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## The Adjudicative State

**ABSTRACT.** Over the last decade, the Supreme Court has advanced a new vision of the administrative state. The two commandments of administrative law in the Roberts Court are to give the President control over the executive branch and to separate government functions into their proper branches. Scholars often describe these two principles as related pieces of a broader effort to shift policymaking toward elected officials and strip power from the civil service. In the standard account, unitary executive theory and separation-of-powers formalism are complementary ideas, which reflect the Court's skepticism about bureaucratic governance.

This Feature questions that consensus. It argues that there is a basic, inescapable tension at the heart of the Supreme Court's approach to administrative law. When it comes to administrative courts, the Court's core intellectual commitments are not complements. The two tenets of its jurisprudence are on a collision course: one requires presidential adjudication, while the other would move agency adjudication to Article III courts. There is no way to reconcile these two views.

Recognizing this conflict reveals deeper problems with both administrative-law doctrine and common critiques of the Supreme Court. Though it is described as anti-administrative, the Roberts Court protects and depends upon a vast system of administrative courts to resolve millions of legal claims outside of Article III. In this respect, the Court favors bureaucracy. Moreover, its defense of the adjudicative state is predicated on a regressive conception of due process, which its critics have largely overlooked.

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## INTRODUCTION

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

As this debate has unfolded, scholars have rarely paused to ask whether the Court's intellectual project is coherent. Academics have taken sides, celebrating or decrying the formalist turn in administrative law. But few have questioned whether the doctrine emerging from the Roberts Court makes sense on its own terms.<sup>4</sup> If anything, both the Court's critics and its defenders seem to agree that recent administrative-law cases reflect a systematic philosophy meant to strip power from the civil service.

This Feature questions that consensus. It argues that there is a basic, inescapable tension at the heart of the Supreme Court's approach to administrative law. The two commandments of administrative law in the Roberts Court are to give the President control over the executive branch and to isolate power in the proper branch of government.<sup>5</sup> The Court has committed itself to a strong version of unitary executive theory in which presidential power permeates Article II. It has also adopted a strict conception of the separation of powers in which the three branches of the federal government have distinct functions. Below, we describe this outlook as an administrative-law jurisprudence devoted to *separate functions* and presidential *outcome control*.

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1. Part I traces this arc, which began in 2010 with *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and culminated last Term in *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).
  2. See, e.g., PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017); Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 822-26 (2019).
  3. See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 285-89 (2021); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2-7 (2017).
  4. For a notable exception that informed our project, see Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088 (2022).
  5. See *infra* Part I (identifying the new rules of administrative law).

These two intellectual commitments seem to work in tandem, particularly if one focuses on regulatory policymaking. The Court's theory sounds simple: push power up toward the President and out toward Congress in order to thwart policymaking by unelected bureaucrats. But if this approach is coherent – if misguided – when it comes to regulation, it runs aground when it comes to administrative courts. Judges in administrative tribunals decide millions of cases each year, often with extraordinarily high stakes.<sup>6</sup> Resolving individual claims is at least half of what the administrative state does. Yet the Court's jurisprudence produces a confused, contradictory account of administrative courts. When one focuses on adjudication, it becomes clear that the two tenets of the Court's worldview are on a collision course.

Consider the conflict that the Court's approach to administrative law creates for agency tribunals. Under the Court's conception of the unitary executive, agency courts should be subjected to presidential control. By contrast, following through on the Court's formalist theory of government functions would mean shifting the work of agency tribunals to Article III courts, where judging belongs. One precept of the new administrative law would require administrative courts to be democratized. The other would require them to be abolished. Recognizing this conflict raises serious questions about whether the Court's jurisprudence is tenable or consistent, even within the Court's own framework. Setting aside whether the Court's goals are desirable, there is a more fundamental question about whether its project hangs together.

This Feature uses agency tribunals to expose this foundational problem with the Supreme Court's administrative-law jurisprudence. In the process, we aim to complicate the conventional account of the Roberts Court. The current Court is widely described as antibureaucracy.<sup>7</sup> But that label oversimplifies the ideo-

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6. Admin. Conf. of the U.S. & Stan. L. Sch., *Caseload Statistics*, STAN. UNIV. [hereinafter *ACUS-Stanford Study*], <http://acus.law.stanford.edu/reports/caseload-statistics> [<https://perma.cc/HHB6-FNJJ>].

7. See, e.g., Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 392 (2013) (“I suspect that the turn against [legislative history] has been anti-statist, in that it has been a means to maintain judicial power against the bureaucracy.”); Metzger, *supra* note 3, at 3 (noting that a “key characteristic[]” of the Supreme Court’s “anti-administrative” jurisprudence is opposition to “administration and bureaucracy”); Metzger, *supra* note 3, at 34-35 (surveying the “bureaucracy bashing” in recent case law); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2074 (2005) (describing “hostility to the modern administrative state” as “an anti-bureaucratic pastoralism that feeds on nostalgia for simpler, more integrated times”); Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13, 13 (2017) (observing that the Court’s antipathy toward the administrative state rests on the “complaint that the federal bureaucracy is extralegal, unconstitutional, and tyrannical”).

logical movement that is underway in administrative law. In the domain of adjudication, the Roberts Court is not so hostile to bureaucracy. On the contrary, the Court has resisted the logical implication of its own Article III formalism, which would dismantle administrative courts and shift their work to the federal judiciary. Instead, the Roberts Court appears bent on championing what one might call presidential adjudication, at least for the vast majority of agency tribunals.<sup>8</sup> Moreover, as we explain below, the Court has preserved administrative courts by advancing a new, regressive theory of due-process rights. In this respect, the Roberts Court is probureaucracy: it defends and depends upon a vast adjudicative state to resolve millions of legal claims outside of Article III. And the Court's theory of administrative law is predicated on a troubling conception of due process, which its critics have largely overlooked.

We come to these conclusions by way of immigration law. Drawing on our background in the field, this Feature turns to immigration courts to demonstrate the contradiction at the center of the Court's jurisprudence and to imagine how the Court's worldview might play out. Immigration law offers an illuminating example for administrative law because it is a domain in which "administration" is often synonymous with adjudication and political control of courts has long been the norm. Presidential adjudication is nothing new in immigration law. In fact, if administrative law takes the path we predict, immigration courts will become a model for the rest of the administrative state.

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

## I. THE NEW RULES OF ADMINISTRATIVE LAW

The Supreme Court's attack on the administrative state is premised on two ideas. First, the Court has adopted a rigid conception of the separation of powers in which the three branches of the federal government have distinct functions

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8. Cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (identifying the "era of presidential administration," in which the President takes "primacy in setting the direction and influencing the outcome of administrative process").

and boundaries, which federal judges are supposed to police.<sup>9</sup> Second, the Court has embraced a strong version of unitary executive theory, which requires direct presidential control of agency administration.<sup>10</sup> These two ideas represent the emergence of a new and highly interventionist approach to structural constitutional law. Together, they have laid the groundwork for a fundamental reconstruction of the national government.

It is worth emphasizing the word *new* in this account. As others have observed, the Court's recent administrative-law cases are neither textualist<sup>11</sup> nor originalist.<sup>12</sup> Instead, they are the realization of a novel political theory derived from freestanding ideas about how American government should work.<sup>13</sup> This Part brings those lines of thought together and distills the core beliefs animating this new brand of administrative law.

### A. *Separate Functions*

The first pillar of the Court's administrative-law jurisprudence is an atomized understanding of the separation of powers. Two decades ago, M. Elizabeth Magill distinguished between two different conceptions of the separation of powers: a "separation-of-functions" theory that emphasized the need to isolate judicial, legislative, and executive power in the proper branch of government; and a "balance-of-powers" theory that stressed interaction and competition between government departments.<sup>14</sup> The first theory is especially concerned about combining multiple powers—say, legislative and executive power—in a single branch. For those in the separation-of-functions camp, there is an identifiable and coherent difference between the three types of government power, and the Constitution requires a clean organizational chart: the right people, doing the right activities, in the right branch.

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9. See Glicksman & Levy, *supra* note 4, at 1093-95 (describing and critiquing the "resurgence of separation of powers formalism" in administrative law).

10. Metzger, *supra* note 3, at 17-28 (tracing this development).

11. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it.").

12. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 86.

13. See *id.* at 86-87. Scholars have critiqued these developments along various dimensions. See, e.g., sources cited *supra* note 3; see also Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1297-1301 (2021) (describing the "sweeping effects" that "constitutional doubt about rulemaking could have").

14. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155-61 (2000).

This theory has ascended in administrative law. The Roberts Court has aligned itself with separation-of-functions ideology, most prominently in cases concerning the nondelegation doctrine. That doctrine holds that Congress may not delegate legislative power to the Executive. Until recently, the conventional wisdom was that the nondelegation doctrine was dead, or at least on life support, lingering in the law as an avoidance canon and an academic obsession.<sup>15</sup> Over the last few years, however, this account has been challenged by the Court's eagerness to revive nondelegation, not just as a narrow principle of statutory interpretation but as a full-blown constitutional rule.

At first, the revival of the nondelegation doctrine—which, its critics contended, was really its invention—was a leitmotif in debates about *Chevron* deference.<sup>16</sup> In disputes over whether courts should defer to an agency's understanding of a statute, some *Chevron* skeptics framed their objection in constitutional terms, as an outgrowth of anxiety about excessive delegation of lawmaking authority. In his 2015 concurrence in *Michigan v. Environmental Protection Agency*,<sup>17</sup> for example, Justice Thomas questioned the idea that statutory ambiguity constitutes an implicit grant of policymaking power to an agency, a view that he argued “raises serious separation-of-powers questions.”<sup>18</sup> Thomas worried not only that *Chevron* deference permitted agencies rather than courts to expound the law; he also feared that the doctrine gave agencies lawmaking power constitutionally reserved to Congress. Meanwhile, some of *Chevron*'s supporters adopted the same framework to defend deference as constitutionally mandatory, arguing that agencies in a political branch were better positioned than courts to make “the policy decisions inherent in the resolution of statutory ambiguity.”<sup>19</sup>

At the time, this was an unusual way to talk about *Chevron*. When the early *Chevron* debate veered into separation-of-powers law, it usually centered on whether agencies usurp judicial power when courts defer to bureaucrats' views

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15. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (“We might say that the conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).”); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 238–43; Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721–23 (2002).

16. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see, e.g., Posner & Vermeule, *supra* note 15, at 1722 (“Nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism . . .”). If this is right, the doctrine never existed to be revived.

17. 576 U.S. 743 (2015).

18. *Id.* at 761 (Thomas, J., concurring).

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

on a statute.<sup>20</sup> But disputes over *Chevron* deference set the stage for the nondelegation doctrine's revival in two ways. First, some jurists—including Justice Thomas in *Michigan*—suggested that agencies exercise *legislative* power when they construe ambiguous statutes.<sup>21</sup> On this view, which has gained traction in recent years, the constitutional problem with *Chevron* is not that agencies are interpreting laws; it is that they are making policy decisions that belong to Congress.<sup>22</sup> Opposition to *Chevron* deference thus becomes one way to enforce the nondelegation doctrine.

Second, and more fundamentally, the ongoing dispute over *Chevron* deference invited the Court to draw sharp distinctions between the types of government power that agencies possess. The *Chevron* debate has endured for decades, transforming a straightforward case into one of the most cited precedents.<sup>23</sup> Over time, that debate encouraged the Court to characterize bureaucratic activity as essentially judicial, legislative, or executive. As judges and academics disputed the proper standard of review in administrative-law cases, the Court began to embrace a constitutional theory in which distinct branches of government do fundamentally different things. This theory made *Chevron* seem less palatable, no matter which type of power agencies exercise when they construe statutes. And it paved the way for a more full-throated endorsement of the nondelegation doctrine.

That moment seems to have arrived, in the guise of the “major questions doctrine.” When it was first introduced in 2000, the major questions doctrine was a narrow exception to *Chevron* deference in cases involving questions of great “economic and political magnitude.”<sup>24</sup> If a case implicated an exceptionally important policy issue—banning cigarettes,<sup>25</sup> the fate of Obamacare<sup>26</sup>—the Court would interpret the relevant statute on its own without heeding the agency's view. This version of the major questions doctrine (if it was a doctrine

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20. See, e.g., Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 200 (1991) (describing *Chevron* as a “transfer[] [of] significant lawmaking authority from the courts to the agencies”).

21. *Michigan*, 576 U.S. at 761 (Thomas, J., concurring); see also Glicksman & Levy, *supra* note 4, at 1109–11 (discussing legislative delegation).

22. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 42–43.

23. Michael Herz, *Chevron Is Dead: Long Live Chevron*, 115 COLUM. L. REV. 1867, 1870 n.19 (2015) (collecting sources for the claim that “*Chevron* is the most cited decision in administrative law . . . .”); see also John Paul Stevens & Linda Greenhouse, *A Conversation with Justice Stevens*, 30 YALE L. & POL'Y REV. 303, 315 (2012).

24. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); see Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 482 (2021).

25. *Brown & Williamson*, 529 U.S. at 126.

26. *King v. Burwell*, 576 U.S. 473, 485 (2015).



at all) focused on an agency's interpretive authority: on whether its view of a statute should get primacy over a court's, not on whether the agency possessed the power to act at all.<sup>27</sup> The basic idea was that the legal fiction supporting *Chevron*—the claim that statutory ambiguity is an implicit grant of interpretive discretion to executive-branch officials—was untenable when significant policy choices were on the line.<sup>28</sup> So, in a very small set of cases, the Court would not defer.

Recently, however, the major questions doctrine has turned into something more substantive. In the past year, the Court has stayed the federal vaccine mandate and dramatically curtailed the Environmental Protection Agency's (EPA's) regulatory authority on the ground that a major question was at stake.<sup>29</sup> In those cases, the Supreme Court treated the major questions doctrine not as an exception to *Chevron* deference but instead as a hard limit on agencies' policymaking power. There appear to be schisms within the Court about just how limiting this new doctrine should be. For some—including Chief Justice Roberts—the major questions doctrine functions as a clear-statement rule, requiring Congress to be explicit when it wants an agency to make big policy decisions.<sup>30</sup> For others, including Justices Alito and Gorsuch, the doctrine seems to be even more robust, closer to an actual bar on Congress giving agencies the authority to make important policy decisions.<sup>31</sup> Whatever the difference between these two views, both are species of the nondelegation doctrine, motivated by a desire to shift power from agencies toward Congress.

The rise of the nondelegation doctrine does not come as a surprise. The Court's conservative wing has signaled its support for the doctrine in recent years,<sup>32</sup> and the addition of Justices Kavanaugh and Barrett made that position the majority view. Perhaps the only real surprise is how much bite nondelegation

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27. See, e.g., *Brown & Williamson*, 529 U.S. at 132–33 (interpreting a statute without deference to the relevant agency based on the “common sense” view that Congress is unlikely to delegate major policy questions by implication).

28. *Id.* at 160; see also *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (describing the implicit delegation theory of *Chevron* deference).

29. *Nat'l Fed. of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 667 (2022) (per curiam); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022).

30. See *West Virginia*, 142 S. Ct. at 2605 (Roberts, C.J.).

31. See *id.* at 2617 (Gorsuch, J., concurring, joined by Alito, J.) (“The major questions doctrine works . . . to protect the Constitution’s separation of powers . . . [I]mportant subjects . . . must be entirely regulated by the legislature itself.” (internal quotation marks omitted)).

32. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J. & Thomas, J.); *King v. Burwell*, 576 U.S. 473, 485 (2015); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

now has. For years, scholars have wondered—and doubted<sup>33</sup>—whether the Court would follow through on its ambitions with nondelegation and other doctrines that curtail administrative action. In the wake of last Term’s major questions cases, the answer to that question is yes.<sup>34</sup> The nondelegation doctrine has surfaced, not yet in a case flatly invalidating a statute as unconstitutional, but as a constitutionally required doctrine of statutory interpretation that achieves the same goal. As with *Chevron*—which the Court has sidelined and maybe even overruled *sub silentio*<sup>35</sup>—the revolution has unfolded quietly. But it is a revolution nonetheless.

The through line in all of these doctrinal developments is a commitment to separation-of-functions formalism. The Court’s skepticism about *Chevron* deference and its enthusiasm for the major questions doctrine both stem from a deeper belief that judges need to organize a chaotic federal government: to identify different sorts of state power and to prevent spillover between them. The Roberts Court has taken a particularly blunt approach to this task. In its vision of administrative law, government activity must be boiled down to its essence—lawmaking or judging, lawmaking or law enforcement. State power can never be two things at once. This jurisprudence transforms what Magill described two decades ago as an undercurrent in constitutional theory into the dominant intellectual framework of contemporary administrative law.<sup>36</sup> For the Roberts Court, the government consists of three hermetically sealed branches, and the judge’s job is to put power in the proper place.

### B. Outcome Control

The second pillar of new administrative law is a robust conception of presidential administration. Here, the intellectual reference point is unitary executive theory. That “bracingly simple” theory holds that, because the President alone is vested with executive power, Congress cannot insulate executive-branch actors from presidential control.<sup>37</sup> Unitary executive theory’s birth in the Reagan era

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33. See, e.g., Metzger, *supra* note 22, at 5 (“[I]t remains unclear (and in my view unlikely) whether a majority will materialize for a major doctrinal recalibration on delegation . . .”).

34. E.g., *West Virginia*, 142 S. Ct. at 2616.

35. See Metzger, *supra* note 22, at 4 (“[T]he Court itself has not relied on *Chevron* deference since 2014.”). Last Term, after debating whether to overrule *Chevron* during oral argument in *American Hospital Ass’n v. Becerra*, 142 S. Ct. 1896 (2022), the Supreme Court issued an opinion that ignored the doctrine entirely. After *Becerra*, it is difficult to imagine the Court reversing an opinion for failure to defer to an agency’s statutory interpretation.

36. See Magill, *supra* note 14, at 1131.

37. See Sunstein & Vermeule, *supra* note 12, at 83.

and entrenchment in conservative judicial thought are well documented.<sup>38</sup> Scholars have said less, however, about the theory's recent transformation. Over the past decade, unitary executive theory has morphed from a stance on the President's removal authority into a much bolder philosophy of executive power.

One can understand this development as a shift from personnel to outcome control. The classic version of unitary executive theory focused on the President's power to control who worked in the executive branch: to hire and fire people as he saw fit. The key precedent for proponents of this theory is *Myers v. United States*,<sup>39</sup> the 1926 case vindicating the President's power to fire a Postmaster, which became the canonical citation for expansive removal power.<sup>40</sup> The aberration is *Humphrey's Executor v. United States*, the New Deal precedent that upheld the constitutionality of independent agencies.<sup>41</sup> In first-generation unitary executive theory, the critical question was when Congress could restrict the President's ability to prune the executive branch. This debate was all about appointments and removals — *personnel decisions*.

This approach to unitary executive theory has shifted during the Roberts Court. We saw the first hints of a transformation in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,<sup>42</sup> which held that agencies with two layers of tenure-protected officers violate the separation of powers. Then, in *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>43</sup> the Court held that an independent agency with a single director does too. These cases signaled a new understanding of executive power. Like their predecessors, *Free Enterprise Fund* and *Seila Law* asked when the President can fire people. But if they were about personnel control, these cases were awfully fascinated with sociological questions about agency organization and effective leadership.<sup>44</sup> Between 2010 and 2020, unitary executive theory started to develop into a debate about how to structure agencies to ensure that the President can control the outcomes of bureaucratic activity. The Court began to emphasize not only the President's power to choose personnel

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38. On the origins of unitary executive theory, see *Morrison v. Olson*, 487 U.S. 654, 697-729 (1988) (Scalia, J., dissenting). On its subsequent intellectual history, see Sunstein & Vermeule, *supra* note 12, at 99-105.

39. 272 U.S. 52, 176 (1926).

40. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191-92, 2206 (2020).

41. 295 U.S. 602, 631-32 (1935).

42. 561 U.S. 477, 492 (2010).

43. 140 S. Ct. at 2192.

44. See, e.g., *Free Enter. Fund*, 561 U.S. at 496 (explaining why the agency's "novel structure" transforms the Board's independence); *Seila L.*, 140 S. Ct. at 2194, 2199-2200 (exploring the differences in design between the Consumer Financial Protection Bureau (CFPB) and "multi-member expert agencies").

but also his ability to effectuate policy preferences through an optimally designed institution.

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

This trend reached its zenith in *United States v. Arthrex*,<sup>45</sup> a case about the constitutionality of a tribunal nestled within the Patent and Trademark Office called the Patent Trial and Appeal Board (PTAB). The PTAB is staffed by judges who specialize in patent disputes. According to the Court, the problem with the PTAB was that these judges could issue decisions that the agency’s Director, a presidential appointee, could not reverse. The PTAB could thus “bind the Executive branch,” even though its judges were not appointed by the President and could not be fired at will by the agency’s Director.<sup>46</sup> Although the Director possessed many other statutory tools to control the Board and shape its decisions, the Supreme Court concluded that the PTAB wielded too much power for anyone other than a political appointee. So, the Court held that the agency’s Director must, as a matter of constitutional right, possess the power to review and revise each and every one of the PTAB’s decisions.

*Arthrex* is particularly remarkable for its remedy. The case came to the Court as a classic hiring-and-firing puzzle: administrative patent judges are not chosen by the President and they enjoy tenure protection.<sup>47</sup> One versed in unitary executive theory would have expected these to be the “problems” to solve. But the Court took a different path, subjecting the judges’ decisions to review by a political appointee rather than clarifying which personnel the President gets to choose. Rather than tinkering with appointments doctrine, the Court restructured the agency to facilitate political control of a tribunal’s decisions.<sup>48</sup> This is peak outcome control: forget who can be hired and fired; the question is whether the President’s politics can be realized in the executive branch, and the goal is to overhaul agencies to ensure that the President and his political appointees can directly control decisions made by bureaucrats.

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45. 141 S. Ct. 1970 (2021).

46. *Id.* at 1985–86.

47. *See id.* at 1978.

48. The Court had seven votes for this approach: the conservative wing—save for Justice Gorsuch, who described the Court’s remedy as a “policy choice”—along with the liberal wing, in begrudging agreement having lost on the merits. *Id.* at 1990 (Gorsuch, J., dissenting in part).

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

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

As we noted at the outset, and Justice Kagan recently observed, this approach to administrative law is not especially concerned with the Constitution's text.<sup>49</sup> After all, there is only so much one can derive from the verb "vest."<sup>50</sup> Nor is this jurisprudence particularly originalist, although it does devolve into debates about practice at the Founding.<sup>51</sup> Rather, contemporary administrative law is best understood as a purification project—a philosophical exercise built on an idealized conception of tripartite government.<sup>52</sup>

## II. THE ADJUDICATION CRISIS

Observers usually treat the two pieces of this intellectual project as complements. In the standard account of the Supreme Court's formalist turn, separate functions theory and unitary executive theory go hand in hand. Commentators disagree about the larger goal the Court is advancing through these theories—some say its jurisprudence promotes democratic accountability;<sup>53</sup> others argue

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

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

51. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2616, 2625 (2022) (Gorsuch, J., concurring); *id.* at 2626, 2641-42 (Kagan, J., dissenting).

52. See Sunstein & Vermeule, *supra* note 12, at 86 (arguing that *Seila Law* is "frankly Dworkinian").

53. See, e.g., Calabresi & Lawson, *supra* note 2, at 824.

that the Court's hostility to administrative agencies is driven by deregulatory aims.<sup>54</sup> But supporters and critics of the Roberts Court tend to agree that presidential maximalism and separation-of-powers literalism are two strands of a unified approach to the administrative state, one whose ambition is to disempower bureaucrats. The individual Justices seem to view the Court's project as coherent, too: the voting patterns in administrative-law cases fall into predictable camps for and against the new formalism.<sup>55</sup>

This Part questions the premise that these two theories work in tandem. It does so by shifting attention toward administrative tribunals. When one focuses on adjudication—rather than regulation, which is front and center in critiques of administrative law—unitary executive theory and separate functions theory seem far less compatible. In fact, the two tenets of the Court's administrative-law jurisprudence are in deep tension, and the Court's commitment to both theories threatens to pull the field apart. This conflict becomes clear when one contemplates each theory's implications for the future of administrative courts.

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54. See, e.g., Metzger, *supra* note 3, at 6 (analogizing contemporary administrative-law jurisprudence to the anti-administrative movement of the 1930s, which was “plainly political, fueled by business and legal interests deeply opposed to pro-labor regulation and economic planning”). As we point out below, it is not obvious that the two tenets of new administrative law work together to promote democracy, even when it comes to regulation. Here, the narrower and stronger point is that there is no way to reconcile the two strands of the Court's philosophy when it comes to administrative adjudication, at least not without embracing a radical and regressive conception of due process that would render many existing rights mere privileges subject to executive whim.
55. For example, the Court's most ardent supporters of separation-of-functions theory—Chief Justice Roberts and Justice Thomas—are also the staunchest proponents of presidential outcome control. See, e.g., *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 67–68 (2015) (Thomas, J., concurring) (“The Constitution does not vest the Federal Government with an undifferentiated ‘governmental power.’ . . . When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–81 (2004) (Thomas, J., dissenting) (outlining the “structural advantages of a unitary Executive”); *Stern v. Marshall*, 564 U.S. 462, 482–83 (2011) (Roberts, C.J.) (“[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.” (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961))); see also John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J.F. 374, 377 (2017) (noting that Chief Justice Roberts' majority opinion in *Free Enter. Fund* “contemplates a President who supervises the entire executive”). Conversely, those most opposed to concentrated presidential power—Justices Breyer and Sotomayor—are also most skeptical of neatly separating legislative and executive functions. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 522–23 (2010) (Breyer, J., dissenting, joined by Ginsburg, Sotomayor & Stevens, JJ.) (noting that limits on presidential power “create legitimacy”); *Stern*, 564 U.S. at 512–13 (Breyer, J., dissenting, joined by Ginsburg, Kagan & Sotomayor, JJ.) (advocating a pragmatic, functionalist approach to separation-of-powers analysis).

### A. Presidential Adjudication

Consider first the purified theory of the unitary executive. Part I described an evolution in the Court's approach to executive power, from personnel to outcome control. As we explained, unitary executive theory initially focused on the President's authority to hire and fire executive-branch officials. When it came to adjudication, this debate centered on the selection of administrative judges. Presidential power expanded over time: while most administrative judges were long hired by professional staff, the Court recently required appointment by the President or an agency head.<sup>56</sup> Yet even as executive power grew, the debate remained within the confines of the Appointments Clause. That paradigm ended with *Arthrex*, which held that, as a matter of separation-of-powers law, a political appointee needed authority to review and overturn decisions made by an administrative tribunal.<sup>57</sup>

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

But there is little reason to expect the Court to take the narrow path. In other contexts, the Justices most committed to increasing the President's control over the bureaucracy have expressed skepticism about the idea that mechanisms of control could ever be adequate substitutes for one another. Take, for example, *Free Enterprise Fund*, in which the Court concluded that officials on the Public Company Accounting Oversight Board (PCAOB) – which sits within the Securities and Exchange Commission (SEC) – could not have tenure protection because the SEC's commissioners were also insulated from removal.<sup>60</sup> In that case,

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56. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018); see Jack M. Beermann & Jennifer L. Mascott, *Research Report on Federal Agency ALJ Hiring After Lucia and Executive Order 13843*, ADMIN. CONF. OF THE U.S. 3 (May 29, 2019), <https://www.acus.gov/sites/default/files/documents/Submitted%20ofinal%20draft%20JB.pdf> [<https://perma.cc/9SXD-XM6Z>].

57. See *supra* notes 45-48 and accompanying text (discussing *Arthrex*).

58. See, e.g., Rebecca Eisenberg & Nina Mendelson, *Limiting Agency Head Review in the Design of Administrative Adjudication*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Feb. 21, 2022), <https://www.yalejreg.com/nc/symposium-decisional-independence-06> [<https://perma.cc/N4JF-PR4W>].

59. *Id.*

60. *Free Enter. Fund*, 561 U.S. at 508-09.

Chief Justice Roberts doubted that any of the tools of control wielded by the SEC over the PCAOB could serve as a substitute for the power to fire board members.<sup>61</sup> The tools in the SEC's possession were, as Justice Breyer took pains to point out in dissent, quite numerous.<sup>62</sup> Perhaps most telling, they included the power to review and revise any policy adopted by the Board.<sup>63</sup> If that power was not an adequate substitute for the power to fire board members in *Free Enterprise Fund*, it is far from clear why the power to fire agency judges would be considered a substitute for the power to review their decisions in other contexts.

Thus, it seems likely that *Arthrex* marks not an endpoint but the beginning of a new line of Article II doctrine holding that the President possesses the power to review and direct decisions made by any executive-branch official.<sup>64</sup> Even if the Court goes no further than it did in *Arthrex*, the developments that culminated in that case already put us in a world radically different than the one we recently inhabited. Just a few years ago, most agency adjudicators were appointed by career staffers and had independence safeguarded by statutes and norms that gave them, rather than political appointees, the final word within the agency as to the proper resolution of a particular dispute.<sup>65</sup> Now, both forms of insulation may be unconstitutional. The Court has tolerated and encouraged the demise of the competitive civil service for administrative judges.<sup>66</sup> And it has

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61. *Id.* at 504-05.

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

63. *Id.*

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

65. See Beermann & Mascott, *supra* note 56, at 3, 5-10; see also Christopher J. Walker & Matthew Lee Weiner, *Agency Appellate Systems*, ADMIN. CONF. OF THE U.S. 31 (Dec. 14, 2020), <https://www.acus.gov/sites/default/files/documents/Walker%20Wiener%20Agency%20Appellate%20Systems%20Report%20-%2012.14.2020.pdf> [<https://perma.cc/4VFE-X98R>] (“To be sure, some agencies have by statute or regulation the authority to review any hearing-level agency adjudication.”).

66. After the Court in *Lucia v. SEC* held that SEC administrative-law judges (ALJs) were officers under the Appointments Clause, the Trump Administration issued Executive Order 13843 exempting ALJs from the Office of Personnel Management’s competitive hiring process. 83 Fed. Reg. 32755 (July 10, 2018). The Biden Administration has maintained this exemption. See Exec. Order No. 14029, 86 Fed. Reg. 27025 (May 14, 2021); see also Paul R. Verkuil, *Recent Developments: Presidential Administration, the Appointment of ALJs, and the Future of for Cause Protection*, 72 ADMIN. L. REV. 461, 465-68 (2020) (discussing post-*Lucia* threats to the “efficiency of selection and politicization of hiring” of ALJs); Beermann & Mascott, *supra* note 56, at 26-45 (tracing the decline of the competitive civil service after *Lucia*). Absent a flurry of congressional action shifting to Article III judges the task of selecting agency adjudicators, this new system of selection is mandatory.



subjected individual judges' decisions to review and redetermination by political officials.<sup>67</sup>

This result is a startling repudiation of the constitutional settlement that accepted agency adjudication in the first place. During the early decades of the twentieth century, many lawyers and judges saw the growth in agency adjudication as among the most troubling developments of the burgeoning administrative state.<sup>68</sup> As Daniel R. Ernst and others have chronicled, securing impartiality and fairness in administrative adjudication was central to lawmakers' ultimate (uneasy) acceptance of a project that located so much federal adjudication in agencies rather than in Article III courts.<sup>69</sup> The Administrative Procedure Act of 1946 (APA) codified this settlement. It prohibited administrative judges who presided over in-person, on-the-record hearings from participating in an agency's investigating or charging functions, even for matters unrelated to the case before the judge.<sup>70</sup> Furthermore, the APA required that those judges receive

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

68. See generally DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014) [hereinafter ERNST, *TOCQUEVILLE'S NIGHTMARE*] (discussing the shift in American attitudes toward the administrative state). See also Daniel R. Ernst, *Dicey's Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform*, 90 GEO. L.J. 787, 787-88 (2002) (explaining that the Administrative Procedure Act's (APA) origins lie in American Bar Association (ABA) proposals in the 1930s, which attempted to "keep administrative lawmaking subordinate to . . . judge-made law"); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219 (1986) ("The story begins in May 1933, when the [ABA] . . . [became] convinced that the 'judicial function' then lodged in administrators' hands should be transferred to an independent tribunal . . ."); Joanna L. Grisinger, *The Hearing Examiners and the Administrative Procedure Act, 1937-1960*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 2 (2014) (noting that federal hearing officers "were crucial figures in the movement to reform administrative law in the 1930s"); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 957-59 (2011) (describing early twentieth-century debates over judicial review of Interstate Commerce Commission orders). To be sure, one should not infer from this progressive-era concern that agency adjudication was not prevalent prior to the twentieth century. As Jerry L. Mashaw, Gregory Ablavsky, and others have shown, adjudication was central to administration throughout the nineteenth century. See, e.g., JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012); GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* (2021); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).

69. ERNST, *TOCQUEVILLE'S NIGHTMARE*, *supra* note 68, at 2-6; see also other sources cited *supra* note 68 (situating the APA as a response to concerns about administrative adjudicators' impartiality).

70. 5 U.S.C. § 554(d)(2) (2018).

tenure protection and banned *ex parte* communication within agencies.<sup>71</sup> In other words, the APA cemented an idea of an internal separation of functions within agencies that mapped to the external separation of functions that was among the most distinctive features of the U.S. Constitution.<sup>72</sup>

At the time, the Supreme Court wholeheartedly embraced this settlement. Surveying the broad purposes of the APA just a few years after the Act became law, the Court wrote that one of the fundamental “administrative evils sought to be cured or minimized” by the APA was “the practice of embodying in one person or agency the duties of prosecutor and judge.”<sup>73</sup> The “evil” of this practice was that it undermined the *impartiality* of adjudication. As the Supreme Court saw it, adjudicators’ freedom from political influence, pressure, or control was the backbone of the new administrative state.<sup>74</sup>

The Court thus characterized the APA as a compromise concerned, first and foremost, with the independence of administrative courts. This characterization can sound foreign to modern ears. Over the past several decades, adjudication has receded from the foreground of administrative law and, thus, from accounts of the administrative state.<sup>75</sup> But administrative judges were central to the Supreme Court’s conception of the APA in 1950. In the first wave of litigation after the statute’s enactment, the Court understood the APA as an effort to create an impartial judiciary outside of Article III.

The context for this characterization of the APA is as important as the settlement itself. The account above comes from *Wong Yang Sung v. McGrath*, a case in which a Chinese ship worker argued that his deportation hearing was procedurally defective because the Immigration and Naturalization Service (INS) had failed to implement the strict separation of functions demanded by the APA’s requirements for formal adjudication.<sup>76</sup> Wong had little hope under immigration statutes, which said nothing about a hearing of any kind before deportation. Yet the Supreme Court reasoned from general principles of due process that a hearing was required.<sup>77</sup> And if a hearing was required, the Court concluded, the APA required that it be before an impartial adjudicator. Immigration inspectors,

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71. *Id.* § 554(d)(1); *id.* § 7521.

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

73. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

74. *Id.* at 41-44 (quoting at length the studies and committee reports leading up to the passage of the APA).

75. See *infra* note 202.

76. *Wong Yang Sung*, 339 U.S. at 35-36.

77. *Id.* at 49-50 (relying on *Yamataya v. Fisher*, 189 U. S. 86 (1903), for the proposition that deportation requires some sort of hearing, “at least for aliens who had not entered clandestinely”).

who might preside over hearings one day and prosecute cases in such hearings the next, exemplified the “commingling of functions” that the APA had been designed to prevent.<sup>78</sup>

Political control of adjudication turns this constitutional settlement on its head. Even more surprising, it is also a stark departure from unitary-executive traditions. For as long as unitary executive theory has existed, its adherents have recognized an exception to presidential control when it comes to adjudication.<sup>79</sup> James Madison himself drew such a distinction in his discussions of the comptroller of the Treasury, whom Madison thought could be insulated from presidential removal because he exercised quasi-judicial functions.<sup>80</sup> Justice Scalia reserved the possibility that adjudication was exceptional in his *Morrison v. Olson* dissent, the founding document of modern unitary executive theory.<sup>81</sup> Even Justice Kagan, who coined the now-ubiquitous phrase “presidential administration” in her article extolling the virtues of increased White House control over the bureaucracy,<sup>82</sup> was reluctant to extend her theory to adjudication.<sup>83</sup>

Indeed, the opinion typically held up as the canonical articulation of unitary executive theory, *Myers v. United States*,<sup>84</sup> itself accepted that adjudication is different.<sup>85</sup> *Myers* contains an important passage that appears to limit presidential

78. *Id.* at 44 (quoting FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941)).

79. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013) (“Commentators widely agree that presidential direction is highly constrained in th[e] domain [of adjudication.]”); Sunstein & Vermeule, *supra* note 12, at 102 (discussing the *Myers* exception for adjudication).

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

81. 487 U.S. 654, 725 (1988) (Scalia, J., dissenting). The *Morrison* dissent questioned how sharp the distinction between judicial and executive functions is. But Justice Scalia relied on that distinction to defend executive power over “quintessentially executive” activities like criminal prosecution. *Id.* at 706.

82. Kagan, *supra* note 8, at 2246.

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

84. 272 U.S. 52, 135 (1926).

85. Chief Justice Roberts’ opinion in *Seila Law* highlights the now-canonical status of *Myers* among contemporary supporters of unitary executive theory. In his majority opinion, the Chief Justice treats *Myers* as providing both the doctrinal authority for a strong unitary executive theory as well as the conceptual framework governing the application of the theory. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197-99 (2020).

control over “quasi-judicial” activity.<sup>86</sup> After concluding that the President could fire his Postmaster, Chief Justice Taft explained that the President’s authority over the executive branch was not absolute: “[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.”<sup>87</sup> This passage has long been understood to distinguish adjudication from other executive-branch functions as the one activity that can—and, in Taft’s view, should—be insulated from politics.

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

### B. Article III Essentialism

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

Recall the separation-of-functions theory we described in Part I. This approach to separation-of-powers law aims to reduce government activities to their essence and to isolate power in the proper branch of government. Congress is supposed to make the laws. The Executive is supposed to enforce the laws. The judiciary is supposed to adjudicate disputes concerning the application of the

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86. *Myers*, 272 U.S. at 135; see also Sunstein & Vermeule, *supra* note 12, at 102 (“[T]he *Myers* Court recognized that adjudicatory authority is distinctive, in the sense that its exercise might be immunized from presidential influence or control.”); Richard J. Pierce, Jr., *The Court Should Change the Scope of the Removal Power by Adopting a Purely Functional Approach*, 26 GEO. MASON L. REV. 657, 670 (2019).

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

laws. Or at least that is the simple version of separation-of-functions formalism that undergirds many of the Court's recent separation-of-powers cases.

Within this framework, an enormous amount of activity that currently takes place within the administrative state should be the business of the judiciary, not the Executive. Administrative officials are pervasively empowered to engage in what lawyers classically think of as judging: they hold hearings in which they apply law to contested facts in order to resolve disputes between parties. Administrative-law judges working within the SEC adjudicate securities-fraud claims, levying fines and other penalties. Immigration judges working within the Justice Department adjudicate deportation charges against noncitizens, with the ultimate power to order those noncitizens deported from the United States (in many instances, with no access to judicial review of those orders). Reflecting their role, these officials are often denominated "judges" and organized by statute into "courts." Thus, we have a massive system of Article II courts and judges in a constitutional regime where both are supposed to be located in Article III. This is the puzzle of non-Article III tribunals, which generations of scholars have worked to resolve.<sup>88</sup>

To those pursuing the purification project, it seems there is but one available fix for this problem: our modern system of administrative adjudication is unconstitutional. If it violates the separation of powers for executive-branch officials to engage in activity that looks suspiciously like lawmaking, it similarly should violate the separation of powers for those officials to engage in activity that looks suspiciously like judging. And if the sole solution to excessive delegation of lawmaking power is to require Congress to make laws, one would think the sole solution to misplaced adjudicative authority would be to remove adjudication from the administrative state and lodge it in Article III courts.

This conclusion would completely transform the structure of the federal government. Some Article III purists welcome this development.<sup>89</sup> Steven G. Calabresi, for example, has argued for a dramatic expansion of the federal judiciary on the ground that "one cannot overstate the threat" that administrative judges pose "to the separation of powers under our Constitution."<sup>90</sup> Most separation-

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88. For a recent attempt to solve this puzzle, see William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1514 (2020). For examples of additional attempts, see *infra* notes 201 to 204.

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

90. Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill* 22 (Northwestern Univ. Pritzker Sch. of L. Pub. L. & Legal Theory Series, Paper No. 17-24, 2017), <https://archive.thinkprogress.org/uploads/2017/11/calabresi-court-packing-memo.pdf> [<https://perma.cc/D4CN-27E3>].

of-functions theorists, however, have been reluctant to embrace the logical implication of their theory. Instead, they have advanced two arguments to save administrative adjudication.

The first insists that administrative courts are qualitatively different from Article III courts. In this vein, scholars have distinguished “courts” from “tribunals” and “judicial” power from the type of power that judges in agencies possess.<sup>91</sup> This line of thought leans heavily on formalism about the nature of government functions; the basic approach is to define the problem away by insisting that judging may occur outside Article III so long as it is not the specific *kind* of judging reserved for federal courts. Thus, some scholars argue that most adjudication in the administrative state does not amount to an exercise of “judicial power.”<sup>92</sup> Because it is judicial power – not the act of adjudication more broadly – that the Constitution vests in Article III tribunals, executive-branch officials can engage in all the adjudication they want without creating a constitutional problem. All one has to do is define agency adjudication so as not to constitute an exercise of the “judicial power” the Constitution vests in Article III courts.

The trouble with this definitional “fix” is that it proves too much. This approach could be used to dissolve *all* of the separation-of-functions problems identified by the current Court, not just the problems associated with adjudication. Consider the Court’s obsession with the possibility that administrative agencies are usurping Congress’s lawmaking function. The Constitution separates out and reserves to Congress only the exercise of “legislative power” – not all “lawmaking” or “policymaking.” Thus, as Eric A. Posner and Adrian Vermeule argued in the context of the nondelegation doctrine, one could easily decide by definitional fiat that policymaking by the Executive pursuant to a valid congressional delegation never amounts to an exercise of “legislative power” reserved to Congress.<sup>93</sup> Defining terms in this fashion dissolves the nondelegation problem in the same way that one can justify agency adjudication by defining “judicial power” to include only matters currently adjudicated by Article III tribunals.

Separation-of-powers purists usually oppose such tidy solutions. In the nondelegation context, proponents of separation-of-functions theory reject the definitional fix because they are committed to an intuitive mode of legal analysis that draws on commonsense – rather than semantic or historical – distinctions between the three forms of government power. This jurisprudence does not parse fine distinctions between terms like “legislative power” and “lawmaking,” nor does it pursue an historically grounded understanding of those terms. The Court’s method is more instinctive: if government officials make a decision that

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91. See, e.g., Baude, *supra* note 88, at 1527; Pfander, *supra* note 89, at 672.

92. E.g., Baude, *supra* note 88, at 1555.

93. Posner & Vermeule, *supra* note 15, at 1756.

feels like an act of lawmaking, then at least five Justices believe Congress is required to make that decision. This is the logic of recent nondelegation cases like *West Virginia v. Environmental Protection Agency* and *Gundy*.<sup>94</sup> The Court has taken a similar approach in cases concerning executive power. In that context, the same Justices describe prosecutorial decisions as the archetypical exercise of Article II power, despite the fact that federal prosecutors did not exist for the first hundred years of the nation's history.<sup>95</sup> This gestalt jurisprudence builds from gut feelings about which form of government power is at stake. Its foundational premise is that each branch has an essential function, which cannot be defined away.

One would expect an analogous approach to the task of separating executive and judicial functions. If legislative and executive power are distinguished by whether an action feels more like lawmaking or law enforcement, it seems judicial power would be assessed similarly. Departing from that approach when it comes to the constitutionality of agency adjudication makes the new formalist project look either incoherent or hypocritical.

The second conceptual move formalists make to justify administrative courts is to accept that adjudication is judging but to insist that certain *kinds of cases* can be heard within Article II.<sup>96</sup> This approach focuses on the interests at stake in a particular dispute rather than the nature of the tribunal. It is essentially an exercise in revisionist history. Scholars start by noting that adjudication by executive-

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94. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (concluding that “a decision of such magnitude and consequence [as the EPA’s promulgation of its Clean Power Plan] rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body”); *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

95. *See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020).

96. *See, e.g., Caleb Nelson, Vested Rights, “Franchises,” and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1431 (2021) (“[V]arious branches of government play different roles when different types of legal interests are at stake . . . .”); For some scholars, these two methods of justifying non-Article III adjudication are related. William Baude, for example, argues that the nature of the interest at stake in an adjudication determines whether it is an exercise of “judicial power.” In his approach, adjudication involves the “judicial power” vested in Article III courts only if it deprives a person of life, liberty, or property that was protected by the Due Process Clause in the nineteenth century. Other adjudications are not exercises of that “judicial power” and therefore present no separation-of-powers concern. *See Baude, supra* note 88, at 1520–21. As this argument illustrates, one can resolve the puzzle of non-Article III tribunals both by redefining the nature of a dispute and by focusing on the interest at stake in a particular case. Our goal is to identify these two distinct conceptual moves, not to suggest that they are mutually exclusive.

branch officials has a long historical pedigree, dating back to before the twentieth-century rise of the modern administrative state.<sup>97</sup> One might take this history as powerful evidence *against* separation-of-functions formalism; after all, it is strange to argue that separating functions is a constitutional tradition when executive-branch adjudication has been with us since the Founding. But scholars use this history differently, mining the past in an effort to explain why most—but not all—administrative adjudication today is consistent with the Constitution’s separation of powers.<sup>98</sup>

Their argument proceeds as follows. In the nineteenth century, it was widely accepted that adjudication by executive-branch officials was sometimes constitutionally permissible.<sup>99</sup> Whether Article III judicial process was required turned, under then-orthodox thinking about due process and the separation of powers, on the type of interest at stake in the adjudication. Liberty and property protected by the Due Process Clause were “private rights” that could be taken only by judicial process.<sup>100</sup> Other interests, often labeled “privileges,” could be infringed by Congress or the Executive without federal-court involvement. So, the world was divided into two categories: private rights and everything else.<sup>101</sup> A deprivation of the former required due process, which meant a full hearing in an Article III court. A deprivation of the latter was an executive matter requiring no Article III involvement. Due process and Article III were thus inextricably linked.

Separation-of-functions formalists argue that this old distinction between private rights and everything else should today dictate which claims must be resolved by Article III courts. But they have a modern twist on this old approach, one that severs the link between due process and Article III: they argue that if a dispute could have proceeded in the executive branch during the 1800s because

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97. See, e.g., Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 576–82 (2007).

98. *Id.*; see, e.g., Kent Barnett, *Due Process for Article III: Rethinking Murray’s Lessee*, 26 GEO. MASON L. REV. 677, 691 (2019); Baude, *supra* note 88, at 1520–21.

99. See Nelson, *supra* note 96, at 1433 (summarizing this “nineteenth century framework”).

100. *Id.*

101. Some proponents of this school of thought further subdivide these categories. See, e.g., Nelson, *supra* note 97, at 566 (adopting a typology broken into public rights, private rights, and quasi-private privileges); John Harrison, *Public Rights, Private Rights, and Article III*, 54 GA. L. REV. 143, 143 (2019) (distinguishing public rights from private rights and private privileges). More recently, Caleb Nelson has added “franchises” to his earlier typology. Nelson, *supra* note 96, at 1438. Although these typologies differ slightly, and continue to proliferate, they all adopt a basic, first-order distinction between interests that can be infringed without a federal court and “real” private rights that belong in Article III. See Nelson, *supra* note 96, at 1433 (describing the distinction between public and private rights as the first “key distinction” in this framework).



it did not then implicate due process, it is fine to keep that claim in Article II—regardless of whether courts today would conclude that the dispute implicates due process.<sup>102</sup>

The revisionists thus borrow old ideas about due process and the separation of functions to justify modern administrative courts. But again, there are problems with this neat solution to the problem of agency tribunals. Most obviously, this “fix” still requires a radical overhaul of the executive branch. No one, least of all the formalists on the Supreme Court, is willing to conclude that due process is irrelevant to all matters currently adjudicated by executive-branch officials. Large swaths of administrative adjudication implicate interests traditionally understood to constitute liberty and property rights under the Due Process Clause. Those committed to a nineteenth-century worldview would demand that such cases—and thus a significant portion of the administrative docket—be moved to Article III.<sup>103</sup> (This is precisely the point for those who want patent and securities disputes in federal courts. Our observation is merely that this defense of administrative tribunals would eliminate many of them.)

The deeper problem is that this theory of administrative tribunals rewrites due-process law. Many claims that once belonged in the domain of privileges have long been held to implicate property and liberty rights protected by the Due Process Clause. In modern constitutional law, when an immigration judge orders a long-term-resident noncitizen to be deported from the United States, she deprives that person of a liberty interest that the Supreme Court decided more than a century ago was protected by due process.<sup>104</sup> Similarly, when a Social Security judge terminates a person’s welfare benefits, he deprives that person of a legal right to payments the Court has treated as property for more than fifty years.<sup>105</sup> The Supreme Court steadily expanded due-process rights over the course of the

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102. Nelson, *supra* note 96, at 1432 (“Various scholars with an interest in originalism have embraced [the private rights argument] to distinguish the kinds of legal claims that Congress can commit to administrative agencies from the kinds of legal claims that trigger the need for ‘judicial’ power.”).

103. See, e.g., *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1381, 1386 (2018) (Gorsuch, J., dissenting, joined by Roberts, C.J.) (“[O]nly courts could hear patent challenges in England at the time of the Founding . . . . Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But . . . the loss of a right to an independent judge is never a small thing.”).

104. See *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903). Indeed, as Part III explains, as far back as the Founding, many lawyers and judges believed that deportation deprived noncitizens of a liberty protected by the Due Process Clause (and not just because deportation might require taking a person into custody). But here a simpler point is what matters: the Supreme Court has recognized that liberty interest for over a hundred years.

105. See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

twentieth century.<sup>106</sup> If Article III tracked these doctrinal developments – if every claim that now implicated due process required a federal judge – we would be back to where we started: the fix for administrative courts would be to abolish most of them.

There are only two ways to avoid this conclusion. The first is to abandon a century of due-process development and revert to a nineteenth-century understanding of what counts as property or liberty. Under this approach, any right recognized as liberty or property in the last hundred years becomes a mere privilege again. While Justice Thomas may be open to this doctrinal revolution, most separation-of-functions formalists will not go so far as to resurrect the nineteenth-century boundaries of the rights/privilege distinction.<sup>107</sup> Justice Gorsuch, for example, is openly opposed to the idea that executive-branch officials should be entirely free to deal with all but the most traditional of liberty and property claims however they see fit, without any requirements of fairness, procedural regularity, or judicial oversight.<sup>108</sup>

The only other way to avoid this conclusion is to invent a distinction among due-process claims that exists nowhere in the Constitution. To preserve most agency tribunals, some formalists draw a sharp line between “classical” and “modern” rights. In this account, traditional liberty and property interests require Article III courts, but property and liberty rights recognized after the turn of the twentieth century can be adjudicated in administrative agencies, where due process exists in a “watered down” form.<sup>109</sup>

One might call this the *new rights theory* of administrative adjudication. This theory is a gloss on the long-standing debate over adjudication of “public” rights.<sup>110</sup> Recognizing the tenuousness of public-rights doctrine, Article III formalists have begun to argue that administrative tribunals are acceptable so long as the rights in question are “modern.” While the Roberts Court has not yet adopted this theory explicitly, the distinction between old and new rights under-

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106. See, e.g., notes 104-105 and accompanying text; Baude, *supra* note 88, at 1580; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1650-55 (1992); David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1780 (2013).

107. See, e.g., *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (citing Nelson, *supra* note 97, at 561-74) (adopting Caleb Nelson’s rights taxonomy and classifying “statutory entitlements” as privileges).

108. See, e.g., *Patel v. Garland*, 142 S. Ct. 1614, 1636 (2022) (Gorsuch, J., dissenting).

109. Baude, *supra* note 88, at 1578-80.

110. See Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 280-83 (2022) (summarizing that debate and collecting sources used to justify each side).

girds its separation-of-powers jurisprudence. In cases on non-Article III tribunals, Chief Justice Roberts, Justice Gorsuch, and Justice Thomas have asserted that “old” rights require Article III courts.<sup>111</sup> The two new members of the Court’s conservative wing—Justices Kavanaugh and Barrett, both professed originalists and separation-of-functions purists—almost certainly agree. A majority for the proposition that “old” property and liberty claims demand Article III courts leaves only the question whether “new” rights receive any process at all—that is, whether this Court will opt for a complete or partial retrenchment of due process.

A wholesale reversion to nineteenth-century due-process law seems highly unlikely. Thus, with a new majority on the Court, the “new rights” theory is on the rise. This approach has the benefit of being more moderate than a theory that would abolish non-Article III tribunals or revive the rights-privilege distinction: it forces only some rather than the overwhelming majority of administrative adjudication into federal courts, and it requires basic fairness in administrative tribunals.

But it achieves this goal through ad hoc, largely indefensible reasoning. Neither textualism nor originalism—allegedly the Court’s dominant methodologies—can explain the choice to consign millions of liberty and property claims to administrative courts while cherry-picking certain property disputes for Article III courts.<sup>112</sup> There is no basis in the text of the Due Process Clause for a distinction between old and new rights. Nor is there an originalist justification for this line-drawing exercise. Founding Era lawyers would have been shocked to learn that the government could take a person’s recognized due-process rights without a trial before an Article III tribunal.<sup>113</sup> Ultimately, then, to the extent that the new rights theory avoids the radical implication that rights recognized in the last century are not really rights at all, it does so only by arguing on grounds that are orthogonal to the basic approach of the Court’s purification project and by inventing doctrinal categories that are antithetical to the purported aims of that project.

When all is said and done, the problem remains: to be a formalist about the separation of powers, one has to bend over backward to explain why there are so many courts and judges inside the administrative state. For the separation-of-

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111. See, e.g., *Oil States Energy Servs. v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1381, 1386 (2018) (Gorsuch, J., dissenting, joined by Roberts, C.J.); *B&B Hardware, Inc.*, 575 U.S. at 171 (Thomas, J., dissenting); *Stern v. Marshall*, 564 U.S. 462, 482–83 (2011) (Roberts, C.J.).

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

113. See Adam B. Cox, *The Invention of Immigration Exceptionalism* 9–14 (Jan. 18, 2023) (unpublished manuscript) (on file with author).

functions purist, the simplest conclusion is that all this federal adjudication belongs in Article III courts.

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There is thus a basic conflict between presidential maximalism and separation-of-functions essentialism. When it comes to adjudication, the tenets of the Court's administrative-law doctrine advance diametrically opposed values and drive toward incompatible institutional solutions. One prizes maximum political control of adjudication, while the other insists upon adjudicators' insulation and independence. One theory would dismantle the bureaucracy's internal separation of functions, while the other would relocate agency adjudication to the Article III judiciary. This is a separation-of-powers jurisprudence at war with itself.

This glaring conflict has been underappreciated in debates about administrative law, which tend to focus on rulemaking.<sup>114</sup> In the regulatory domain, presidential maximalism and separation-of-functions essentialism are typically understood as parallel theories, animated by the shared goal of shifting power toward democratically accountable actors. Democracy, the Justices themselves have repeatedly emphasized, is what unites the Court's nondelegation and executive-power cases.<sup>115</sup>

To be sure, once we see the conflict between separate functions theory and unitary executive theory in the context of adjudication, one might begin to wonder whether they are really compliments in the rulemaking context. While the Supreme Court claims that "democracy" unites those ideas, the Court itself has adopted mutually incompatible conceptions of democracy in different strands of its administrative-law jurisprudence. In nondelegation cases, the standard argument for constraining regulators and empowering Congress is that the cumbersome collective decision-making process laid out in Article I, Section VII yields high-quality laws reflecting deep and thus legitimate agreement.<sup>116</sup> In removal-

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114. See *infra* note 203 (collecting sources describing adjudication as understudied).

115. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508-09 (2010); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *Morrison v. Olson*, 487 U.S. 654, 697-729 (1988) (Scalia, J., dissenting).

116. See, e.g., *West Virginia*, 142 S. Ct. at 2626 (Gorsuch, J., concurring) ("When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives."); see also John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 192, 198 (2007) ("Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking.").

power cases, on the other hand, the argument runs the other way: policymaking ought not be too hard, lest the President be unable to implement his mandate.<sup>117</sup>

These doctrines are built on conflicting ideas about the values that democracy serves. In one line of cases, presidential policymaking is more democratic because it is highly responsive to majoritarian preferences. In the other, congressional lawmaking is more democratic because the cumbersome, purposefully inefficient legislative process forces slower, deliberative decisions and requires collaboration that safeguards minority interests. Notably, on this latter theory, policymaking by an agency through the public notice-and-comment process—which was modeled on the legislative process—is *more* democratic than unilateral presidential control because collective procedures are what make a policy democratic.<sup>118</sup> All of this complicates the argument that the Court’s regulatory jurisprudence is coherent.

Still, there is something different about adjudication. When it comes to rulemaking, it makes at least superficial sense to contend that administrative-law doctrine ought to shift policymaking toward elected officials. And there is at least a plausible theory under which the President is closer to the ideal lawmaker than an unelected bureaucrat is. These arguments are intelligible, if not ironclad. For adjudication, however, there is no such theory—no plausible account under which the President is closer to the ideal judge than is an insulated career official who resolves legal disputes using court-like procedures in a court-like setting. Because the activity in question is judging rather than lawmaking, the conflict between the two tenets of new administrative law cannot be resolved through handwaving about democracy. Instead, the Court has to decide which of its theoretical commitments matters more.

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

It is clear how this battle will end. Decisions like *Arthrex* make plain that the Roberts Court will not be transferring millions of new cases into Article III courts. Instead, the Court will almost certainly preserve most administrative

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117. See, e.g., *Seila L.*, 140 S. Ct. at 2203 (“The Framers deemed an energetic executive essential . . . . Accordingly, they chose not to bog the Executive down with the ‘habitual feebleness and dilatoriness’ that comes with a ‘diversity of views and opinions.’” (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))).

118. This conception of rulemaking as a policymaking model that mirrors the virtues of the legislative process was a key part of the APA settlement. Ironically, the theory of democracy that now animates the Court’s nondelegation cases—roughly, that “lawmaking made hard” produces better and more legitimate laws—is what gave rise to the internal separation of functions within administrative agencies and enabled the administrative state. See ERNST, TOCQUEVILLE’S NIGHTMARE, *supra* note 68.

courts and subject them to increased political control.<sup>119</sup> The Court will choose presidential adjudication.

Scholars alert to this possibility have wondered what a new era of politicized adjudication might entail.<sup>120</sup> As it turns out, they need not look far. In immigration law, political control of immigration courts has always been the norm. For those familiar with the immigration system, the Supreme Court is not moving in some uncharted or mysterious direction. It is simply exporting the pathologies of immigration law to the rest of the administrative state.

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

To appreciate this development, one needs to understand how the immigration court system works. Immigration courts are administrative tribunals located within the Department of Justice (DOJ).<sup>121</sup> The trial judges in these courts are lawyers selected by the Attorney General,<sup>122</sup> who are subject to the Attorney General's "direction and control"<sup>123</sup> and lack the tenure protection typically associated with judges in the federal civil service.<sup>124</sup> The immigration system also

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119. There may be a narrow exception for certain property disputes if the new rights theory of agency adjudication wins a majority. See *infra* Section IV.B (exploring which claims this theory leaves in administrative courts).

120. See, e.g., Eisenberg & Mendelson, *supra* note 58; Christopher J. Walker, *What Arthrex Means for the Future of Administrative Adjudication: Reaffirming the Centrality of Agency-Head Review*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (June 21, 2021), <https://www.yalejreg.com/nc/what-arthrex-means-for-the-future-of-administrative-adjudication-reaffirming-the-centrality-of-agency-head-review> [<https://perma.cc/CPA5-NBHU>] (contending that *Arthrex* merely "conforms [parent] adjudication to the standard model for federal administrative adjudication where there is agency-head review"). These scholars argue for a narrow reading of *Arthrex*. As Part II explained, we see *Arthrex* as part of a broader shift in the Court's unitary executive jurisprudence. See *supra* Part II. And as we explain in this Part, that conceptual shift moves agency adjudication toward the currently exceptional model of immigration law rather than the standard model of appellate review in which adjudication remains relatively insulated from political control, notwithstanding agency-head review.

121. See *Office of the Chief Immigration Judge*, U.S. DEP'T JUST. (July 1, 2022), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> [<https://perma.cc/PY6Y-M9YB>].

122. 8 C.F.R. § 1001.1(L) (2021).

123. Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53673 (Sept. 20, 2007) (to be codified at 8 C.F.R. pts. 1003, 1240). See Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 599 n.10 (2009).

124. 5 U.S.C. § 7521 (2018).

has an appellate court, the Board of Immigration Appeals (BIA), which the Attorney General established by order in 1940.<sup>125</sup> The BIA is entirely a creature of regulation; it has no “independent statutory existence,” which is to say, Congress never passed a law creating or requiring it.<sup>126</sup> As a result, the Attorney General has largely unfettered control over the BIA, including plenary control over the Board’s jurisdiction. Indeed, the regulations establishing the BIA treat board members as extensions of the Attorney General herself, “appointed . . . to act as the Attorney General’s delegates in the cases that come before them.”<sup>127</sup>

The docket before immigration courts is immense. Currently, there are more than 1.9 million immigration cases pending across the country.<sup>128</sup> Adjudication of these cases is unusually political, not only because immigration judges lack traditional tenure protection (and in the case of the BIA, statutory pedigree) but also because the Attorney General enjoys direct control over immigration decisions. Under a rule first promulgated in 1940, the Attorney General may refer any immigration case to himself and “re-adjudicate [it] autonomously.”<sup>129</sup> This “referral and review” authority—essentially the power to control immigration precedent—distinguishes immigration courts from other administrative tribunals. While many agencies contain appellate courts, and some permit agency directors to review adjudicator’s decisions, the Attorney General’s power to revise decisions in immigration cases *sua sponte* is exceptional.<sup>130</sup> This power makes

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125. Immigration and Naturalization Service: Delegation of Powers and Definition of Duties, 5 Fed. Reg. 2454 (July 3, 1940). See generally Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977) (tracing the origins and developments of the Board of Immigration Appeals (BIA)).

126. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 849 (2016).

127. 8 C.F.R. § 1003.1 (2021).

128. *Immigration Court Backlog Tool*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (2022), [https://trac.syr.edu/phptools/immigration/court\\_backlog](https://trac.syr.edu/phptools/immigration/court_backlog) [https://perma.cc/4CY8-VVXS]. By comparison, there are 761,028 cases pending in U.S. district courts and 33,582 cases pending in the federal courts of appeals as of March 31, 2022. *U.S. Federal Courts—Work of the Federal Judiciary—During the 12-Month Periods Ending March 31, 2013, 2018, 2021 and 2022*, ADMIN. OFF. U.S. CTS. (Mar. 31, 2022), <https://www.uscourts.gov/statistics/table/jci/federal-judicial-caseload-statistics/2022/03/31> [https://perma.cc/JX6N-VJ6T].

129. See Gonzales & Glen, *supra* note 126, at 850–51 (tracing the trajectory of referral and review); Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. 129, 130 (2017) (discussing 8 C.F.R. § 1003.1(h)(1) (2016)).

130. See Walker & Weiner, *supra* note 65 (noting that the Attorney General’s self-referral power is unusual); see also David K. Hausman, Daniel E. Ho, Mark S. Krass & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection and Precedential Rulemaking*, J.L. ECON. & ORG. (forthcoming 2024) <https://ssrn.com/abstract=3830897> [https://perma.cc/US2P-M2XZ] (exploring the Attorney General’s use of the referral power during the Trump Administration).

immigration courts and the law coming out of them quite responsive to the vicissitudes of politics.

While the Attorney General's self-referral power is a midcentury invention, political control of immigration adjudication is not. When Congress first began to build an immigration bureaucracy in the late nineteenth century, it lodged immigration enforcement in the Department of Treasury.<sup>131</sup> The federal government did this after initially contracting most enforcement out to the states.<sup>132</sup> Under those earliest immigration statutes, the decisions of immigration inspectors were subject to review by the Treasury Secretary. Congress moved immigration to the Department of Commerce and Labor in 1903 and to the newly distinct Department of Labor in 1913.<sup>133</sup> But the practice of agency-head review continued largely unchanged. When Department of Labor employees made decisions in immigration cases, they forwarded those decisions to the Labor Secretary for approval.<sup>134</sup>

In this era, deportations were relatively rare. The deportation boom did not begin until the 1920s, after the 1917 Immigration Act expanded the grounds of deportability and the government began to build bureaucratic capacity to deport larger numbers of people.<sup>135</sup> As enforcement intensified, the Secretary of Labor created an internal board to review the agency's growing immigration caseload.<sup>136</sup> That review board made nonbinding recommendations to the Labor Secretary.<sup>137</sup> It was retained when, in 1933, President Roosevelt created the INS within the Department of Labor.<sup>138</sup> And when Congress moved INS to the DOJ in 1940—in response to efforts by the Labor Secretary Frances Perkins to institute progressive reforms within the immigration service—the appellate body that had developed within the Department of Labor was recreated by regulation

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131. The first formal federal immigration-enforcement agency was the Office of the Superintendent of Immigration, which Congress created and placed in the Treasury Department in 1891. Immigration Act of 1891, ch. 551, § 7, 26 Stat. 1084, 1085. Coordinated federal enforcement really began, however, with the office of the “Chinese Inspector,” a position established to implement the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

132. See ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 136 (2020); Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092, 1099 (2013); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841-44 (1993).

133. Roberts, *supra* note 125, at 33.

134. *Id.*

135. COX & RODRÍGUEZ, *supra* note 132, at 86-87.

136. Roberts, *supra* note 125, at 33-34.

137. *Id.*

138. Exec. Order No. 6166 § 14 (June 10, 1933).



within the Justice Department.<sup>139</sup> In a flurry of administrative orders, the Attorney General established the BIA to review immigrant inspectors' decisions, made BIA rulings final, and invented the power to refer any immigration case to himself.<sup>140</sup>

Thus, the modern immigration court system was born: a network of initial decision makers; reviewed by an appellate court; subject to the Attorney General's power to self-refer. There are a few more wrinkles in the story—immigrant inspectors become “hearing examiners” and “special inquiry officers” before they are anointed “judges” in 1973,<sup>141</sup> and Congress moves immigration enforcement to the newly minted Department of Homeland Security (DHS) in 2002, leaving adjudication in DOJ.<sup>142</sup> But by the middle of the twentieth century, the basic architecture of the immigration court system is in place.

As this quick history shows, immigration adjudication has always been subject to political oversight. The country's earliest federal immigration statutes permitted the Treasury Secretary to review decisions made by immigration inspectors.<sup>143</sup> In the progressive era, immigration cases went to the Labor Secretary.

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139. Between 1933 and 1940, Frances Perkins introduced rules prohibiting immigration officers from presiding over cases they investigated, created a program that allowed Canadians who entered unlawfully to “adjust” their status, and formed a panel to investigate the Immigration and Naturalization Service's (INS) deportation policies, which she said had attracted “much odium” to the immigration service. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 98-100 (2003). These and other progressive reforms prompted “angry” Senators and Congressmen to move INS to the Department of Justice (DOJ), the federal government's main law-enforcement agency. *Id.* at 102.

140. See Gonzales & Glen, *supra* note 126, at 851 (tracing this history); Roberts, *supra* note 125, at 33-34 (same, in even more detail); see also *Bridges v. Wixon*, 326 U.S. 135, 139 n.3 (1945) (describing the BIA in 1945).

141. For the classic survey of this history, see Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 456-57 (1988). For a recent one, see Nicole Sequeira Tashovski, *Immigration Judge Independence Under Attack: A Call to Re-Evaluate the Current Method of IJ Appointment and Create a Separate Immigration Court System*, 19 HASTINGS RACE & POVERTY L.J. 173, 177-79 (2022).

142. To offer a bit more detail: after immigration moved from the Labor Department to DOJ in 1940, immigration courts lived within INS until 1983, when an internal DOJ reorganization created the Executive Office of Immigration Review (EOIR), the subagency that now houses immigration courts. See *Executive Office for Immigration Review: About the Office*, U.S. DEP'T JUST., <https://www.justice.gov/eoir/about-office> [<https://perma.cc/G78G-UA4Z>]. EOIR then stayed in DOJ when the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, eliminated INS and created two new enforcement divisions, Immigration and Customs Enforcement (ICE) and Customs and Border Protection. Many who had criticized the failure to separate immigration enforcement from immigration adjudication welcomed the idea that EOIR would remain in DOJ, though as we explain below, advocates still argue that immigration judges lack sufficient independence.

143. Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86.

After immigration courts moved to DOJ and appellate decisions became final, the Attorney General created the self-referral mechanism.

Throughout this history, there were important tussles over immigration judges' independence. Part II mentioned one landmark in that debate, the Supreme Court's 1950 decision to subject immigration inspectors to the APA's impartiality requirements in *Wong Yang Sung v. McGrath*.<sup>144</sup> But that precedent was short-lived. Six months after *Wong Yang Sung*, Congress exempted immigration adjudication from the formal-hearing requirements laid out in the APA, and a few years later, the Supreme Court rejected a challenge to the Attorney General's "supervision and control" of immigration judges.<sup>145</sup> By 1955, both Congress and the Court had concluded that immigration adjudication fell outside the protection of the APA. The statutory regime that later came to govern immigration adjudication would provide for hearings and judicial review but not judges insulated from the Attorney General's political control. And since 1891, the political leader of every federal agency that has housed immigration has had the power to review immigration decisions. From this perspective, the Attorney General's power to refer any case to himself is the culmination of a more-or-less unbroken history of political involvement in immigration adjudication.

Today, immigration courts are known as markedly political bodies. During the Bush Administration, the Attorney General's office "took political considerations into account" when selecting immigration judges.<sup>146</sup> The Attorney General who oversaw those efforts, Alberto R. Gonzales, lauded the referral and review he wielded as a "robust tool for the advancement of executive branch immigration policy."<sup>147</sup> When President Obama came to office, his Attorney General reversed or vacated a number of decisions made in immigration adjudications by Attorneys General under the George W. Bush Administration, ultimately using the power to decide immigration cases *sua sponte* to announce significant changes to asylum policies for those fleeing gang and domestic violence. More recently, in 2018, President Trump's Attorney General imposed case quotas on immigration judges to speed up deportations and effectuate the President's

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144. 339 U.S. 33 (1950).

145. Supplemental Appropriation Act of 1951, ch. 1052, 64 Stat. 1044 (exempting exclusion and expulsion proceedings from Sections 5, 7, and 8 of the APA); *Marcello v. Bonds*, 349 U.S. 302, 306, 311 (1955).

146. Off. of Pro. Resp. & Off. of the Inspector Gen., *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, U.S. DEP'T JUST. 1 (July 28, 2008), <https://www.justice.gov/opr/page/file/1206586/download> [<https://perma.cc/CND3-429Z>]; see also Jill Family, *The Crisis in Immigration Adjudication*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Feb. 15, 2022), <https://www.yalejreg.com/nc/symposium-decisional-independence-02> [<https://perma.cc/UCF6-ASHV>] (arguing for "greater decisional independence" for immigration adjudication given its politicization).

147. Gonzales & Glen, *supra* note 126, at 896.

immigration policies.<sup>148</sup> Throughout the Trump Administration, the Attorney General “made unprecedented use of referral and review” to set immigration policy via adjudication, sometimes reversing longstanding precedent on the meaning of immigration laws.<sup>149</sup>

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

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

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

Yet this is not how the debate plays out. Although some separation-of-powers formalists have argued that immigration cases belong in Article III courts, most sense the problem—dare we say the functional difficulty—with putting two million new immigration cases on the federal docket.<sup>150</sup> So, scholars turn to

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148. See Family, *supra* note 146; Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM ET), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges> [<https://perma.cc/4KPV-HMFX>].

149. Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy Through Attorney General Referral and Review*, MIGRATION POL’Y INST. 12 (2021), [https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf) [<https://perma.cc/32AP-H6BX>]; see, e.g., Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1212 (2021) (discussing *Matter of A-B-*, 28 I. & N. Dec. 199 (Att’y Gen. 2021), in which Attorney General Jeff Sessions reversed settled precedent on whether domestic violence is a basis for asylum).

150. See, e.g., Laura Ferguson, *Revisiting the Public Rights Doctrine: Justice Thomas’s Application of Originalism to Administrative Law*, 84 GEO. WASH. L. REV. 1315, 1332 (2016) (“Legal disputes

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

Most lean heavily on a distinction between new and old rights to narrow the class of claims that require Article III adjudication.<sup>151</sup> Under the theory of federal jurisdiction outlined above, only “old” liberty rights require Article III process.<sup>152</sup> Any “new” liberty rights – roughly, any due-process-protected interest recognized after the birth of the modern administrative state – can be relegated to agency adjudication.<sup>153</sup> Because the liberty interests implicated by deportation decisions are, Article III formalists contend, inventions of the twentieth century, they do not require Article III courts.

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

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over immigration . . . can implicate constitutional rights. These private elements of immigration statutes would thus require at the very least de novo appellate review, if not Article III adjudication in itself.” (footnote omitted)); *cf.* Barnett, *supra* note 98, at 691 (“[T]he text of Article III does not support the public-rights exception.”).

151. It is occasionally suggested, more radically, that Article III adjudication is not required for immigration cases because noncitizens simply lack due-process rights altogether – in other words, that foreign nationals are beyond the protection of the Due Process Clause. *See, e.g.,* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020); Diana G. Li, Note, *Due Process in Removal Proceedings After Thuraissigiam*, 74 STAN. L. REV. 793, 796–97 (2022) (critiquing *Thuraissigiam*). Even putting to one side the difficulty of squaring such a conclusion with the fact that the Due Process Clause extends to all “persons,” not just to citizens, there is essentially no historical or jurisprudential support for such a position. Since the Founding, all have agreed, for example, that noncitizens charged with criminal offenses are entitled to the protections of the Fifth Amendment, as are noncitizens whose real property is taken by government officials, and so on.
152. *See, e.g.,* Baude, *supra* note 88, at 1579–81 (distinguishing “classical” conceptions of liberty and property from new rights). Baude does not use the phrase “new liberty,” but he does use the term “new property” and he argues that both expanded in the twentieth century. *Id.* at 1580; *see also* Barnett, *supra* note 98, at 702 n.172 (advocating revival of the rights/privilege distinction and suggesting in a footnote that immigration cases involve mere privileges and thus belong in the executive branch); *cf.* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (defining “new property”). As we noted in Part II, Barnett’s is the more radical position insofar as it would render immigration entirely a matter of executive grace, with no process due as a matter of right. *See supra* Part II.
153. The point in time when “old” and “new” rights diverge for these theorists is not entirely clear. For some, it appears to be around 1900. *See, e.g.,* Barnett, *supra* note 98, at 702–03 (distinguishing nineteenth- from twentieth-century thinking about due process). For others, the line between old and new rights seems closer to the 1970s, when the Supreme Court decided *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See, e.g.,* Baude, *supra* note 88, at 1580.

The decision to exclude or deport a noncitizen often entails the arrest and detention of that noncitizen. It is hard to fathom how the loss of one's physical liberty at the hands of executive-branch officials does not count as a deprivation of the most traditional form of liberty. Certainly, this was the view of James Madison, Thomas Jefferson, and other opponents of the short-lived Alien Friends Act, a 1798 statute that authorized the President to deport any noncitizen he "judge[d] dangerous to the peace and safety of the United States."<sup>154</sup> Stressing that due process applied to "persons" and not just "citizens," Madison argued that immigrants could not be arrested or confined unless "some probable ground of suspicion be exhibited before some judicial authority."<sup>155</sup> The Alien Friends Act "expired in disgrace" in 1800 in the face of fierce, constitutionally inflected debate about immigrants' rights.<sup>156</sup> The better part of a century passed before Congress again enacted federal immigration laws authorizing exclusion or deportation. And when the Supreme Court finally confronted squarely the question of whether the arrest and detention of a noncitizen under those laws amounted to a deprivation of the traditional liberty of freedom from physical restraint, it unanimously concluded that it did.<sup>157</sup>

Of course, one could concede that the decision to *detain* a noncitizen requires judicial involvement but argue that the decision to *exclude* or *deport* a noncitizen does not. This approach would preserve Article II adjudication of the core question of many immigration cases, which is whether a person may enter or remain. In this version of new rights theory, the argument would be that the legal interest in entering or remaining in the United States – the interest infringed by the government when it orders a noncitizen deported – was not a liberty interest protected by the Due Process Clause prior to the rise of the modern administrative state.<sup>158</sup> Today, it is indisputable that a noncitizen's right to remain in the United States can be a due-process-protected interest. But being a "new" liberty, one

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154. Alien Friends Act, ch. 58, § 1, 1 Stat. 570, 571 (1798).

155. See Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1443 (2022) (quoting James Madison, *The Report of 1800 (Jan. 7, 1800)*, in 17 THE PAPERS OF JAMES MADISON 303, 318 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991)).

156. *Id.* at 1445. As Nikolas Bowie and Norah Rast point out, in addition to being a debate about immigrants' constitutional rights, the controversy over the Alien Friends Act was also a debate about the scope of Congress's Article I power to regulate immigration. *Id.* at 1431-32.

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

158. See, e.g., Nelson, *supra* note 97, at 580-81.

might argue, the right to enter or remain does not require Article III adjudication.

But even this reframing gets the history wrong. Thomas Jefferson and James Madison did not think that the Alien Friends Act was unconstitutional solely because it permitted arrest and confinement without judicial involvement. They also thought that resident “alien friends” had a liberty right in their continued residence in the country.<sup>159</sup> Taking that liberty right without judicial involvement represented a distinct constitutional violation: within the then-dominant understanding of due process – which, we explained earlier, required judicial involvement any time liberty rights were at stake – it was an unconstitutional banishment without full judicial process. To be sure, whether Jefferson and Madison’s view was correct was hotly debated at the time.<sup>160</sup> The Supreme Court did not get an opportunity to weigh in for nearly ninety years because Congress permitted the Alien Friends Act to lapse after two years and then declined for decades to enact other federal immigration legislation.<sup>161</sup> But, at the very least, the Founding Era history on the status of noncitizens’ right to remain in the United States is mixed.

Moreover, the Court finally did weigh in on the question nearly a century later. Its response belies the notion that a noncitizen’s liberty interest in avoiding deportation should be treated as “new” even by those who subscribe to the new rights theory of agency adjudication. In 1891, the Court, for the first time, considered the interest a lawful immigrant had in remaining in the United States. The question left the Court deeply divided. While five Justices concluded that this interest did not count as a right to liberty protected by the Due Process Clause, three Justices authored strident dissents from this conclusion.<sup>162</sup> Then, within a decade, the Court abandoned its initial holding and reversed course,

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159. See Bowie & Rast, *supra* note 155, at 1443 (citing James Madison, *The Report of 1800 (Jan. 7, 1800)*, in 17 THE PAPERS OF JAMES MADISON 303, 318 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991)). Madison made an exception for “enemy aliens” – that is, for noncitizens who were citizens of a nation with which the United States was at war.

160. Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties*, 5 WM. & MARY Q. 145, 151 (1948) (describing this controversy and citing a 1798 letter to Madison in which Jefferson described “the alien bill” as “so palpably in the teeth of the Constitution as to show they mean to pay no respect to it”).

161. See COX & RODRÍGUEZ, *supra* note 132, at 19-21 (explaining why Congress stayed out of the field until after Reconstruction).

162. See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); *id.* at 733 (Brewer, J., dissenting); *id.* at 746 (Field, J., dissenting); *id.* at 761 (Fuller, C.J., dissenting). Notably, Justice Field, the author of the Court’s earlier opinion sustaining the first Chinese Exclusion Acts in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), dissented. See *id.* at 744 (Field, J., dissenting).

concluding in 1903 – this time unanimously – that a noncitizen’s interest in remaining in the United States *can* be a liberty right protected by the Due Process Clause.<sup>163</sup> Thus, to treat the right to reside as some “new liberty” requires privileging a resolution by a deeply divided Court, one that lasted less than a decade before being abandoned and that conflicted with some significant Founding Era evidence.

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

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

To the extent that it has shown its hand, the Roberts Court has indicated that it will embrace presidential adjudication, leaving immigration courts in the executive branch and celebrating them as an example of democratically responsive government. The Court has not had the opportunity to be explicit about this; it

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163. *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903). *Yamataya* was not technically unanimous; Justices Brewer and Peckham dissented without writing opinions explaining their views. But there is strong reason to believe they were dissenting from Justice Harlan’s decision that *Yamataya*’s hearing *satisfied* due process – not from the first-order conclusion that her right to remain implicated the Due Process Clause. Indeed, Justices Brewer and Peckham’s opinions in other immigration cases provide powerful evidence that they shared Justice Harlan’s view that deportation implicated due process. In *Fong Yue Ting* itself, Justice Brewer dissented on the ground that deportation was banishment that required a trial before an Article III tribunal. *Fong Yue Ting*, 149 U.S. at 737-38 (Brewer, J., dissenting). So, Justice Brewer clearly believed that deportation triggered due process before a majority of the Court did so. Justice Peckham joined the Court three years after *Fong Yue Ting* was decided, but after *Yamataya*, he joined Justice Brewer in several dissents arguing for stronger due-process protections against exclusion and deportation. See, e.g., *United States v. Ju Toy*, 198 U.S. 253, 264 (1905) (Brewer & Peckham, JJ., dissenting); *United States v. Sing Tuck*, 194 U.S. 161, 170 (1904) (Brewer & Peckham, JJ., dissenting); see also *Pearson v. Williams*, 202 U.S. 281, 286 (1906) (Peckman, J., dissenting, joined by Brewer & Harlan, JJ.). Justice Harlan was the author of *Yamataya*. Thus, it is fair to conclude that the *Yamataya* Court was united in its view that deportation could deprive a person of a liberty interest protected by the Due Process Clause.

has not been asked to decide whether immigration courts violate the separation of powers and is highly unlikely to see such a case given the current state of the law. But recent cases indicate that this Court wants less Article III involvement, not more, in immigration decisions. Just last Term, in *Patel v. Garland*, the Court ruled that federal courts cannot review factual findings made by immigration judges in most deportation cases.<sup>164</sup> That conclusion does not suggest deep anxiety about executive authority over immigration adjudication. Alongside *Arthrex*—which reorganized an agency to facilitate political review of an administrative tribunal’s decisions—*Patel* signals a jurisprudence in which immigration courts live quite happily in Article II, with decreasing supervision from the federal judiciary.<sup>165</sup>

This outlook turns courts that have long been pariahs into the prototype of administrative justice. For years, scholars have derided immigration courts as unjust and overly political.<sup>166</sup> Critics argue that immigration courts depart from the promise of “decisional independence” embedded in the APA and serve as the “poster child” for the problems with politicized adjudication.<sup>167</sup> Sounding a similar tune, Judge Easterbrook recently excoriated the BIA for deferring to the Attorney General rather than the Seventh Circuit.<sup>168</sup> For these critics, susceptibility to politics is a deep flaw in immigration adjudication.

In the new administrative law, this flaw becomes a feature. If the President’s politics are supposed to permeate Article II, aspects of immigration courts that

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164. 142 S. Ct. 1614, 1627 (2022).

165. Justice Gorsuch is one notable skeptic of this approach. As Part I noted, he dissented as to the remedy in *Arthrex*, arguing that the Court should have vacated the patent tribunal’s decision rather than revising the statute to provide for review by the agency’s Director. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1990–91 (2021) (Gorsuch, J., concurring in part and dissenting in part). This partial dissent suggests some qualms about political oversight of administrative tribunals, or at least about the Court’s willingness to redesign executive agencies to facilitate presidential administration. Gorsuch also dissented in *Patel*, arguing that the Court was foreclosing “judicial review [of] . . . bureaucratic misfeasance.” *Patel*, 142 S. Ct. at 1637 (Gorsuch, J., dissenting). These dissents position Gorsuch as something of an outlier—not wholly aligned with the Court’s liberal wing on questions of administrative law, but more distrustful of the executive branch than some of his colleagues. See *infra* Section IV.A (discussing tensions within the Court’s conservative wing).

166. See Family, *supra* note 146 (making this critique and collecting sources for the claim); see also Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1648 (2016) (citing immigration judges as a prime example of the “partiality concerns” with “all agency hearings” and particularly those judges who lack the APA’s tenure protections).

167. Family, *supra* note 146.

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



have made them objects of derision become examples of a properly accountable executive branch. These courts become a model to be exported—for example, to the National Labor Relations Board, Medicare courts, or social-security tribunals. Presidential adjudication could transform longstanding institutions, making them look more like immigration courts. Recognizing this possibility helps to expand and sharpen critiques of the formalist turn in administrative law.

#### IV. THE LESSONS OF ADJUDICATION

The conventional wisdom is that the Roberts Court is antibureaucracy. Critics contend that the Court is decimating the civil service to protect big business.<sup>169</sup> The Court's supporters counter that it is taming a deep state of recalcitrant bureaucrats whose existence undermines democracy.

This Feature has told a more complicated story. It is true that the Roberts Court is using formalist constitutional doctrines to constrain regulatory policy-making. But as the preceding pages have shown, the Court is also advancing a parallel jurisprudence—one based on revisionist ideas about “new” rights—that preserves administrative tribunals and insulates their decisions from judicial oversight. This strand of the Court's jurisprudence is less skeptical of administrative institutions than a simple antibureaucracy narrative suggests.

Bringing adjudication into debates about modern administrative law thus creates a richer and, in some ways, more disquieting account of recent developments in the field. In particular, focusing on adjudication reveals two conclusions, which we explore below. First, the Roberts Court is constitutionalizing administrative tribunals. The tools the Court is using to advance its philosophy of government will make its intellectual project hard to reverse. Second, that project is deeply unstable. There is a conflict lurking in the background of the new administrative law between distinguishing government functions and expanding presidential power. Going forward, the question is how the Court will resolve that conflict and how the administrative state will change if the Court embraces presidential courts.

##### A. *A New Era of Constitutionalism*

Until recently, the story of administrative adjudication could be divided into two relatively distinct eras. The first—the era of constitutional due process—was a period in which the model for agency adjudication flowed from the Constitution and required administrative judges to be impartial and insulated from an agency's political activities. This understanding of agency adjudication had its

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169. See, e.g., Metzger, *supra* note 3, at 70-71.

origins in the early decades of the twentieth century, when Congress was dramatically expanding the administrative state. As Congress created agencies to regulate the economy, a bureaucracy to regulate immigration, and so on, it repeatedly authorized those new administrators to engage in adjudication of individual claims.

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

As courts embraced this new conception of due process, they began to impose basic requirements of fairness on administrators.<sup>170</sup> Again, the idea that courts would police the process of administrative adjudication was a departure from nineteenth-century public law. During that earlier period, executive adjudication was largely beyond the purview of federal courts. In the progressive era, by contrast, courts started to review administrative adjudication to ensure that executive-branch officials followed statutory requirements, held fair hearings, and reached decisions that had evidentiary support.<sup>171</sup> In other words, courts began to ensure that administrative officials acted in accordance with basic due-process values.

This “appellate model” of review quickly spread throughout the administrative state.<sup>172</sup> Yet even with rudimentary judicial oversight in place, many lawyers and regulated parties worried that the structure of administrative adjudication provided too little assurance of impartiality. Due process demanded more, they believed, and so they argued that greater safeguards were needed, including the establishment within agencies of an internal separation of functions—institu-

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170. See Cox, *supra* note 113.

171. *Id.*

172. See Merrill, *supra* note 68, at 940-41.

tional arrangements that would insulate adjudicators from the agency’s prosecutorial and lawmaking functions.<sup>173</sup> As Part II noted, these concerns about adjudicators’ impartiality helped propel passage of the APA in 1946. That Act laid out an elaborate set of procedures designed to make administrative judging more uniform and impartial. In those procedures, the APA captured the core theme of the first era of adjudication: the Constitution required administrative judging to be separate from politics.

This era began to unravel within a few years of the APA’s passage. Part III introduced this part of the narrative. As we explained above, the Supreme Court embraced this due-process-inspired vision of adjudication in *Wong Yang Sung* in 1950 – but did so technically as a matter of statutory interpretation (of the APA), rather than as a matter of constitutional law.<sup>174</sup> That left an opening for Congress, which responded quickly by exempting immigration adjudication from the strictures of APA.

Congress’s move in immigration law might be seen as the opening shot announcing a new era of adjudication. During this second period, due-process-inspired requirements of uniformity and impartiality gave way to widespread disuniformity in adjudication – an era of variation and statutory dominance.<sup>175</sup> Due process continued to constrain administrative courts at the margins; that is the story of *Goldberg v. Kelly*,<sup>176</sup> *Mathews v. Eldridge*,<sup>177</sup> and the other “new property” cases decided during the 1960s and 70s.<sup>178</sup> But even as these cases imposed basic constitutional constraints on administrative hearings, they embraced the idea that agency adjudication should be tailored to context,<sup>179</sup> and they accepted that Congress, not courts, should be designing these tailored adjudication regimes.<sup>180</sup>

During this second period, one might have expected the APA to supply uniformity, impartiality, and a healthy dose of process even in the absence of strong

173. See Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389, 389-90 (1948).

174. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

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

176. 397 U.S. 254 (1970).

177. 424 U.S. 319 (1976).

178. See Reich, *supra* note 152, at 734-37.

179. See *Goldberg*, 397 U.S. at 268-69.

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

constitutional constraints. After all, in *Wong Yang Sung*, the Court had been quick to assume that an administrative hearing required the APA's formal adjudication procedures.<sup>181</sup> But the standardized approach to administrative courts gave way as Congress created ever more (and ever more varied) schemes of adjudication and as the Court grew more concerned that the APA might overproceduralize administrative action. Anxiety about what Adam M. Samaha has called "undue process"<sup>182</sup> led the Court, within just a few decades, to ease its insistence on formal procedures in every administrative hearing.<sup>183</sup>

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

This is the era we have lived in for the last half-century. But now administrative law appears to be entering a third phase in which the Court will again constitutionalize and homogenize adjudication. This time, however, the Court is operating with exactly the reverse presumption of the progressive era. In the early twentieth century, the administrative state grew out of the idea that the Constitution required agency adjudication to be fair, impartial, and insulated from politics. A century later, the Court has concluded that the Constitution requires political control of adjudication.

This is about as far a cry as one could get from the original constitutional settlement that led the Supreme Court to accept a dramatic expansion in the number and type of disputes that could be adjudicated in agencies rather than federal courts. The agreement that helped cement acceptance of the modern administrative state has been inverted. As a result, impartial adjudication — once the backbone of the administrative state — has given way to a much more politicized vision of agency courts.

### B. *The Probureaucracy Court*

This is not a vision of administrative law in which the bureaucracy is thin or feeble. As we noted above, the Roberts Court is typically described as an anti-bureaucracy institution. When it comes to adjudication, however, the Court does not seem keen to downsize or disempower employees in the executive branch.

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<sup>181</sup>. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

<sup>182</sup>. Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 602-03 (2006).

<sup>183</sup>. See Bremer, *supra* note 175, at 1752.

On the contrary, the Court wants to *preserve and empower* the administrative state as a place for millions of people to resolve their legal claims.

Part III offered immigration courts as an example of this trend. In that domain, the Court serves as the savior of the administrative state, departing from the core principles of its larger project in order to maintain a massive bureaucracy of administrative courts. The antibureaucracy move would be to dismantle these courts, pushing vast swaths of dispute resolution into Article III. But as we explained above, the Court shows little appetite for such a move.

Indeed, the Court appears not only willing to tolerate the continued existence of an enormous adjudicative bureaucracy but bent on further empowering it. On the regulatory side of administrative law, the Court has ratcheted up judicial oversight: it has expanded access to federal courts,<sup>184</sup> refused to defer to agency interpretations of the statutes they administer,<sup>185</sup> and grown ever more searching and dubious about the reasons agencies give for their actions.<sup>186</sup> Yet when it comes to administrative adjudication, the Court has done the opposite: it has

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184. In litigation over the Deferred Action for Childhood Arrivals (DACA) Program, for example, judicial conservatives who once heralded the presumption against review of enforcement discretion have come to embrace broad review of the government's enforcement policies. See, e.g., *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1906 (2020) (recharacterizing DACA to avoid *Heckler v. Chaney*, 470 U.S. 821 (1985)). The Court has also expanded standing doctrine – not a typically conservative move – to permit states to challenge almost any federal policy. See Ann Woolander & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2020–22 (2019) (describing this expansion and noting that “Texas . . . notoriously obtained standing to challenge the . . . [Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)] [P]rogram on the ground that immigrants whose status was adjusted under DAPA would be able to obtain state driver’s licenses whose issuance would cost the state money”); see also Amanda Frost, *In Major Immigration Case, Both Sides Look to Academia to Untangle Three Knotty Questions*, SCOTUSBLOG (Nov. 23, 2022, 1:16 PM), <https://www.scotusblog.com/2022/11/in-major-immigration-case-both-sides-look-to-academia-to-untangle-three-knotty-questions> [<https://perma.cc/KK9A-ZFJF>] (“A glance at the Court’s docket in recent years reveals the rapid rise in state challenges to executive branch changes in policy . . .”).

185. See *supra* note 35 (discussing *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896 (2022)).

186. See, e.g., *Regents*, 140 S. Ct. at 1912, 1915 (invalidating the rescission of DACA); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573–76 (2019) (concluding that the Trump Administration’s decision to add a citizenship question to the census was pretextual and therefore unlawful). And see especially *Biden v. Texas*, 142 S. Ct. 2528 (2022), in which the Court quite clearly signaled that it would decide for itself whether the agency’s policy was rational. To be fair, the Court has not been entirely consistent about increasing judicial oversight of regulatory policy. See, e.g., Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1132–33 (2021). There is clearly some cherry-picking going on within the Court’s non-delegation jurisprudence too. But the general trend on the regulatory side of administrative law has been toward judicial intervention. The opposite is true when it comes to administrative courts, at least those the Supreme Court wants to leave in the executive branch.

curtailed Article III oversight and signaled that administrative courts will be left largely free to exercise power as they see fit.

Two cases from this past Term exemplify the Court's effort to empower administrative courts. We briefly mentioned one, *Patel v. Garland*, in Part III.<sup>187</sup> That case raised the question of what sort of review is available when an immigration judge denies discretionary relief from deportation. No one – not *Patel*, of course, but not even the government – argued that federal courts lack jurisdiction to review at least some of the factual determinations made by an immigration judge in the course of denying deportation relief. Yet that is exactly what the Supreme Court held. “Today,” Justice Gorsuch wrote in dissent, “the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual’s removal from this country, and nothing can be done about it. No court may even hear the case.”<sup>188</sup>

The second case was *George v. McDonough*, a dispute that arose after an administrative court improperly denied George veterans’ benefits by applying a regulation that misinterpreted the relevant benefits statute.<sup>189</sup> By the time the dispute made its way to federal court, even the agency had agreed that its earlier interpretation of the statute had been incorrect and that its rule was invalid. The only question was what to do about the mistake in George’s case. Despite the fact that Congress had in recent decades explicitly expanded judicial review of veterans’ benefits decisions, including by authorizing veterans to ask the agency to revisit a final benefits decision on grounds of “clear and unmistakable error,” the Court held again that nothing could be done to correct the glaring error.<sup>190</sup> Criticizing this outcome, Justice Gorsuch wrote that the Court was now “in the business of adding words to the law . . . to insulate badly mistaken agency decisions from any chance of correction.”<sup>191</sup>

It would be easy to overlook these decisions as precedents in specialist fields or as minor cases in a Term that delivered the major questions doctrine and the

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187. 142 S. Ct. 1614 (2022).

188. *Id.* at 1627 (Gorsuch, J., dissenting). Justice Gorsuch accused the majority of undermining the very “presumption of judicial reviewability of administrative action,” which he views as a necessary prerequisite to the acceptance of administrative power. *Id.* at 1637.

189. 142 S. Ct. 1953, 1961 (2022).

190. *Id.* at 1963. While *George* does not formally concern *Chevron* deference, the Court’s approach in the case stands in sharp contrast with its recent *Chevron* jurisprudence. In the *Chevron* context, the Court has made increasingly clear that it has no interest in deferring to an agency’s interpretation of the statutes it administers, and that agency action grounded in an incorrect reading of a statute should be struck down. *See supra* Section I.A. In *George*, however, the Court chose to insulate from oversight a statutory-interpretation error so clear that even the agency had admitted its mistake.

191. *Id.* at 1968 (Gorsuch, J., dissenting).

end of *Roe v. Wade*.<sup>192</sup> But *Patel* and *George* are part of the canon of new administrative law insofar as they reflect the Court's increasing interest in insulating administrative courts from judicial oversight. These cases reinforce the conclusion that this Court is not out to disempower bureaucrats and reduce the scope of the administrative state. That may be half of its intellectual project—a half focused principally on the production of agency rules and regulations. But the other half is about policing the boundary of federal-court jurisdiction. On the adjudicative side of the administrative state, the Court is engaged in docket control.<sup>193</sup> And *that* effort requires a large, uninhibited bureaucracy.

Unlike the deregulatory agenda, this part of the Court's project has exposed divisions within the conservative wing. As we noted, Justice Gorsuch dissented in *Patel* and *George*.

Justice Barrett authored both majority opinions, with the balance of the conservative bloc in lockstep. The root of Justice Gorsuch's disagreement with the majority in these cases was its refusal to follow through on the commitments underlying its broader constitutional theory. For Gorsuch, the tyrannical threat of an unaccountable bureaucracy looms just as large when agencies adjudicate as when they regulate.<sup>194</sup> He thus sees meaningful judicial oversight as crucial to preserving the rule of law and chastised the majority for conveniently forgetting that fact when it comes to administrative courts. As he wrote in dissent in *Patel*, the majority's holding “turns an agency once accountable to the rule of law into an authority unto itself. Perhaps some would welcome a world like that.”<sup>195</sup> This dissent exposes tension within the Court's administrative-law jurisprudence—specifically, disagreement about how unfettered executive power over the adjudicative bureaucracy should be. Gorsuch would discipline that bureaucracy. A solid majority would leave administrative courts alone.

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192. See *supra* Part I (tracing the rise of the major questions doctrine); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284–85 (2022).

193. See *infra* note 201 and accompanying text (noting the regressive, racialized aspect of this docket-control project).

194. In *George*, for example, Justice Gorsuch emphasized that the Department of Veterans Affairs is an agency that regularly denies benefits on the basis of “self-serving regulations inconsistent with Congress's instructions,” delays access to justice by taking seven years on average to process administrative appeals, and in recent years has been reversed ninety percent of the time on appeal before the Veteran's Court. *George*, 142 S. Ct. at 1968 (Gorsuch, J., dissenting). Gorsuch adopted a similar tone in *Patel*, describing the BIA's error as “bureaucratic misfeasance.” *Patel v. Garland*, 142 S. Ct. 1614, 1637 (2022) (Gorsuch, J., dissenting). His dissent in *Arthrex*, discussed *supra* note 48, is also consistent with the assessment that his administrative-law jurisprudence sometimes departs outside the conservative orthodoxy.

195. *Patel*, 142 S. Ct. at 1637 (Gorsuch, J., dissenting).

Yet even Justice Gorsuch seems unwilling to follow through on separation-of-functions first principles. While he expresses concern that agency courts undermine the rule of law, Gorsuch never suggests that the solution is to put those courts back into the branch of government specifically established to promote impartiality and fairness in adjudication. Instead, he calls for judicial oversight of administrative tribunals – a stark contrast with his approach in nondelegation cases, where he has repeatedly argued that oversight by Congress cannot legitimate acts of lawmaking by the administrative state.

Thus, the conservative wing of the Court is basically united in rejecting Article III essentialism. This worldview is not “anti-administrative,” at least not if that term means “hostile to a large bureaucracy” or “averse to delegating policy-making power to long-term employees in the executive branch.” The adjudicative bureaucracy is massive. There are more than eighty different federal agencies that adjudicate individual cases.<sup>196</sup> In 2013, the first and last year for which anyone has a comprehensive count, 4,726 administrative adjudicators decided more than 1,448,193 cases.<sup>197</sup> One could proliferate statistics here: 1.9 million cases pending in immigration courts;<sup>198</sup> nearly 850,000 cases pending in social-security courts;<sup>199</sup> 384,000 new cases filed annually in the Office of Medicare Hearings.<sup>200</sup> The list goes on and portrays not a withering but a robust bureaucracy.

As we pointed out above, the Court appears eager both to empower this bureaucracy *and* to pull certain claims out of the administrative state. Given the new majority on the Court, claims concerning “old” forms of property may well return to Article III courts. But liberty and property interests recognized after the nineteenth century will likely remain in the executive branch. This approach casts the federal bureaucracy as a critical extension of the federal judiciary. In this version of administrative law, the administrative state becomes a second-class court system for people whose rights are too new.

The boundaries of this bureaucracy are not random. It is not just anyone who files a disability claim or needs to defend a deportation case. The “high volume” administrative courts are social-security courts, immigration courts, Medicare courts, and veterans-affairs courts.<sup>201</sup> These are courts where poor people of

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196. *ACUS-Stanford Study*, *supra* note 6.

197. *Id.*

198. *See supra* note 128.

199. *ACUS-Stanford Study*, *supra* note 6; *see also Annual Statistical Supplement, SOC. SEC. ADMIN.: OFF. RET. & DISABILITY POL'Y* (2020), <https://www.ssa.gov/policy/docs/statcomps/supplement/2020/2f8-2f11.html> [<https://perma.cc/Q6NZ-KE72>] (providing data on pending social-security cases from 2016-2019).

200. *ACUS-Stanford Study*, *supra* note 6.

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



color file legal claims. When one compares this collection of cases to the disputes that separation-of-powers formalists would siphon out of the administrative state – notably, patent, property, and securities cases – the border between Article II and Article III does not look coincidental. Instead, the formalist vision re-designs the administrative state based on a regressive theory of whose due-process claims deserve an initial hearing in Article III.

Ultimately, this approach to administrative law is as much about docket control and rights erosion as it is about deregulation. The Court’s jurisprudence reduces administrative government in some places but defends and expands it in others. This is a renovation project, not a hatchet job. The upshot is a thinner regulatory state and a hearty bureaucracy to manage cases that federal courts would rather leave to the executive branch.

## CONCLUSION

We are left, in other words, with an adjudicative state, rebuilt on a new constitutional foundation. The emergence of this vision of American government is a notable development in the intellectual history of public law. The Supreme Court’s effort to restrict regulation while encouraging presidential adjudication raises fascinating questions about the future of administrative law. It will be interesting to watch how agency behavior and judicial review of agency action change in the face of a Court that enforces the nondelegation doctrine but embraces presidential courts.

One misses these developments entirely if adjudication is omitted from the story of administrative law. This is the final and simplest lesson of our piece. Whether supportive or critical of the Roberts Court, the account of its administrative-law jurisprudence is incomplete without administrative courts.

Here, we are joining the chorus. In recent years, a number of administrative-law scholars have lamented the field’s relative inattention to adjudication.<sup>202</sup> On the whole, agency courts tend to be understudied because regulation is the paradigm of administrative law. Within this paradigm, adjudication is either a puzzle for federal-courts scholars, or a topic for specialists in fields where administrative judging is the dominant agency activity, or one of several interchangeable

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202. See, e.g., Barnett, *supra* note 166, at 1645 (“[Administrative judges] mostly go about unnoticed, toiling in the shadows of agency rulemaking.”); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1353 (“Absent from the standard narrative of administrative law is adjudication . . .”).

ways that agencies make policy. Adjudication is not part of the larger structural account of the Supreme Court's conception of the administrative state.<sup>203</sup>

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

This orientation also flattens the complex dynamics at work in modern administrative law. As this Feature has demonstrated, recent developments in the field put tremendous pressure on the boundary between administrative and federal courts. The Supreme Court is poised to adopt a vision of administrative law in which a significant amount of regulatory activity shifts back to Congress, a small batch of legal claims move to Article III courts, and the President is left with considerable political control over everything that stays in the executive branch. This theory of government makes it exceedingly important to determine which disputes can be adjudicated outside of Article III because everything that remains is fair game for presidential administration. But that question has never had a clear answer. Scholars have long described public-rights doctrine as hopelessly confused,<sup>204</sup> and new rights theory dispels the fog only by embracing a regressive vision of due process.

Our goal is not to solve the puzzle of permissible agency adjudication. Nor do we mean to suggest that a liberal Court would have a more satisfying theory of federal jurisdiction. Rather, our aim is to bring debates about administrative tribunals into conversation with debates about the “anti-administrativism” of the Roberts Court. Administrative-law textbooks and syllabi tend not to dwell on adjudication, or at least not on the problem of non-Article III tribunals, on

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203. In a sense, the field's inattention to administrative tribunals is surprising given the general obsession with courts rather than other aspects of agency culture and design. See Peter Conti-Brown, Yair Listokin & Nicholas R. Parrillo, *Towards an Administrative Law of Central Banking*, 38 YALE J. ON REGUL. 1, 4–5 (2021) (criticizing administrative law's juris-centrism). But to the extent that it fixates on courts, administrative-law scholarship is focused on Article III judicial review of administrative action, not the boundary between Articles II and III.

204. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 916 (1988); Nelson, *supra* note 97, at 563 (describing public-rights doctrine as a “notoriously tangled area”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 990 n.106 (2002) (calling public-rights doctrine “a delight for teachers of federal courts and a nightmare for everyone else”).

the theory that judging is slightly orthogonal to the field's core substance. As a result, while academics who specialize in federal courts have spent considerable time trying to resolve the conundrum of agency adjudication—which rights count as public rights,<sup>205</sup> which institutions count as courts,<sup>206</sup> whether appellate review cures the problem with non-Article III tribunals<sup>207</sup>—adjudication features far less in debates about the past and future of the administrative state.

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

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

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

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205. See, e.g., Nelson, *supra* note 97, at 563.

206. See, e.g., Pfander, *supra* note 89, at 645.

207. Compare Fallon, *supra* note 204, at 918 (arguing that it does), with Baude, *supra* note 88, at 1518-19 (arguing that it does not).

like the emergence of a new vision of the civil service in which bureaucrats exist to administer a more political kind of justice.