed to adjudicate disputes concerning the application of the laws. Or, at least, that is the simple version of separation-of-functions formalism that undergirds many of the Court’s recent separation of powers cases.

Within this framework, an enormous amount of activity that currently takes place within the administrative state should be the business of the Judiciary, not the Executive. Administrative officials are pervasively empowered to engage in what lawyers classically think of as judging: they hold hearings in which they apply law to contested facts in order to resolve disputes between parties. Administrative Law Judges working within the Securities and Exchange Commission adjudicate securities fraud claims, levying fines and other penalties. Immigration judges working within the Justice Department adjudicate deportation charges against noncitizens, with the ultimate power to order those noncitizens deported from the United States (in many instances with no access to judicial review of those orders). Reflecting their role, these officials are often officially denominated as “judges” and organized by statute into “courts.” Thus, we have a massive system of Article II courts and judges in a constitutional regime where both are supposed to be located in Article III. This is the puzzle of non-Article III tribunals, which generations of scholars have worked to resolve.<sup>80</sup>

To those pursuing the purification project, it seems there is but one available conclusion to this problem: our modern system of administrative adjudication is unconstitutional. If it violates the separation of powers for executive branch officials to engage in activity that looks suspiciously like lawmaking, it similarly should violate the separation of powers for those officials to engage in activity

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<sup>79</sup> *Myers*, 272 U.S. at 135. The Court went on to say that the President could nonetheless consider the adjudicator’s decision as a reason for firing him. *Id.* Note the distinction the Court draws here: controlling the substance of an adjudicator’s decisions is impermissible, but choosing whether to fire someone for those decisions is within the President’s purview. *Myers* thus recognizes the difference between outcome and personnel control—and critically, suggests that only personnel control is required by Article II. The Roberts Court’s vision of unitary executive theory is a departure from this view.

<sup>80</sup> For a recent example, see William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1514 (2020). For an overview, see *infra* Part IV.C.

that looks suspiciously like judging. And if the sole solution to excessive delegation of lawmaking power is to require Congress to make laws, one would think the sole solution to misplaced adjudicative authority would be remove adjudication from the administrative state and lodge it in Article III courts.

This conclusion would completely transform the structure of the federal government. Some Article III purists welcome this development.<sup>81</sup> Stephen Calabresi, for example, has argued for a dramatic expansion of the federal judiciary on the ground that “one cannot overstate the threat” that administrative judges pose “to the separation of powers under our Constitution.”<sup>82</sup> Most separation-of-functions theorists, however, have been reluctant to embrace the logical implication of their theory. Instead, they have advanced two arguments to save administrative adjudication.

The first insists that administrative courts are qualitatively different from Article III courts. In this vein, scholars have distinguished “courts” from “tribunals” and “judicial” power from the type of power that judges in agencies possess.<sup>83</sup> This line of thought leans heavily on formalism about the nature of government functions; the basic approach is to define the problem away, by insisting that judging can occur outside Article III so long as it is not the specific *kind* of judging reserved for federal courts. Thus, some scholars argue that most adjudication in the administrative state does not amount to an exercise of “judicial power.”<sup>84</sup> Because it is judicial power—not the act of adjudication more broadly—that the Constitution vests in Article III tribunals, executive branch officials can engage in all the adjudication they want without creating a constitutional problem. All we have to do is define agency adjudication not to constitute an exercise of the sort of power the Constitution vests in Article III courts.

The trouble with this definitional “fix” is that it proves too much. This approach could be used to dissolve *all* of the separation of functions problems identified by the current Court, not just the problems associated with adjudication. Consider the Court’s obsession with the possibility that administrative agencies are usurping Congress’s lawmaking function. The Constitution separates out and reserves to Congress only the exercise of “legislative power”—not all “lawmaking” or “policymaking.” Thus, as Adrian Vermeule and Eric Posner argued in the context of the non-delegation doctrine, one could easily decide by definitional fiat that lawmaking by the executive pursuant to a valid congressional delegation never amounts to an exercise of “legislative power.”<sup>85</sup> Defining terms in this fashion formally dissolves the nondelegation problem in the same way that one can justify agency adjudication by defining “judicial power” to include only matters currently adjudicated by Article III tribunals.

Separation of powers purists usually oppose such tidy solutions. In the non-delegation context, proponents of separation-of-functions theory reject the definitional fix because they are committed not to parsing fine distinctions between terms like “legislative power” and “lawmaking,” nor to pursuing some historically-grounded understanding of those terms, but instead to a jurisprudence that uses common-sense, intuitive definitions to divide legislative, judicial, and executive power. If government officials make a decision that feels like an act of lawmaking, then at least five members of

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<sup>81</sup> See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 647 n.8 (2004) (collecting sources “supporting a return to principled Article III literalism”).

<sup>82</sup> Steven G. Calabresi & Shams Hirji, *Memorandum to the Senate and the House of Representatives Concerning the Proposed Judgeship Bill*, at 22, Nov. 7, 2017, <https://archive.thinkprogress.org/uploads/2017/11/calabresi-court-packing-memo.pdf>.

<sup>83</sup> Baude, *supra* note \_\_; Pfander, *supra* note \_\_.

<sup>84</sup> E.g., Baude, *supra* note \_\_.

<sup>85</sup> Posner & Vermeule, *supra* note \_\_, at 1723.

the current Court believe Congress is required to make that decision. This is the logic of recent non-delegation cases like *West Virginia v. EPA* and *Gundy*.<sup>86</sup> But if legislative and executive functions are distinguished by whether an action feels more like lawmaking or law enforcement, then one would expect an analogous approach to the task of separating executive and judicial functions. Departing from that method when it comes to the constitutionality of agency adjudication makes the Court's new formalist project look either incoherent or hypocritical.

A second conceptual move formalists make to justify administrative courts is to accept that adjudication is judging, but to insist that certain *kinds of cases* can be heard within Article II.<sup>87</sup> This approach focuses on the interests at stake in a particular dispute rather than the nature of the tribunal. It is essentially an exercise in revisionist history. Scholars start by noting that adjudication by executive branch officials has a long historical pedigree, dating back to before the twentieth century rise of the modern administrative state. One might take this history as powerful evidence *against* separation-of-functions formalism; after all, it is strange to argue that separating functions is a constitutional tradition when executive branch adjudication has been with us since the founding. But scholars use this history differently, mining the past in an effort to explain why most (but not all) administrative adjudication today is consistent with the Constitution's separation of powers.<sup>88</sup>

Their argument proceeds as follows. In the nineteenth century, it was widely accepted that adjudication by executive branch officials was sometimes constitutionally permissible. Whether Article III judicial process was required turned, under then-orthodox thinking about due process and the separation of powers, on the type of interest at stake in the adjudication. Liberty and property protected by the Due Process Clause were "private rights" that could be taken only by judicial process. Other interests, often labeled "privileges," could be infringed by Congress or the executive without federal court involvement. So the world was divided into two categories: private rights and everything else. Only a deprivation of the former required due process, which meant a full hearing in Article III. And—here is the modern twist—if a claim could proceed in the executive branch in the 1800s because it did not implicate due process two hundred years ago, it is fine to keep that claim in Article II today.

The revisionists thus borrow old ideas about due process to justify modern administrative courts. But again, there are problems with this neat solution to the problem of agency tribunals. Most obviously, this "fix" still requires a radical overhaul of the executive branch. No one, least of all the formalists on the Supreme Court, is willing to conclude that due process is irrelevant to all matters currently adjudicated by executive branch officials. Large swaths of administrative adjudication implicate interests traditionally understood to constitute liberty and property rights under the Due

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<sup>86</sup> Separation of functions formalists approach questions about what counts as an "executive" function in the same fashion. These Justices frequently describe prosecutorial decisions as the archetypical or core exercise of Article II power, despite the fact that federal prosecutors didn't exist for the first 100 years of the nation's history. See, e.g., *Seila Law*, 140 S.Ct. at 2194. What matters is not history but the gut feeling that certain activities are quintessentially executive.

<sup>87</sup> For many scholars, these two rejoinders are related. Baude, for example, argues that the nature of the interest at stake in an adjudication determines whether it is an exercise of "judicial power." In his approach, adjudication involves the "judicial power" vested in Article III courts only if it deprives a person of life, liberty, or property that was protected by the Due Process Clause in the nineteenth century. Other adjudications are not exercises of that "judicial power" and therefore present no separation of powers concern. See Baude, *supra* note \_\_\_. As this argument illustrates, one can resolve the puzzle of non-Article III tribunals both by redefining the nature of a dispute and by focusing on the interest at stake in a particular case. Our goal is to identify these two distinct conceptual moves, not to suggest that they are mutually exclusive.

<sup>88</sup> See, e.g., Kent Barnett, *Due Process for Article III: Rethinking Murray's Lessee*, 26 GEO. MASON L. REV. 677, 691 (2019); Baude, *supra* note \_\_; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007).

Process Clause. Those committed to a nineteenth-century worldview would demand that such cases—and thus a significant portion of the administrative docket—be moved to Article III. (This is precisely the point for those who want patent and securities disputes in federal courts. Our observation is merely that this defense of administrative tribunals would eliminate many of them.)

The deeper problem is that this theory of administrative tribunals rewrites due process law. Many claims that once belonged in the domain of “privileges” have long been held to implicate property and liberty rights protected by the Due Process Clause. In modern constitutional law, when an immigration judge orders a long-term resident noncitizen to be deported from the United States, she deprives that person of a liberty interest that the Supreme Court decided more than a century ago was protected by due process.<sup>89</sup> Similarly, when a Social Security judge terminates a person’s welfare benefits, he deprives that person of a legal right to payments the Court has treated as property for more than fifty years.<sup>90</sup> The Supreme Court steadily expanded due process rights over the course of the twentieth century. If Article III tracked these doctrinal developments—if every claim that now implicated due process required a federal judge—we would be back to where we started: the fix for administrative courts would be to abolish most of them.

There are only two ways to avoid this conclusion. The first is to abandon a century of due process development and revert to a nineteenth-century understanding of what counts as property or liberty. Under this approach, any right recognized as liberty or property in the last 100 years becomes a mere privilege again. While Justice Thomas may be open to this doctrinal revolution,<sup>91</sup> most separation of functions formalists will not go so far as to resurrect wholesale the nineteenth century boundaries of the rights-privilege distinction. Justice Gorsuch, for example, is quite openly opposed to the idea that executive branch officials should be entirely free to deal with all but the most traditional of liberty and property claims however they see fit, without any requirements of fairness, procedural regularity, or judicial oversight.<sup>92</sup> It seems unlikely that a majority of the Court would ever agree to a complete retrenchment of due process.

The only other way to avoid this conclusion is to invent a distinction among due process claims that exists nowhere in the Constitution. To preserve most agency tribunals, some formalists draw a sharp line between “classical” and “modern” rights. In this account, traditional liberty and property interests require Article III courts, but property and liberty rights recognized after the turn of the twentieth century can be adjudicated in administrative agencies, where due process exists in a “watered down” form.<sup>93</sup>

One might call this the new rights theory of administrative adjudication. This theory is an update to the longstanding debate over adjudication of “public” rights.<sup>94</sup> Recognizing the tenuousness of public rights doctrine, Article III formalists now argue that administrative courts are acceptable not when a right is *public* but instead when it is *new*. This approach has the benefit of being more moderate

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<sup>89</sup> Indeed, Part III makes the bolder claim that immigrants have *always* had liberty rights. But here the simpler point is what matters: immigrants have had liberty claims for at least a hundred years.

<sup>90</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>91</sup> See, e.g., *B&B Hardware, Inc. v. Hargis Industries, Inc.* 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (adopting Caleb Nelson’s rights taxonomy and classifying “statutory entitlements” as privileges). See Nelson, *supra* note \_\_, at 568.

<sup>92</sup> See, e.g., *Patel v. Garland*, 586 U.S. \_\_ (2022) (Gorsuch, J., dissenting).

<sup>93</sup> Baude, *supra* note \_\_, at 1578.

<sup>94</sup> See Gregory Ablavsky, *Getting Public Rights Wrong*, 74 STAN. L. REV. 277, 280-82 (2022) (summarizing that debate and collecting sources).



than a theory that would abolish non-Article III tribunals or revive the rights-privilege distinction: it forces only some, rather than the overwhelming majority, of administrative adjudication into federal courts, and it requires basic fairness in administrative tribunals.

But it achieves this goal through ad hoc, largely indefensible reasoning. Neither textualism nor originalism—allegedly the Court’s dominant methodologies—can explain the choice to consign millions of liberty and property claims to administrative courts, while cherry-picking certain property disputes for Article III.<sup>95</sup> There is no basis in the text of the Due Process Clause for a distinction between old and new rights. Nor is there an originalist justification for this line-drawing exercise. Founding era lawyers would have been shocked to learn that the government could take a person’s recognized due process rights without a trial before an Article III tribunal.<sup>96</sup> Ultimately, then, to the extent that the “new rights” theory avoids the radical implication that rights recognized in the last century are not really rights at all, it does so only by arguing on grounds that are orthogonal to the basic approach of the Court’s purification project, and by inventing doctrinal categories that in are antithetical to purported aims of that project.

When all is said and done, the problem remains: to be a formalist about the separation of powers, one has to bend over backward to explain why there are so many courts and judges inside the administrative state. For the separation of functions purist, the simplest conclusion is that all this federal adjudication belongs in Article III.

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There is thus a basic conflict between presidential maximalism and Article III essentialism. These two theories are aligned if the goal is to inhibit regulation. But when it comes to administrative courts, they advance diametrically-opposed values and drive towards deeply incompatible institutional solutions. One prizes maximum political control of adjudication, while the other insists upon adjudicators’ insulation and independence. One theory would dismantle the bureaucracy’s internal separation of functions, while the other would relocate adjudication to the judiciary. This is a separation of powers jurisprudence at war with itself.

### III. IMMIGRATION AS A MODEL FOR THE ADMINISTRATIVE STATE

We know how this battle will end. Decisions like *Arthrex* make plain that the Roberts Court will not be transferring millions of new cases into Article III. Instead, the Court will preserve most administrative courts<sup>97</sup> and subject them to political control. The Court will choose presidential adjudication.

Scholars alert to this possibility have wondered what a new era of politicized adjudication might entail.<sup>98</sup> As it turns out, they need not look far. In immigration law, presidential adjudication is nothing

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<sup>95</sup> Part IV explores which claims would survive the “new rights” revolution. As we point out below, it is poor people of color whose legal claims wind up in Article II, while property and patent claims go to Article III courts.

<sup>96</sup> See Adam B. Cox, *The Invention of Immigration Exceptionalism* (draft on file).

<sup>97</sup> With a narrow exception for certain property disputes, if the new rights theory of agency adjudication wins a majority. See *infra* Part IV.B. (exploring which claims this theory leaves in administrative courts).

<sup>98</sup> See, e.g., Rebecca Eisenberg & Nina Mendelson, *Limiting Agency Head Review in the Design of Administrative Adjudication*, YALE J. REG., Notice & Comment Blog, Feb. 15, 2022, <https://www.yalejreg.com/nc/symposium-decisional-independence-06/>. See also Christopher J. Walker, *What Arthrex Means for the Future of Administrative Adjudication: Reaffirming*

new. Political control of immigration courts has always been the norm. For those familiar with the immigration system, the Supreme Court is not moving in some uncharted or mysterious direction. It is simply exporting the pathologies of immigration law to the rest of the administrative state.

### 1. *A Brief History of Immigration Courts*

To appreciate this development, one needs to understand how the immigration court system works. Immigration courts are administrative tribunals located within the Department of Justice.<sup>99</sup> The trial judges in these courts are lawyers selected by the Attorney General,<sup>100</sup> who are subject to the AG's "direction and control"<sup>101</sup> and lack the tenure protection typically associated with judges in the federal civil service.<sup>102</sup> The immigration system also has an appellate court, the Bureau of Immigration Appeals, which the Attorney General established by order in 1940.<sup>103</sup> The BIA is entirely a creature of regulation; it has no "independent statutory existence,"<sup>104</sup> which is to say, Congress never passed a law creating or requiring it. As a result, the Attorney General has largely unfettered control over the BIA, including plenary control over the Board's jurisdiction. Indeed, the regulations establishing the BIA treat board members as extensions of the Attorney General herself, "appointed to act as the Attorney General's delegates in the cases that come before them."<sup>105</sup>

The docket before immigration courts is immense. Currently, there are more than 1.8 million immigration cases pending across the country.<sup>106</sup> Adjudication of these cases is unusually political, not just because immigration judges lack traditional tenure protection (and in the case of the BIA, statutory pedigree) but also because the Attorney General enjoys direct control over immigration decisions. Under a rule first promulgated in 1940,<sup>107</sup> the AG may refer any immigration case to himself and "re-adjudicate [it] autonomously."<sup>108</sup> This "referral and review" authority—essentially the power to control immigration precedent—distinguishes immigration courts from other administrative tribunals. While

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*the Centrality of Agency-Head Review*, June 21, 2021, <https://www.yalejreg.com/nc/what-arthrex-means-for-the-future-of-administrative-adjudication-reaffirming-the-centrality-of-agency-head-review/>. These scholars argue for a narrow reading of *Arthrex*, and on that ground Walker contends the case merely "conforms [parent] adjudication to the standard model for federal administrative adjudication where there is agency-head review." *Id.* As Part II explained, we see *Arthrex* as part of a broader shift in the Court's unitary executive jurisprudence. And we explain in this Part, that conceptual shift moves agency adjudication toward the currently-exceptional model of immigration law rather than the standard model of appellate review in which adjudication remains relatively insulated from political control, notwithstanding agency-head review.

<sup>99</sup> See *Office of the Chief Immigration Judge*, U.S. DOJ., <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

<sup>100</sup> 8 C.F.R. § 1001.1(l).

<sup>101</sup> 72 Fed. Reg. 53,673. See also Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMM. L.J. 595, 599 n.10 (2009).

<sup>102</sup> 5 U.S.C. § 7521.

<sup>103</sup> 5 Fed. Reg. 2454 (July 3, 1940). See Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

<sup>104</sup> Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 849 (2016).

<sup>105</sup> 8 C.F.R. § 1003.1.

<sup>106</sup> Transactional Records Access Clearinghouse, *Immigration Court Backlog Tool*, [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/). By comparison, in the same month, there 432,873 cases pending in U.S. District Courts and 33,582 cases pending in the federal courts of appeals. See Admin. Office of the U.S. Courts, CASELOAD STATISTICS DATA TABLES, U.S. Federal Courts – Work of the Federal Judiciary (Mar. 31, 2022) and U.S. District Courts – Federal Court Management Statistics (Mar. 31, 2022). Available at: <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>.

<sup>107</sup> See Gonzales & Glen, *supra* note \_\_, at 850-51 (tracing the trajectory of referral and review).

<sup>108</sup> Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129, 130 (2017) (discussing 8 C.F.R. § 1003.1(h)(1)).

many agencies contain appellate courts, and some permit agency directors to review adjudicator's decisions, the Attorney General's power to decide immigration cases *sua sponte* is exceptional.<sup>109</sup> This power makes immigration courts, and the law coming out of them, quite responsive to the vicissitudes of politics.

While the Attorney General's self-referral power is a midcentury invention, political control of immigration adjudication is not. When Congress first began to build an immigration bureaucracy in the late nineteenth century, it lodged immigration enforcement in the Department of Treasury.<sup>110</sup> (The federal government did this after initially contracting most enforcement out to the states.)<sup>111</sup> Under those earliest immigration statutes, the decisions of immigration inspectors were subject to review by the Treasury Secretary. Congress moved immigration to the Department of Commerce and Labor in 1903 and to the newly-distinct Department of Labor in 1913.<sup>112</sup> But the practice of agency head review continued largely unchanged. When Department of Labor employees made decisions in immigration cases, they forwarded those decisions to the Labor Secretary for approval.<sup>113</sup>

In this era, deportations were relatively rare. The deportation boom did not begin until the 1920s, after the 1917 Immigration Act expanded the grounds of deportability and the government began to build bureaucratic capacity to deport larger numbers of people.<sup>114</sup> As enforcement picked up pace, the Secretary of Labor created an internal board to review the agency's growing immigration caseload.<sup>115</sup> That review board made non-binding recommendations to the Labor Secretary.<sup>116</sup> It was retained when, in 1933, President Roosevelt created the Immigration and Nationality Service (INS) within the Department of Labor.<sup>117</sup> And when Congress moved INS to the Department of Justice in 1940—in response to efforts by the Labor Secretary Francis Perkins to institute progressive reforms within the immigration service—the appellate body that had developed within the Department of Labor was re-created by regulation within the Justice Department.<sup>118</sup> In a flurry of administrative orders, the

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<sup>109</sup> See CHRISTOPHER J. WALKER & MATTHEW LEE WEINER, AGENCY APPELLATE SYSTEMS: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 31 (Dec. 14, 2020), <https://www.acus.gov/report/final-report-agency-appellate-systems> (noting that the AG's self-referral power is unusual); see also David Hausman, Daniel E. Ho, Mark Krass, & Anne M. McDonough, *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, April 19, 2021, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3830897](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830897) (exploring the AG's use of the referral power during the Trump Administration).

<sup>110</sup> The first formal federal immigration enforcement agency was the office of the Superintendent of Immigration, which Congress created and placed in the Treasury Department in 1891. Act of Mar. 3, 1891, ch. 529, 26 Stat. 839. Coordinated federal enforcement really began, however, with the office of the "Chinese Inspector," a position established to implement the 1882 Chinese Exclusion Act. Pub. L. 47-126 (May 6, 1882).

<sup>111</sup> See ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020); Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. Am. Hist. 1092 (2013); Gerald L. Neuman, *The Lost Century of American Immigration Law* (1776–1875), 93 COLUM. L. REV. 1833, 1841–44 (1993).

<sup>112</sup> Roberts, *supra* note \_\_\_, at 33.

<sup>113</sup> *Id.*

<sup>114</sup> COX & RODRÍGUEZ, *supra* note \_\_.

<sup>115</sup> Roberts, *supra* note \_\_\_, at 33–34.

<sup>116</sup> *Id.*

<sup>117</sup> Exec. Order 6166 § 14 (June 10, 1933).

<sup>118</sup> Between 1933 and 1940, Frances Perkins introduced rules prohibiting immigration officers from presiding over cases they investigated, created a program that allowed Canadians who entered unlawfully to "adjust" their status, and formed a panel to investigate INS's deportation policies, which she said had attracted "much odium" to the immigration service. Mae Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 68, 90, 98 (2003). These and other progressive reforms prompted "angry" Senators and Congressmen to move INS to the Department of Justice, the federal government's main law enforcement agency. *Id.* at 102.

Attorney General established the Board of Immigration Appeals to review immigrant inspectors' decisions, made BIA rulings final, and invented the power to refer any immigration case to himself.<sup>119</sup>

Thus, the modern immigration court system was born: a network of initial decisionmakers; reviewed by an appellate court; subject to the AG's power to self-refer. There are a few more wrinkles in the story—immigrant inspectors become “hearing examiners” and “special inquiry officers” before they are anointed “judges” in 1973;<sup>120</sup> and Congress moves immigration enforcement to the newly-minted Department of Homeland Security (DHS) in 2002, leaving adjudication in DOJ.<sup>121</sup> But by the middle of the twentieth century, the basic architecture of the immigration court system is in place.

As this quick history shows, immigration adjudication has always been subject to political oversight. The country's earliest federal immigration statutes permitted the Treasury Secretary to review decisions made by immigration inspectors.<sup>122</sup> In the progressive era, immigration cases went to the Labor Secretary. After immigration courts moved to the Department of Justice and appellate decisions became final, the Attorney General created the self-referral mechanism.

Throughout this history, there were important tussles over immigration judges' independence. Part II mentioned one landmark in that debate, the Supreme Court's 1950 decision to subject immigration inspectors to the APA's impartiality requirements in *Wong Yang Sung v. McGrath*.<sup>123</sup> But that precedent was short-lived. Six months after *Wong Yang Sung*, Congress exempted immigration adjudication from the formal hearing requirements laid out in the APA, and a few years later the Supreme Court rejected a challenge to the Attorney General's “supervision and control” of immigration judges.<sup>124</sup> By 1955, both Congress and the Court had concluded that immigration adjudication fell outside the protection of Administrative Procedure Act. The statutory regime that later came to govern immigration adjudication would provide for hearings and judicial review, but not judges insulated from the Attorney General's political control. And since 1891, the political leader of every federal agency that has housed immigration has had the power to review immigration decisions. From this perspective, the AG's power to refer any case to himself is the culmination of a more-or-less unbroken history of political involvement in immigration adjudication.

Today, immigration courts are known as markedly political bodies. During the Bush Administration, the Attorney General's office “took political considerations into account” when

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<sup>119</sup> See Gonzales & Glen, *supra* note \_\_\_, at 851 (tracing this history); Roberts, *supra* note \_\_\_, at 33-34 (same, in even more detail). See also *Bridges v. Wixon*, 326 U.S. 135, 139 n.3 (1945) (describing the BIA in 1945).

<sup>120</sup> For the classic survey of this history, see Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 456 (1988). For a recent one, see Nicole Sequeira Tashovski, *Immigration Judge Independence Under Attack*, 19 HASTINGS RACE & POV. L. J. 173, 177-79 (2022).

<sup>121</sup> To offer a bit more detail: after immigration moved from the Labor Department to DOJ in 1940, immigration courts lived within INS until 1983, when an internal DOJ reorganization created the Executive Office of Immigration Review (EOIR), the subagency that now houses immigration courts. See DOJ, Executive Office for Immigration Review: About the Office, <https://www.justice.gov/eoir/about-office> (August 8, 2022). EOIR then stayed in DOJ when the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, eliminated INS and created two new enforcement divisions, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CPB). Many who had criticized the failure to separate immigration enforcement from immigration adjudication welcomed the idea that EOIR would remain in DOJ, though as we explain below, advocates still argue that immigration judges lack sufficient independence.

<sup>122</sup> Immigration Act of 1891, Pub. L. 51-551, 26 Stat. 1084a, § 8.

<sup>123</sup> 339 U.S. 33 (1950).

<sup>124</sup> Supplemental Appropriation Act of 1951, 64 Stat. 1048 (exempting exclusion and expulsion proceedings from Sections 5, 7, and 8 of the APA); *Marvello v. Bonds*, 249 U.S. 302, 306, 311 (1955).

selecting immigration judges.<sup>125</sup> The Attorney General who oversaw those efforts, Alberto Gonzales, lauded the referral and review he wielded as a “robust tool for the advancement of executive branch immigration policy.”<sup>126</sup> When President Obama came to office, his Attorney General reversed or vacated a number of decisions made in immigration adjudications by Bush Attorneys General, ultimately using the power to decide immigration cases *sua sponte* to announce significant changes to asylum policies for those fleeing gang requirement and domestic violence. More recently, in 2018, President Trump’s Attorney General imposed case quotas on immigration judges to speed deportations and effectuate the President’s immigration policies.<sup>127</sup> And throughout the Trump Administration, the Attorney General repeatedly used his “referral authority . . . to set immigration policy via adjudication,” sometimes reversing longstanding precedent on the meaning of immigration laws.<sup>128</sup>

Immigration law thus presents an interesting model for administrative law. Immigration is an adjudicative domain: administrative courts are central to the government’s effort to regulate immigrants, and immigration policy is often made through the resolution of individual cases. Immigration is also a thoroughly executive domain: its courts developed from an Attorney General’s order; its judges have thin tenure protection; and their decisions are subject to spontaneous review by a political appointee. In this corner of the administrative state, presidential adjudication is neither an innovation nor a revolution. It is more like a return to immigration law’s roots.

## 2. *Old Liberty, New Liberty, and the Defense of Executive Courts*

It is not clear what an adherent of new administrative law should make of immigration courts. For unitary executive theorists, immigration tribunals are the dream: nimble, responsive political bodies, whose output matches the President’s views. For separation-of-functions purists, on the other hand, these tribunals are a nightmare: courts that make enormously consequential decisions, including whether to incarcerate and deport people, trapped in the wrong branch. The presidential maximalist should champion immigration adjudication as an ideal. The Article III formalist should be appalled.

Yet this is not how the debate plays out. Although some separation of powers formalists have argued that immigration cases belong in Article III courts,<sup>129</sup> most sense the problem—dare we say the functional difficulty—with putting two million new immigration cases on the federal docket. So

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<sup>125</sup> U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), <https://www.justice.gov/opr/page/file/1206586/download>; see also Jill Family, *The Crisis in Immigration Adjudication*, YALE J. REG., Notice & Comment Blog, Feb. 15, 2022, <https://www.yalejreg.com/nc/symposium-decisional-independence-02/>.

<sup>126</sup> Gonzales and Glen, *supra* note \_\_, at 896.

<sup>127</sup> Family, *supra* note \_\_; Joel Rose, Justice Department Rolls Out Quotas for Immigration Judges, NPR, Apr. 3, 2018.

<sup>128</sup> Family, *supra* note \_\_; see, e.g., Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1212 (2021) (discussing *Matter of A-B-*, 28 I. & N. Dec. 199 (Att’y Gen. 2021), in which Attorney General Jeff Sessions reversed settled precedent on whether domestic violence is a basis for asylum).

<sup>129</sup> See, e.g., Laura Ferguson, *Revisiting the Public Rights Doctrine: Justice Thomas’s Application of Originalism to Administrative Law*, 84 GEO. WASH. L. REV. 1315, 1332 (2016) (“Legal disputes over immigration . . . implicate constitutional rights. These private elements of immigration statutes would thus require at the very least de novo appellate review, if not Article III adjudication in itself.”). Cf. Kent Barnett, *Due Process for Article III: Rethinking Murray’s Lessee*, 26 GEO. MASON L. REV. 677, 691 (2019) (“[T]he text of Article III does not support the public-rights exception”). But see *infra* note \_\_ (explaining Barnett’s reluctant defense of administrative immigration courts, on the ground that immigrants’ rights are really privileges).

scholars turn to the conceptual moves we introduced in Part II to explain why immigration case can be adjudicated by the executive branch.

Most lean heavily on a distinction between “new rights” and old ones to narrow the class of claims that require Article III adjudication.<sup>130</sup> Under the theory of federal jurisdiction outlined above, only *old* liberty rights require Article III process.<sup>131</sup> Any “new liberty” rights—roughly, any due-process-protected interest recognized after the birth of the modern administrative state—can be relegated to agency adjudication.<sup>132</sup> Because the liberty interests implicated by deportation decisions are, Article III formalists contend, inventions of the twentieth century, they do not require Article III courts.

As we noted earlier, one basic problem with this approach is that it draws distinctions among due-process-protected interests that exist nowhere in the Fifth Amendment. There is also a historical problem with this effort to justify executive branch adjudication of immigration claims: it is far from obvious that deportation decisions deprive noncitizens of “new” rather than “old” liberty.

The decision to exclude or deport a noncitizen often entails the arrest and detention of that noncitizen. It is hard to fathom how the loss of one’s physical liberty at the hands of executive branch officials does not count as a deprivation of the most traditional form of liberty. Certainly this was the view of James Madison, Thomas Jefferson, and other opponents of the short-lived Alien Friends Act, a 1798 statute that authorized the President to deport any noncitizen he “judged dangerous to the peace and safety of the United States.”<sup>133</sup> Stressing that due process applied to “persons” and not just “citizens,” Madison argued that immigrants could not be arrested or confined unless “some probable ground of suspicion be exhibited before some judicial authority.”<sup>134</sup> The Alien Friends Act “expired in disgrace” in 1800 in the face of fierce, constitutionally-inflected debate about immigrants’ rights.<sup>135</sup> The better part of a century passed before Congress again enacted federal immigration laws authorizing exclusion or deportation. And when the Supreme Court finally confronted squarely the

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<sup>130</sup> It is occasionally suggested, more radically, that Article III adjudication is not required for immigration cases because noncitizens simply lack due process rights altogether—in other words, that they are beyond the protection of the Due Process Clause. Even putting to one side the difficulty of squaring such a conclusion with the fact that the Due Process Clause extends to all “persons,” not just to citizens, there is essentially no historical or jurisprudential support for such a position. Since the founding all have agreed, for example, that noncitizens charged with criminal offenses are entitled to the protections of the Fifth Amendment, as are noncitizens whose real property is taken by government officials, and so on.

<sup>131</sup> See, e.g., Baude, *supra* note \_\_, at 1579-81 (distinguishing “classical” conceptions of liberty and property from new rights). Baude does not use the phrase “new liberty,” but he does use the term “new property” and he argues that both expanded in the twentieth century. Cf. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). See also Barnett, *supra* note \_\_, at 702 n.172 (advocating revival of the rights-privilege distinction and suggesting in a footnote that immigration cases involve mere privileges and thus belong in the executive branch). As we noted in Part II, Barnett’s is the more radical position insofar as it would render immigration entirely a matter of executive grace, with no process due at all.

<sup>132</sup> The point in time when “old” and “new” rights diverge for these theorists is not entirely clear. For some, it appears to be around 1900. See, e.g., Barnett, *supra* note \_\_, at 701-02 (distinguishing nineteenth- from twentieth-century thinking about due process). For others, the line between old and new rights seems closer to the 1970s, when the Supreme Court decided *Goldberg v. Kelly*, 397 U.S. 254 (1969), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). See, e.g., Baude, *supra* note \_\_, at 1581.

<sup>133</sup> Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (expired 1800).

<sup>134</sup> See Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1443 (2022) (quoting James Madison, *The Report of 1800* (Jan. 7, 1800), in 17 THE PAPERS OF JAMES MADISON 318 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991)).

<sup>135</sup> *Id.* at 1445. As Bowie and Rast point out, in addition to being a debate about immigrants’ constitutional rights, the controversy over the Alien Friends Act was also a debate about the scope of Congress’s Article I power to regulate immigration. *Id.*

question whether the arrest and detention of a noncitizen under those laws amounted to a deprivation of the traditional liberty of freedom from physical restraint, it unanimously concluded that it did.<sup>136</sup>

Of course, one could concede that the decision to *detain* a noncitizen requires judicial involvement, but argue that the decision to *exclude* or *deport* a noncitizen does not. This approach would preserve Article II adjudication of the core question of many immigration cases, which is whether a person may enter or remain. In this version of new rights theory, the argument would be that the legal interest in entering or remaining in the United States—the interest infringed by the government when it orders a noncitizen deported—was not a liberty interest protected by the Due Process Clause prior to the rise of the modern administrative state.<sup>137</sup> Today, it is indisputable that a noncitizen’s right to remain in the United States can be a due-process-protected interest. But being “new” liberty, one might argue, the right to enter or remain does not require Article III adjudication.

But even this reframing gets the history wrong. James Madison did not think that the Alien Friends Act was unconstitutional solely because it permitted arrest and confinement without judicial involvement. He also thought that resident “alien friends” had a liberty right in their continued residence in the country.<sup>138</sup> Taking that liberty right without judicial involvement represented a distinct constitutional violation: within the then-dominant understanding of due process—which, we explained earlier, required judicial involvement any time liberty rights were at stake—it was an unconstitutional banishment without full judicial process. To be sure, whether Madison’s view was correct was hotly debated at the time. The Supreme Court did not get an opportunity to weigh in for nearly ninety years because Congress permitted the Alien Friends Act to lapse after two years and then declined for decades to enact other federal immigration legislation.<sup>139</sup> But, at the very least, the founding-era history on the status of noncitizens’ right to remain in the United States is mixed.

Moreover, when the Court finally did weigh in on the question nearly a century later, its response belies the notion that a noncitizen’s liberty interest in avoiding deportation should be treated as “new” even by those who subscribe to the new rights theory of agency adjudication. In 1891, the Court for the first time considered the interest a lawful immigrant had in remaining in the United States. The question left the Court deeply divided. While five Justices concluded that this interest did not count as a right to liberty protected by the Due Process Clause, three Justices authored strident dissents from this conclusion.<sup>140</sup> Then, within a decade, the Court abandoned its initial holding and reversed course, concluding in 1903—this time unanimously—that a noncitizen’s interest in remaining in the United States *can* be a liberty right protected by the Due Process Clause.<sup>141</sup> Thus, to treat the right to reside as some “new liberty” requires privileging a resolution by a deeply divided Court, one that lasted less than a decade before being abandoned, and one that itself was in tension with some significant founding-era evidence.

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<sup>136</sup> See *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). In *Nishimura Ekiu*, Supreme Court agreed that Nishimura was being deprived of a private right when she was detained by the federal government at a local Mission house in San Francisco pending the resolution of her right to land. Because she was clearly deprived of her physical liberty, the Court concluded, she “was entitled to the writ of habeas corpus to ascertain whether the restraint is lawful.” *Id.*, 142 U.S. at 660.

<sup>137</sup> See, e.g., Nelson, *supra* note \_\_, at 580.

<sup>138</sup> Madison made an exception for “enemy aliens”—that is, for noncitizens who were citizens of a nation with which the United States was at war.

<sup>139</sup> See COX & RODRIGUEZ, *supra* note \_\_ (explaining why Congress stayed out of the field until after reconstruction).

<sup>140</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). Even Chief Justice Field, the author of the Court’s earlier opinion sustaining the first Chinese Exclusion Acts in *Chae Chan Ping v. United States*, dissented. See *id.* at 744.

<sup>141</sup> *Yamataya v. Fisher*, 189 U.S. 86 (1903).

In sum, whether one focuses on noncitizens' right to be free from physical confinement or the right to remain in the United States, history makes it difficult to explain why defenders of immigration adjudication by agency courts have been so quick to conclude that immigration law concerns only "new" rather than "old" liberty. For now, though, set this historical debate aside. To engage with it, one has to accept the questionable premise that only old rights deserve federal courts, and our aim is not to legitimate this way of thinking about federal jurisdiction.

Rather, the point is that immigration courts capture the tension inherent in new administrative law and offer a nice illustration of the conflict we identified in Part II. The problem of immigration courts is only a problem because unitary executive theory and separation of functions theory are contradictory when it comes to adjudication. According to one theory, immigration courts seem wildly unconstitutional and require an elaborate justification. According to the other, immigration courts are the paragon of constitutionality.

To the extent that it has shown its hand, the Roberts Court has indicated that it will embrace presidential adjudication, leaving immigration courts in the executive branch and celebrating them as an example of democratically-responsive government. The Court has not been explicit about this; it has not yet decided whether immigration courts violate the separation of powers. But recent cases indicate that this Court wants less, not more, oversight of immigration judges' decisions. Just last Term, in *Patel v. Garland*,<sup>142</sup> the Court ruled that federal courts cannot review factual findings made by immigration judges in most deportation cases. That conclusion does not suggest deep anxiety about executive authority over immigration adjudication. Alongside *Arthrex*—which reorganized an agency to facilitate political review of an administrative tribunal<sup>143</sup>—*Patel* signals a jurisprudence in which immigration courts live quite happily in Article II, with decreasing supervision from the federal judiciary.<sup>144</sup>

This outlook turns courts that have long been pariahs into the prototype of administrative justice. For years, scholars have derided immigration courts as unjust and overly political.<sup>145</sup> Critics argue that immigration courts depart from the promise of "decisional independence" embedded in the APA and serve as the "poster child" for the problems with politicized adjudication.<sup>146</sup> Sounding a similar tune, Judge Easterbrook recently excoriated the Board of Immigration Appeals for deferring to the Attorney

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<sup>142</sup> 586 U.S. \_\_\_\_ (2022).

<sup>143</sup> 141 S.Ct. 1970 (2021).

<sup>144</sup> Justice Gorsuch is one notable skeptic of this approach. As Part I noted, he dissented as to the remedy in *Arthrex*, arguing that the Court should have vacated the patent tribunal's decision rather than revising the statute to provide for review by the agency's Director. *Id.* This partial dissent suggests some qualms about political oversight of administrative tribunals, or at least about the Court's willingness to redesign of executive agencies to facilitate presidential administration. Justice Gorsuch also dissented in *Patel*, arguing that the Court was foreclosing "judicial review [of] . . . bureaucratic malfeasance." 586 U.S. at 18 (Gorsuch, J., dissenting). These dissents position Justice Gorsuch as something of an outlier—not wholly aligned with the Court's liberal wing on questions of administrative law, but more distrustful of the executive branch than some of his colleagues. See *infra* Part IV.A. (discussing tensions within the Court's conservative wing).

<sup>145</sup> See Family, *supra* note \_\_\_\_ (making this critique and collective sources for the claim). See also Kent H. Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1648 (2016) (citing immigration judges as a prime example of the "partiality concerns" with "all agency hearings" and particularly those before judges who lack the APA's tenure protections).

<sup>146</sup> Family, *supra* note \_\_\_\_.



General rather than the Seventh Circuit.<sup>147</sup> For these critics, susceptibility to politics is a deep flaw in immigration adjudication.

In the new administrative law, this flaw becomes a feature. If the President's politics are supposed to permeate Article II, aspects of immigration courts that have made them objects of derision become examples of a properly accountable executive branch. Recognizing this development helps to expand and sharpen critiques of the Roberts Court's administrative law jurisprudence.

#### IV. THE LESSONS OF ADJUDICATION

The conventional wisdom is that the Roberts Court is anti-bureaucratic. Supporters of the Court argue that it is taming a “deep state” of recalcitrant bureaucrats, whose existence undermines democracy. Critics contend that the Court is decimating the civil service to protect big business.<sup>148</sup> Even the Court itself adopts the basic anti-bureaucracy framing, casting its nondelegation and executive power decisions as an effort to shift policymaking toward elected officials.<sup>149</sup>

Yet this is only half of the story. When it comes to adjudication, the Court's jurisprudence is more complicated and less skeptical of bureaucracy than the standard narrative suggests. Bringing adjudication into debates about modern administrative law creates a richer—and in some ways more troubling—account of recent developments in the field.

##### 1. *The Pro-Bureaucracy Court*

When one focuses on adjudication, the Roberts Court does not seem not particularly anti-bureaucratic, at least not if that term means keen to downsize or disempower actors in the executive branch. To the contrary, the Court wants to *preserve* the administrative state as a place for millions of people to resolve their legal claims. Part III offered immigration courts as an example of this trend. In that domain, the Court serves as the savior of the administrative state, departing from the core principles of its larger project in order to maintain a massive bureaucracy of administrative courts. The anti-bureaucratic move would be to dismantle these courts, pushing vast swaths of dispute resolution into Article III. But as we explained above, the Court shows little appetite for such a move.

Indeed, the Court appears not just willing to tolerate the continued existence of an enormous adjudicative bureaucracy but bent on further empowering it. On the regulatory side of administrative law, the Court has ratcheted up judicial oversight: it has expanded access to federal courts,<sup>150</sup> refused to defer to agency interpretations of the statutes they administer,<sup>151</sup> and grown ever more searching

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<sup>147</sup> *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035-36 (7th Cir. 2020). (“[It] beggars belief . . . . We have never before encountered defiance of a remand order, and we hope never to see it again . . . . The Board seemed to think . . . that when faced with a conflict between our views and those of the Attorney General it should follow the latter.”)

<sup>148</sup> See, e.g., Metzger, *supra* note \_\_, at 70.

<sup>149</sup> See *supra* Part I.

<sup>150</sup> In litigation over the Deferred Action for Childhood Arrivals (DACA) Program, for example, judicial conservatives who once heralded the presumption against review of enforcement discretion have come to embrace broad review of the government's enforcement policies. See, e.g., *DHS v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1906 (2020) (recharacterizing DACA to avoid *Heckler v. Chaney*, 470 U.S. 821(1985)). The Court has also expanded standing doctrine—not typically a conservative move—to permit states to challenge almost any federal policy.

<sup>151</sup> See *supra* note \_\_ (discussing *American Hospital Association v. Becerra*, 596 U.S. \_\_ (2022)).

and dubious about the reasons agencies give for their actions.<sup>152</sup> Yet when it comes to administrative adjudication, the Court has done the opposite: it has curtailed Article III oversight and signaled that administrative courts will be left largely free to exercise power as they see fit.

Two cases from this past Supreme Court Term exemplify the Court's effort to empower administrative courts. We briefly mentioned one, *Patel v. Garland*, in Part III.<sup>153</sup> That case raised the question of what sort of review is available when an immigration judge denies discretionary relief from deportation. No one—not *Patel* of course, but not even the government—argued that federal courts lack jurisdiction to review at least some of the factual determinations made by an immigration judge in the course of denying deportation relief. Yet that is exactly what the Supreme Court held. “Today,” Justice Gorsuch wrote in dissent, “the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual’s removal from this country, and nothing can be done about it. No court may even hear the case.”<sup>154</sup>

The second case was *George v. McDonough*, a dispute that arose after an administrative court improperly denied George veterans’ benefits by applying a regulation that misinterpreted the relevant benefits statute.<sup>155</sup> By the time the dispute made its way to federal court, even the agency agreed that its earlier interpretation of the statute had been incorrect and that its rule was invalid. The only question was what to do about the mistake in George’s case. Despite the fact that Congress had in recent decades explicitly expanded judicial review of veterans’ benefits decisions, including by authorizing veterans to ask the agency to revisit a final benefits decision on grounds of “clear and unmistakable error,” the Court held again that nothing could be done to correct the glaring error.<sup>156</sup> Criticizing this outcome, Justice Gorsuch wrote that the Court was now “in the business of adding words to the law . . . to insulate badly mistaken agency decisions from any chance of correction.”<sup>157</sup>

It would be easy to overlook these decisions as precedents in specialist fields or as minor cases in a Term that delivered the major questions doctrine and the end of *Roe v. Wade*.<sup>158</sup> But *Patel* and *George* are part of the canon of new administrative law insofar as they reflect the Court’s increasing interest in insulating administrative courts from judicial oversight. These cases reinforce the conclusion that this Court is not out to disempower bureaucrats and reduce the scope of the administrative state. That may be half of its intellectual project—a half focused principally on the production of agency rules and regulations. But other half is about policing the boundary of federal court jurisdiction. On the

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<sup>152</sup> See, e.g., *Regents*, 140 S.Ct. at 1912 (invalidating the rescission of DACA); *Dept. of Commerce v. New York*, 139 S. Ct. 2551 (2019) (concluding that the Trump Administration’s decision to add a citizenship question to the census was pretextual and therefore unlawful). And see especially *Biden v. Texas*, 597 U.S. \_\_\_\_ (2022), in which the Court quite clearly signaled that it would decide for itself whether the agency’s policy was rational.

<sup>153</sup> 586 U.S. \_\_\_\_ (2022).

<sup>154</sup> *Id.* at 18 (Gorsuch, J. dissenting). Justice Gorsuch accused the majority of undermining the very “presumption of judicial review of administrative action,” which he views as a necessary prerequisite to the acceptance of administrative power. *Id.*

<sup>155</sup> 596 U.S. \_\_\_\_ (2022).

<sup>156</sup> *Id.* at 1. While *George* does not formally concern *Chevron* deference, the Court’s approach in the case stands in sharp contrast with its recent *Chevron* jurisprudence. In the *Chevron* context, the Court has made increasingly clear that it has no interest in deferring to an agency’s interpretation of the statutes it administers, and that agency action grounded in an incorrect reading of a statute should be struck down. See *supra* Part I.A. In *George*, however, the Court chose to insulate from oversight an error so clear that even the agency had admitted its mistake.

<sup>157</sup> *Id.* at 7 (Gorsuch, J., dissenting).

<sup>158</sup> See *supra* Part I (tracing the rise of the major questions doctrine); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_\_ (2022).

adjudicative side of the administrative state, the Court is engaged in docket control. And *that* effort requires a large, uninhibited bureaucracy.

Unlike the deregulatory agenda, this part of the Court’s project has exposed divisions within the conservative wing. As we noted, Justice Gorsuch dissented in *Patel* and *George*; Justice Barrett authored both majority opinions, with the conservative bloc in lockstep. The root of Justice Gorsuch’s disagreement with the majority in these cases was its refusal to follow through on the commitments underlying its broader separation of powers theory. For Justice Gorsuch, the tyrannical threat of an unaccountable bureaucracy looms just as large when agencies adjudicate as when they regulate.<sup>159</sup> He thus sees meaningful judicial oversight as crucial to preserving the rule of law and chastises the majority for conveniently forgetting that fact when it comes to administrative courts. As he wrote in dissent in *George*, the majority’s holding “turns an agency once accountable to the rule of law into an authority unto itself. Perhaps some would welcome a world like that.”<sup>160</sup> This dissent exposes tension within the Court’s administrative law jurisprudence—in particular, disagreement about how unfettered executive power over the adjudicative bureaucracy should be. Justice Gorsuch would discipline that bureaucracy. A solid majority would leave administrative courts alone.

But we ought not forget: the majority would leave adjudicators to their own devices only *after* pulling certain claims out of the administrative state. Part II explained that separation of powers purists typically argue that traditional property claims belong in Article III courts. At the same time, they carve out a class of claims—those involving “public” rights, or perhaps now it is “new” rights—that can stay in the executive branch, where under the majority’s theory of judicial review there is decreasing oversight of administrative tribunals. This approach casts the federal bureaucracy as a critical extension of the federal judiciary. In this version of administrative law, the administrative state becomes a second-class court system for people whose rights are too public or too new to warrant an initial hearing in Article III.

This adjudicative bureaucracy is massive. There are more than eighty different federal agencies that adjudicate individual cases.<sup>161</sup> In 2013, the first and last year for which anyone has a comprehensive count, 4,726 administrative adjudicators decided more than 1,448,193 cases.<sup>162</sup> One could proliferate statistics here: 1.8 million cases pending in immigration courts;<sup>163</sup> 850,000 cases

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<sup>159</sup> In *George*, for example, Justice Gorsuch emphasized that the Department of Veterans’ Affairs is an agency that regularly denies benefits on the basis of “self-serving regulations inconsistent with Congress’s instructions,” that delays access to justice by taking seven years on average to process administrative appeals, that in recent years has been reversed 90 percent of the time on appeal before the Veteran’s Court. *George*, 596 U.S. at 7-8. Justice Gorsuch adopted a similar tone in *Patel*, describing the BIA’s error as “bureaucratic misfeasance.” *Patel*, 586 U.S. at 18 (Gorsuch, J., dissenting). His dissent in *Arthrex*, discussed *supra* note \_\_\_, is also consistent with the assessment that his administrative law jurisprudence sometimes departs outside the conservative orthodoxy.

<sup>160</sup> *George*, 596 U.S. at 8. (Gorsuch, J., dissenting).

<sup>161</sup> ADMIN. CONF. OF THE U.S. & STANFORD LAW SCHOOL, JOINT PROJECT ON FEDERAL ADMINISTRATIVE ADJUDICATION, CASELOAD STATISTICS, [https://acus.law.stanford.edu/\(August 1, 2022\)](https://acus.law.stanford.edu/(August 1, 2022) [hereinafter ACUS-STANFORD STUDY]) [hereinafter ACUS-STANFORD STUDY].

<sup>162</sup> *Id.*

<sup>163</sup> See Part III.A.

pending in social security courts;<sup>164</sup> 384,000 new cases filed annually in the Office of Medicare Hearings.<sup>165</sup> The list goes on and portrays not a withering but a robust bureaucracy.

The boundaries of this bureaucracy are not random. It is not just anyone who files a disability claim or needs to defend a deportation case. The “high volume” administrative courts are social security courts, immigration courts, Medicare courts, and veterans’ courts.<sup>166</sup> These are courts where poor people of color file legal claims. When one compares this collection of cases to the disputes that separation of powers formalists would siphon out of the administrative state—notably, patent, property, and securities cases—the border between Article II and Article III does not look coincidental. It looks like a theory of federal jurisdiction structured by race and class. And as Part II explained, it redesigns the administrative state by distinguishing between “real” from lesser due process claims.

It is here that the fuller picture of the Court’s project comes into view. The regulatory piece of the Court’s jurisprudence is straightforward, premised on distrust of bureaucrats and distaste for red tape. But with adjudication in the mix, the Court seems less hostile to bureaucrats and more eager to maintain an administrative state in order to implement a theory of bureaucracy’s value that has troubling race and class implications. The Court’s administrative law jurisprudence is as much about docket control and rights erosion as it is about deregulation. This worldview does not seek to end the administrative state. It reduces administrative government in some places but defends and expands it in others. This is a renovation project, not a hatchet job. The upshot is a thinner regulatory state and a hearty bureaucracy to manage cases that federal courts would rather leave to the executive branch. We are left, in other words, with an adjudicative state.

## 2. *A New Era of Constitutionalism*

Focusing on adjudication thus reveals the extent to which the Roberts Court is pro-bureaucracy and pro-administration. This shift in perspective also yields a second lesson: the Court is constitutionalizing a corner of administrative law that has had an ambivalent, loose relationship with the Constitution for more than fifty years.

The story of administrative adjudication can be divided into two relatively distinct eras. The first—the era of constitutional due process—was a period in which the model for agency adjudication flowed from the Constitution and required administrative judges to be impartial and insulated from an agency’s political activities. This understanding of adjudication has its origins in the early decades of the twentieth century, when Congress first began to build the administrative state. As Congress created agencies to regulate the economy, a bureaucracy to regulate immigration, and so on, it repeatedly authorized those new administrators to engage in adjudication of individual claims.

Courts responded to all this administrative adjudication in a way that transformed American public law and created the foundations of what we now call administrative law. First, the Supreme Court

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<sup>164</sup> ACUS-STANFORD STUDY, *supra* note \_\_; see ALSO SOCIAL SECURITY ADMINISTRATION, OFFICE OF RETIREMENT AND DISABILITY POLICY, ANNUAL STATISTICAL SUPPLEMENT (2020), <https://www.ssa.gov/policy/docs/statcomps/supplement/2020/2f8-2f11.html>.

<sup>165</sup> ACUS-STANFORD STUDY, *supra* note \_\_.

<sup>166</sup> Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1098-99 (2018).

accepted the idea that administrative judges could adjudicate matters that implicated due process. This was an enormous conceptual shift. As Part II explained, during the nineteenth century, due process was essentially a separation of powers requirement: depriving a person of life, liberty, or property required a hearing before an Article III court; only matters that did not implicate rights protected by due process could be adjudicated by executive branch officials. Second, the Court began to expand the set of interests that counted as “liberty” or “property” under the Due Process Clause. As a result, administrators could decide cases involving liberty or property, and the Due Process Clause applied to administrative hearings.

As courts embraced this new conception of due process, they began to impose basic requirements of fairness on administrators.<sup>167</sup> Again, the idea that courts would police the process of administrative adjudication was a departure from nineteenth century public law. During that earlier period, executive adjudication was largely beyond the purview of federal courts. In the progressive era, by contrast, courts started to review administrative adjudication to ensure that executive branch officials followed statutory requirements, held fair hearings, and reached decisions that had evidentiary support.<sup>168</sup> In other words, courts began to ensure that administrative officials acted in accordance with basic due process values.

This “appellate model” of review quickly spread throughout the administrative state.<sup>169</sup> Yet even with rudimentary judicial oversight in place, many lawyers and regulated parties worried that the structure of administrative adjudication provided too little assurance of impartiality. Due process demanded more, they believed, and so they argued that greater safeguards were needed, including the establishment within agencies of an internal separation of functions—institutional arrangements that would insulate adjudicators from the agency’s prosecutorial and lawmaking functions.<sup>170</sup> As we noted in Part II, these concerns about adjudicators’ impartiality helped propel passage of the Administrative Procedure Act in 1946. That Act laid out an elaborate set of procedures designed to make administrative judging more uniform and impartial. In those procedures, the APA captured the core theme of the first era of adjudication: the Constitution required administrative judging to be separate from politics.

This era began to unravel within just a few years of the APA’s passage. Part III introduced this part of the narrative. As we explained above, the Supreme Court embraced the constitutionalized vision of adjudication in *Wong Yang Sung* in 1950.<sup>171</sup> But Congress quickly responded by exempting immigration adjudication from the strictures of APA. Congress’s move in immigration law might be seen as the opening shot announcing a new era of adjudication. During this second period, due-process-inspired requirements of uniformity and impartiality gave way to widespread disuniformity in adjudication—an era of variation and statutory dominance.<sup>172</sup> Due process continued to constrain administrative courts at the margins: that is the story of *Goldberg v. Kelly*, *Mathews v. Eldridge*, and the

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<sup>167</sup> See Cox, *supra* note \_\_\_\_.

<sup>168</sup> *Id.*

<sup>169</sup> Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

<sup>170</sup> *Id.*; Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389 (1948).

<sup>171</sup> 339 U.S. 33 (1950).

<sup>172</sup> See Emily S. Bremer, *Reckoning with Adjudication’s Exceptionalism Norm*, 69 DUKE L.J. 1749, 1752 (2020) (“Adjudication is ruled by a norm of exceptionalism: a presumption in favor of procedural specialization and against uniform, cross-cutting requirements.”).

other “new property” cases decided during the 1960s and 70s.<sup>173</sup> But even as these cases imposed basic constitutional constraints on administrative hearings, they embraced the idea that agency adjudication should be tailored to context,<sup>174</sup> and they accepted that Congress, not courts, should be designing these tailored adjudication regimes.<sup>175</sup>

During this second period, one might have expected the APA to supply uniformity, impartiality, and a healthy dose of process even in the absence of strong constitutional constraints. After all, in *Wong Yang Sung* the Court had been quick to assume that an administrative hearing required the APA’s formal adjudication procedures. But the standardized approach to administrative courts gave way as Congress created ever more (and ever more varied) schemes of adjudication, and as the Court grew more concerned that the APA might over-proceduralize administrative action. Anxiety about what Adam Samaha has called “undue process” led the Court, within just a few decades, to ease its insistence on formal procedures in every administrative hearing.<sup>176</sup>

The result was that the APA came to serve less as a framework statute for administrative procedure than as an off-the-rack procedural option that Congress could choose expressly if it wished. While Congress did occasionally choose that option, in the overwhelming majority of cases it instead created bespoke procedural regimes to govern new schemes of administrative adjudication. Thus, in the second era of adjudication, the Constitution and the APA receded from their once-central position in agency design.

This is the era we have lived in for the last half century. But now administrative law appears to be entering a third phase in which the Court will again constitutionalize and homogenize adjudication. This time, however, the Court is operating with exactly the reverse presumption of the progressive era. In the early twentieth century, the administrative state grew out of the idea that the Constitution required agency adjudication to be fair, impartial, and insulated from politics. A century later, the Court has concluded that the Constitution requires political control of adjudication. This is about as far a cry as one could get from the original constitutional settlement that led the Court to accept a dramatic expansion in the number and type of disputes that could be adjudicated in agencies rather than federal courts.

### 3. *The Regulatory Paradigm*

In the end, we are left with an adjudicative state, rebuilt on a new constitutional foundation. The emergence of this vision of American government is a notable development in the intellectual history of public law. Yet one misses it entirely if adjudication is omitted from the story of the Court’s administrative law jurisprudence. This is the final and simplest lesson of our piece. Whether supportive or critical of the Roberts Court, the account of administrative law is incomplete without administrative courts.

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<sup>173</sup> Reich, *supra* note \_\_\_\_.

<sup>174</sup> See *Goldberg v. Kelly*, 397 U.S. at 254, 268-69 (1970).

<sup>175</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (“In assessing what process is due in this case, substantial weight must be given to the good faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.”).

<sup>176</sup> Bremer, *supra* note \_\_\_, at 1752; Adam Samaha, *Undue Process*, 59 STAN. L. REV. 601 (2006).

A number of administrative law scholars have lamented the field's relative inattention to adjudication.<sup>177</sup> On the whole, agency courts tend to be understudied because regulation is the paradigm of administrative law. Within this paradigm, adjudication is either a puzzle for federal courts scholars; a topic for specialists in fields where administrative judging is the dominant agency activity; or one of several interchangeable ways that agencies make policy. Adjudication is not part of the larger structural account of the Supreme Court's conception of the administrative state.<sup>178</sup>

This approach to administrative law obscures the role that adjudication played in the field's development. As we have just explained, the appellate model of judicial review, and the administrative state itself, emerged from progressive-era debates about agency tribunals. Today, adjudication is an enormous part of what the administrative state does. For millions and millions of people—social security claimants, immigrants, veterans, patent holders, labor union members—the “administration” of modern government means the resolution of individual legal claims in an agency court. The field's regulatory orientation can minimize this fact.

This orientation also flattens the complex dynamics at work in modern administrative law. As this piece has demonstrated, recent developments in the field put tremendous pressure on the boundary between administrative and federal courts. The Supreme Court is advancing a vision of administrative law in which a significant amount of regulatory activity shifts back to Congress, a small batch of legal claims move to Article III courts, and the President is left with considerable political control over everything that remains in the executive branch. This theory of government makes it exceedingly important to determine which disputes can be adjudicated outside of Article III because everything left behind is fair game for presidential administration. But that question has never been clear. Scholars have long described public rights doctrine as hopelessly confused,<sup>179</sup> and new rights theory does little to dispel the fog.

This body of doctrine is usually understood as a matter of federal court jurisdiction. Administrative law textbooks and syllabi tend not to dwell on adjudication, or at least not on the problem of non-Article III tribunals, on the theory that judging is slightly orthogonal to the field's core substance. As a result, while federal courts scholars have spent considerable time trying to resolve the conundrum of agency adjudication—which rights count as public rights,<sup>180</sup> which institutions count as courts,<sup>181</sup> whether appellate review cures the problem with non-Article III tribunals<sup>182</sup>—adjudication features far less in debates about the past and future of the administrative state.

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<sup>177</sup> See, e.g., Barnett, *supra* note \_\_, at 1645 (“[Administrative judges] mostly go unnoticed, toiling in the shadows of agency rulemaking.”); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WISC. L. REV. 1351, 1353 (2019) (“Absent from the standard narrative of administrative law is adjudication . . .”).

<sup>178</sup> In a sense, the field's inattention to administrative tribunals is surprising given the general obsession with courts rather than other aspects of agency culture and design. See Conti-Brown, *supra* note \_\_, at 4-5 (criticizing administrative law's juris-centrism). But to the extent that it fixates on courts, administrative law scholarship is focused on Article III judicial review of administrative action, not the boundary between Articles II and III.

<sup>179</sup> See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 916 (1988). See also Nelson, *supra* note \_\_, at 963 (describing public rights doctrine as a “notoriously tangled area”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 990 n.106 (2002) (calling public rights doctrine “a delight for teachers of federal courts and a nightmare for everyone else”).

<sup>180</sup> See, e.g., Nelson, *supra* note \_\_.

<sup>181</sup> See, e.g., James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004).

<sup>182</sup> Compare Fallon, Jr., *supra* note \_\_ (arguing that it does), with Baude, *supra* note \_\_ (arguing that it does not).

At its base, though, the “problem” of agency adjudication is a debate about whether administrative government is legal and legitimate. And—this is the critical part—legitimizing the adjudicatory state is a far different task than legitimizing the regulatory state. The characteristics that make federal policies feel connected to democratic will and responsive to political change are different than the traits that make dispute resolution seem reliable and fair. The Roberts Court has not grappled fully with this fact, and as a consequence, is advancing a jurisprudence that legitimates one half of the administrative state at the expense of the other. Think, for a minute, about the sort of government that could emerge from the Roberts Court. On the rulemaking side, the Court has taken a deregulatory turn. On the adjudicative side, it is drawing sharp distinctions between claims that belong in federal court and claims that may proceed in administrative tribunals, and it is subjecting agency courts to more direct political control. The cumulative result of this legitimization project is a federal bureaucracy composed of executive courts.

Assessing this new bureaucracy is a task for administrative law. When it comes to the Roberts Court’s separation of powers jurisprudence, the key questions are how much judging the Court will tolerate in administrative agencies and how political the adjudicative side of the administrative state is going to become. These are questions about federal jurisdiction, to be sure. But they are also bread-and-butter questions of administrative law, about the size and purpose of a federal bureaucracy.

When cast in this light, agency courts become a critical part of the intellectual, legal, and social project that is the modern administrative state. And the Court’s jurisprudence seems like an effort to revitalize bureaucracy, with a new goal in mind. Once one recognizes that this Court permits and even encourages bureaucratic government, it is interesting to ponder what the Court wants the federal bureaucracy to do. Adjudication and rulemaking are two interrelated pieces of a larger ideological movement. When situated alongside the Court’s deregulatory jurisprudence, the rise of presidential adjudication starts to look like the emergence of a new vision of the civil service, in which bureaucrats exist to administer a more political kind of justice.