The Executive Power of the Federal Courts

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Modern judicial review of agency action invites several potential formalist objections: Do litigants have the right legal interest for Article III standing? Does Chevron *violate a duty of judicial independence? Can a court enter a universal remedy against an agency rule? When can the Supreme Court hear a direct appeal from an executive body? These important and timely questions share a premise: because federal courts use judicial power to review agency action, the review is subject to Article III's constraints.*

This Article challenges that premise by asking whether, in some important facets of modern administrative law, federal courts might be using executive power—not judicial—when reviewing agency action. In particular, certain judicial review of agency rulemaking might best be understood as an extension of the administrative process itself, in which case Article III's constraints are perhaps largely beside the point.

Although counterintuitive, this understanding could be constitutionally proper in certain circumstances. Article III tells us a lot about constraints on the judicial power, but it tells us surprisingly little about what that power is or how it relates to the executive power. A careful reading of constitutional text and structure, the political theory underlying Article III, and historical practice from the Founding onward, however, might suggest that federal courts can (and do) use executive power when reviewing some agency action. After unpacking the historical, textual, and conceptual grounds for this executive power model of judicial review, the Article explains how the model informs ongoing debates about standing to challenge agency action, the use of Chevron *and universal remedies in pre-enforcement review, and the Supreme Court's appellate jurisdiction in agency review cases. The Article concludes by exploring how this novel conception of judicial review of agency action advances legal stability and agency accountability while also informing ongoing debates in other areas of law.*

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INTRODUCTION

Centuries after the Constitution divided the federal government's great powers—legislative, executive, and judicial[1]—differentiating these powers, and identifying the relationships between them, remains "one of the most intractable puzzles in constitutional law."[2] This puzzle poses a particular challenge for the administrative state. To take one notable example, jurists and scholars have struggled for decades to explain how the modern agency fits within the constitutional scheme.[3] But agencies are not the only important players. Much of administrative law, after all, is the body of principles and rules that govern judicial review of executive action.[4] And in recent years, jurists and scholars have highlighted the many ways in which cornerstones of this review are arguably incompatible with Article III's limits on the judicial power.[5]

Consider these important administrative law issues, which have recurred in recent Supreme Court terms:

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1. U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

2. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1238 n.45 (1994); *see also, e.g.*, John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 295–96 (2016) ("That legislative and judicial power are conceptually distinct may seem obvious, but explaining the difference between them is not so easy."); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1779 (2012) ("[D]istinguishing between the constitutional functions of the legislature, executive, and judiciary is 'daunting, if not impossible.'" (quoting M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1193 (2000))).

3. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (justifying "quasi-legislative or quasi-judicial agencies"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578–79 (1984) (exploring why agency rulemaking, execution, and adjudication are "not the forbidden conjoining of powers" and advocating for abandonment of "the rigid separation-of-powers compartmentalization of government functions"); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 147 (2019) (observing the "well-known constitutional difficulty" that arises because "important components of the government seems to combine" each of the powers). *Compare, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) (maintaining that agency rulemaking and adjudication "take 'legislative' and 'judicial' forms, but they are exercises of . . . the 'executive Power'"), *with, e.g.*, *id.* at 312–13 (Roberts, C.J., dissenting) (stating that "as a practical matter" agencies exercise legislative, executive, and judicial power).

4. *See* Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 483 (2004).

5. In this Article, "judicial power" is a shorthand for the "judicial Power of the United States" vested under Article III, U.S. CONST. art. III, § 1, as distinct from the judicial powers of other sovereigns. *See* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1521–40 (2020). Similarly, this Article's scope is limited to federal courts and judges discussed in Article III (and not, for example, so-called Article I courts). *Cf. id.* at 1565 (discussing the treatment of Article I courts in different opinions).

- Standing to Sue: Supreme Court doctrine about the "special solicitude" of states' "quasi-sovereign interests"[6] in Article III standing analysis has led some to worry that the courts are too open to partisan administrative litigation,[7] while the Court's recent emphasis on historical common law analogues for ordinary citizens' lawsuits have others worried about the Freedom of Information Act's (FOIA) demise.[8]
- Agency Deference: Under the well-known *Chevron* framework, an agency's interpretation or construction of an ambiguity or gap in the statute it administers is often entitled to controlling deference in federal court,[9] which might violate an Article III-based duty of judicial independence,[10] an argument before the Court in October Term 2023.[11]

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6. Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

7. *See, e.g.*, William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 167, 172–74 (2023). For timely cases presenting issues of state standing to challenge agency action, see Biden v. Nebraska, 143 S. Ct. 2355, 2365–68 (2023) (student loan forgiveness); United States v. Texas, 599 U.S. 670, 674–86 (2023) (immigration policy); and Haaland v. Brackeen, 599 U.S. 255, 294–96 (2023) (Interior Department Indian Child Welfare rules).

8. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1967) (codified at 5 U.S.C. § 552). For the Court's emphasis on historical analogues, see TransUnion LLC v. Ramirez, 594 U.S. 413, 425 (2021). For concerns about *TransUnion*'s effects on FOIA, see, for example, Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 270–71 (2021); and Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 350.

9. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

10. For judicial suggestions of Article III problems with administrative deference doctrines, see, for example, Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (questioning *Chevron*); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155–56 (10th Cir. 2016) (Gorsuch, J., concurring) (same); *cf.* Kisor v. Wilkie, 588 U.S. 558, 612–13 (2019) (Gorsuch, J., concurring) (questioning deference to agency interpretations of ambiguous regulations). For scholarly critiques, see, for example, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1208 (2016) (arguing that *Chevron* violates a duty of independent judgment); and Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1262 (2002) (collecting Article III objections).

11. *See* Brief for Petitioners at 25, Loper Bright Enters. v. Raimondo, No. 22-451 (U.S. July 17, 2023), 2023 WL 4666165 (arguing that *Chevron* violates what "Article III demands"); Brief for Petitioners at 14, Relentless, Inc. v. Dep't of Com., No. 22-1219, (U.S. Nov. 20, 2023), 2023 WL 8237503 (arguing that "*Chevron* contravenes Article III"). Substantive revisions to this Article were concluded prior to the Supreme Court's decision in these cases, in which the Court ultimately overruled the *Chevron* framework. *See* Loper Bright Enters. v. Raimondo, No. 22-451, 2024 WL 3208360, at *22 (U.S. June 28, 2024). So, the Article largely discusses *Chevron*

- Universal Remedies: Several statutes authorize pre-enforcement judicial review of agency action and render a particular court's jurisdiction exclusive.[12] That a single reviewing court's determination of a rule's validity or invalidity conclusively settles the matter, some have said, "raises significant questions under the Due Process Clause"[13] and "conflicts" with "fundamental precepts of the federal court system."[14]
- Appellate Jurisdiction: When the Biden Administration issued an emergency temporary standard regarding COVID-19 vaccinations in the workplace,[15] the challengers' race to obtain Supreme Court review raised a question that the Court had dodged for years: can the Supreme Court, which generally has only appellate jurisdiction,[16] be the first to judge an agency action's lawfulness?[17]

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deference as it existed going into October Term 2023. That said, the Court's opinion dropped in just enough time for the *Journal* to allow a few quick observations. Justices Thomas and Gorsuch reiterated their views that *Chevron* implicates Article III concerns, but a majority did not rely on that rationale for overruling the *Chevron* framework. *See id.* at *22 (Thomas, J., concurring) (writing separately "to underscore a more fundamental problem [that] Chevron deference also violates our Constitution's separation of powers"); *id.* at *31 (Gorsuch, J., concurring) (objecting that "Chevron deference . . . precludes courts from exercising the judicial power vested in them by Article III to say what the law is"). Although the majority opinion rested on a particular interpretation of the judicial review provisions in the Administrative Procedure Act ("APA"), *id.* at *15 (majority opinion), it nevertheless invoked formal, Article III-based themes, *see id.* at *8–9 (highlighting Article III's vision that the "judicial function" is to exercise independent judgment about the law when adjudicating cases and controversies). Thus, a live question that remains is whether Congress can, without violating the separation of powers, legislate something akin to the old *Chevron* framework, such as by amending the APA provision that the Court construed. This Article's analysis in Section IV.B.1—that constitutional objections to *Chevron* may have legs only in some (but not necessarily all) applications—therefore remains apt, insofar as one might think that deference is less constitutionally problematic when a court adjudicates a pre-enforcement challenge to a rule and private rights or interests are not immediately at stake. In other words, even accepting the soundness of some Article III objections, Congress may yet have the power to require deference in some cases, even if not all.

12. *See, e.g.*, Hobbs Act, ch. 1189, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341–2351); PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 588 U.S. 1, 3–4 (2019).

13. *PDR Network*, 588 U.S. at 19 (Kavanaugh, J., concurring).

14. Gorss Motels, Inc. v. FCC, 20 F.4th 87, 99 (2d Cir. 2021) (Menashi, J., dissenting). In the interest of disclosure, I briefed and argued the *Gorss Motels* case for the government. *Id.* at 91.

15. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB*), 595 U.S. 109, 115–16 (2022) (per curiam).

16. U.S. CONST. art. III, § 2.

17. *See* Aditya Bamzai, *Administrative Agencies and the Supreme Court's Appellate Jurisdiction*, YALE J. REG.: NOTICE & COMMENT BLOG (Jan. 4, 2022), https://www.yalejreg.com/nc/administrative-agencies-and-the-supreme-courts-appellate-jurisdiction/ [https://perma.cc/5QLY-JTRA].

These concerns all share a premise: because federal courts exercise the "judicial Power of the United States,"[18] Article III constrains their review.

This Article challenges that premise by raising a novel alternative: when reviewing certain agency action, might federal courts be better understood to use *executive* rather than judicial power? Although counterintuitive, this executive power model of judicial review comports with the Constitution's text and structure, its underlying political theory, and relevant historical practice. The model rests on a simple (albeit contestable) claim: in separating the judicial power from the legislative and executive powers, the Constitution principally removed from the latter the capacity to divest or otherwise alter previously vested private rights or interests.[19] But when engaged in modern judicial review of agency action, federal courts often do not immediately affect the vested rights or interests of private parties.[20] Instead, much of this review asks simply whether an agency adhered to statutory requirements when issuing a rule and enforces those standards through the statutory remedy of vacatur. This mere enforcement of pre-existing statutory rules and standards, without divesting any private person of anything, regardless of the case's outcome, looks far more like routine executive power rather than judicial power.[21]

This makes sense. Although Article II vests the executive power in the President,[22] it contemplates that the President will share that power with others. These are the "Officers of the United States" in the Appointments Clause,[23] a category historically understood to include anyone "whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance."[24] Federal judges fit the bill: Article II identifies

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18. U.S. CONST. art. III, § 1.

19. *See generally infra* Section III.A.

20. *Cf., e.g.*, Adam Crews, *Interagency Litigation Outside Article III*, 55 CONN. L. REV. 319, 347–48 (2023) (discussing how judicial functions such as applying statutes and rules are not part of the core judicial power and are instead merely incidental to the judicial power vested under Article III).

21. *Cf. id.* at 350 (proposing this possibility in the limited context of litigation between two executive agencies). Note that this Article is concerned with "executive power" as domestic law execution, not matters like foreign affairs authority. *Compare, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 314–15 (2021), *with, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001).

22. U.S. CONST. art. II, § 1.

23. *Id.* art. II, § 2; *cf., e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 213 (2020) (stating that "lesser officers . . . wield" the President's Article II authority).

24. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 454 (2018).

"Judges of the supreme Court" as among the "Officers of the United States,"[25] and the function of judicial review of agency action is often a statutory duty carried out under statutory standards. When this review does not require a court to act on vested private interests—i.e., when no use of the judicial power is strictly necessary—then federal judges may well be thought to use executive power instead.

This Article therefore presents a case for conceiving of some modern judicial review of agency action as using executive power. That begins with history. The Article traces how Congress has long used federal courts as part of administrative processes, including: how the Founders assigned courts to administer benefits in the early Republic, a trend that continued into the antebellum period;[26] how late nineteenth and early twentieth century legal thought grappled with judicial review of agency action in the early modern administrative state;[27] and how Congress has relied on courts to supervise agency action since the rise of rulemaking as a primary mode of agency action in the mid-twentieth century.[28] That history matters because many provisions in the Constitution are underdeterminate and, on many views of proper interpretative methodology, are given meaning through political practices over time.[29] Indeed, constitutional provisions directly relevant to what the judicial power is all about ("the due process of law")[30] and the scope of Congress's power to innovate in the law's execution (the Necessary and Proper Clause)[31] are susceptible to that form of settlement.[32] So, drawing on constitutional text and structure—contextualized by the judicial power's principal attribute as the capacity to affect vested private interests—the Article argues that Congress can elect that its laws for the administrative state be "carr[ied] into execution" in part by federal courts using executive power.[33]

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25. U.S. CONST. art. II, § 2.

26. *See infra* Section II.A.

27. *See infra* Section II.B.

28. *See infra* Section II.B.2.

29. By "underdeterminate," this Article means that a provision allows a range of possible outcomes that are consistent with and limited by the law. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987). For the competing methodologies, see sources cited *infra* notes 279–82.

30. U.S. CONST. amend. V.

31. *Id.* art. I, § 8, cl. 18.

32. *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 21–29 (2019) (Necessary and Proper Clause); Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2453–54 (2016) (Due Process Clause).

33. U.S. CONST. art. I, § 8, cl. 18.

At this point, it is worth emphasizing what the Article does *not* claim. First, the argument is not that the Founders or following generations widely or openly understood federal courts to use executive power—although, notably, there is evidence that some in the Founding generation viewed the judicial power merely as a subset of (rather than distinct from) the executive power.[34] But even if the Founders could not foresee federal courts' use of executive power when reviewing agency action (an issue of the Constitution's expected application), nothing about that innovation necessarily offends the Constitution's text and structure (an issue of the Constitution's meaning).[35] Second, the executive power model is not an invitation for unconstrained congressional innovation. Rather, the Article's thesis is largely limited to statutory pre-enforcement judicial review of agency rulemaking in which divesture of private interests is not immediately at stake.[36]

Even this narrow domain for an executive power model of judicial review, however, has important implications for several debates over judicial review of agency action. An executive power model (1) allows Congress more leeway to provide judicial review of agency rules and supplies a coherent rationale for the Court's recent (and thinly theorized) standing decision in *United States v. Texas*;[37] (2) undermines a central constitutional objection to the *Chevron* framework;[38] (3) informs ongoing judicial and scholarly debates about the legitimacy of universal remedies;[39] and (4) provides a coherent framework to understand the Supreme Court's jurisdiction over non-Article III bodies, an issue that lurked in recent cases like *National Federation of Independent Business v. Department of Labor* (*NFIB v. OSHA*) and *Ortiz v. United States*.[40] Thus, this model has a practical bent: as functions that federal courts have been performing in administrative law for decades come under renewed formalist scrutiny,[41] this Article offers a potential justification for

34. *See, e.g.*, *infra* note 229.

35. *Cf.* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 383 (2013) ("Specific expectations about the consequences of a legal rule are distinct from the meaning of the rule itself.").

36. *See infra* Section III.C.

37. *See infra* Sections IV.A.1, V.A.2.

38. *See infra* Section IV.B.1.

39. *See infra* Section IV.B.2.

40. *See infra* Section IV.C.

41. *See, e.g.*, *supra* notes 6–17 and accompanying text.

these longstanding practices using formal methods comparable to those underlying the objections.[42]

This contribution comes at an apt time. Not only do these administrative law issues recur in high-profile litigation,[43] but scholars are actively grappling with how to move beyond the traditional formalism-versus-functionalism debates that animate much of separation of powers law.[44] This Article is part of that project; it accepts that certain core government functions are nonexclusive but adds to the literature by focusing on the federal courts. In doing so, the Article seeks to create a more coherent picture of how government power operates across the modern administrative state, with insights that may have ramifications for other timely debates in the federal courts field.[45]

The Article has five parts. Part I explains administrative law's current fixation on Article III but then proposes that Article III might be beside the point for some important aspects of modern administrative law. Part II explores the historical support for conceiving of an executive role for federal courts in administrative processes. Part III leverages that history to propose an executive power model of judicial review that fits the Constitution's text, structure, and purpose. Part IV explores this model's ramifications for important aspects of modern administrative law doctrine. Part V briefly discusses the model's normative benefits and its relevance to ongoing scholarly debates in other areas.

I. ADMINISTRATIVE LAW AND ARTICLE III

Administrative law has an Article III fixation. "At its core," Thomas Merrill has said, "administrative law consists of the body of principles and rules that govern judicial review of executive action."[46] Some of these rules

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42. *Cf.* Crews, *supra* note 20, at 343–67 (pursuing a similar goal with respect to interagency litigation's justiciability).

43. *See, e.g.*, *supra* notes 6–17 and accompanying text.

44. *See, e.g.*, Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1197 (2023) (proposing a power-versus-authority distinction); Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 742–43 (2022) (proposing a nonexclusive functions theory); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–46 (2011) (discussing the shortcomings in traditional functionalist and formalist views).

45. *See infra* Section V.B.

46. Merrill, *supra* note 4, at 483. *But see, e.g.*, Emily Bremer, *Power Corrupts*, 41 YALE J. REG. (forthcoming 2024) (manuscript at 4–10), https://ssrn.com/abstract=4375200 [https://perma.cc/P24K-FS98] (challenging this arguably misplaced focus).

come from the Constitution. Article III, for example, vests the "judicial Power of the United States" in the federal courts and then places important limits on that power's use.[47] Judicial power extends only to particular "Cases" and "Controversies,"[48] and courts enforce that limit through the doctrine that litigants must have "standing" to sue.[49] Even with a proper case, Article III governs where you can bring it; the Supreme Court's exercise of judicial power, for example, usually must be appellate.[50] And these rules are enforced by independent judges who enjoy protection (via fixed tenures and salaries) from unwarranted executive and legislative interference.[51]

These constitutional constraints lurk in much of modern administrative law. Indeed, on some accounts, Article III doctrine has grown in importance precisely because of doctrinal shifts especially relevant to public law litigation.[52] Moreover, federal courts have read Article III's standing requirement into the cause of action in many judicial review statutes,[53] which usually allow Supreme Court review only after an initial judgment in a circuit court,[54] lest review violate *Marbury v. Madison* by conferring too much original jurisdiction on the Supreme Court.[55] And some contend that, precedent notwithstanding, Article III imposes a duty of judicial independence that requires resolution of legal questions without deference to the agencies they are reviewing.[56] Article III concerns are everywhere.

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47. U.S. CONST. art. III, § 1.

48. *Id.* art. III, § 2; *see also id.* amend. XI.

49. *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021). For some of the debate over that doctrine's pedigree, compare, for example, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (calling the doctrine an "invention" of federal judges), with Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) ("[H]istory does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.").

50. U.S. CONST. art. III, § 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

51. U.S. CONST. art. III, § 2.

52. *See* Baude & Bray, *supra* note 7, at 153–54.

53. Many such statutes limit challenges to persons "adversely affected" or "aggrieved." *E.g.*, 5 U.S.C. § 702; 16 U.S.C. § 825*l*(b); 28 U.S.C. § 2344; 29 U.S.C. § 655(f); 30 U.S.C. § 816(a)(1); 47 U.S.C. § 402(b)(6). These are "term[s] of art" in modern administrative law "identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue." Doe v. Chao, 540 U.S. 614, 624 (2004).

54. *See, e.g.*, 16 U.S.C. § 825*l*(b); 28 U.S.C. § 2350; 30 U.S.C. § 816(a)(1). *But see* 28 U.S.C. § 2101(e) (authorizing certiorari before judgment); Bamzai, *supra* note 17 (discussing tension that certiorari before judgment creates).

55. 5 U.S. (1 Cranch) at 175.

56. *See* sources cited *supra* notes 10–11.

Contemporary lawyers have come by the Article III fixation honestly. For generations, American administrative law has operated under an "appellate review model" that has imposed on the court-agency relationship a structure and role that parallels the structures and roles of juries, trial courts, and appellate courts in ordinary civil litigation.[57] This model emerged as courts analogized new agencies and modes of review to older institutions and doctrines more familiar to civil litigation.[58] And the model evolved, in part, from specific concerns about contamination of the judicial role with executive power.[59] Unsurprisingly, then, the culture of judicial review reflects concerns about restraining courts to their seemingly proper sphere: use of judicial power within Article III's limits.

The constitutional theory that led to the appellate review model was a predecessor to what is today called the "formalist" view of separation of powers.[60] But recent work has sought to move separation of powers discourse beyond the traditional functionalism-versus-formalism debate. John Manning has argued that the Constitution's vesting of government powers says nothing about how those provisions "intersect with Congress's broad coordinate power to compose the government under the Necessary and Proper Clause"—a silence that justifies neither a one-size-fits-all formalist or functionalist view.[61] And more recently, Philip Hamburger has proposed distinguishing exclusive power from nonexclusive authority,[62] while Ilan Wurman has pitched the idea of exclusive and nonexclusive functions.[63]

This Article wades into the same project with the goal to free administrative law from the rigid view that everything a federal court does is—and perhaps must be—an exercise of judicial power. To that end, this

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57. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940, 953–79 (2011).

58. *See id.* at 963–65.

59. *See id.* at 987–97.

60. *See id.* at 987. Formalism generally emphasizes "a fixed set of rules," Magill, *supra* note 2, at 1138, and separation of powers formalism seeks to impose bright-line rules on the scope and manner in which each category of government power is exercised. *See, e.g.*, Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1092–93 (2022). Functionalism, by contrast, favors a flexible analysis with powers that overlap and intermingle; the goal in each case is to preserve each branch's essential functions and the basic balance of control among the branches that underlies the Constitution's design. *See, e.g.*, *id.* at 1093; Magill, *supra* note 2, at 1142–43 (noting functionalism's focus on achieving "an appropriate balance of power among the three spheres of government").

61. Manning, *supra* note 44, at 1945.

62. Hamburger, *supra* note 44, at 1144 (defining "power" as what is "granted by the Constitution" and "authority" as "a part or application of that power").

63. Wurman, *supra* note 44, at 743.

Article proposes an executive power model of pre-enforcement judicial review carried out under special statutory review schemes. The proposal starts with the premise that a defining characteristic of the domestic executive power is the capacity to give effect to the law by carrying it out according to its terms.[64] The judicial power was carved out of this executive power,[65] and both powers are often carried out using common functions: ascertaining the law's meaning, ascertaining facts, and applying the law to the facts (what together one might call adjudication).[66] What separates the two powers is whether, at the end of the process, a divesture or alteration of private rights or interests is possible; that is the judicial power's exclusive domain.[67]

In certain administrative law contexts, however, courts are not called to divest or alter any private interests. The paradigmatic example is a petition for pre-enforcement review of an agency rule. Agency rulemaking is a statutorily regulated cornerstone of the contemporary administrative state,[68] and rules tell regulated parties what their obligations are in the future.[69] But when an agency says that regulated parties must follow a rule, that rule's mere promulgation is not an alteration or divesture of private interests any more than a criminal statute's mere existence is a deprivation of liberty from restraint.[70] The possibility of divesture occurs only if the rule is violated and the agency then seeks enforcement (e.g., to impose a fine or other penalty like revocation of a license). Yet, *pre*-enforcement judicial review of a rule's validity is normal in administrative law.[71] In that posture, when vested private interests are not yet immediately at stake, the court's function looks more like executive power: ascertaining whether the agency complied with applicable

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64. *Cf., e.g.*, Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1319–20 (2020) (describing the Founding-era view of executive action as "the active implementation of legislated instructions in the real world"); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704 ("At bottom, the executive power is the power to execute the laws.").

65. *See infra* Section III.A.

66. *Cf.* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1520 (2020) (observing that adjudication is a "procedure" that "need not signal judicial power").

67. *See, e.g.*, Wurman, *supra* note 44, at 760.

68. *See, e.g.*, 5 U.S.C. § 553. On the rise of rulemaking in administrative law, see *infra* notes 178–79 and accompanying text.

69. *See* 5 U.S.C. § 551(4) (defining a "rule" as "an agency statement of . . . future effect").

70. *Cf.* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 595 (2007) (noting that under the traditional public rights framework, "regulated entities did not have a vested right to be free from regulation of their future conduct").

71. *See, e.g.*, PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 588 U.S. 1, 13–16 (2019) (Kavanaugh, J., concurring) (discussing examples across the administrative state).

statutory law in promulgating the rule and vacating the rule (as the statute commands) if not.[72]

This all leads to the proposal for a possibly cleaner way of thinking about this area of law: when a federal court engages in judicial review under a valid special statutory review scheme that requires only the application of statutory standards to a closed agency record without an immediate effect on private interests, that court is using executive power—not judicial—because the court is simply carrying out pre-existing legislative commands applicable to agencies. The Hobbs Act, which governs judicial review of several agencies' final orders, is a good example.[73] Publication of a final agency order

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72. *See, e.g.*, 5 U.S.C. § 706 (providing the general scope of judicial review of agency action). The obvious objection is that pre-enforcement review is simply equity; just as one can invoke judicial power to seek an offensive, pre-enforcement injunction against an unconstitutional statute, so too one can seek protection from an invalid rule. *Cf., e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) (noting the "power of federal courts to enjoin unlawful executive action," albeit "subject to express and implied statutory limits"); John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 990 (2008) (noting that "an injunction to restrain proceedings at law" was "a standard tool of equity"). But equity historically operated as a backstop; it addressed a grievance in relation to the law itself, and even today it operates only when legal remedies are inadequate. *See* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1778 (2022); Knick v. Twp. of Scott, Pa., 588 U.S. 180, 199–200 (2019). Especially apt here, the APA provides for a "prohibitory or mandatory injunction" only "in the absence or inadequacy" of a "special statutory review proceeding." 5 U.S.C. § 703. A special statute providing judicial review of agency action provides a remedy at law. *See, e.g.*, 28 U.S.C. § 2342. Even though these statutes might use equitable language, *see, e.g.*, *id.*, statutory labels alone do not control what constitutional power is at work. Just ask a "bankruptcy court," *id.* § 151, which (notwithstanding the name) perhaps "must be sustained—if at all—as a tribunal that exercises no independent power," either judicial or executive. *See* Baude, *supra* note 66, at 1574–75.

Moreover, federal courts do not behave like their statutory, pre-enforcement review is in equity. Decisions setting aside agency orders under special statutory review schemes do not consider the usual equitable factors. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (identifying the factors); Env't Health Tr. v. FCC, 9 F.4th 893 (D.C. Cir. 2021) (granting a petition for review with no consideration of those factors). And these schemes frequently envision universal relief by their terms, *e.g.*, 28 U.S.C. § 2342, which courts often grant. *See, e.g.*, Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078, 1081, 1083 (D.C. Cir. 2017) (vacating an order reaffirming an agency rule). If federal courts are doing traditional equity backed by the judicial power, then Article III's case-or-controversy requirement at least arguably constrains the power to grant relief beyond the parties to a specific case. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 471 (2017). *But see, e.g.*, Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020).

73. Hobbs Act, ch. 1189, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341–2351). The Hobbs Act is one of several modern "so-called 'channeling' statutes" that "allow a single circuit court to determine the validity of a rule within a specified time after the rule's promulgation." Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1176 (2020).

announcing a rule starts a sixty-day clock to petition for judicial review,[74] and a single reviewing court is then empowered to "set aside, suspend (in whole or in part), or to determine the validity of" the order.[75] In conducting this review, courts apply familiar (and deferential) APA statutory principles.[76] Thus, judicial review looks like one final stop in the total administrative process—a last check to ensure agency compliance with statutory commands.[77] Isn't the mere carrying out of a statute just executive power?

II. A CONCISE HISTORY OF JUDICIAL ROLES IN ADMINISTRATION

The likely initial reaction to this executive review model is skepticism; the suggestion that federal courts can exercise government power other than judicial is admittedly counterintuitive. This Part attempts to address that concern by showing how Congress has grafted federal courts into administrative processes—for reasons other than adjudication of vested private interests—from the Founding through present day.

A. The Founding and Antebellum Periods

The idea of a law-execution (as opposed to an interest-adjudication) role for courts in reviewing administrative action would likely have seemed foreign to the Founders because nothing akin to modern federal judicial review of agency rulemaking existed in the early Republic. Today, federal law channels offensive judicial review of agency action through one of two routes: (1) special statutory review schemes, like a petition for review directly in federal circuit court;[78] or (2) in the absence of a special scheme, "any applicable form of legal action" in federal district court, such as a proceeding for injunctive relief.[79] The former were largely absent at the Founding,[80] and the latter was not available until 1875, when Congress allowed for general

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74. 28 U.S.C. § 2344.

75. *Id.* § 2342.

76. *See, e.g.*, Mobile Relay Assocs. v. FCC, 457 F.3d 1, 7–8 (D.C. Cir. 2006) (applying arbitrary and capricious review under 5 U.S.C. § 706(2)(A)).

77. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851–52 (D.C. Cir. 1970) (describing how the court is "part of the total administrative process").

78. *E.g.*, Hobbs Act, 28 U.S.C. § 2342.

79. 5 U.S.C. § 703.

80. *See, e.g.*, Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1319–21 (2006) (observing the absence of widespread specific statutory review provisions in favor of common law actions and limited writ review).

federal question jurisdiction.[81] Prior to these innovations, persons seeking to challenge an executive application of law were left with common law actions or extraordinary legal writs like mandamus.[82] This constrained judicial review to customary exercises of judicial power; for example, a wronged citizen might simply sue an officer defendant for damages (thereby affecting the defendant's interest in property) and let the officer raise statutory authority as a defense.[83] But although federal courts were not widely engaged in judicial review of agency action as they are today, they were far from removed from administration and law execution.[84] In several important contexts, Congress assigned to federal courts tasks that today are familiar to executive agencies or otherwise viewed as quintessentially executive.[85]

1. Naturalizations

Congress has used federal courts to administer benefits from the Republic's earliest days, as the nation's first naturalization statute shows. Today, naturalization is a quintessentially administrative act, with "authority . . . conferred upon the Attorney General"[86] as assisted by the U.S. Citizenship and Immigration Services ("USCIS").[87] But in 1790, federal law provided that an alien could be admitted to United States citizenship "on application to any common law court of record."[88] The "court" would make the requisite findings, administer the citizenship oath, and make a record of the application and proceedings.[89] And federal courts readily conducted this business despite the absence of an adverse party in these proceedings—the customary touchstone for judicial power.[90]

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81. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121–30 (1998).

82. *See* Mashaw, *supra* note 80, at 1319–21; Merrill, *supra* note 57, at 947–53; Nelson, *supra* note 70, at 577–79.

83. *See* Mashaw, *supra* note 80, at 1334.

84. *See, e.g.*, *id.* at 1331 ("Congress in the early years of the Republic seemed to have little hesitation in using courts or judicial personnel as administrators . . . ." (footnote omitted)).

85. For more examples of courts as administrative tribunals than this Article allows, see *id.* at 1331–33.

86. 8 U.S.C. § 1421(a).

87. *See, e.g.*, 8 C.F.R. § 316.4 (2024).

88. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

89. *Id.*

90. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1361–63 (2015) (citing, e.g., James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the*

This arrangement may have made good sense given the practical and political realities of the time. There was no "vast bureaucratic apparatus" like today's USCIS on which to rely,[91] and the federal courts were already meeting throughout the country—a far more convenient venue than the national capital.[92] Moreover, using courts helped to reduce the total number of federal officials, which might have assuaged fears about the new national government's size.[93] So, Congress may well have seen the courts as useful administrators of citizenship, even though naturalization was not obviously viewed as an exercise of judicial power. Conferring a new status by checking for compliance with statutory standards looks much more like domestic law execution than traditional judicial adjudication, which customarily adjusted rights as between parties with adverse legal interests arising from some dispute or controversy.[94] Indeed, whether judicial naturalization proceedings comported with Article III was not squarely decided at the Supreme Court until 1926, at which point the Court justified judicial involvement in no small part on the robust history that had evolved over more than a century.[95]

2. Pensions

The Second Congress adopted a similar approach to administering veteran benefits, an example of judicial administration famously reflected in *Hayburn's Case*.[96] Federal law provided that Revolutionary War veterans could apply either to a "circuit court" or "district court" for placement on a pension list, and the "court" would transmit to the Secretary of War an

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Early Republic: Prospectivity, Uniformity, and Transparency, 96 VA. L. REV. 359, 394 n.155 (2010)).

91. *Cf.* Maeva Marcus & Robert Teir, Hayburn's Case*: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 529 (explaining that Congress could not rely on the Veteran's Administration during the federalist era to hear and decide claims under the Invalid Pensions Act).

92. *Cf.* Mark Tushnet, *Dual Office Holding and the Constitution: A View from* Hayburn's Case, 15 J. SUP. CT. HIST. 44, 45 (1990) ("In modern times the duties given to the circuit courts would be assigned to some bureaucracy . . . [but] [t]he circuit courts had the advantage of being already in place throughout the nation, even though they had been created for other purposes.").

93. *See id.*

94. *See, e.g.*, Ann Woolhandler, *Adverse Interests and Article III*, 111 NW. U. L. REV. 1025, 1026–27 (2017).

95. *See* Tutun v. United States, 270 U.S. 568, 576 (1926). *Tutun* unsurprisingly spoke of the need for naturalizations to fit with Article III's requirements—an analytical move the Court understood to be required by precedents like *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and its progeny. *Tutun*, 270 U.S. at 576. But this gloss on *Hayburn* is perhaps an historical error. *See infra* notes 102–04 and accompanying text.

96. *Hayburn*, 2 U.S. (2 Dall.) 409.

"opinion in writing" whether each applicant should be placed on the list and the proper amount of pay.[97] This arrangement again made sense for the time: there was no alternative bureaucracy like today's Department of Veterans Affairs, nor was there likely much appetite to build one.[98] While riding circuit, however, various justices expressed doubts about their duties under the statute, generally objecting (1) to the lack of finality because their decisions were subject to review in other branches and (2) that the proceedings were not conducted in a "judicial manner."[99] Thus, *Hayburn* is conventionally viewed as teaching two lessons: first, that proper federal judicial functions require adverse legal interests;[100] and second, that early congressional practice is not necessarily good evidence of constitutional meaning.[101]

That conventional view, however, has been the subject of questioning. Some have suggested that the Court in *Hayburn* treated as obvious conclusions that were actually contestable.[102] Others have argued that the best reading of the scant documentary evidence suggests that modern lawyers improperly read *Hayburn* through an anachronistic case-or-controversy lens.[103] For those who take seriously this criticism of the conventional view, the pension statute looks like just another effort to solve a pressing policy problem by administering government benefits through the courts—a choice that, although plausibly unconstitutional, was likely *not* widely seen as unconstitutional merely because the statute did not call for an exercise of traditional judicial power (i.e., an adjudication of private rights or interests as between adverse parties).[104] To see why, one needs to progress a bit further along the historical path.

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97. Invalid Pensions Act of 1792, ch. 11, §§ 2–3, 1 Stat. 243, 244 (repealed 1793).

98. *See* sources cited *supra* notes 91–92.

99. *See Hayburn*, 2 U.S. (2 Dall.) at 410 n.*.

100. *See, e.g.*, Pfander & Birk, *supra* note 90, at 1426–27.

101. *See, e.g.*, Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1741 (2015) (stating that "the obviousness of the scheme's unconstitutionality was lost on the members of Congress" who enacted it); *cf.* Michael T. Morley, *Non-Contentious Jurisdiction and Consent Decrees*, 19 U. PA. J. CONST. L. ONLINE 1, 6 (2016) ("Congress blatantly abrogated the cornerstone principle of judicial finality.").

102. *See* Tushnet, *supra* note 92, at 46.

103. *See* Pfander & Birk, *supra* note 90, at 1427–29; Marcus & Teir, *supra* note 91, at 540–41. *But see* Woolhandler, *supra* note 94 at 1056–58.

104. *See* Crews, *supra* note 20, at 354–55 ("*Hayburn's Case* perhaps teaches a narrow lesson: Article III courts 'can act only where their decision will have a binding, legally determinative effect.'" (quoting Pfander & Birk, *supra* note 90, at 1432)).

3. Claims Adjustments

Congressional reliance on the courts as proto-agencies continued into the antebellum period, including by using courts as monetary claims adjusters. The Adams-Onís Treaty of 1819, for example, required the United States "to cause satisfaction to be made" for injuries that Spanish officers suffered from U.S. Army operations in Florida.[105] To satisfy that obligation, Congress initially assigned to the judges of certain Florida territory courts responsibility to receive and to adjust these claims and then to report their findings to the Secretary of Treasury for a final determination.[106] After Florida became a state with a federal court, Congress transferred those duties to Florida's federal district judge.[107] These tasks—examining and certifying an amount due, then transmitting it to a high-level Treasury official—were not all that different from the executive role assigned to the Treasury Department's Auditor as early as 1789.[108]

In *United States v. Ferreira*, the question arose whether the Supreme Court had jurisdiction over appeals from these district court proceedings.[109] The Court said "no" because the underlying decision was not an exercise of judicial power: although the proceedings were "judicial in their nature" because they called for "judgment and discretion," they were "not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States."[110] On the question whether judges could exercise this non-judicial power because they were not proper "officers of the United States," the Court noted—but dodged—the objection because "these laws have for so many years been acted on as valid and constitutional" and the Court did "not think it proper to express an opinion."[111] Thus, in one plausible view, a federal judge was doing executive work, and the Supreme Court declined to stop it.

Shortly after *Ferreira* was decided, the Court ordered the opinion amended after a previously unreported decision, *United States v. Todd*, came to its attention.[112] So that the *Todd* decision would "not be overlooked" again,

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105. Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, Spain-U.S., art. IX, Feb. 22, 1819, 8 Stat. 252.

106. Act of Mar. 3, 1823, ch. 35, 3 Stat. 768.

107. Act of Feb. 22, 1847, ch. 17, § 6, 9 Stat. 128, 130.

108. *See* Mashaw, *supra* note 80, at 1284–85 ("[T]he Auditor . . . examined and certified the amount due and then transmitted the accounts and accompanying documentation to the Comptroller for a final decision.").

109. 54 U.S. (13 How.) 40, 46 (1851).

110. *Id.* at 48.

111. *Id.* at 51–52.

112. *Id.* at 52.

Chief Justice Taney inserted a note describing *Todd*, which concerned the same pension statute at issue in *Hayburn*.[113] As recorded in *Ferreira*, the *Todd* decision held that the pension statute was "unconstitutional" because "the power proposed to be conferred . . . was not judicial power."[114] The bottom-line outcome is unsurprising; most of the justices had already agreed (while riding circuit) that the review and revision reserved to other branches violated the Constitution.[115]

Todd may not have changed the outcome in *Ferreira*, but it perhaps emboldened Chief Justice Taney, who was hardly enthused with the idea of judges' wielding non-judicial power. In one of his final judicial writings—a proposed opinion in *Gordon v. United States* that he circulated before his death, but which was not adopted—he declared emphatically that the "power conferred on [the Supreme Court] is exclusively judicial, and it cannot be required or authorized to exercise any other."[116] That case, like *Ferreira*, presented the question whether the Court could hear an appeal from a federal court (this time, the Court of Claims), which acted "like . . . an Auditor or Comptroller" that decided "the validity and justice of any claim for money against the United States" and reported its opinion to the Secretary of Treasury so that an appropriation might be sought from Congress to pay the claim.[117] As in *Ferreira*, Chief Justice Taney believed there was no appellate jurisdiction because the underlying decision was not an exercise of judicial power.[118] This was so, he argued, because the judicial power must "be final and conclusive upon the rights of the parties."[119] But where, as in *Hayburn* and *Ferreira*, a law provides for further review in other branches, no finality exists.[120]

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113. *Id.*

114. *Id*. at 53.

115. *See Hayburn*, 2 U.S. (2 Dall.) at 410 n.*. Consistent with Amanda Tyler's warning, *Todd* may be an example of reasoning through new problems rather than applying obvious and established principles. *See* Tyler, *supra* note 101, at 1741. Indeed, that certain early justices were initially open to executing the law as commissioners (albeit perhaps begrudgingly) is some evidence of no obvious and settled Founding-era objection to judicial exercise of executive power. *See Hayburn*, 2 U.S. (2 Dall.) at 409 n.* (stating that the New York circuit court "proceed[ed], as commissioners, to execute the business" assigned by the statute); *Ferreira*, 54 U.S. (13 How.) at 52 (noting that "Chief Justice Jay and Justice Cushing acted upon their construction" that they could serve as commissioners).

116. 117 U.S. 697, 697, 700 (1864).

117. *Id.* at 699.

118. *Id.* at 706.

119. *Id.* at 702.

120. *See id.* at 702–04.

Despite some of its sweeping language, Chief Justice Taney's *Gordon* opinion does not necessarily disavow *any* possibility of judicial exercise of non-judicial power. Taney's concerns rested on Congress's subversion of the structural safeguards against review and revision in other branches,[121] citing for example the need for judicial "impartiality" and "independence."[122] Indeed, *Gordon* and subsequent cases like it were ultimately decided solely on that principle. That was the only ground cited when the Court finally dismissed *Gordon*, and the Article III objection disappeared from later cases once the offending review-and-revision provision was repealed.[123] So all told, the *Hayburn*-to-*Gordon* line is perhaps good evidence only of an objection rooted in insulation from executive branch review and revision. If *Hayburn* and *Todd* stood for the proposition that federal courts or judges can never exercise a non-judicial power, that message was certainly not clear either to Congress (which continued to make executive assignments to Article III courts) or to nineteenth-century jurists (some of whom continued to carry them out).

4. Domestic Law Enforcement?

The preceding discussion focused on contexts in which early Congresses seem to have assigned to courts or judges tasks resembling modern benefits administration. But another early statute perhaps suggests yet another overlap in duty between the courts and the executive branch. In 1792, the Second Congress enacted a Militia Act that, on one reading, authorized the President "to call forth the militia of [a] state" to "suppress" oppositions to the execution of federal law only upon being "notified . . . by an associate justice or the district judge."[124] Thus, Congress used its power to "provide for calling forth the Militia to execute the Laws of the Union"[125] to condition presidential

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121. *See id.* at 700–06.

122. *Id.* at 700–01.

123. *See* United States v. Jones, 119 U.S. 477, 477–79 (1886) (recounting this history).

124. Militia Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795). To be sure, one might plausibly read this text other than as *requiring* judicial certification (as opposed merely to *permitting* a militia in these circumstances), but at least one other scholar has concluded that this Act conferred "the highly political function of certifying the breakdown of local law enforcement as a predicate for the President to call out the state militia." Mashaw, *supra* note 80, at 1331–32. A 1795 successor statute dropped the requirement of notification by a judicial officer as a condition for the President's calling forth the militia. *See* Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424, 424. That may well reflect a reasoned judgment about the wisdom of requiring such notification, but it does not obviously undermine the Second Congress's judgment about the notification requirement's constitutional validity.

125. U.S. CONST. art. I, § 8, cl. 15.

action on a judicial officer's certification that opposition to federal law was "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings."[126] Although far from a silver bullet of structural constitutional law on its own, this early statute suggests an important point about the balance of federal power: namely, that early political actors saw no obvious problem with conditioning core executive tasks—like domestic law execution by force—on findings or conclusions by judicial officers outside the context of delivering a final judgment in a case or controversy.

B. The Modern Administrative State

Turn now to the modern administrative state's emergence in the late nineteenth century,[127] when modern judicial review of agency action under special judicial review statutes began to emerge.[128] This culminated in what is today known as the appellate review model, i.e., a relationship between federal courts and agencies that roughly mirrors the relationships between appellate and trial courts.[129] As this Section argues, the story around this model's emergence perhaps merely reinforced earlier conceptions about how courts could participate in executing the law.

1. Revising Authority

Several statutes in the late nineteenth and early twentieth centuries provided for judicial review of agency action, but they conferred on courts a function likely peculiar to modern lawyers: revising an executive officer's initial determination.[130] Apt examples included issuance of patents[131] and

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126. Militia Act of 1792 § 2.

127. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 329 (3d ed. 2005).

128. *See, e.g.*, Mashaw, *supra* note 80, at 1258.

129. *See* Merrill, *supra* note 57, at 953–79.

130. This was not unique to federal administration; in *Prentis v. Atlantic Coast Line Co.*, for example, the Supreme Court held that a federal court should not review the Virginia State Corporation Commission's rate orders until they had been appealed in state court, which acted in a revising capacity with power that was "legislative in [its] nature." 211 U.S. 210, 224–26 (1908).

131. 60 Rev. Stat. § 4914 (1873–1875) ("The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way [and the revision] shall govern the further proceedings [at the patent office]."); Butterworth v. United States, 112 U.S. 50, 60 (1884) (stating that the statute made the appeal "one step in the statutory proceeding" and "conclusive upon the patent-office itself").

trademarks,[132] regulation of public utilities,[133] and radio licensing.[134] The Supreme Court adamantly rejected appeals from decisions of this sort out of discomfort with this judicial capacity to revise an administrative decision.[135] For example, although then-applicable trademark law allowed a reviewing court to "revise the decision appealed from in a summary way,"[136] the Court held in *Postum Cereal Co. v. California Fig Nut Co.* that when appeal was initially taken from the agency to the court of appeals, that court's decision was not judicial but "administrative" and therefore did not produce a final judgment subject to further appellate review.[137]

That courts would be acting as administrative revisers was a known risk when Congress was writing these statutes. The Supreme Court had not been shy about characterizing these judicial review schemes as just "one step in the statutory proceeding,"[138] and some legislators openly warned of judicial aggrandizement under these schemes. The Radio Act of 1927, which governed radio licensing, provides an illustration. Congress gave the Secretary of Commerce certain licensing authority subject to de novo appeal to a Federal Radio Commission.[139] From there, aggrieved parties could seek review in a federal appellate court, which would "hear, review, and determine the appeal" and could "alter or revise the decision appealed from and enter such judgment as to it may seem just."[140] That sweeping revisionary authority did not sit well with Representative Ewin Davis, who unsuccessfully urged

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132. Act of Feb. 20, 1905, ch. 592, § 9, 33 Stat. 724, 727 (providing that "the same rules of practice and procedure" apply to trademark appeals as provided in 60 Rev. Stat. § 4914); Postum Cereal Co. v. Cal. Fig Nut Co., 272 U.S. 693, 698–99 (1927) (so holding and declining jurisdiction because the trademark statute made reviewing courts "part of the machinery of the Patent Office for administrative purposes").

133. Act of Mar. 4, 1913, ch. 150, § 8, ¶ 64, 37 Stat. 938, 988 (granting the reviewing court authority "to vacate, set aside, or modify" a commission decision or order); Keller v. Potomac Elec. Power Co., 261 U.S. 428, 444 (1923) (holding that the Supreme Court could not assume "legislative or administrative jurisdiction" to "review the entire record" and "to make the order or decree which the commission and the District Courts should have made").

134. Radio Act of 1927, ch. 169, § 16, 44 Stat. 1162, 1169 ("At the earliest convenient time the court shall hear, review, and determine the appeal . . . and may alter or revise the decision appealed from and enter such judgment as to it may seem just."); Fed. Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464, 467 (1930) (stating that the reviewing court acted as "a superior revising agency" under the Radio Act).

135. *See, e.g.*, *Gen. Elec. Co.*, 281 U.S. at 467.

136. *See* sources cited *supra* notes 131–32.

137. 272 U.S. at 699–700.

138. Butterworth v. United States, 112 U.S. 50, 60 (1884).

139. Radio Act § 5 (providing administrative appeal from "any decision, determination, or regulation" of the Secretary).

140. *Id.* § 16.

in Congress that the Commission's findings of fact should be conclusive on the reviewing court.[141]

Davis's concerns about the scope of the court's power came to pass. The Court of Appeals of the District of Columbia applied the statute's review provision according to its broad terms. That court would independently assess the "public convenience, interest, and necessity" to reverse the Commission's policy judgments,[142] and when the court determined that "the public interested would be enhanced" by action different from what the Commission took, it would remand to the Commission "to carry [the court's] judgment into effect."[143] As Davis later described it, the court "assumed to perform the function of a super radio commission, substituting its judgment and discretion for that of the Federal Radio Commission."[144] And in *General Electric Co. v. Federal Radio Commission*, the Supreme Court held—as it had in *Postum*—that it lacked jurisdiction over these decisions because the Court of Appeals acted as "a superior revising agency."[145] Simply put, the Court of Appeals had become "part of the machinery of the Radio Commission for administrative purposes."[146]

Because Congress wanted to ensure Supreme Court review, it responded to the Court's *General Electric* decision by acting "to more clearly define the subject matter of such appeals."[147] The law was amended within weeks to narrow the scope of judicial review to questions of law on a closed record.[148] The Court blessed that new arrangement in *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.* and began reviewing the circuit court's decisions.[149]

The history here is messy, but important. The Supreme Court's early modern cases—perhaps most notably *Postum*—suggested that the court of appeals could perform these administrative revising functions because it was an Article I court, whereas the Article III Supreme Court could not take an

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141. H.R. REP. NO. 69-404, at 23 (1926).

142. Great Lakes Broad. Co. v. Fed. Radio Comm'n, 37 F.2d 993, 995 (D.C. Cir. 1930).

143. Gen. Elec. Co. v. Fed. Radio Comm'n, 31 F.2d 630, 634 (D.C. Cir. 1929).

144. 72 CONG. REC. 11530 (1930).

145. 281 U.S. 464, 467 (1930).

146. Harry P. Warner, *Subjective Judicial Review of the Federal Communications Commission*, 38 MICH. L. REV. 632, 637 (1940); *accord* 72 CONG. REC. 11530 (1930) (statement of Rep. Charles R. Davis) (recounting the Supreme Court's view that the appeal provision "in effect made an administrative body of the court of appeals").

147. H.R. REP. NO. 71-1665, at 2 (1930).

148. Act of July 1, 1930, ch. 788, sec. 1, § 16(d), 46 Stat. 844, 845 (amending the Radio Act of 1927).

149. 289 U.S. 266, 275–77 (1933).

appeal from these decisions.[150] As the Court itself would quickly recognize, however, that was an error: the judges of this appellate court were appointed consistent with Article III.[151] Thus, in *O'Donoghue v. United States*—decided a mere three weeks after *Nelson Bros.* turned the tide on judicial review of agency action—the Supreme Court dismissed its prior suggestions about the court of appeals and held that it was "vested generally with the same jurisdiction as that possessed by the [other] inferior federal courts."[152] Contrary past statements were mere "dictum," and *Postum* was to be "confined."[153]

And *O'Donoghue*'s importance runs even deeper. The Court reaffirmed that even though the court of appeals had Article III judicial power, Congress could nevertheless use its Article I power to "confer . . . jurisdiction . . . over quasi-judicial or administrative matters."[154] That is, the Court did not back down from its *other* prior statements that the court of appeals properly exercised some power that was not judicial, but variously described as "legislative"[155] or "administrative."[156]

To be sure, the Court justified this holding by specific reference to Congress's power over the District of Columbia,[157] on which ground the Court attempted to draw a defensible line between what Congress can do with federal courts *in* the District versus *outside* of it.[158] But that line drawing seems hard to defend. If the dispositive factor is Congress's supposedly

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150. Postum Cereal Co. v. Cal. Fig Nut Co., 272 U.S. 693, 700 (1927) ("Congress . . . may vest courts of the District with administrative or legislative functions which are not properly judicial, [but] it may not do so with this court, or any federal court established under article 3 of the Constitution."); *see also* Merrill, *supra* note 57, at 993 ("The provisions for review in the District of Columbia courts were upheld on the ground that these were Article I courts and could be assigned a variety of governmental functions under Congress's plenary authority over the District.").

151. Act of Feb. 9, 1893, ch. 74, § 1, 27 Stat. 434, 434–35 (providing for appointment "by the President, by and with the advice and consent of the Senate" with tenure "during good behavior"); *see also id.* § 3 (requiring the standard judicial oath for these appointments).

152. 289 U.S. 516, 545 (1933), *superseded by statute*, District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

153. *Id.* at 550–51.

154. *Id.* at 545.

155. Keller v. Potomac Elec. Power Co., 261 U.S. 428, 444 (1923).

156. Postum Cereal Co. v. Cal. Fig Nut Co., 272 U.S. 693, 700 (1927); *cf.* Downs v. Hubbard, 123 U.S. 189, 211 (1887) (describing any "right to control, to correct, to reverse, and to dictate the procedure and action of executive officers" as "not judicial" but "administrative, executive, and political in its nature").

157. U.S. CONST. art. I, § 8, cl. 17.

158. *O'Donoghue*, 289 U.S. at 550 ("Congress derives from the District clause distinct powers in respect of the constitutional courts of the District which Congress does not possess in respect of such courts outside the District.").

enhanced power over courts *located* in the District, then the question arises why that power does not extend to the Supreme Court, which sits in the District. Perhaps the Court more likely meant that Congress could confer more sweeping authority on D.C. federal courts over local matters because Congress possesses "the powers of a state" with respect to the District.[159] That might explain cases in which the administrative power was truly local, i.e., affecting only the District,[160] but cases like *Postum* and *General Electric* remain hard to explain. Those cases dealt with judicial administration of national regulatory programs (trademark and radio, respectively) applicable throughout the United States—programs that themselves draw on power other than Congress's "exclusive Legislation" over the District.[161] *General Electric*, for example, concerned a broadcasting license for Schenectady, New York, awarded under authority of "a regulation of interstate and foreign radio communication," i.e., a channel of interstate commerce.[162] In any event, questions about "carrying into Execution" legislation enacted under Congress's enumerated powers are often questions about the Necessary and Proper Clause, not just the "foregoing Powers" that authorize the specific statute.[163] So even if *O'Donoghue* stands for the proposition that Congress may confer a broad, policy-laden "legislative"[164] or "executive and political"[165] power on only D.C. federal courts, that does not answer whether it is constitutionally "proper"[166] to grant more limited and constrained administrative power (e.g., unaccompanied by broad policy discretion) on federal courts more generally.[167]

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159. *Id.* at 545.

160. *See, e.g.*, *Keller*, 261 U.S. at 442–43 (discussing regulation of public utilities within the District of Columbia).

161. U.S. CONST. art. I, § 8, cl. 17.

162. Gen. Elec. Co. v. Fed. Radio Comm'n, 281 U.S. 464, 465–66 (1930).

163. U.S. CONST. art. I, § 8, cl. 18.

164. *See Keller*, 261 U.S. at 443 (explaining that Congress may confer broad, legislative-like power on the District of Columbia federal courts).

165. *See* Downs v. Hubbard, 123 U.S. 189, 211 (1887) (describing the power in use when a federal court purports to control or correct an executive official).

166. U.S. CONST. art. I, § 8, cl. 18.

167. Even accepting *O'Donoghue*'s distinction on its terms, however, might go a long way toward validating an executive power model simply because many statutory review schemes still authorize or require judicial review in the D.C. Circuit, a court which may plausibly draw on both Congress's power to create inferior tribunals *and* to regulate the District. *See, e.g.*, 5 U.S.C. § 7123(c); 15 U.S.C. § 8302(c)(1)(A); 16 U.S.C. § 825l(b); 28 U.S.C. § 2343; 39 U.S.C. § 3663; 49 U.S.C. § 46110(c). To be sure, Congress has since created non-Article III courts for the District to handle local matters (existing in addition to the federal district and circuit court in D.C.). *See* Palmore v. United States, 411 U.S. 389, 405–07 (1973). But that these Article I courts might draw

2. Interagency Litigation

Although the Supreme Court may well have harbored reservations about judicial review as a mere extension of the administrative process,[168] it is not clear that Congress and the lower courts have thought the same. In the wake of *Nelson Bros.*, Congress has devised several statutory review schemes that often channel an agency proceeding directly to a federal appellate court, usually by means of a petition for review, and limiting the judicial role to answering questions of law.[169] These statutes, however, can look a far cry from what ordinary litigation would entail (e.g., proceeding in equity)[170] and instead reflect an almost conscious desire to graft courts into administration. Judge Harold Leventhal perhaps best captured the sentiment when, writing for the D.C. Circuit in 1970, he described the judicial role in agency review as "supervisory";[171] "agencies and courts," he said, "together constitute a 'partnership' in furtherance of the public interest," and the court "is in a real sense part of the total administrative process."[172] That is the same sentiment seen in many of the cases from the early modern administrative state.[173]

This characterization is perhaps especially apt in the context of interagency litigation. Over time, Congress has enacted multiple statutory review schemes allowing two federal agencies to sue one another in federal court.[174] Interagency litigation under special statutory review schemes is a fixture of modern administrative law, arising in numerous cases dating back to Franklin Roosevelt's presidency.[175] How to square this reality with conventional wisdom about Article III—in particular, the case-or-

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on Congress's District power does not obviously mean that the Article III courts have ceased to do so as well.

168. *Cf.* FCC v. Pottsville Broad. Co., 309 U.S. 134, 141 (1940) (cautioning lower courts against application of the mandate rule from ordinary civil litigation to administrative litigation).

169. *See, e.g.*, Securities Exchange Act of 1934, ch. 404, § 25(a), 48 Stat. 881, 901–02; Hobbs Administrative Orders Review Act of 1950, ch. 1189, 64 Stat. 1129.

170. *See supra* note 72 (explaining that appellate review of agency rulemaking under special statutory review schemes does not entail consideration of the traditional equitable factors).

171. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970) (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589 (1965)).

172. *Id.* at 851–52; *cf.* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing ascendant public law litigation as focused more on "the vindication of constitutional or statutory policies" than the resolution of "disputes . . . about private rights").

173. *See, e.g.*, Fed. Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464, 467 (1930) (stating that the reviewing court acted as "a superior and revising agency"); Postum Cereal Co. v. Cal. Fig Nut Co., 272 U.S. 693, 698–99 (1927) (stating that the reviewing court was "part of the machinery of the Patent Office for administrative purposes").

174. *See* Crews, *supra* note 20, at 333–35.

175. *See* Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 712 (2020).

controversy limitation—has for decades posed a conceptual problem for the Supreme Court, lower courts, practitioners, and scholars.[176]

I have previously argued that one possible solution to this puzzle is to recast interagency litigation under these special review schemes as constitutionally permissible uses of non-judicial power in which the reviewing court serves a sort of supervisory role to the agencies.[177] This solution perhaps makes particular sense given the historical context in which interagency litigation has arisen. Before the 1960s, agencies acted mainly through case-by-case adjudications rather than issuing substantive, generally applicable rules.[178] This changed in the 1960s and 1970s in part because Congress began to enact legislation that often required agencies to proceed via rulemaking.[179] In this era of increased rulemaking, Congress has enacted more and more statutes that essentially designate federal courts to referee legal disputes between two agencies with potentially overlapping jurisdictions. Examples include statutes facilitating interagency dispute resolution for occupational health and safety and for the civil service in the 1970s;[180] for aviation regulators in the 1990s;[181] for the Postal Service in the mid-2000s;[182] and for enforcing divided regulation of the financial swaps market as part of the 2010 Dodd-Frank Act.[183] In this context, Congress's goal seems to be (1) maintaining a division of authority between multiple agencies while (2) maintaining at least partial independence for these agencies from presidential control. The result is that some independent third party needs to ensure that the law—in particular, the appropriate division of authority—is faithfully executed. With interagency litigation, Congress assigns that role to the federal courts, even when no private party with private

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176. *See* Crews, *supra* note 20, at 330–31, 335–43.

177. *See id.* at 365–66.

178. *See, e.g.*, Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145 (2001).

179. *Id.* at 1148–49.

180. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 11(b), 84 Stat. 1590, 1603 (codified at 29 U.S.C. § 660(b)); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 205, 92 Stat. 1111, 1144 (codified as amended at 5 U.S.C. § 7703(d)); *id.* § 701 (codified as amended at 5 U.S.C. § 7123).

181. Act of July 5, 1994, Pub. L. No. 103-272, § 1(d), 108 Stat. 745, 1191 (codified as amended at 49 U.S.C. § 44709(f)).

182. Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 205, 120 Stat. 3198, 3217 (2006) (codified as amended at 39 U.S.C. § 3663).

183. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 712(c), 124 Stat. 1376, 1643–44 (2010) (codified in relevant part at 15 U.S.C. § 8302(c)).

rights or interests is present in the litigation.[184] Such a purely supervisory role looks executive or administrative in character—and the Supreme Court has explicitly blessed the justiciability of such disputes.[185]

C. Summary

The historical record suggests that Congress has consistently seen the federal courts as useful instruments in advancing what today we think of as paradigmatic administrative tasks, whether adjusting citizenship status (like today's USCIS), assessing monetary benefits (like today's Department of Veterans Affairs), granting patents and licenses (like today's Patent and Trademark Office or Federal Communications Commission), or settling legal disputes between competing agencies (like the Department of Justice's Office of Legal Counsel). Over time, the courts' place in administration has shifted: from front-line bureaucrat (in our early history); to agency supervisor and reviser (in the early twentieth century); to limited reviewer (the current regime).

In each of these examples of court-as-administrator, although the courts perform tasks that look sufficiently "judicial"—ascertaining the law and applying it to facts to bring about a legal outcome—the assigned functions are hard to square with Article III along several dimensions. Naturalizations and monetary claims adjustments lack adverse parties;[186] interagency litigation lacks adverse legal interests;[187] and the early modern agency revision statutes imbued federal courts with sweeping policy discretion that no one seemed to think of as judicial power.[188] Yet, these roles have persisted over time. To be sure, the record is not devoid of judicial pushback on varied constitutional grounds.[189] But in the face of these known constitutional concerns, Congress has continued to design statutory review schemes that make courts look like extensions of the administrative process, and courts have continued to perform these duties unabated. In the grand scheme of American constitutional history, judicial exercise of certain non-judicial power looks not uncommon.

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184. *See* Crews, *supra* note 20, at 371 ("In a sense, this process is the law that the President is to faithfully execute—allow the process to play out and respect the judgment reached, in line with Congress's design for the administrative apparatus.").

185. *See id.* at 321 (citing, e.g., United States v. Interstate Com. Comm'n, 337 U.S. 426, 430–31 (1949)).

186. *See* Pfander & Birk, *supra* note 90, at 1361–65.

187. *See* Crews, *supra* note 20, at 328.

188. *See supra* Section II.B.1.

189. *See supra* Sections II.A.2–3 (*Hayburn* and its progeny), II.B.1 (revising authority).

III. A THEORY OF EXECUTIVE POWER FOR THE FEDERAL COURTS

Part II argued that federal courts and judges have exercised non-judicial government power—whether called "legislative,"[190] "administrative, executive and political in nature,"[191] or simply "not judicial"[192]—throughout history. As explained, the American legal community was perhaps most transparent about this in the early twentieth century, when we openly conceived of certain judicial review statutes as making judicial review part of the administrative process itself—a mentality that persisted well into the twentieth century.[193] Now featuring a narrowed scope of review, many statutory review provisions still essentially channel matters directly from the agency into court (generally a federal appellate court) for pre-enforcement review.[194] Although this narrowing of the judicial task led to acceptance of these statutes as appropriately judicial,[195] cases like *Ferreira* teach that functions can be "judicial in their nature" without being "judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States."[196] Might these special statutory review schemes—modern successors to what was once openly called non-judicial—continue to draw on constitutional power other than that conferred under Article III? In particular, might they call for an exercise of Article II's executive power?

This Part suggests how the historical precedents in Part II might identify a legitimate scope of executive power for the federal courts. Making this claim requires two steps: (1) identifying a defining core of Article III's judicial power that would not extend to many of the examples discussed in Part II; and (2) identifying why constitutional text, structure, and historical precedent might support some limited access to the federal executive power for federal courts in situations in which courts act more like administrators.

Before tackling that project, it is worth pausing to acknowledge an important point when trying to make sense of this history: the American conception of government powers has not been stable over time. For

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190. *See* Keller v. Potomac Elec. Power Co., 261 U.S. 428, 444 (1923).

191. *See* Downs v. Hubbard, 123 U.S. 189, 211 (1887).

192. *See* United States v. Ferreira, 54 U.S. (40 How.) 48 (1852).

193. *See supra* Section II.B.

194. *See, e.g.*, 15 U.S.C. § 78y(b) (Securities Exchange Commission); 28 U.S.C. § 2342(1)–(6) (Federal Communications Commission, Secretary of Agriculture, Secretary of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission, and Surface Transportation Board); 29 U.S.C. § 655(f) (Secretary of Labor); 33 U.S.C. § 1369(b) (Environmental Protection Agency Clean Water Act rules); 39 U.S.C. § 3663 (Postal Regulatory Commission); 42 U.S.C. § 7607(b) (Environmental Protection Agency Clean Air Act rules).

195. *See* Merrill, *supra* note 57, at 955.

196. *Ferreira,* 54 U.S. (40 How.) at 48.

example, the administrative law canon prominently references the "quasi-legislative" and "quasi-judicial" powers of agencies as distinct from "executive" power,[197] just as it once distinguished "administrative" from "executive" agencies altogether.[198] That thinking animated important facets of modern administrative law.[199] But those days are gone. Today's Supreme Court is more formalistic on the separation of powers,[200] and part of the ongoing formalist project is the abandonment of the old interstitial "quasi" powers in favor of sorting everything into a legislative, executive, or judicial power box.[201] So, a separation of powers formalist seeking to make sense of the history discussed in Part II seems to have three options: (1) denounce the non-judicial work as largely unconstitutional, despite the deep history and practice;[202] (2) reclassify the previously non-judicial work as actually using judicial power;[203] or (3) reclassify the non-judicial work the same way the law has done for administrative agencies: as executive power.[204]

This Part explores the last option's defensibility. Section III.A proposes that the defining core of Article III's judicial power is capacity to divest or to alter private rights and interests, something that simply does not apply in many instances discussed in Part II. Section III.B then argues that a constitutional arrangement with limited judicial access to executive power makes textual, structural, and historical sense. Finally, Section III.C defends this model of judicial review in modern administrative law from potential objections.

A. The Judicial Power's Domain

This Section makes room for judicial use of executive power by arguing that the judicial power serves a narrow role as the government's capacity to

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197. Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935).

198. *See* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 444 (2021).

199. *See, e.g.*, *id.* at 442–47 (exploring this distinction's influence on the Administrative Procedure Act).

200. *See, e.g.*, Glicksman & Levy, *supra* note 60, at 1090.

201. *See, e.g.*, United States v. Arthrex, Inc., 594 U.S. 1, 17 (2021) (maintaining that agency rulemaking and adjudication "take 'legislative' and 'judicial' forms, but they are exercises of . . . the 'executive Power'" (quoting City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013))).

202. *Cf.* Morley, *supra* note 101, at 4–8 (arguing that early judicial practice can be an unreliable guide to Article III's requirements).

203. *Cf.* Tutun v. United States, 270 U.S. 568, 576 (1926) (justifying judicial naturalizations because if they "were not a case or controversy within the meaning of [Article III, Section 2], this delegation of power upon the courts would have been invalid").

204. *Cf. Arthrex*, 594 U.S. at 17 (citing *City of Arlington*, 569 U.S. at 304 n.4).

divest or otherwise alter certain private rights and interests and, therefore, some of what courts have long been doing in the administrative law context is not use of that power. This view is defended by reference to three bodies of authority: the political theory that influenced the Constitution; the Constitution's text and context; and longstanding American legal thought and practice.

1. Enlightenment Political Theory

Political theorists and legal scholars have long recognized that the "judicial power, properly understood, is executive in nature."[205] That power seemingly emerged from the executive power with the distinct goal of safeguarding certain private rights.

Enlightenment thinkers inherited an intellectual tradition with a well-established twofold division of legislative and executive powers.[206] The judicial power emerged from this older division as thinkers began to carve out one aspect of the old executive power into something that stood alone. George Lawson, writing in the mid-1600s, provides an example;[207] he explained the traditional twofold legislative-executive division as "two acts of Majestie," of which execution entailed two subordinate rights: "making Officers" and the "administration of Justice."[208] He then divided the administration of justice into (1) "acts of Judgement" that decide cases "upon

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205. Murray S.Y. Bessette, *On the Genesis and Nature of Judicial Power*, 15 EIDOS 206, 207 (2011); *see also* Mortenson & Bagley, *supra* note 21, at 314 & n.185 (noting "taxonomic disagreement" over whether "the judicial power was best understood as a subset of the executive"); Lawson, *supra* note 2, at 1246 ("[U]nder many pre-American conceptions of separation of powers, the judicial power was treated as an aspect of the executive power.").

206. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 31–32 (2d ed. 1998) (describing this "dominant view of the division of government functions"). For a deeper discussion of the political theory that shaped the American judicial power, see generally Ian Bartrum, *The People's Court: On the Intellectual Origins of American Judicial Power*, 125 DICK. L. REV. 283 (2021). Although I differ in the conclusions to draw from this history, Bartrum canvasses important sources in greater depth than this Article allows.

207. On Lawson and the background against which he wrote, see VILE, *supra* note 206, at 59–60.

208. GEORGE LAWSON, POLITICA SACRA & CIVILIS 66, 68 (1660) [hereinafter LAWSON, POLITICA]. In earlier writing, Lawson had identified "Legislation, Judgment, and Execution by the Sword" as "the three essential acts of supreme Power civil in the administration of a State." GEORGE LAWSON, AN EXAMINATION OF THE POLITICAL PART OF MR. HOBBS HIS LEVIATHAN 8 (1657) https://archive.org/details/politicasacraciv00laws/page/68/mode/2up [https://perma.cc/UJY3-ZJWW].

evidence" and (2) the later "Execution" of that judgment.[209] The former was the core of the judicial power; the latter remained with the executive.[210] This new tripartite conception eventually reached the Americas by way of Locke, Montesquieu, and Blackstone.[211]

Locke famously centered two important ideas: (1) the government's proper end is "the mutual preservation" of individuals' "lives, liberties and estates";[212] and (2) the government's role is to provide the "established, settled, known law" missing from the state of nature, which the government did through three powers—the legislative, executive, and federative.[213] Despite lacking a distinct judicial power, Locke saw government's main function as "essentially judicial."[214] For Locke, the domestic application of law to resolve individual disputes—today's conventional judicial role—was executive power.[215] But the executive power had important limits rooted in government's purpose of preserving life, liberty, and property. For example, Locke stressed that the executive power cannot lay and collect its own taxes; it must rely on the legislature because taxation without consent "invades the fundamental law of property" and thereby "subverts the end of

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209. LAWSON, POLITICA, *supra* note 208, at 70–71. Lawson's focus was the law's penal nature; the administration of government in a modern sense was not his concern. *See* VILE, *supra* note 206, at 62 (calling Lawson's view "closer to the present-day view than the older twofold division, but still a long way from our present conception of the executive function, for he still saw it as essentially a step in the judicial procedure of applying largely penal laws").

210. *See* Bartrum, *supra* note 206, at 317–18.

211. Although Lawson was perhaps "obscure," some have concluded that it was "overwhelmingly probable" that John Locke read, and was influenced by, Lawson's political theory. A.H. Maclean, *George Lawson and John Locke*, 9 CAMBRIDGE HIST. J. 69, 71, 73 (1947); *see also, e.g.*, Bartrum, *supra* note 206, at 317; Lois G. Schwoerer, *Locke, Lockean Ideas, and the Glorious Revolution*, 51 J. HIST. IDEAS 531, 534 (1990) (noting Lawson's seemingly "great influence on Locke"). Of course, "the legal and political theory" to which educated American Founders were exposed was "varied and quarrelsome." Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1201 (2019). But the consensus view is that Locke, Montesquieu, and Blackstone were widely read staples of Founding thought, particularly with respect to concepts of government power. *See, e.g.*, *id.* at 1217–18; Manning, *supra* note 44, at 1994 n.281.

212. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 123 (C.B. MacPherson ed., Hackett Publ'g Co. 1980) (1689).

213. *See id.* §§ 124–26.

214. VILE, *supra* note 206, at 65.

215. *See, e.g.*, Mortenson, *supra* note 211, at 1231; *cf.* Mortenson, *supra* note 64, at 1319–20 (describing the Founding-era view of judicial action as "the impartial assessment of how legislated instructions should apply to particular circumstances" and executive action as "the active implementation of legislated instructions in the real world," with "varying views on the taxonomic relationship" between those powers).

government."[216] So, as the judicial power began to take form as distinct from traditional law execution, Locke (drawing on Lawson) understood that certain core interests—among them life, liberty, and property—are properly divested only by the application of known and standing law.[217]

Montesquieu emphasized similar concerns in his own parsing of government powers.[218] Although he began with Locke's legislative, executive, and federative powers, Montesquieu (like Lawson) then divided the domestic executive power to encompass both how the government "punishes criminals" and "determines the disputes that arise between individuals," which he called "the judiciary power."[219] And that "judiciary power," he reasoned, must be "separated from the legislative and executive" power to avoid "violence and oppression" and "arbitrary control" of "the life and liberty of the subject."[220] So, setting aside the federative power, Montesquieu reworked the great domestic powers into "that of enacting laws, that of executing public resolutions, and that of trying the causes of individuals."[221] Montesquieu's distinction between ordinary executive power ("executing public resolutions") and the judicial power ("trying the causes of individuals") turns on whether individual private interests are at stake.[222] Thus, Montesquieu's recognition of a distinct judicial power weakened the legislative and executive powers by removing from their domains decisions about particular individuals' private rights or interests.[223] And Montesquieu further safeguarded these rights by narrowing the judicial role to the

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216. LOCKE, *supra* note 212, § 140 (recognizing that "government cannot be supported without great charge," but support must come from "the consent of the majority, giving it either by themselves, or their representatives chosen by them" but not from the executive's "own authority . . . without such consent of the people").

217. *See id.* § 136 (stressing the importance of "standing laws" over "extemporary arbitrary decrees").

218. *See* BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAWS 62–63 (Thomas Nugent trans., Cosimo Classics 2011) (1748).

219. *Id.* at 151.

220. *Id.* at 152.

221. *Id.*

222. *Id.*; *cf.* Renée Lettow Lerner, *The Surprising Views of Montesquieu and Tocqueville About Juries: Juries Empower Judges*, 81 LA. L. REV. 1, 23 (2020) (stating that Montesquieu "pointedly recommended that judges not get involved in 'political law,' or disputes over public law").

223. *See* Bartrum, *supra* note 206, at 324 (arguing that "the point of institutional separation was not so much to empower an additional branch of government, but rather to *disempower* the executive and legislative branches").

application of fixed law to resolve discrete disputes over private rights, with judges serving largely as ministerial functionaries.[224]

As a final stop before turning to America's shores, William Blackstone likewise acknowledged the "distinct and separate existence of the judicial power."[225] As with Lawson and Montesquieu, this was the power to "hear and determine complaints."[226] And its separation from the legislative power principally served to protect the private rights implicated in disputes. "Were [the judicial power] joined with the legislative," Blackstone warned, then "the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe."[227] This reflects that familiar Enlightenment concern that private rights be divested only by previously announced law, not arbitrary decree.

2. The Constitution in Context

These Enlightenment concerns echo throughout the Constitution. To be sure, a well-noted difficulty in separation of powers doctrine is that "the Constitution does not specify exactly what 'judicial' power is or when its use is necessary."[228] That is perhaps unsurprising; a distinct judicial power was a recent innovation, so not everyone involved in the Constitution's drafting (much less its ratification) likely shared one unifying view of its role and scope.[229] Nevertheless, that the judicial power is unique among the

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224. *See* MONTESQUIEU, *supra* note 218, at 153 (arguing that "judgments" should "be ever conformable to the letter of the law" and not merely "the private opinion of the judge"); *id.* at 159 ("[T]he national judges are no more than the mouth [that] pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor."); *accord* Bartum, *supra* note 206, at 323 ("The judicial power, even in the limited and formalistic form he envisioned, functioned as a final safeguard of the People's rights against the coercive power of the state."); VILE, *supra* note 206, at 99 (stating that, for Montesquieu, "the judicial power is the announcing of what the law is by the settlement of disputes").

225. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 173 (Oxford Univ. Press 2016) (1765).

226. *Id.* at 172.

227. *Id.* at 173.

228. Nelson, *supra* note 70, at 565.

229. As Amanda Tyler has argued, because "the separation of powers framework was, at the least, a transformation of the British model, if not a dramatic departure from it[,] . . . it would be curious indeed if the details of the Article III power were fully settled from the outset." Tyler, *supra* note 101, at 1741. Indeed, "uncertainty about whether to classify judicial power as a distinct

government's great powers in its capacity to act on private rights (e.g., life, liberty from restraint, and property) is well understood.[230] That follows from several aspects of the Constitution's text, structure, and context, which suggest that cementing this unique capacity was an animating purpose of formally separating the judicial power from other powers—a conclusion that would accord with the Enlightenment view that a distinct judicial power is fundamental to guarding these rights and interests.

Consider first Article I's discussion of impeachment.[231] The "Judgment" in an impeachment is limited to removal and disqualification from public office; the officer's private liability is reserved "to Indictment, Trial, Judgment and Punishment, according to Law,"[232] a first clue that the judicial power is necessary to act on one's private rights and interests.[233] Indeed, Hamilton remarked in *Federalist No. 65* that the Supreme Court was unfit to try impeachments precisely because an "error" in the impeachment might "bias" the court when called to impose "punishment in the ordinary course of law," when the official's "life and estate" would be at risk,[234] a view consistent with the centrality of protecting private rights via robust judicial procedures.

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authority or as a subset of executive power ran deep." Mortenson, *supra* note 211, at 1238 & n.302. For just one example, the early Justice James Wilson acknowledged the judicial power's genesis in the executive power and remarked that the judicial power was still "sometimes considered as a branch of the executive power," albeit "inaccurately," in his view. *See* JAMES WILSON, *Government, Lectures on Law*, *in* 1 THE WORKS OF JAMES WILSON 296–97 (Robert Green McCloskey ed., 1967). Of course, Wilson's personal views on Article III are not determinative; as his opinion in *Chisholm v. Georgia* shows, even great early American jurists could misapprehend Article III at the Founding. *See* 2 U.S.(1 Dall.) 419, 465–66 (1793); James E. Pfander, *History and State Suability: An Explanatory Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1279 (1998) (describing the Eleventh Amendment's abrogation of *Chisholm* as a form of "explanatory" amendment that typically "sought to clarify the meaning of a law that a court had interpreted (perhaps erroneously)"). For additional examples illustrating the confusion around the relationship between the executive and judicial powers in the Republic's early years, see Jed Handelsman Shugerman, *Venality and Functionality: A Strangely Practical History of Selling Offices, Administrative Independence, and Limited Presidential Power*, 100 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 14–20), https://ssrn.com/abstract=4752868 [https://perma.cc/T6DP-VKDB].

230. *See, e.g.*, Harrison, *supra* note 2, at 306 ("Only the judiciary, not the legislature or the executive, could 'declare that a competent private individual no longer retained core private rights previously vested in him.'" (quoting Nelson, *supra* note 70, at 565)); Chapman & McConnell, *supra* note 2, at 1727 (citing as the "classic example" of early invalidated statutes one "that took a vested property right from A and gave it to B").

231. U.S. CONST. art. I, § 3.

232. *Id.*

233. *See* Hamburger, *supra* note 44, at 1111–12.

234. THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

Article I also offers an important clue that the judicial power's separation implied a limit on the legislative power. After enumerating the legislative power's reach,[235] the Constitution immediately deprives Congress of several "quasi-judicial" powers relating to private rights and interests.[236] Congress could never divest private rights through bills of attainder or ex post facto laws (i.e., statutes applying new law to specific past acts), and only rarely could Congress suspend the privilege of habeas corpus.[237] And that these powers fall outside *any* proper legislative domain is further reflected in Article I's directive that no *state* may "pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."[238] This focus on "law" that a state might "pass" suggests a conventional limitation on legislative authority, which the Supreme Court confirmed in an early seminal case.[239]

Article I's insulation of private rights from legislative interference was later reinforced in the Fifth Amendment, which specifies that any federal deprivation of "life, liberty, or property" requires "due process of law."[240] Although the Due Process Clause's original public meaning is the subject of ongoing debate, there is substantial agreement that the Clause channels matters into court.[241] Nathan Chapman and Michael McConnell, in particular, have shown how the Clause limited legislative acts that "exercised judicial power," with the "classic example" of invalid legislation, "an act that took a vested property right from A and gave it to B."[242] By limiting divestures of

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235. *See* U.S. CONST. art. I, § 8.

236. *See* Chapman &McConnell, *supra* note 2, at 1717.

237. U.S. CONST. art. I, § 9, cl. 2–4; *see also* Hamburger, *supra* note 44, at 1112.

238. U.S. CONST. art. I, § 10, cl. 1.

239. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (1 Wheat.) 518, 630–41, 651–54 (1819) (holding that New Hampshire impermissibly attempted to alter a private corporation's charter by statute); *see also id.* at 712 (Story, J., concurring) (further articulating limits on legislative authority).

240. U.S. CONST. amend. V.

241. For prior work arguing that the Due Process Clause requires, at minimum, "judicial procedure," see Chapman & McConnell, *supra* note 2, at 1676 & nn.5–6 (collecting scholarship on the Clause's meaning). Although this judicial procedure view can be broken into at least three sub-theories about the Clause's requirements, *see* Max Crema & Laurence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447, 450–52 (2022), that debate is beyond this Article's scope. The key point is that the Clause's agreed core—judicial involvement—signifies the judicial power's nature and purpose as separated from the remaining powers.

242. Chapman & McConnell, *supra* note 2, at 1677, 1727.

those private rights to a judicial proceeding,[243] the Constitution again nods to the judicial power's exclusive capacity with respect to those rights.[244]

All told, to read the Constitution in its earliest forms (as ratified and as promptly amended) is to walk away with the sense that the judicial power is principally the government's unique capacity to divest from its citizens.

3. American Legal Thought and Practice

The judicial power's contours come into sharper relief when contrasted to the prevailing view of the executive power from which it was carved. The Founding-era view saw executive action as "the active implementation of legislated instructions in the real world."[245] As a carve-out from that power, we would expect the judicial power to be concerned with some subset of that implementation. Given the intellectual context that spawned the judicial power as separate, a logical way to delineate that subset is by reference to whether divesture or alteration of private rights or interests is at stake.

The centrality of vested private rights and interests to the judicial power has been evident in American legal practice since the nation's early days. This is unsurprising; Anglo-American law—even before the Founding—saw adversity of private legal interests as critical to the very existence of most kinds of judicial proceedings.[246] Early administrative law doctrine illustrates the point. For one example, someone looking to challenge a government land grant had to wait for title to pass from the government to a private person; only once that property interest vested could one bring a common law

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243. I use divesture here to mean something different from a temporary infringement. For example, an executive officer can seize someone without a judicial warrant because the seizure—even though *depriving* the arrestee of liberty from restraint—does not *divest* the arrestee of a legal *right* to that liberty. Indeed, the Constitution channels seizures of this sort into courts, in part, by preserving the writ of habeas corpus, thereby allowing a court to vindicate a still-vested right in liberty from restraint. *See* U.S. CONST. art. I, § 9; Brown v. Davenport, 596 U.S. 118, 128 (2022) (recounting that, at the Founding, habeas was "the instrument by which due process could be insisted upon"). I draw this distinction between divesture and deprivation (even though it does not track the Fifth Amendment's language) to try to shed light on a puzzle that others have flagged about why executive power can seem to act on a vested interest in this seizure context. *See* Baude, *supra* note 66, at 1553; Wurman, *supra* note 44, at 763 n.136.

244. For contemporaneous commentary to this effect by a leading early American jurist, see WILSON, *supra* note 229, at 296–97 (describing "all controversies in the community respecting life, liberty, reputation, and property" as the judicial power's object).

245. Mortenson, *supra* note 64, at 1319–20.

246. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1568 & n.29 (2002).

ejectment action to dispute the lawfulness of the government's action.[247] For another, someone seeking an extraordinary writ likewise needed to show a vested interest. Thus, *Marbury v. Madison* stressed that mandamus required the petitioner to establish a "vested legal right,"[248] a threshold requirement that maps to modern Article III standing.[249] In short, the judicial power has long been concerned with disputes that would affect vested private rights or interests.

Antebellum caselaw further illustrates how different underlying rights were understood as subject to different government power. This is the so-called public rights doctrine famously articulated in *Murray's Lessee*.[250] There, in identifying the proper spheres of executive and judicial action, the Court stated:

> [W]e do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the court of the United States, as it may deem proper.[251]

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247. *See* Merrill, *supra* note 57, at 947–48.

248. 5 U.S. (1 Cranch) 137, 172 (1803).

249. *See* Merrill, *supra* note 4, at 490. This was not a freestanding constitutional inquiry but a threshold requirement for the form of action. So, the Court would deny mandamus seeking to compel transfer of government property to a private person unless the law gave the beneficiary a judicially enforceable claim. *See* Harrison, *supra* note 3, at 169. Two famous examples are *Kendall v. United States*, 37 U.S. (1 Pet.) 524, 611–12, 615 (1838), which recognized a mandamus's availability against a federal officer only after confirming that the petitioners had "a vested right" that was "fixed by law," and *Decatur v. Paulding*, 39 U.S. (1 Pet.) 497, 514–17 (1840), which denied a mandamus where there was no such right.

250. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (1 How.) 272, 284 (1856). For some of the literature attempting to reconstruct the nineteenth century jurisprudential distinction between "public" and "private" rights and its significance to Article III, see generally Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277 (2022); James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493 (2021); Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429 (2021); Nelson, *supra* note 70.

251. *Murray's Lessee*, 59 U.S. (1 How.) at 284.

In other words, there are matters (1) exclusively *within* the judicial power's reach; (2) necessarily *beyond* the judicial power's reach; and (3) "*susceptible* to judicial determination" if assigned to courts by Congress.[252]

James Pfander and Andrew Borrasso recently offered a new account of *Murray's Lessee*'s public rights doctrine.[253] Most important for this Article, Pfander and Borrasso distinguish two types of agency authority familiar in the nineteenth century: (1) "constitutive" authority that, within a statutory framework, confers new rights or establishes a new status or relationship and (2) "adjudicative" authority that resolves disputes otherwise falling within the judicial power.[254] Congress could assign the former to agencies or to courts because constitutive authority acts on public rights, whereas adjudicative authority requires (at some stage) an exercise of judicial power because these disputes implicate vested private rights or interests.[255] Matters like veterans' benefits and naturalization—in which Congress had long given roles to the federal courts[256]—were constitutive because they create new rights or statuses by applying Congress's standards to specific facts.[257]

Congress's ability to confer constitutive authority on the federal courts is consistent with viewing the judiciary as capable of using limited non-judicial power.[258] To constitute a new right or status is simply to ascertain the relevant law; to ascertain the relevant facts; and then to apply the law to the facts within the governing statute's strictures.[259] Insofar as it merely implements a legislated instruction, it is a form of law execution as that concept would have been understood at the Founding.[260] And it is an implementation far removed from the concerns that motivated a distinct judicial power: safeguarding rights and interests already vested. Indeed, *Murray's Lessee* hints at the basic idea of a distinction between judicial *power* and judicial *execution*. The

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252. *Id.* (emphasis added).

253. *See* Pfander & Borrasso, *supra* note 250, at 498–99.

254. *Id.*

255. *Id.* at 539. This is the sense in which "agencies may be adjuncts to Article III courts by proposing a disposition but cannot exercise final control over the resolution of disputes within the judicial power." *Id.* at 499. Consider a modern example: the FCC can adjudicate certain violations of law and determine forfeiture penalties, *see, e.g.*, 47 U.S.C. §§ 227(e)(5), 503(b)(1), but if a penalized party refuses to pay, actual recovery (by creating a judgment debt) can be had only via civil action in district court, *see, e.g.*, *id.* §§ 227(e)(5)(A)(ii), 504(a).

256. *See supra* Sections II.A.1–2.

257. Pfander & Borrasso, *supra* note 250, at 540–44.

258. *See id.* at 549 ("As for the issuance of constitutive decrees, Congress enjoys a measure of discretion and can assign the work to agencies or courts as it sees fit," but judicial review "must respect the agency's discretion within the boundaries Congress has prescribed.").

259. *Id.*

260. *See* Mortenson, *supra* note 64, at 1319–20.

judicial power is defined by its exclusivity over "matter[s]" of a particular "nature," i.e., the core private rights or interests traditionally subject to suit.[261] But courts also perform other tasks fit "for judicial determination"—tasks that can likewise be performed within the executive branch.[262]

Here, context from other antebellum cases may inform what made a matter fit for "judicial determination" despite not calling for potential alteration or divesture of a private right or interest. Recall that *Ferreira* observed only a few years prior to *Murray's Lessee* that the exercise of "judgment and discretion" made "power conferred by . . . acts of Congress" upon either a judge or commissioner "judicial in their nature," albeit not "in the sense in which judicial power is granted by the Constitution."[263] And *Ferreira*, a monetary claims case, is within the universe of constitutive functions that are assignable either to courts or to agencies. If *Murray's Lessee* is speaking of tasks in this category, and if we take *Ferreira* as serious when it describes these tasks as not drawing on the constitutional judicial power, by elimination it suggests that the underlying power is executive. That again makes sense if one understands a function to become exclusive to the federal courts (that is, requiring an act of judicial power) only when *divesture* of rights or interests is at stake—a view consistent with antebellum descriptions of judicial power acting upon "the rights of the parties."[264]

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261. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (1 How.) 272, 284 (1856).

262. *Id.*

263. United States v. Ferreira, 54 U.S. (1 How.) 40, 48 (1852). Although modern readers might see reference to "discretion," *id.*, and think of freedom to decide (i.e., acting within a policymaking zone), Chief Justice Taney was perhaps more likely using the word in its older ordinary sense, "knowledge and prudence," often used to describe capacity "to judge critically." *See Discretion*, WEBSTER'S DICTIONARY 255 (10th ed. 1832).

264. Gordon v. United States, 117 U.S. (1 Black) 697, 702 (1864). Divesture as the judicial power's core concern is also consistent with the longstanding view that just because something is within a court's authority does not mean that no other power act on it. The famous antebellum *Wheeling Bridge* cases illustrate the point. After the Supreme Court acted in equity to order abatement of a bridge obstructing navigation of a river, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (1 How.) 518, 563–65, 578 (1851), Congress passed a law declaring that the bridge was not an unlawful obstruction of navigation, *see* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (1 How.) 421, 431 (1855). The prevailing plaintiff challenged that law on the ground that an "act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff." *Id.* The Court ultimately held that although this was true of "adjudication upon the private rights of parties"—in which some vested interest is created, settled, or altered—it had no bearing on adjudication of "a public right." *Id.* So, to the extent there is something special and unique about the judicial power—some attribute that operates to the exclusion of other government powers—that exclusive jurisdiction is limited to adjudication of vested private rights and interests.

By the twentieth century, legal thought characterized the zone of shared authority over constitutive acts as a freestanding "quasi-judicial" power.[265] On this view, a key distinction between "executive action" and quasi-judicial "administration" was the scope of discretion; the latter embraced the enforcement of those statutes that conferred upon individuals a *right* to relief in specified circumstances.[266] Or, as Emily Bremer put it, "an administrative agency was distinguishable from an executive agency because it exercised *less discretion* in enforcing a statute that affected *private rights*."[267] This well describes the eighteenth and nineteenth century contexts in which matters were assignable to courts, like naturalizations and claims adjustment, insofar as establishing factual eligibility entitled one to the benefit under the statute. Again, even when judges performed these tasks, they were not necessarily "judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States."[268] By contrast, the judicial pushback in the early twentieth century to revising authority statutes, which allowed a court to substitute its own policy judgment for the agency's, in a sense tracks the then-prevailing view of "executive" power as entailing greater discretion. But although early twentieth century thought tried to parse out two distinct powers (executive and administrative), in formalist terms it has always been executive all the way down. At bottom, these tasks called only for "the active implementation of legislated instructions in the real world,"[269] and hence today's doctrine characterizes the entire package as "executive."[270]

B. The Propriety of Limited Executive Delegations to Federal Courts

If one accepts that the judicial power's defining attribute is its capacity to affect changes in already-vested private rights and interests, the question remains why courts can do other things that have no immediate effect on such interests—for example, granting a claim as part of a constitutive process or, to use a more modern example, determining the lawfulness of an agency rule

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265. *See, e.g.*, Bremer, *supra* note 198, at 443.

266. *See id*.

267. *Id*.

268. *Ferreira*, 54 U.S. (1 How.) at 48.

269. Mortenson, *supra* note 64, at 1319–20.

270. *See, e.g.*, United States v. Arthrex, Inc., 594 U.S. 17 (2021) (maintaining that agency rulemaking and adjudication "take 'legislative' and 'judicial' forms, but they are exercises of . . . the 'executive Power.'" (quoting City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013))).

in an interagency legal dispute. The Necessary and Proper Clause perhaps provides the answer.

Article I empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution."[271] As John Mikhail has argued, this "All Other Powers Provision" likely served "to assign Congress the express power to make whatever laws were necessary and proper to carry into execution the powers vested in the other branches of government."[272] Put differently, Congress was allowed "to organize the internal workings of the federal government and to carry into effect the executive and judicial powers of the United States."[273] But that power was not unbounded.[274] Although the concept of necessity is famously broad,[275] Gary Lawson and Patricia Granger's influential "jurisdictional" interpretation illustrates that the Clause's propriety prong was originally understood to preclude laws that "tread on . . . the prerogatives of federal executive or judicial departments."[276] And that interpretation is not just academic; the Supreme Court has embraced it in the federalism context,[277] and there is little reason to think it might not do the same for separation of powers issues.[278]

Importantly, however, propriety is the type of underdeterminate concept the Founders might have understood to acquire fixed meaning only over

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271. U.S. CONST. art. I, § 8, cl. 18.

272. John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1050 n.18, 1100 (2014).

273. *Id.* at 1101.

274. *See id.* at 1107–09.

275. *See* McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 413–14 (1819) ("To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.").

276. Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 272 (1993); *id.* at 333 ("[A] 'proper' law for carrying into execution the powers of any department of the national government must confine that department to its peculiar jurisdiction."); *see also* Hamburger, *supra* note 44, at 1178–79 (distinguishing "necessary and proper" from the use of "necessary and expedient" elsewhere, which suggests that propriety is of "independent significance"); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 112–13 (2005) (arguing that the "proper" requirement was a "global safeguard" against pretexts that might subvert the separation of powers).

277. *See* Printz v. United States, 521 U.S. 898, 924 (1997). *But see* Mikhail, *supra* note 272, at 1108–09 (questioning whether the Clause's author would have anticipated its use to invalidate laws based on intrusions upon state sovereignty).

278. *Cf.* Crews, *supra* note 20, at 350–52 (exploring the interpretation's application to interagency litigation).

time.[279] To be sure, the precise way in which political practice can settle constitutional underdeterminacy is a topic of debate. Some might adhere to "liquidation"—in particular, a Madisonian conception of it—a process that requires a threshold level of serious deliberation.[280] But Madison's conception did not unambiguously represent a pervasive "original method" of interpretation or the "law of interpretation" at the Founding,[281] and the Supreme Court instead has repeatedly embraced a less stringent "traditionalist" approach that affords significant weight to consistent post-ratification constitutional practice without as much concern for the seriousness of constitutional debate or deliberation.[282] In fact, the Court has very recently used a traditionalist approach to delineate the scope of executive versus judicial power in the context of military justice appeals.[283]

Under this longstanding traditionalism approach, the historical record discussed in Part II provides ample support for concluding that Congress can assign to federal courts tasks that do not implicate the judicial power's exclusive domain to divest private rights or interests—tasks that, over time, the legal community has not understood as drawing on judicial power. But importantly, the historical record also identifies limits on those assignments, particularly with respect to the scope of judicial discretion and insulation from review in other branches. The remainder of this Section explores how the historical record informs the constitutional propriety of Congress's assigning limited executive power to the federal courts. In short, an executive power model (1) builds on federal judges' status as officers of the United

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279. *See* Baude, *supra* note 32, at 21–29.

280. *See id.* at 8–21; Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1773–74 (2015); Caleb Nelson, *Originalism and Interpretative Conventions*, 70 U. CHI. L. REV. 519, 527–29 (2003).

281. *See* Baude, *supra* note 32, at 32–35.

282. *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1479–80, 1482–84 (2023); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174. For prominent examples over time in structural constitutional law, see, e.g., McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 401 (1819) (stating that "the practice of government" can settle "the respective powers of those who are equally the representatives of the people"); Myers v. United States, 272 U.S. 52, 175 (1926) (stating that "a contemporaneous exposition of the Constitution . . . , acquiesced in for a long of years, fixes the constitution to be given its provisions"); NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (analyzing presidential recess appointment power through a liquidation lens). Even in an originalist framework, such appeals to tradition can operate as a valid method of construction, i.e., the development of constitutional rules to implement underdeterminate provisions. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 437, 448–49 (2023).

283. *See* Ortiz v. United States, 585 U.S. 427, 437–49 (2018) (affirming the Supreme Court's direct appellate jurisdiction over Article I military tribunals).

States; (2) maintains policy discretion within the political branches; and (3) protects judges from interference by other branches that might threaten the core structural safeguard of independence.

1. Judges as Officers

As an initial matter, there is good reason why the Constitution would allow Congress to assign courts and judges some authority to actively implement legislation. Judges are officers of the United States. Although Article II vests executive power in a President, it anticipates that other officers will assist with execution where, for example, they have been commissioned by the President with the Senate's advice and consent.[284] The Appointments Clause's text, which refers to "Judges of the supreme Court, and all other Officers of the United States,"[285] suggests that "Judges" are part of a common category of federal officers.[286] And Jennifer Mascott has shown that Founding-era uses of "officer" ordinarily encompassed "any individual who had ongoing responsibility and government duty," including "a statutory duty of any level of importance."[287] Indeed, the First Congress at times lumped "judges" in with "Executive Officers of the Government."[288] To be sure, judges receive special treatment relative to other officers of the United States: good behavior tenure and salary protection.[289] But that does not necessarily mean that judges are distinguished from other officers in their access to some portion of the executive power, i.e., the carrying out of statutory duties.

Because judges are duly appointed officers of the United States, it makes sense that Congress might have looked to the courts as administrators from the earliest days, when a large federal bureaucracy was lacking.[290] Indeed, this comfort with judicial officers' exercising an "administrative power"

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284. U.S. CONST. art. II, §§ 1 (vesting), 2 (appointing), 3 (commissioning); *see also, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 213 (2020) (stating that "lesser officers . . . wield" the President's Article II authority).

285. U.S. CONST. art. II, § 2.

286. *Id*.; *see* Mascott, *supra* note 24, at 470; *cf.* Hamburger, *supra* note 44, at 1134 ("The courts have the judicial power, though the judges can serve in executive roles."); THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (suggesting that "judges" are part of a "general" pool of "officers of the Union").

287. Mascott, *supra* note 24, at 450, 454.

288. Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 68 (providing a salary for "three judges" alongside various executive officials).

289. U.S. CONST. art. III, § 1.

290. *See supra* text accompanying notes 91–93 (discussing how reliance on courts as administrators may have served interests in efficiency and keeping the federal government's size small).

persists into modern times; *Mistretta v. United States*, for example, affirmed that judicial officers can serve in an administrative capacity on the U.S. Sentencing Commission.[291] To be sure, *Mistretta* cited *Hayburn* and *Ferreira* to suggest that Congress can give administrative assignment to judges but *not* to courts.[292] That narrowing dicta, however, failed to grapple with two relevant data points in the historical record: (1) the significance of Congress's contrary judgment to assign tasks like naturalization and pension determinations to courts, not to judges;[293] and (2) that the Court's own precedent in cases like *Postum*, *Keller*, and *O'Donoghue* retreated from any hard rule against legislative assignment of executive tasks to Article III courts in the face of those congressional choices.[294]

2. Respecting Executive Prerogative

Of course, the nature of administrative tasks assignable to courts should not necessarily be coextensive with that assignable to officers more directly accountable to the political branches. Indeed, a recurring theme in American legal practice is fear of too much judicial discretion. On one reading, for example, Chief Justice Taney saw tasks not drawing on judicial power as fit for judicial assignment only when appropriately bounded by statutory standards and amenable to reasoned judgment in their administration.[295] And even in the early twentieth century, the scope of discretion is what (in then-prevailing legal thought) separated executive from quasi-judicial administrative tasks, with greater discretion defining the heartland of what was then seen as the true executive power.[296] That distinction helps to make sense of the issues with which the Court grappled in cases like *Keller*, *Postum*, *General Electric*, and *O'Donoghue*. When the Court in *O'Donoghue* officially blessed the assignment of "quasi-judicial or administrative matters" to an Article III court, that may well reflect this early modern conception of *administration* (as distinct from execution) as limited to application of statutes conferring less discretion.[297] In other words, the constitutionally

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291. Mistretta v. United States, 488 U.S. 361, 404 (1989).
292. *Id.* at 403.
293. *See* discussion *supra* Sections II.A.1–2.
294. *See* discussion *supra* Section II.B.1.
295. *See supra* text accompanying note 263.
296. *See* Bremer, *supra* note 198, at 443.
297. O'Donoghue v. United States, 289 U.S. 516, 545 (1933); *see supra* text accompanying notes 160–67.

proper scope of non-judicial power that a court can wield depends on the scope of policy discretion purportedly given to the court.

Thus, the history of courts as administrative actors reflects the striking of a constitutional balance in the shadow of this overarching concern about executive prerogative. On one extreme, administrative assignments that constrain courts or judges to apply statutory standards to clear factual records have generally escaped pushback; the Court never shut down naturalization or Spanish claims adjustments,[298] and it ultimately acquiesced to a role in modern administration when review was pared down to questions of law on a closed record.[299] On the other extreme, the Court balked at largely unconstrained power of revision that allowed courts to substitute their policy judgments for those of the executive. Limiting courts to resolving questions of law on a closed record, thereby preventing judicial intrusion into discretionary political decisions, is a plausible middle ground at which a political community might land.[300] By respecting discretionary executive prerogatives—core policy or public interest judgments—modern judicial review statutes reflecting that middle ground have come to be accepted as "proper" legislation that Congress can enact for carrying the administrative state into execution.[301]

3. Maintaining Judicial Independence

While narrower discretion protects the prerogatives of the politically accountable, the longstanding rule against review and revision of judicial determinations protects the independence of the courts. Judges are unique officers because they enjoy express protection of tenure and salary. It makes sense, therefore, that a statute assigning administrative tasks to courts might be deemed constitutionally improper if it subjects judicial determination to review or revision in the political branches. This is *Hayburn*'s central lesson—and the one for which it is commonly cited in the separation of powers canon.[302]

Apart from Article III's protections for judicial independence, Article II contains its own safeguard. From among the officers of the United States, the

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298. *See supra* Section II.A.1; *supra* text accompanying notes 109–11.

299. *See supra* Section II.B.1.

300. *See* Merrill, *supra* note 57, at 993 (noting that the concern in the early twentieth century was with too much "policy discretion" in the courts).

301. U.S. CONST. art. I, § 8, cl. 18; *see* Merrill, *supra* note 57, at 995.

302. *See, e.g.*, Crews, *supra* note 20, at 355–56, 355 n.264; Pfander & Birk, *supra* note 90, at 1432.

President can "require the Opinion, in writing," only "of the principal Officer in each of the *executive* Departments."[303] This is an important limitation on the President's power to coopt judicial officers and a sharp break from the English tradition, in which the sovereign's Privy Council (which often included judges) could be pressed into advising the monarch on both public and private matters.[304] A structural limit on the President, however, does not necessarily inform what *Congress* can require of the federal courts, especially in view of Congress's expressly broad authority under the Necessary and Proper Clause.[305] Stated differently, that the President could not personally direct the federal courts to participate in administration (by, for example, opining on one's eligibility for a benefit or the lawfulness of an agency rule) should not necessarily suggest that Congress cannot do so via legislation.

C. An Executive Power Model of Judicial Review

As discussed, a cornerstone of modern administrative law litigation is the pre-enforcement petition for review of agency action authorized by various special review statutes.[306] These statutes are successors to those from the early twentieth century insofar as they provide a direct avenue from the agency to federal court and call on the court to determine the lawfulness of the agency's action on a closed record.[307] What differs today from the early twentieth century, though, is the typical form of agency action; the old preference for administration-by-adjudication has been overtaken by administration-by-rulemaking.[308] Today, then, a significant body of administrative litigation calls on a federal appellate court to determine whether a generally applicable, prospective rule is valid in the abstract (i.e., outside the context of its attempted application to a regulated party). If not—if the agency exceeded its substantive authority or failed to adhere to required procedural formalities—the statutes often call on the court to "set aside" the agency action,[309] which under prevailing doctrine means "to universally vacate invalid regulations" nationwide.[310] If one accepts that there is no vested right to be free from

303. U.S. CONST. art. II, § 2 (emphasis added).

304. *See* AMAR, *supra* note 276, at 187.

305. *See* Crews, *supra* note 20, at 368–69 (making this point in the context of interagency litigation and explaining why a non-Article III model does not violate the rule against advisory opinions, which was grounded partly in Article II).

306. *See supra* note 194.

307. *See, e.g.*, *supra* discussion of the Hobbs Act accompanying notes 73–77.

308. *See* Schiller, *supra* note 178, at 1145–49.

309. *E.g.*, 28 U.S.C. § 2342.

310. Sohoni, *supra* note 73, at 1176–77.

regulation of future conduct,[311] such that the core interest that the judicial power is thought to protect is simply not at issue, then the old view that these "channeling" statutes[312] are part of the administrative process itself—requiring a function that is judicial, but not in the sense of drawing on the judicial power—may well make the best descriptive sense. And, importantly, it may well be constitutional as presently designed.

1. The Model and Its Limits

Given the history, theory, and constitutional text discussed to this point, there are good reasons to think certain *congressional* assignments of *administrative* tasks to *judicial* bodies would be constitutionally proper. The Necessary and Proper Clause is a facially broad and underdeterminate grant of power to Congress to direct how the Constitution's great powers are carried out.[313] Although that Clause does not permit congressional intrusion on the other branches' core prerogatives, it has also been generally accepted since the Founding that political practices over time would settle the difficult line-drawing problems that such an underdeterminate principle invites. On that score, centuries of historical practice suggest a reasonable landing spot: courts no less than agencies can engage in certain non-discretionary, non-divesting executions of statutory law (perhaps called constitutive authority,[314] perhaps called administration[315]) where the statutory scheme limits the court to resolving questions of law on a closed record and insulates the court from review and revision in another branch. In short, schemes that fit this mold are likely constitutionally "proper" assignments for carrying out the executive power in administering federal law.

These principles can be reduced to a four-factor model for when federal courts can perform administrative tasks that do not necessarily draw on judicial power:

(1) The task is assigned by Congress via statute, thereby drawing on the Necessary and Proper Clause as a constitutional source for dictating how law is carried into execution.

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311. Nelson, *supra* note 70, at 595 (recounting that, under the traditional public rights framework,"regulated entities did not have a vested right to be free from regulation of their future conduct").

312. *See* Sohoni, *supra* note 73, at 1176.

313. *See supra* notes 271–83 and accompanying text.

314. Pfander & Borrasso, *supra* note 250, at 498–99.

315. Bremer, *supra* note 198, at 443.

(2) The task does not entail an immediate effect on previously vested private rights or interests, i.e., it does not purport to diminish or divest those rights or interests, as that would require an act of judicial—not executive—power.
(3) The task does not call on the court to do more than resolve questions of law on a closed record, as the exercise of broader discretion would improperly intrude on the prerogatives of politically accountable executive actors.
(4) The task's outcome is not subject to further review or revision in the political branches, as that would improperly intrude on the judicial prerogative of independence.

Under this model, many special statutory review schemes that govern pre-enforcement judicial review of agency rulemaking could be understood as assigning courts to execute the law.[316] As was true in the early modern administrative state, these channeling statutes envision judicial review as an extension of the administrative process; they often create a narrow window to move legal disputes directly from the agency to the federal courts once a rule is published, with the expectation that the court will determine the rule's validity or invalidity full stop.[317] Because these review schemes are statutory, the assignment to courts draws on the Necessary and Proper Clause. On the traditional view, private rights and interests are not immediately at stake because a rule's existence or invalidity in the abstract and prior to enforcement does not divest or diminish existing private rights or interests.[318] Review is limited to determining the lawfulness of a rule on a closed record by reference to general statutory standards, and there is no further review in another branch.

This model has an important limit worth emphasizing. The theory applies only to special statutory review schemes—like the Hobbs Act, as a prominent example[319]—but not to general equitable actions like those commonly brought in district court under the APA. In the absence of a special statutory review scheme, the APA channels litigants to a "legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction."[320] Without

316. *See, e.g.*, *supra* note 194.

317. *See, e.g.*, *supra* notes 73–78 and accompanying text; Sohoni, *supra* note 73, at 1176–77.

318. *See* Nelson, *supra* note 70, at 595 (noting that regulated entities did not traditionally "have a vested right to be free from regulation of their future conduct").

319. 28 U.S.C. §§ 2342–2344 (providing a sixty-day window in which to obtain exclusive pre-enforcement review via petition for review).

320. 5 U.S.C. § 703.

a special statutory remedy—and, in particular, one that channels litigants directly from an agency process into court—litigants are left with traditional legal remedies that are governed by Article III's requirements.

2. A Defense of the Model

Not everyone will agree with the executive power model. On one view, any intermixing of power across branches violates constitutional structure.[321] But, for reasons articulated here about constitutional text and early practice, the stringency that applies to the vesting of the legislative and judicial powers might not apply with the same force to the executive power, especially as applied to courts and judges whose relationship to the executive branch remained hazy at the Founding.[322] Other formalists will likely object that Article II imposes upon the President an obligation to take care that the law be faithfully executed,[323] yet the President cannot supervise judges who are structurally insulated by their tenure and salary protections.[324] But on the view presented here, if Congress channels agency action like rulemaking into a special statutory review scheme that looks merely like an extension of the administrative process itself, the court's resolution of legal questions—and its decision whether a rule was validly enacted—does not *frustrate* the President's ability to execute the law; it provides a rule of decision for understanding whether the rule actually counts as law in the first place.[325] Indeed, the idea that the executive branch—up to and including the President—can act only after certification of some statutory finding by a court perhaps has roots as deep as 1792.[326] And if the President *disagrees* with a court's determination that a rule was validly promulgated, he has his own tools (like the threat of removal) to see that the law is faithfully executed within the executive branch through the rule's non-enforcement and/or repeal.

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321. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013); Hamburger, *supra* note 44, at 1086.

322. *See* Tyler *supra* note 101, at 174 (recounting uncertainty around the newly separated judicial power's relationship to the executive power); Shugerman, *supra* note 229 (manuscript at 14–20) (similar).

323. U.S. CONST. art. II, § 3.

324. For additional responses a presidential interference objection that arises from something akin to the executive power model of judicial review—and to objections that the model (1) is inconsistent with what review statutes say; (2) raises Appointments Clause problems; or (3) renders judicial decisions merely advisory—see Crews, *supra* note 20, at 367–72.

325. *Cf. id.* at 371 (making a similar point about interagency litigation).

326. *See supra* Section II.A.4 (discussing the 1792 Militia Act).

Others are likely to reject the executive power model altogether in favor of other defenses of the modern administrative state. Ilan Wurman, for example, has argued that the way to break the formalist/functionalist stalemate is to reorient the separation of powers around exclusive and nonexclusive functions.[327] Whereas the executive power model posits that some of what courts do outside their exclusive domain (divesting private rights and interests) draws on executive power, Wurman's model might say that certain non-divesting functions (like those with executive and judicial characteristics) are simply assignable to multiple powers.[328] Our competing views get us roughly to the same place. But the model presented here attempts to account for a broader range of historical datapoints, including situations in which Article III courts were performing administrative tasks that everyone seemed to agree at the time did not implicate the judicial power; and for how these practices might be understood to interact with the Necessary and Proper Clause as part of the Constitution's overall structure for government power.

Moreover, few would seriously doubt Congress's power to create an Article I court with jurisdiction over pre-enforcement petitions for review of agency rulemakings and with the power to vacate rules determined to be unlawful under the APA. And all would likely agree (at least as a matter of current doctrine) that this Article I court's power was executive.[329] Why, then, would we insist that an Article III court is any different when it performs precisely the same functions to bring about precisely the same legal effect in the real world? Yes, Article III courts are vested with the judicial power,[330] but to the extent that power is distinct from the executive power, one might expect that distinction to play out in *unique* capacities to affect legal change in the world. If power is the capacity to produce a particular legal effect—like the legislative power is the government's unique capacity to create general rules for society[331]—then where a court and an agency perform the

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327. Wurman, *supra* note 44, at 742; Hamburger, *supra* note 44, at 1108–09 (rejecting the view that processes define powers); *see also, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 358 (2002) (stating that "certain functions might fit within more than one kind of power").

328. *See* Wurman, *supra* note 44, at 760.

329. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013); Baude, *supra* note 5, at 1565 (arguing that Article I courts and administrative agencies are "correctly" viewed as "constitutionally identical").

330. U.S. CONST. art. III, § 1.

331. *See, e.g.*, Fletcher v. Peck, 10 U.S. (1 Cranch) 87, 136 (1810).

same functions to produce identical legal effects, one might perceive no distinction in their powers.[332]

Finally, some might suggest that this model conflates two issues: the capacity of *judges* to execute the law and the capacity of *courts* to do so. But early Congresses were in fact assigning *to courts* law-executing functions.[333] Given the hazy contours of the newly separated powers, and the Constitution's flexibility via the Necessary and Proper Clause, I am hesitant to dismiss these early innovations as unambiguously unconstitutional, especially when the judiciary in practice acquiesced. To be sure, some of these statutes may well have had constitutional defects—review and revision in the political branches chief among them. But in the face of Congress's repeated assignment of these tasks to the courts, over the course of decades and then centuries, and with the courts' frequent acquiescence to those functions at least to some degree, it is difficult to argue that the post-ratification political traditions that so often inform the proper balance of government powers cuts against a limited allowance for *courts*, and not just judges, to wield executive power.

IV. JUDICIAL REVIEW WITHOUT JUDICIAL POWER

The Part tackles a new question: what difference does it make whether a function assignable to courts or to agencies (like final pre-enforcement review of a rule's validity) is using executive or judicial power? The answer is that an executive power model of judicial review would have important consequences for formal, Article III-based objections to modern administrative law. If one does not need the judicial power—but instead can conceive of certain judicial review as executive—then one need not present a dispute as an Article III case or controversy, the form required to invoke the judicial power. Stepping outside Article III therefore helps to resolve multiple timely concerns rooted in doctrines about standing, deference, remedies, and appellate jurisdiction. This Part explores how.[334]

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332. Of course, a formalist might then say: yes, Article III courts engaged in pre-enforcement statutory review of agency rulemaking *are* using executive power—and that is why such review is itself unconstitutional. But, as I have suggested, that conclusion seems hard to square with longstanding (including immediate post-ratification) practice that has seemingly been receptive to courts as administrators. *See generally supra* Part II.

333. *See supra* Sections II.A.1–2 (naturalizations and pensions). *But see, e.g.*, Wurman, *supra* note 44, at 803 (suggesting that some early statutes "did not really grant the judges any governmental power at all").

334. For a further discussion of the executive power model's implications for interagency litigation, see Crews, *supra* note 20, at 350–52.

A. Standing

An important question throughout federal courts doctrine is who has the right legal interests to bring a lawsuit. That body of standing doctrine has recently intersected with administrative law in two important ways: first, by privileging states in their efforts to judicially halt key administrative decisions; and second, by threatening to keep out of court certain plaintiffs Congress *wants* to be there. The executive power model has something to say about both issues.

1. Special State Solicitude

The Court's seminal decision in *Massachusetts v. EPA* resolved a statutory petition for review presenting the question whether the EPA had authority to regulate greenhouse gases.[335] Before answering that merits question, though, the Court struggled to articulate a coherent Article III basis for standing. Ultimately, the Court held that Massachusetts had "quasi-sovereign interests" that called for "special solicitude" in the standing analysis.[336] Since *Massachusetts*, many states have seized this rationale to raise judicial challenges in other administrative law contexts.[337] This has sparked controversy, with some noting that an expansive view of *Massachusetts* "puts enormous pressure on our democratic system" by ensuring that almost every major action by the political branches will end up in court and (given forum shopping) be "judicially blocked" for at least some period.[338]

Whereas *Massachusetts* was a petition for review case arising under a special statutory review scheme (one of the modern administrative state's so-called "challenging" statutes),[339] many recent high-profile judicial challenges invoking *Massachusetts* have arisen from federal district court as standard APA actions seeking injunctive relief. That is true of various of Texas's efforts to challenge federal immigration policy,[340] as well as Missouri's challenge to President Biden's student loan forgiveness plan.[341] One of those

335. 549 U.S. 497, 505 (2007).

336. *Id.* at 520.

337. *See, e.g.*, Texas v. United States, 809 F.3d 134, 151 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016); *see also* Baude & Bray, *supra* note 7, at 165.

338. Baude & Bray, *supra* note 7, at 173–74.

339. 549 U.S. at 514 & n.16; *see* Sohoni, *supra* note 73, at 1176.

340. *See, e.g.*, United States v. Texas, 599 U.S. 670, 673–74 (2023) (immigration enforcement priorities); Texas v. Biden, 20 F.4th 928, 941, 969 (5th Cir. 2021), *rev'd on other grounds*, 597 U.S. 785 (2022) (Migrant Protection Protocols); *Texas*, 809 F.3d at 146 (Deferred Action for Childhood Arrivals).

341. Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023).

cases, *United States v. Texas*, challenged "the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute," a challenge that the Court dismissed as not traditionally cognizable in federal court.[342] In response to Texas's reliance on its quasi-sovereign interests to establish standing, the Court held in a footnote that *Massachusetts* "does not control" because that case arose in a particular administrative law context: "denial of a statutorily authorized petition for rulemaking."[343] That may be a distinction, but as various separate opinions pointed out it does little to grapple with the content of the Court's "special solicitude" doctrine.[344]

The executive power model provides the rationale the Court needed in *United States v. Texas*. There is something special about *Massachusetts*'s administrative law context—the statutory channeling of judicial review is key. The Clean Air Act's judicial review provision is a clean fit for the executive power model: the agency's promulgation of various "standard[s]" (for future conduct) triggers a sixty-day window to file a statutory petition for review in circuit court,[345] which then applies the ordinary APA statutory review framework, a largely deferential check that the agency acted reasonably within the bounds of statutory authority and based on sufficient evidence.[346] Thus, *Massachusetts* did not necessarily call for an exercise of judicial power at all; judicial review was an extension of the administrative process itself, bounded by the application of previously legislated rules to a closed record, with no immediate effect on vested private rights or interests. It was executive power. So, the Court in *Massachusetts* was right that Congress's statutory authorization of judicial review is relevant,[347] just like the Court in *Texas* was right that *Massachusetts* can come out the same way without having anything meaningful to say about Article III in other contexts,[348] particularly those in which no special statutory review scheme displaces review by "legal action" in district court.[349]

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342. 143 S. Ct. at 1970.

343. *Id.* at 1975 n.6.

344. *Id*. at 1977 (Gorsuch, J., concurring); *see also id.* at 1997 (Alito, J., dissenting) ("[T]he majority's footnote on *Massachusetts* raises more questions about *Massachusetts* itself.").

345. 42 U.S.C. § 7607(b)(1).

346. *See, e.g.*, Maryland v. EPA, 958 F.3d 1185, 1196 (D.C. Cir. 2020).

347. Massachusetts v. EPA, 549 U.S. 497, 516 (2007).

348. 143 S. Ct. at 1975 n.6.

349. 5 U.S.C. § 703. This rationale not only makes sense of the cases in a way missing from the *Texas* majority, but it also answers Justice Alito's insistence that *Massachusetts* "applies with at least equal force" in suits seeking ordinary equitable relief. 143 S. Ct. at 1997 (Alito, J., dissenting).

Distinguishing the justiciability rules applicable in statutory review schemes versus traditional legal actions is also consistent with current doctrine. In a series of significant cases, the Court has held that Congress cannot by statute allow certain administrative law disputes into court absent a cognizable legal interest, even when the APA provides a statutory standard.[350] But those leading cases occurred outside of special statutory schemes that channel specific categories of agency action into court.[351] When a party seeks an injunction under the APA,[352] that party invokes traditional judicial power; equity's historic purpose was to change the process by which core legal rights would have been administered in a court of law,[353] so equitable relief under the APA may well require a similar core private interest at stake.[354]

The same is not necessarily true of special statutory review proceedings, as the Court itself has suggested. Not that long ago, the Court addressed whether a Labor Department officer had statutory standing to petition for review of decisions by the Benefits Review Board, another federal body, where the officer viewed the decision as "deny[ing] claimants compensation to which they are entitled."[355] Although mere policy disagreements between these two federal bodies did not give rise to an Article III interest,[356] the Court stated that Congress *could* by statute authorize this agency-against-agency litigation consistent with Article III.[357] That is, judicial review might be permissible even when only the government's interests—not private ones—are at stake, so long as Congress approves. The executive power model explanation for reconciling *Massachusetts* with *Texas* is consistent with this dictum while honoring the limits on judicial review recognized in leading cases that arose from more traditional judicial actions. *Massachusetts* can be right without throwing open every federal district court's door.

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350. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992); *cf.* Summers v. Earth Island Inst., 555 U.S. 488, 492–97 (2009).

351. *See Summers*, 555 U.S. at 491–92; *Lujan*, 504 U.S. at 559.

352. *See* 5 U.S.C. § 703.

353. *See* Bray & Miller, *supra* note 72, at 1784.

354. On the relationship between equity and modern Article III standing doctrine, see, e.g., Baude & Bray, *supra* note 7, at 160–61.

355. Dir., Off. of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 123 (1995).

356. *Id.* at 127–30. The case was about statutory standing, not Article III, but the Court read the review statute as authorizing a petition for review only from someone aggrieved in an Article III sense. *See* Doe v. Chao, 540 U.S. 614, 624 (2004) (citing *Newport News*, 514 U.S. at 126).

357. *Newport News*, 514 U.S. at 133.

2. *TransUnion* and the Future of FOIA

An executive power model may have broader implications for standing in administrative litigation as the Supreme Court adopts an increasingly formal approach to Article III standing. *TransUnion LLC v. Ramirez* is a recent example; the Court held that a plaintiff has standing only if a statute protects a right with "a close historical or common-law analogue,"[358] the sort of core private interests with which the judicial power has historically been concerned. This has led some to worry about FOIA. Erwin Chemerinsky, for example, notes the seeming absence of a common law right to government documents prior to that statute's 1966 enactment, making it "unclear" whether *TransUnion* allows these suits.[359]

The executive power model might save FOIA, which perhaps reflects the type of constitutive authority that, under *Murray's Lessee*, Congress can vest in either the executive or judicial departments.[360] FOIA dictates a process for requesting from agencies documents to which one is entitled under the statute; confers on agencies the initial obligation to apply the statute's terms; and provides a cause of action for a court "to order the production of any agency records improperly withheld."[361] When an agency denies a FOIA request, it essentially declines to constitute a right in documents by refusing to deliver them to the requester. In a subsequent judicial proceeding, a court determines de novo whether the agency exceeded its discretion by violating the statutory standards and, if so, directs the agency to produce documents improperly withheld.[362] If the judicial power's core is *divesting* or *altering* private rights and interests, then a court in a FOIA action can be thought to use executive power (in the sense one might once have called *administrative*): application of a statutory standard as part of a statutory, administrative process to determine on a fixed record whether a new interest should have been created under the statute. If this, too, is executive power, then Article III's case or controversy constraint—which standing exists to enforce—is beside the point.

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358. 594 U.S. 413, 424–25 (2021).

359. *See* Chemerinsky, *supra* note 8, at 270–71; *see also* Sunstein, *supra* note 8, at 350 (echoing Chemerinsky's concern).

360. *See generally supra* Section III.A.3.

361. 5 U.S.C. § 552. As is common, FOIA uses the language of equity, *id.* § 552(a)(4)(B), but statutory labels do not dictate constitutional power. *See supra* note 72.

362. 5 U.S.C. § 552(a)(4)(B). A modified form of de novo review sometimes applies, but that wrinkle is immaterial here. *See, e.g.*, Central Platte Nat. Res. Dist. v. U.S. Dep't of Agric., 643 F.3d 1142, 1147 (8th Cir. 2011).

B. Pre-Enforcement Judicial Review

The executive power model is especially apt for channeling statutes that facilitate direct, pre-enforcement review of agency rules in circuit court. This Section explores the model's ramifications for two timely issues relevant to these schemes: agency deference and universal remedies.

1. Agency Deference

The executive power model informs debates about the *Chevron* framework, under which an agency's interpretation or construction of an ambiguity or gap in the statute it administers is often entitled to controlling deference in federal court.[363] *Chevron* is "widely regarded as the most important administrative law decision in the history of the United States."[364] Despite its centrality to modern administrative law, however, *Chevron* has received judicial and academic criticism for violating an Article III requirement that courts exercise independent judgment, including when interpreting ambiguous statutes.[365] And the Court has agreed to reconsider *Chevron* altogether in two October Term 2023 cases raising these Article III concerns.[366]

To be sure, a guarantee of independent judgment has intuitive appeal.[367] But that obligation must be understood in the context in which it was forged: the protection of private rights and interests.[368] Even accepting that the Founders understood judicial office to entail a duty of independent judgment, it does not follow that every decision requires the strictest of independence. A judge who inherits a case from a retiring colleague, for example, may well refuse to reconsider an earlier ruling on an interlocutory motion and instead defer to the colleague's judgment.[369]

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363. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Although the *Chevron* framework was overruled before this Article went to print, but after substantive revisions concluded, the analysis here is still relevant to whether Congress could restore a deference framework, such as by amending the APA provision that the Supreme Court concluded was incompatible with *Chevron*. *See supra* note 11.

364. Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 251 n.2 (2021).

365. *See, e.g.*, *supra* note 10.

366. *See supra* note 11 and accompanying text.

367. One might wonder, though, to what extent the obligation derives from (or is given content by) the statutory oath of judicial office as distinct from Article III. *See* 28 U.S.C. § 453.

368. *See supra* note 218.

369. *See, e.g.*, Galvan v. Norberg, 678 F.3d 581, 587 (7th Cir. 2012) (advising "that, because litigants have a right to expect consistency even if judges change, the second judge should 'abide

When private interests are not immediately at stake, *Chevron* might not be much different.[370] Agency rules generally articulate how an agency will prospectively interpret and implement a statute or policy.[371] When an agency forecasts what it will do in the future, it does not affect vested rights or interests today. Any effect instead occurs, for example, in an agency enforcement proceeding or a private civil suit seeking damages for violation of the agency rule.[372] The executive power model suggests that this distinction matters; if the structural features that make the judiciary independent were erected to protect private rights and interests, then pre-enforcement review of the agency's rule might not require the same independent judgment as a collateral enforcement proceeding reviewing the same rule. Pre-enforcement review is better conceived as an extension of the executive process: one final check to determine preliminarily whether the agency acted so far afield from its zone of discretion that the rule can be set aside immediately as unlawful.[373] By contrast, actions to enforce a rule may require a more searching inquiry into the rule's lawfulness, perhaps (if the Article III objections are correct) without *Chevron* deference. In other words, one can perhaps have a world in which *Chevron* is unconstitutional only some of the time rather than all-or-nothing.

2. Remedies

The executive power model also informs two ongoing debates about remedies in administrative law. One debate concerns whether Article III limits so-called universal remedies, such as vacatur of an agency rule for all purposes (i.e., not merely as applied to the parties to a particular case).[374]

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by the rulings of the first judge unless some new development, such as a new appellate decision, convinces him that his predecessor's ruling was incorrect'" (quoting Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332, 1339 (7th Cir. 1997))).

370. *Cf.* Wurman, *supra* note 44, at 805 (arguing that to the extent the judiciary is called to address public (rather than private) rights, Congress is free to authorize deferential review).

371. *See* 5 U.S.C. § 551(4).

372. *E.g.*, 47 U.S.C. § 227(b)(3)–(4) (cause of action and civil forfeitures for violation of certain "regulations prescribed" by the FCC).

373. This assumes that there *is* a zone of discretion for the agency, one of the premises underlying *Chevron* that is not at issue here because objections to that premise do not sound in Article III. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

374. *Compare, e.g.*, Sohoni, *supra* note 72, at 924 (arguing that Article III does not limit universal remedies), *with, e.g.*, Bray, *supra* note 72, at 418 (arguing that Article III does limit universal remedies), *and* United States v. Texas, 599 U.S. 670, 693–96 (2023) (Gorsuch, J., concurring) (questioning universal injunctions).

Another debate, also seemingly rooted in Article III, is what effect a supposedly universal remedy has on other courts.[375]

As to the first debate, the Article III argument posits that the judicial power, in being constrained to cases and controversies, is claimant-focused such that a proper remedy should afford relief only to the parties in the case.[376] Thus, traditional judicial review as an exercise of judicial power allows a court (1) to decline to enforce a rule against a particular defendant or (2) to enjoin an executive official from steps to enforce it against the plaintiff while the injunction remains in effect.[377] As an Article III matter, how can a single reviewing court in a special statutory review scheme enter an order that vacates a rule for all purposes and as to all people?

The executive power model provides an answer by setting Article III remedial limitations aside. Special statutory review schemes (like the Hobbs Act) may use the language of equity, but their features are distinctly not equitable.[378] Rather than provide a remedy restraining an *officer*, these statutes often speak of remedies against an *action*. The Hobbs Act, for example, provides for remedies against "final orders," "rules," and "regulations"—not the agencies that issue them or the individual officers that enforce them.[379] A model positing that courts use executive power when engaged in this review better explains the structure of the remedial scheme and why this scheme does not violate any Article III party-specific remedy requirement: universal vacatur is simply the statutory remedy that Congress dictated in a statutory, administrative process that happens to include a court on the back end.

Allowing universal remedies as a use of executive power also explains why an initial reviewing court's determination is conclusive of disputes in other circuits. Consider a recent case from the Second Circuit: the Federal Communications Commission ("FCC") promulgated a rule that the D.C. Circuit declared invalid on direct Hobbs Act review, which prompted the

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375. *Compare* Gorss Motels, Inc. v. FCC, 20 F.4th 87, 92 (2d Cir. 2021) (holding that the D.C. Circuit's vacatur of a rule was binding on the Second Circuit), *with id.* at 99 (Menashi, J., dissenting) (arguing that this conclusion conflicts with central tenets of the federal judicial system).

376. *See* Bray, *supra* note 72, at 471–72.

377. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018).

378. Recall that courts engaged in Hobbs Act review—or review under comparable statutes—tellingly do not engage in the traditional four-factor inquiry for injunctive relief, notwithstanding the use of seemingly equitable terms like "enjoin." 28 U.S.C. § 2342; *see supra* note 72 and accompanying text.

379. § 2342.

FCC to remove the now-invalidated rule from the Code of Federal Regulations.[380] A private party that supported the rule, and that disagreed with the D.C. Circuit's ruling, challenged this removal in a second Hobbs Act action—this time in the Second Circuit—arguing that the agency erred in understanding the D.C. Circuit's decision to invalidate the rule nationwide, rather than only in the D.C. Circuit's territorial jurisdiction.[381] The Second Circuit rejected that argument,[382] but one judge (a former administrative law professor) dissented.[383] In the dissent's view, the majority's rationale conflicted with "fundamental precepts of the federal court system," including that "the judgment of a federal court binds only the parties before it."[384]

The executive power model overcomes that objection, and the interplay between the APA and the Hobbs Act explains why. Something is a "rule" only if it is an "agency statement";[385] the FCC makes its agency statements through orders;[386] and final orders are subject to Hobbs Act review, under which a circuit court can "set aside" or "suspend (in whole or in part)" the order.[387] When the court "suspend[s]" the "part" of a "final order[]" making the statement that is in substance the rule,[388] the now-suspended statement ceases to be a "rule" because it is no longer an agency statement of policy.[389] The statement has been unsaid. Nationwide invalidity is not a function of equitable relief extending beyond the parties; it is a statutory consequence that follows from the plain terms of the APA and the Hobbs Act.[390] When a court enters its remedy, it is not using traditional judicial power to affect any private interests—it is instead using executive power to edit the agency order to carry out what pre-existing legislation governing the administrative process requires.

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380. *Gorss Motels*, 20 F.4th at 93–94.

381. *See id.* at 94.

382. *See id.* at 98.

383. *See id.* at 99 (Menashi, J., dissenting).

384. *Id.*

385. 5 U.S.C. § 551(4).

386. *See, e.g.*, Mais v. Gulf Coast Collection Bureau, Inc., 768 F.3d 1110, 1121 (11th Cir. 2014) (discussing rulemaking by FCC order).

387. 28 U.S.C. § 2342; § 2342(1).

388. § 2342.

389. *See* 5 U.S.C. § 551(4).

390. *Cf.* Mitchell, *supra* note 377, at 950–51. In this regard, certain judicial review of agency rulemaking differs from judicial review of statutes, in which the so-called "writ-of-erasure fallacy" often arises; the law itself affirmatively empowers the court to "cancel[]" or "blot[] out" part of a rule. *See id.* at 937.

C. Appellate Jurisdiction

Finally, the executive power model sheds light on contested issues around the Supreme Court's limitation to "appellate jurisdiction" in reviewing executive action,[391] a limit the Supreme Court famously enforced in *Marbury v. Madison*.[392] On the conventional view, in order for the Supreme Court's jurisdiction to be appellate, some other court must first exercise judicial power by entering a judgment.[393] Two relatively recent cases—*NFIB v. OSHA*[394] and *Ortiz v. United States*[395]—illustrate the problem.

1. Certiorari Before Judgment

NFIB was a challenge to an OSHA mandate that certain employers enforce a policy requiring COVID-19 vaccination or a weekly testing and masking regime for millions of workers.[396] Challengers petitioned for review of the mandate under the applicable statutory review provision.[397] After losing a request for emergency relief in the Sixth Circuit, the challengers sought emergency relief or certiorari before judgment from the Supreme Court.[398] The problem: without a *final* ruling from the Sixth Circuit, granting certiorari before judgment might violate *Marbury*,[399] an issue that the Court ultimately dodged by limiting itself to consideration of emergency relief.[400]

The executive power model offers a clean answer to the certiorari before judgment question. The review statute in *NFIB* imposed traditional agency review standards, i.e., limitation of the judicial role to questions of law and a "substantial evidence" standard to a closed record.[401] And the facial challenge had no immediate effect on challengers' vested rights or interests; those rights were implicated only if an employer violated the rule and became subject to

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391. U.S. CONST. art. III, § 2.

392. 5 U.S. (1 Cranch) 137, 175–76 (1803) (declining to exercise original jurisdiction to issue mandamus).

393. *See* LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 263 (1965).

394. 595 U.S. 109 (2022) (per curiam).

395. 585 U.S. 427 (2018).

396. 595 U.S. at 112–13.

397. 29 U.S.C. § 655(f).

398. Emergency Application of Twenty-Six Business Associations for Immediate Stay of Agency Action Pending Disposition of Petition for Review at 6, 36, *NFIB v. OSHA*, 595 U.S. 109 (2022) (No. 21A244), 2021 WL 8945188, at *36.

399. Response in Opposition to the Applications for a Stay at 85–86, *NFIB*, 595 U.S. 109 (No. 21A244), 2021 WL 8945197, at *85.

400. *NFIB*, 595 U.S. at 119–21.

401. § 655(f).

its financial penalty enforcement mechanism.[402] If one accepts that review of this sort calls for executive power, then—as in the other contexts discussed—Article III is beside the point, and its limitation on the Court's jurisdiction is irrelevant.

This, too, avoids inconsistency with the Court's broader body of cases. When the antebellum Court declined jurisdiction over appeals from lower courts engaged in administration,[403] those jurisdictional rulings are likely best understood as statutory rather than constitutional because Supreme Court review was limited to "final judgments and decrees in civil actions,"[404] which would exclude decrees in administrative matters. And in the early modern administrative state, the Court declined jurisdiction largely on the view that, as an Article III court, it could not wield discretionary legislative and administrative power.[405] Today's more restrained scope of review avoids that constitutional flaw.[406] And with the current certiorari before judgment statute,[407] an innovation post-dating the antebellum cases, the executive power model would allow the Supreme Court to be the first to judge the validity of an agency rule on a petition for review using a constrained grant of executive power.

2. Military Justice Appeals

As with issues around standing, the executive power model may have even broader implications. Consider the military justice appeals at issue in *Ortiz*, which presented the question whether the Supreme Court could directly review a judgment of the Court of Appeals for the Armed Forces ("CAAF"), a non-Article III court.[408] With no Article III judgment to review, the Court was arguably not exercising Article III appellate jurisdiction.[409] But citing the "judicial character, as well as the constitutional foundations and history, of the court-martial system," the Court held that it had jurisdiction in the unique circumstance of military justice, albeit while reserving the question

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402. *See NFIB*, 595 U.S. at 115–16.

403. *See supra* notes 109–11 and accompanying text.

404. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84; *see, e.g.*, Perkins v. Fourniquet, 47 U.S. (1 How.) 206, 207–08 (1848).

405. *See, e.g.*, Postum Cereal Co. v. Cal. Fig Nut Co., 272 U.S. 693, 700–01 (1927) (quoting Keller v. Potomac Elec. Co., 261 U.S. 428, 444 (1923)).

406. *See supra* Section III.B.2.

407. 28 U.S.C. § 2101(e) (allowing certiorari "before judgment has been rendered in the court of appeals").

408. Ortiz. v. United States, 585 U.S. 427, 430–31 (2018).

409. *See id.* at 441.

(discussed above) "whether [it] could exercise appellate jurisdiction over cases from other adjudicative bodies in the Executive Branch, including those in administrative agencies."[410]

Military justice has long presented an Article III puzzle. Criminal conviction resulting in imprisonment implicates a core vested liberty interest, yet the public rights doctrine has long viewed military justice as not requiring Article III judicial power.[411] For some, like Justice Thomas, the answer is that Article III must be read in historical context, which suggests that military courts are an "exception" or "carve-out" from Article III's vesting of judicial power.[412] For others, like Justice Alito, military courts properly use executive power.[413] And, most recently, Ilan Wurman has sought to justify *Ortiz* by proposing that military courts exercise "a blended *function*" with a sufficiently judicial character to support appellate jurisdiction.[414]

The executive power model may support Wurman's bottom line, albeit on a slightly altered rationale. The key question is whether the executive power encompasses divesture of core private rights in the military context. I have no well-formed view, but it is plausible that Article III merely separated from the executive power the capacity to divest private interests in a civilian context.[415] That does not necessarily make military courts "judicial" in the Article III sense; it simply left the capacity to divest in the military context as part of the executive power. Contrary to Justice Alito's view, however, Article III courts are not out of the picture if they can *also* use limited executive power in a sufficiently judicial form, e.g., an adjudication that calls for the application of law to fact under a statutory standard and without policymaking discretion. So long as the standards governing Supreme Court review of the CAAF limit the Court to behave in an appellate manner (e.g., application of law to a closed record) and without review in another branch, then under the executive power model the Necessary and Proper Clause might permit the Court's role even absent an exercise of judicial power in the

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410. *Id.* at 448.

411. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 (1982).

412. *See, e.g.*, *Ortiz*, 585 U.S. at 458 (Thomas, J., concurring); *see also, e.g.*, Nelson, *supra* note 70, at 576.

413. *See, e.g.*, *Ortiz*, 585 U.S. at 465 (Alito, J., dissenting); *see also, e.g.*, Baude, *supra* note 5, at 1558–61.

414. Wurman, *supra* note 44, at 784.

415. *Cf. Ortiz*, 585 U.S. at 458 (Thomas, J., concurring). Insofar as one accepts that the Fifth Amendment is relevant in understanding the judicial power's content, see *supra* notes 240–44 and accompanying text, its language plausibly suggests this limitation by excepting "cases arising in the land or naval forces" from the amendment's introductory limitation on the imposition of criminal liability. U.S. CONST. amend. V.

court below precisely because the Court's own review is a use of *executive* power, albeit with a judicial character.

V. BROADER IMPLICATIONS

This Part concludes by briefly discussing an executive power model's normative benefits for administrative law doctrine and how its insights might inform debates in other areas.

A. Administrative Law Doctrine

1. Stability in the Face of Doctrinal Change

As separation of powers law continues down a formalist path under a majority-originalist Supreme Court, we should expect formalist and originalist objections to the status quo to become increasingly common, including with respect to the structure of judicial review. Appeals to functionalism are unlikely to satisfy the objectors. As Wurman says, "giving up on differentiating government power and abandoning originalist sources and reasoning are nonstarters" in this legal environment.[416] Maintaining the status quo in judicial review of agency action will likely require a formal, historically grounded defense.

The executive power model provides one. The model endeavors to assign the function at issue—certain judicial review of agency action—to one of the Constitution's specific powers by emphasizing constitutional text, the political theory that informed the text, and historical practice's gloss on the text.[417] The model builds from historical evidence about what the ratifiers understood executive power to be and how they understood that the Necessary and Proper Clause would operate, including that political practices could settle and fix what the Constitution allows in the face of underdeterminacy. Moreover, the model's use of judicial precedent—not always necessarily as binding, but as informing a centuries-long give-and-take between the branches—is an accepted mode of originalist constitutional

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416. Wurman, *supra* note 44, at 742.

417. *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1499–1500 (2021) ("[O]riginalists usually look to text, structure, intent, and early historical practice" as well as "political theory."). For a discussion of separation of powers formalism, see *supra* notes 60–61 and accompanying text.

construction.[418] And it may appeal to jurists of varied commitments; the emphasis on centuries-long practice as a basis to infer a legitimate use of power is not dissimilar to the analysis in *Ortiz v. United States*, in which an ideologically and methodologically diverse coalition of justices recently upheld judicial review of military justice cases in the face of a formalist, Article III challenge.[419] Moreover, the model makes sense of *Massachusetts v. EPA* where the Court has failed to provide guidance; potentially saves FOIA; legitimizes important facets of pre-enforcement review, including the roles of *Chevron* and universal vacatur in that context; and perhaps makes cleaner sense of cases like *Ortiz* when compared to the Court's it's-judicial-enough-but-don't-ask-about-agencies rationale.[420]

To be clear, despite reliance on originalist sources and reasoning, this Article emphatically does *not* claim that the Founders widely understood or anticipated federal courts to use executive power when reviewing executive action—that is an application that they would likely have found quite foreign, given the legal conventions of the time.[421] Nor does it claim that the more modern Supreme Court (or Congresses or agencies) openly embraced this view as the modern administrative state was taking hold and evolving, although some important inferior courts may have.[422] The basic claim, instead, is that the practice that evolved organically is not obviously inconsistent with the flexibility that the Constitution has always provided via the Necessary and Proper Clause, and formalism does not necessarily demand departure from the evolved practice. In this respect, the model may satisfy the current Court's apparent desire for a complete and coherent originalist theories that can account for an entire body of cases, doctrines, or outcomes over time.[423]

Given that concern for coherence, even if formalists are not persuaded that the executive power model is unambiguously correct, it might still preserve stability by illustrating that the formalist objections suffer the same fault. If a

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418. *See, e.g.*, Barnett & Solum, *supra* note 282, at 448–49 (discussing the role of traditional practice in originalist analysis); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1952, 1977 (recognizing that precedent can "play a role in constitutional construction" because "nonoriginalist considerations inevitably play a role in constitutional practice when the communicative content of the constitutional text is vague or irreducibly ambiguous").

419. 585 U.S. at 437–50.

420. *See generally supra* Part IV.

421. *See supra* notes 78–83 and accompanying paragraph.

422. *See, e.g.*, Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851–52 (D.C. Cir. 1970).

423. *See* Haaland v. Brackeen, 599 U.S. 255, 278–79 (2023) (criticizing petitioners' originalist and formalist position for its failure to account for "potential consequences" or "offer a theory for rationalizing this body of law").

plausible case can be made that formal methods support current practice, one might (regardless of views on the modern administrative state) find appealing the lawyerly instinct to declare that the objectors have not carried their burden to depart from the status quo. Put differently, if the status quo is not demonstrably erroneous—i.e., beyond the bounds of constitutional underdeterminacy—the presumption should favor stability.[424] So, even if the executive power model does not definitively best the formalist objections, it may at least prevent the objectors from making so convincing a case as to persuasively upend current practice.

2. Promoting Accountability

Why should we *want* to maintain the status quo? Judicial review is "one of the key mechanisms for ensuring agency accountability,"[425] and the executive power model promotes that accountability while reducing the risk that judicial review will supplant the role of administration. The model suggests that Congress has broader capacity to provide for judicial review when it grafts that review onto the end of an administrative process via a special statutory review scheme that essentially makes judicial review part of the overall administrative process.[426] The model therefore liberates doctrine from a one-size-fits-all standing analysis and instead presents Congress with a simple two track choice. Where Congress fails to establish a special, channeling statutory review scheme akin to the Hobbs Act, and instead leaves citizens with recourse only to traditional judicial remedies, courts should continue to enforce their understanding of Article III's limits. But special statutory review schemes—when constitutionally valid under the model's framework—require a more permissive analysis. As discussed, this creates a coherent basis to limit the reach of *Massachusetts v. EPA*'s state solicitude holding while empowering Congress to provide for expansive judicial review where it determines that a special statutory review scheme is appropriate.[427]

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424. *Cf.* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (exploring the doctrine of stare decisis and the balance of perceptions of "legal indeterminacy and one's views about stare decisis").

425. Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 110 (2020).

426. *Cf. Greater Bos.*, 444 F.2d at 851–52.

427. *See supra* Section IV.A.1.

B. Federal Courts Doctrine

The executive power model might also shed light on a recent scholarly debate whether Article III cases and controversies require adversity as a constitutional matter or instead permit federal courts to exercise so-called non-contentious jurisdiction.[428] The contending scholars focused on what lessons could be gleaned about cases and controversies from historically constitutive processes, including judicial involvement in naturalization.[429] Indeed, Ann Woolhandler (in the pro-adversity corner) conceded that naturalizations were the "strongest example of non-contentious jurisdiction" assigned to courts.[430] But the lesson might not have anything to do with cases or controversies if naturalizations are permissible judicial exercises of executive power. That is, the debate might have proceeded from a contestable premise that federal courts must always be using the judicial power and never the executive power.

Even if one does not accept that courts are sometimes using executive power, the model at least hopefully sheds some light on the judicial power's proper contours and domain. By focusing sharply on what the judicial power *is* at its core, and by suggesting that justiciability rules are not always the same in all contexts, this Article perhaps sheds light on a central error in *TransUnion v. Ramirez*.[431] If the judicial power is principally the government's capacity to divest or otherwise alter vested private rights and interests, then the seminal case *Lujan v. Defenders of Wildlife* may make good sense.[432] That was a public law case in which the plaintiffs made claims against a federal official seeking to coerce a particular mode of enforcement of federal law.[433] No vested private right or interest was at stake. But *TransUnion* is a case of a fundamentally different type; federal law imposes certain obligations on credit reporting agencies and creates a cause of action for statutory damages where the law is violated.[434] The reason for the cause of action, of course, is because a credit reporting agency in violation of the law is unlikely simply to hand over its money to an aggrieved consumer. So, when that consumer turns to federal court, the consumer needs the judicial power because only that power can *divest* an interest from the agency and

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428. *See generally* Pfander & Birk, *supra* note 90 (supporting non-contentious jurisdiction); Woolhandler, *supra* note 94 (supporting adversity of legal interest).

429. *See* Pfander & Birk, *supra* note 90, at 1361; Woolhandler, *supra* note 94, at 1061–65.

430. Woolhandler, *supra* note 94, at 1065.

431. 594 U.S. 413 (2021).

432. 504 U.S. 555 (1992).

433. *See id.* at 559.

434. 594 U.S. at 417–20.

create a new right for the consumer.[435] That is, the consumer's Article III "injury" is not whatever harm (if any) flowed from the statutory violation; the injury is that the consumer asserts legal entitlement to part of the agency's wealth (in consequence of the statutory violation), but the agency will not hand it over. That is quintessentially a dispute that only the judicial power is competent to resolve, and thinking about these private disputes in a framework derived from public law disputes obscures that insight. As the executive power model attempts to show, we should perhaps think about justiciability differently depending on what is ultimately at stake.

VI. CONCLUSION

Gary Lawson wrote nearly thirty years ago that "distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law."[436] That remains true, and this Article by no means claims to have solved the puzzle. Rather, the Article aims to move the ball by sketching out one defensible way to draw a line between the judicial and executive powers and then exploring that division's ramifications for certain judicial review of agency action. The lesson is this: by remembering the judicial power's origin in the executive power, the reasons for separating it out, and the long history of judicial involvement in administrative action, one might conclude that some judicial review of agency action is a permissible use of narrow executive (rather than judicial) power. If that is right, it offers a coherent theory to address recurring issues in administrative law, accounts for recent cases like *United States v. Texas*, and sheds some timely light on issues like constitutional challenges to *Chevron* deference. But although the ramifications are many and varied, the bottom line is simple: several formal Article III objections to modern administrative law may simply be beside the point.

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435. *Cf.* Harrison, *supra* note 2, at 313 (noting that "a damages judgment gives rise to a new right, a debt owed the plaintiff by the defendant in the amount of the judgment," which is a wealth transfer unavailable to the legislature).

436. Lawson, *supra* note 2, at 1238 n.45.