

## ESSAY

# Revisiting the Public Rights Doctrine: Justice Thomas's Application of Originalism to Administrative Law

*Laura Ferguson\**

### ABSTRACT

*Administrative agencies today adjudicate vastly more disputes than do Article III courts. The constitutional underpinnings of the administrative agency's adjudicative power remain somewhat murky, however, as does today's conception of which cases administrative agencies can appropriately adjudicate. The Supreme Court has said that Article III courts alone retain the constitutional power to adjudicate private rights disputes, but that administrative agencies can be congressionally delegated the power to adjudicate public rights disputes. However, issues arise because the distinction between public and private rights—and the definitions of these terms—is not clearly drawn. Indeed, the Supreme Court has repeatedly faced the question of whether administrative agency adjudication of certain so-called public rights is appropriate, given the litigations' resulting impact on private rights. During the October 2014 Term, Justice Thomas laid the groundwork for an originalist approach to public rights, wherein public rights disputes are limited to historically understood categories. Under this method, if a public right was not recognized either at common law or as an exception to Article III litigation in the*

---

\* J.D., 2016, The George Washington University Law School; B.A., Political Science, 2012, Drew University. The Author wishes to thank James Huang, for his invaluable comments on previous drafts of this Essay, and Sean Marotta, for his lessons in writing and lawyering. Professor Joshua Schwartz provided immeasurable guidance as academic advisor for this research. Thanks to the staff of *The George Washington Law Review* for their tireless edits. Any remaining mistakes are solely the Author's.

*early days of the Republic, it could not be adjudicated by an administrative agency. Although this would restrict the number of cases that administrative agencies could review, it would better protect the constitutional function of Article III courts and the private rights of individuals. This Essay discusses Justice Thomas's model and suggests possible categories for future research, concluding that reformulating the public rights doctrine in this manner would also provide coherence, clarity, and boundaries for the ever-growing administrative state.*

## TABLE OF CONTENTS

INTRODUCTION .....	1316
I. THE HISTORICAL EVOLUTION OF THE PUBLIC RIGHTS DOCTRINE .....	1318
II. JUSTICE THOMAS'S ORIGINALIST TWIST TO THE PUBLIC RIGHTS DEBATE .....	1324
III. AN ORIGINALIST FRAMEWORK OF THE PUBLIC RIGHTS DOCTRINE .....	1328
CONCLUSION .....	1333

## INTRODUCTION

The Constitution nominally vests all judicial power in the Article III courts, but it is beyond dispute that administrative justice predominates in the modern state.<sup>1</sup> Yet the doctrinal underpinnings of a non-Article III adjudication have long been murky. The October 2014 Term provided Justice Thomas an opportunity to lay the foundation for the future use of originalism in administrative law, which, to date, the Court's precedents almost entirely ignored.<sup>2</sup> This Essay discusses Justice Thomas's originalist reinterpretation of the public rights doctrine that governs permissible uses of legislative courts.

Legislative courts established under Article I stand apart from the Article III judiciary. The Court has traditionally recognized three exceptions to the requirement of Article III adjudication: cases arising in the territories,<sup>3</sup> the Armed Forces,<sup>4</sup> and, this Essay's focus, those involving public rights disputes.<sup>5</sup> At its traditional base, public rights

<sup>1</sup> See *infra* notes 10–11 and accompanying text.

<sup>2</sup> See generally Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 *YALE L.J.F.* 94 (2015) (discussing the significance of Justice Thomas's originalist interpretation of administrative law in six cases decided in 2015).

<sup>3</sup> *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

<sup>4</sup> *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 83–84 (1857).

<sup>5</sup> *E.g.*, *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1964–67 (2015) (Thomas, J., dissenting); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853–54 (1986); Thomas

cases involve civil litigation between the government and private citizens over rights that belong to the citizenry as a whole but are vested in political bodies such that private citizens alone cannot adjudicate the dispute.<sup>6</sup> This differentiates them from private rights—rights belonging to each individual—which can only be litigated in an Article III tribunal.<sup>7</sup>

Since 1856, administrative agencies have adjudicated public rights disputes under the guise of administrative law.<sup>8</sup> In the 1980s, Supreme Court doctrine further expanded public rights cases to include those closely related to government regulatory activity because such disputes are of a “public” nature serving public interest.<sup>9</sup> Today, administrative agencies, created as a result of Article I delegation, oversee hundreds of thousands of cases every year<sup>10</sup> in areas such as Social Security and Medicare.<sup>11</sup> Yet what constitutes a public rights case that Congress may remove from Article III jurisdiction remains unclear. Indeed, the public rights doctrine is one of the murkiest areas of administrative and constitutional law.<sup>12</sup> The resulting caselaw and academic discussion has been a source of controversy with academics,

---

v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585 (1985); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (plurality opinion); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 203–04.

<sup>6</sup> See *Union Carbide*, 473 U.S. at 585 (quoting *N. Pipeline*, 458 U.S. at 67–68).

<sup>7</sup> “Legislative courts Are but agencies in drag; Glidden is but paint.” Kenneth Karst, Poetry, *Federal Jurisdiction Haiku*, 32 STAN. L. REV. 229, 230 (1979).

<sup>8</sup> *Murray’s Lessee*, 59 U.S. (18 How.) at 284; ERWIN CHEREMINSKY, FEDERAL JURISDICTION 241 (6th ed. 2012).

<sup>9</sup> *Union Carbide*, 473 U.S. at 593–94.

<sup>10</sup> A total of 423,321 cases were terminated in the district courts, while 58,349 appeals were resolved in the circuit courts. See U.S. COURTS, JUDICIAL CASELOAD INDICATORS (2011), <http://www.uscourts.gov/statistics/table/jci/federal-judicial-caseload-statistics/2011/03/31>. The Social Security Administration alone rendered approximately 629,000 administrative decisions that same year. SOC. SEC. OFFICE OF THE INSPECTOR GEN., A-07-12-21234, CONGRESSIONAL RESPONSE REPORT: THE SOCIAL SECURITY ADMINISTRATION’S REVIEW OF ADMINISTRATIVE LAW JUDGES’ DECISIONS 1 (2012), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-12-21234.pdf>; see also, e.g., OFFICE OF PLANNING, ANALYSIS, & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2014 STATISTICS YEARBOOK C1 (2015) (indicating that immigration judges had a total of 209,277 “initial case completions” in FY 2011).

<sup>11</sup> See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 252–53 (1990); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 925 (1988); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 658–59 (2004).

<sup>12</sup> See *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011) (“[O]ur discussion of the public rights exception since that time has not been entirely consistent, and the exception has been the subject of some debate . . .”).

practitioners, and judges disagreeing over whether the exceptions outlined *supra* should be narrowly cabined.<sup>13</sup>

Modern public rights doctrine accepts the broad authority over adjudications that Congress has delegated to agencies. Justice Thomas challenged this in his dissents in *Wellness International Network, Ltd. v. Sharif*<sup>14</sup> and *B&B Hardware, Inc. v. Hargis Industries, Inc.*,<sup>15</sup> suggesting that a regime predicated on a narrow, historical understanding of public rights combined with other historically recognized exceptions to Article III adjudication, such as bankruptcy, more appropriately protects separation of powers.<sup>16</sup> His regime offers two main advantages: first, it can operate where the rights at issue do not easily fit into the dichotomy of public versus private rights; and, second, it allows a continuing role for administrative adjudication in today's modern bureaucracy. This Essay expands his model by clarifying what an originalist reinterpretation of the public rights doctrine could resemble.

This Essay proceeds in four parts. Part I discusses the historical evolution of the public rights doctrine. In this Part, the major cases are reviewed with an eye towards deconstructing the precedent and establishing how administrative adjudication became so predominant. Part II reviews the originalist model of the public rights doctrine Justice Thomas established in the October 2014 Term. Part III then turns to a broader conceptualization of what an originalist model of the public rights doctrine could resemble when fully fleshed out by legal academics. This Essay concludes with a brief discussion of the advantages of this regime.

## I. THE HISTORICAL EVOLUTION OF THE PUBLIC RIGHTS DOCTRINE

The public rights doctrine is one of three categories of cases that the judicial branch need not adjudicate. Indeed, public rights cases

---

<sup>13</sup> Chemerinsky, *supra* note 8, at 242–43. Compare *Union Carbide*, 473 U.S. at 585–88 (rejecting discrete categorical delineations in favor of a balancing approach), with *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63–67 (1982) (plurality opinion) (creating a strict categorical test based on the three discrete exceptions to Article III adjudication). See generally *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (focusing on incidental or *de minimis* encroachment on Article III power by administrative adjudication).

<sup>14</sup> *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1960–70 (2015) (Thomas, J., dissenting).

<sup>15</sup> *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1310–18 (2015) (Thomas J., dissenting).

<sup>16</sup> See *infra* Part II.

were not originally understood to be part of judicial jurisdiction; courts could only adjudicate private rights.<sup>17</sup> This Part explores the historical evolution of the public rights doctrine in Supreme Court jurisprudence, beginning with a brief outline of the constitutional background before analyzing the cases.

Article III vests judicial power of the United States exclusively in the judiciary: “The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>18</sup> Although a literal interpretation of Article III would promote a strict separation between the branches, there is almost universal agreement that such separation is simply impractical in modern administrative law.<sup>19</sup> As such, the Article II and Article III branches—the executive and the judiciary—necessarily have jurisdictional overlap: Congress delegates adjudication between branches, thus excluding certain categories of adjudication from judicial review.<sup>20</sup> Other categories, however, are “inherently judicial” and must be decided by an Article III court. Public rights jurisprudence questions which matters are appropriately delegated to agency adjudication and which are not.

The Court first articulated its interpretation of the public rights doctrine in *Murray’s Lessee v. Hoboken Land & Improvement Co.*,<sup>21</sup> an 1856 case regarding a public transfer of land.<sup>22</sup> There the Court noted that “we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity.”<sup>23</sup> The Court also recognized:

there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.<sup>24</sup>

---

<sup>17</sup> See *Wellness Int’l*, 135 S. Ct. at 1965 (Thomas, J., dissenting) (“If ‘public rights’ were not thought to fall within the core of the judicial power, then that could explain why Congress would be able to perform or authorize non-Article III adjudications of public rights without transgressing Article III’s Vesting Clause.”).

<sup>18</sup> U.S. CONST. art. III, § 1.

<sup>19</sup> See Pfander, *supra* note 11, at 656, 658–59.

<sup>20</sup> Three justifications have been given for exclusion: sovereign immunity, original intent, and history. See CHEMERINSKY, *supra* note 8, at 242–43.

<sup>21</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

<sup>22</sup> See *id.* at 284.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

But with the exception of reference to equitable claims to land of ceded territories as a “class of cases” falling into the public rights category, the Court was silent about what would qualify as a public right.<sup>25</sup>

The Court did not return to this doctrine until 1932 in *Crowell v. Benson*.<sup>26</sup> There, the Court indicated that it would allow administrative adjudication of a dispute that was fundamentally between two private parties.<sup>27</sup> In dicta, the Court found that Congress could delegate decisionmaking to administrative adjudications provided that Article III judges were given review of the proceedings.<sup>28</sup> From this holding arose an alternative doctrine to explain why Article I courts can adjudicate private rights in certain situations.<sup>29</sup> The adjunct theory, as it is known, has two parts: first, “that non-article III tribunals can be used extensively by Congress to finally determine most facts,”<sup>30</sup> and second, that “Congress could constitute agencies as ‘adjuncts’ to the federal courts, but only insofar as the ‘essential attributes’ of even initial decisionmaking remain in an article III tribunal.”<sup>31</sup> This theory allows for non-Article III tribunals to adjudicate private rights cases in the first instance if Article III courts have effective review of the decision.<sup>32</sup> Although the Court ultimately held against allowing administrative adjudication of the dispute at issue,<sup>33</sup> its dicta has had dangerous repercussions in administrative law: it has been misconstrued to allow and support the use of administrative tribunals to adjudicate all manner of disputes—including those that have private rights bases—with limited Article III review.<sup>34</sup>

*Crowell*'s effect on separation of powers jurisprudence should not be understated. *Crowell* affirmed that Congress could “establish ‘legislative’ courts (as distinguished from ‘constitutional courts in which the judicial power conferred by the Constitution can be deposited’)”

<sup>25</sup> *See id.*

<sup>26</sup> *Crowell v. Benson*, 285 U.S. 22 (1932).

<sup>27</sup> *See id.* at 50–54.

<sup>28</sup> *See id.* at 53; Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 594 (1985).

<sup>29</sup> *See* Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 848–49 (1986).

<sup>30</sup> *Id.* at 779.

<sup>31</sup> Fallon, *supra* note 11, at 927; *see* WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 37–38 (Vicki Been et al. eds., 3d ed. 2009) (“This adjunct theory permitted non-Article III entities, including administrative agencies, to do fact-finding even with respect to ‘private rights’ . . . so long as the legal significance of those factual determinations was subject to determination by an Article III court.”).

<sup>32</sup> *See* Resnik, *supra* note 28, at 594.

<sup>33</sup> *Crowell*, 285 U.S. at 64–65.

<sup>34</sup> *See infra* notes 47–53 and accompanying text.

by its own accord and that such power may be delegated to either executive tribunals or to the judiciary.<sup>35</sup> The Court pointed to immigration, interstate commerce, and taxation as examples of “class[es] . . . completely within congressional control.”<sup>36</sup> It is no wonder, then, that scholars have recognized the Court’s decision as “the most significant [early] relaxation of [the] constitutional obstacles to the modern administrative state,” as it reshaped the scope and nature of the public rights inquiry.<sup>37</sup> The Court did, however, recognize the danger of using administrative agencies for investigation and factfinding, noting that having such agencies “does not require the conclusion that there is no limitation of their use.”<sup>38</sup> This would, the Court reasoned, allow Congress to “sap . . . judicial power” and to “establish a government of a bureaucratic character alien to our system,” directly affecting fundamental rights of the people.<sup>39</sup> But *Crowell* ultimately did not clarify what constituted a public right because it adopted the traditional definition of a public right from *Murray’s Lessee*: aside from recognizing the fundamental rights underpinning the nature of this system and the danger of a strengthened bureaucracy, the definition of a public right remained somewhat mysterious.<sup>40</sup>

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>41</sup> the next public rights case, a plurality of the Court approached this body of law in a formalistic manner.<sup>42</sup> Justice Brennan’s opinion narrowed *Crowell*, which had relied partly on the pragmatic need for agency adjuncts and implicitly utilized a balancing-of-interests standard.<sup>43</sup> In contrast, Justice Brennan found that “[the Court’s] prece-

---

<sup>35</sup> *Crowell*, 285 U.S. at 50 (quoting *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 512 (1828)); *see also id.* at 51 (“Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.”).

<sup>36</sup> *Id.* (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). In dicta, the Court discusses public rights claims as a class of cases under which some claims are not subject to the Article III mandate, even though the claim at issue in the case was a private rights claim. *Id.* In so doing, *Crowell* laid out the categorical approach Justice Thomas uses in his exceptions-based theory of public rights. *See supra* notes 14–16 and accompanying text.

<sup>37</sup> David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504, 514 (1987).

<sup>38</sup> *Crowell*, 285 U.S. at 57.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 50.

<sup>41</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion).

<sup>42</sup> *See id.* at 70.

<sup>43</sup> *Id.*

dents clearly establish that *only* controversies [between the government and others] may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination,” because only “[p]rivate-rights disputes . . . lie at the core of the historically recognized judicial power.”<sup>44</sup> Bankruptcy courts, at the center of the issue, could not appropriately exercise judicial power because bankruptcy historically was a private rights determination.<sup>45</sup> This approach, grounded in a strict, literal interpretation of the Constitution that envisioned no overlap between the branches, was largely unworkable in an era where agency adjudication predominated.<sup>46</sup>

*Thomas v. Union Carbide Agricultural Products Co.*,<sup>47</sup> the Court’s fourth major case addressing public rights, was arguably its first attempt to actually *define* the doctrine. There, the Court shifted from *Northern Pipeline*’s formalistic approach to a pragmatic balancing test it claimed emanated from *Crowell*: “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”<sup>48</sup> But the resulting application has left the balancing in name only. The Court’s subsequent holdings have indicated that, in practice, balancing is instead a default rule in favor of agency adjudication absent special circumstances.<sup>49</sup>

Following *Union Carbide*, courts have typically found that most rights can be properly adjudicated by agencies. For example, in *Commodity Futures Trading Commission v. Schor*,<sup>50</sup> the Court ruled that the Commodity Futures Trading Commission properly had jurisdiction over a state law cause of action—including not just claims, but also counterclaims.<sup>51</sup> Justice O’Connor’s opinion employed a balancing test, weighing congressional interests in providing for administra-

---

<sup>44</sup> *Id.* The effect this would have on the adjunct theory is unclear. Justice Brennan’s formalist approach to public rights reflects a traditional approach that does not square with *Crowell*’s dicta supporting the adjunct theory.

<sup>45</sup> *Id.* at 76.

<sup>46</sup> See generally *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) (noting that *Crowell* emphasized how “practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III”).

<sup>47</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

<sup>48</sup> *Id.* at 593–94.

<sup>49</sup> See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61–63 (1989); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847, 856 (1986).

<sup>50</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

<sup>51</sup> *Id.* at 847, 857.

tive adjudication against “the purposes underlying the requirements of Article III.”<sup>52</sup> The Court also elaborated on the balancing test’s effect on separation of powers, reasoning that any infringement of judicial power by Article I courts was at worst *de minimis*.<sup>53</sup>

Lastly, in *Stern v. Marshall*,<sup>54</sup> the Court found against administrative adjudication of bankruptcy claims.<sup>55</sup> *Stern* took a step back from the pragmatic balancing test, towards *Northern Pipeline*’s more formalistic framework. In an opinion authored by Chief Justice Roberts, the Court held that bankruptcy judges issuing final judgments violated the Constitution because such judges did not have life tenure.<sup>56</sup> Congress could not authorize a bankruptcy court to issue a final judgment over a state law counterclaim because it did not fit into any traditional exceptions or the adjunct theory.<sup>57</sup> Chief Justice Roberts wrote: “[T]he question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.”<sup>58</sup> His emphasis on the independence of the federal judiciary may have signaled a new direction in the Court’s jurisprudence: “A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.”<sup>59</sup>

As these cases evidence, the Court has waived back and forth between a literal and pragmatic formulation of the public rights doctrine, resulting in confusion and a general trend towards allowing administrative agencies to adjudicate private law claims.<sup>60</sup> But the doctrine’s contours should depend on the fundamental roles of Congress and the judiciary outlined by the Constitution. Lack of clarity about the source and scope of public rights doctrine has inappropriately meshed private law disputes into these cases.<sup>61</sup> Therefore, congressional delegation of these adjudications away from the judiciary

---

<sup>52</sup> *Id.* at 847. These purposes include ensuring fairness to litigants by providing an independent judiciary and maintaining the structural integrity of separation of powers. *See id.* at 856–57; Fallon, *supra* note 11, at 931.

<sup>53</sup> *See Schor*, 478 U.S. at 856; *see also, e.g., Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (per curiam) (holding that appellants were not deprived of due process where they were required to pay a twenty-five dollar filing fee in the state appellate court where they sought review of agency determinations).

<sup>54</sup> *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

<sup>55</sup> *Id.* at 2618.

<sup>56</sup> *Id.* at 2601.

<sup>57</sup> *Id.* at 2618–19.

<sup>58</sup> *Id.* at 2618.

<sup>59</sup> *Id.* at 2620. As discussed *infra*, the Court moved away from this holding in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

<sup>60</sup> *See supra* notes 41–59 and accompanying text.

<sup>61</sup> *See supra* notes 47–53 and accompanying text.

violates the constitutional design of separation of powers.<sup>62</sup> Because, today, such cases almost never receive full judicial adjudication, concerns regarding people's fundamental right to judicial adjudication also exist.<sup>63</sup> The October 2014 Term brought two new public rights cases before the Court: *Wellness International*<sup>64</sup> and *B&B Hardware*.<sup>65</sup> The next Part discusses the doctrinal impact of both cases, focusing primarily on the potential effect of Justice Thomas's two dissents: his reformulation of the public rights doctrine through an originalist lens.

## II. JUSTICE THOMAS'S ORIGINALIST TWIST TO THE PUBLIC RIGHTS DEBATE

Justice Thomas articulated his originalist vision of the public rights doctrine in his dissents in *Wellness International* and *B&B Hardware*.<sup>66</sup> This Part discusses the dissents in three sections: first, his understanding of public rights; second, his originalist alternative basis for non-Article III jurisdiction over bankruptcy cases; and third, his rejection of the quasi-private rights doctrine.

Justice Thomas posited that certain categories of cases could qualify as separate exceptions to Article III adjudication, in addition to the three traditionally recognized exceptions.<sup>67</sup> Even though the Court may have recognized these separate exceptions as "public rights," the Justice argued that they more properly belong as their own categories because they do not fit into the historical dichotomy of public rights.<sup>68</sup> By his understanding, public rights evolve from fundamental rights of the community, "belonging to the people at large."<sup>69</sup> As early as 1829, American courts recognized the difference between public rights and the "*private* unalienable rights of each individual."<sup>70</sup> This reflected the English understanding of public rights of "the whole community, considered as a community, in its social aggregate capacity" as opposed to the private rights of each individual, which developed from principles of natural law.<sup>71</sup>

---

<sup>62</sup> See *supra* notes 18–20 and accompanying text.

<sup>63</sup> See *Crowell v. Benson*, 285 U.S. 22, 57 (1932); *supra* note 10.

<sup>64</sup> *Wellness Int'l Network, Ltd.*, 135 S. Ct. 1932 (2015).

<sup>65</sup> *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015).

<sup>66</sup> See *Wellness Int'l*, 135 S. Ct. at 1964–67 (Thomas, J., dissenting); *B&B Hardware*, 135 S. Ct. at 1316–18 (Thomas, J., dissenting).

<sup>67</sup> See *supra* note 66. Justice Thomas also noted that other factors could play a role in this determination but did not detail them in depth.

<sup>68</sup> See *Wellness Int'l*, 135 S. Ct. at 1967–68 (Thomas, J., dissenting).

<sup>69</sup> *Id.* at 1965 (quoting *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829)).

<sup>70</sup> *Id.* (quoting *Lansing*, 4 Wend. at 21).

<sup>71</sup> *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 5 (1769)).

Justice Thomas reasoned that “[d]isposition of private rights to life, liberty, and property falls within the core of the judicial power, whereas disposition of public rights does not.”<sup>72</sup> That distinction is significant because Congress may only delegate public rights cases—but not private rights cases—to administrative adjudication.<sup>73</sup> The Justice acknowledged, however, two historical exceptions to the requirement of Article III adjudication of private rights: territorial courts and military courts.<sup>74</sup> The third exception, public rights cases, differed in large part because it consisted of cases outside of “the core of the judicial power.”<sup>75</sup> The public rights doctrine thus had a greater impact on the scope of judicial power itself because it specifically delineated a class of cases that Article III courts need not review under their constitutional jurisdiction.<sup>76</sup> Ultimately the Justice concluded that “[a] return to the historical understanding of ‘public rights’ . . . would lead to the conclusion that the inalienable core of the judicial power vested by Article III in the federal courts is the power to adjudicate *private* rights disputes.”<sup>77</sup> “If ‘public rights’ were not [originally] thought to fall within the core of the judicial power,” Congress could “authorize non-Article III adjudications of public rights without transgressing Article III’s Vesting Clause.”<sup>78</sup> This conception of Article III and public rights is consistent with the historical tradition of public rights cases as claims against the government.<sup>79</sup>

In *Wellness International*, a majority of the Supreme Court held that Article III permits bankruptcy judges to adjudicate *Stern* claims

---

<sup>72</sup> *Id.* at 1963.

<sup>73</sup> *See id.* at 1965. Due process principles certainly have some application here as well. *Crowell* addressed due process application in depth, *see* *Crowell v. Benson*, 285 U.S. 22, 45–48 (1932), and it should be for other scholars to debate at length where due process principles apply to the originalist view. Here, it suffices to note that originalism certainly did not envision judicial substitution of private-rights adjudication by Article I courts. To the extent to which it may have, it only envisioned legislative or executive adjudication of these certain categories specifically delineated by the public rights exception, as well as those noted by *Crowell* and other such exceptions as scholars may discover. *See Ortwein v. Schwab*, 410 U.S. 656, 660 (1973).

<sup>74</sup> *See Wellness Int’l*, 135 S. Ct. at 1964 (Thomas, J., dissenting).

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* This point—distinguishing between the class of cases that Article III courts *need not* adjudicate, as opposed to cases that they *must* adjudicate—is critical to understanding the originalist distinction.

<sup>77</sup> *Id.* at 1967.

<sup>78</sup> *Id.* at 1965.

<sup>79</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68 (1989) (Scalia, J., concurring) (“It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States.”).

with the parties' knowledge and voluntary consent.<sup>80</sup> The Court, in an opinion by Justice Sotomayor, reasoned that nothing in the Constitution requires an express waiver of the right to an Article III judge: all the public rights doctrine requires is "that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent* of the litigants, and subject only to ordinary appellate review."<sup>81</sup>

Although Justice Thomas ultimately disagreed with the majority's understanding that consent would allow bankruptcy courts to issue final rulings on cases, he argued that bankruptcy forms a categorical exception to Article III adjudication, which could appropriately remove such claims from judicial adjudication.<sup>82</sup> He acknowledged that bankruptcy courts did not fit into any of the historically recognized exceptions to Article III adjudication.<sup>83</sup> The Court had traditionally, however, implicitly accepted that bankruptcy courts would necessarily resolve a multitude of processes, even those that affect core private rights.<sup>84</sup> Thus, Justice Thomas reasoned that, "bankruptcy courts and their predecessors more likely enjoy a unique, textually based exception, much like territorial courts and courts-martial do."<sup>85</sup> This approach is necessarily more principled than those taken previously: the *Northern Pipeline* approach limited agency adjudication to too few claims,<sup>86</sup> the *Union Carbide* approach broadened agency adjudication so much that it violated separation of powers,<sup>87</sup> and Justice Sotomayor's consent-based doctrine would allow any claims to be removed from judicial adjudication so long as the parties consented.<sup>88</sup>

In *B&B Hardware*, the Court held that issue preclusion applies to administrative adjudication through the Trademark Trial and Appeal Board ("TTAB") so long as the proceedings are materially similar to those used by a district court and the elements of issue preclusion are met.<sup>89</sup> The Court reasoned that administrative adjudication, where

---

<sup>80</sup> *Wellness Int'l*, 135 S. Ct. at 1939. This case resolved the leftover issue from *Stern v. Marshall*, 131 S. Ct. 2594 (2011), whether consent would allow bankruptcy courts to adjudicate the private rights claims attached to bankruptcy disputes.

<sup>81</sup> *Id.* at 1946 (quoting *Stern*, 131 S. Ct. at 2615).

<sup>82</sup> *See id.* at 1967–68 (Thomas, J., dissenting).

<sup>83</sup> *See id.* at 1967.

<sup>84</sup> *See id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See supra* notes 41–46 and accompanying text.

<sup>87</sup> *See supra* notes 47–53 and accompanying text.

<sup>88</sup> *See supra* notes 80–81 and accompanying text.

<sup>89</sup> *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303–05 (2015).

parties have an adequate opportunity to litigate an issue of fact and the agency adjudicator resolves the issues to the standards set forth for issue preclusion, provides adequate grounding for preclusive effect.<sup>90</sup> Because trademarks have elements of both private and public rights, Justice Thomas's analysis of *B&B Hardware* thus, necessarily, examined the related doctrine of quasi-private rights.

Justice Thomas disagreed with the majority's conclusion that the TTAB could adjudicate trademark registration claims, concluding that such claims involved, at their core, private rights disputes that only a court could adjudicate.<sup>91</sup> Quasi-private rights, or statutory entitlements, are those "privileges" or "franchises" the government bestows upon individuals.<sup>92</sup> These claims raise constitutional concerns because federal administrative agencies, as part of the executive branch, may not have power to adjudicate claims involving core private rights, even where the government has attempted to redefine the private right as a public one.<sup>93</sup> If quasi-private rights involve historically protected private rights, then only Article III courts can hear them.<sup>94</sup> Trademark registration, for example, involved both characteristics: registration, a statutory entitlement with quasi-private right characteristics; and the private, historically recognized property right to adopt and use a trademark.<sup>95</sup> Moreover, longstanding common law tradition allowed trademark infringement suits in Article III courts.<sup>96</sup> Justice Thomas therefore concluded that allowing administrative preclusion inappropriately "sap[ped]" judicial power from its constitutional boundaries.<sup>97</sup>

Justice Thomas's dissents do not fully outline the configuration of an originalist framework of the public rights doctrine. Indeed there is some dissonance in his framework: in many situations, it is inherently unclear when government acts to affect private rights (e.g., to property) or whether there is a public rights dispute at issue. Tax disputes exemplify this incongruity: is the people's private right to their property—their money—in question, or is it the public's right to tax?<sup>98</sup> The next Part elaborates on Justice Thomas's vision, attempting to an-

---

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 1314–16 (Thomas, J., dissenting).

<sup>92</sup> *Id.* at 1316 (quoting Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007)).

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* at 1316–17.

<sup>95</sup> *See id.* at 1317.

<sup>96</sup> *See id.*

<sup>97</sup> *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 57 (1932)).

<sup>98</sup> *See id.*

swer and further clarify what qualifies as a public or private right in the framework.

### III. AN ORIGINALIST FRAMEWORK OF THE PUBLIC RIGHTS DOCTRINE

The originalist conception<sup>99</sup> of the public rights doctrine can therefore be said to follow a categorical approach more similar to that of *Northern Pipeline*, but without the rigid unworkability that the *Northern Pipeline* test commanded.<sup>100</sup> The framework requires the creation of *categories* of exceptions, rather than, on the one hand, automatically excluding all private rights cases from congressional oversight or, on the other hand, establishing a balancing test that effectively weighs in favor of administrative adjudication.<sup>101</sup> While limiting agency adjudication to traditional public rights cases and the historical exceptions, it still allows a large role for the bureaucratic state today. This approach is thus functional, protective, and more faithful to the precedent set forth in *Crowell*.<sup>102</sup>

The originalist framework poses a series of preliminary questions: Is it a private or a public right at issue? How does one determine that right? What can the government do if the right at issue is an *exception*, not a private right? What can the government do if it is a private right? Does the adjunct theory allow for administrative adjudication even of cases that would otherwise be held under judicial adjudication?<sup>103</sup> The remainder of this Essay begins to distill the originalist framework in more depth, focusing on what qualifies as a public right, a private right, a quasi-private right, or an exception.

Although there is a broad conception of what the public rights doctrine encompasses, it is more difficult to identify its source. Justice

---

<sup>99</sup> For the purposes of this Essay, the Author considers originalism to be the belief that the original intent of those who drafted the Constitution should be followed in subsequent interpretations, including when evaluating historical understandings of common law as applied to the Constitution.

<sup>100</sup> See *supra* notes 41–46 and accompanying text.

<sup>101</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1967–68 (2015) (Thomas, J., dissenting) (discussing a bankruptcy exception to Article III adjudication).

<sup>102</sup> See *supra* notes 26–40 and accompanying text.

<sup>103</sup> See *supra* Part II for a discussion of Justice Thomas's originalist perspective on the public rights exception to Article III adjudication. As it pertains to the adjunct theory in particular, an originalist would likely find it both activist and dangerous because it allows administrative adjudication of private rights in a non-Article III court. The adjunct theory invents and accepts the idea that judicial adjudication may be replaced by a separate "appropriate" forum. See *Crowell v. Benson*, 285 U.S. 22, 45–50 (1932).

Thomas's dissents do little to clarify this discrepancy.<sup>104</sup> There are three potential sources of public rights. First, public rights litigation could be defined by its party alignment: litigation brought against the government by an individual to vindicate an infringed-upon right.<sup>105</sup> Second, the public rights doctrine could be defined by natural, as opposed to positive, sources of rights.<sup>106</sup> Finally, the doctrine could arise out of the concept of community rights, where the government serves as a class-action representative, rather than individual rights, where an individual vindicates an individual wrong.<sup>107</sup> These different variations are not well served by the Court's current balancing test: at best, it only inconsistently recognizes the three sources; at worst, it inappropriately conflates the sources. But Justice Thomas's conception is no less convoluted: although he asserts that public rights are anchored in the community, he did not differentiate between the positive and natural sources of the right.<sup>108</sup> His categorical approach, however, better encompasses each variation because exceptions can be grounded in any of the three sources.

Public rights developed from natural law principles. A practice of English law, public rights belong to the community, encompassing a category of cases and a description of well-established practices that developed under the guide of the community-at-large.<sup>109</sup> Blackstone discusses natural rights in terms of absolute rights, "those which belong to him considered as related to others."<sup>110</sup> Such rights are "vested" in people by nature, but "could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities."<sup>111</sup> The concept of pub-

---

<sup>104</sup> See *supra* Part II.

<sup>105</sup> See Fallon, *supra* note 11, at 951–52. This principle draws from sovereign immunity and the capacity of the state to define when it will be subject to litigation. *Id.* at 952.

<sup>106</sup> Compare *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1317 (2015) (Thomas J., dissenting) (contrasting common law-recognized private trademark rights with the government-endowed statutory entitlements), with *Shively v. Bowlby*, 152 U.S. 1, 36–38 (1894) (discussing the evolution of the natural right to navigation into a legally cognizable public right).

<sup>107</sup> See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68 (1989) (Scalia, J., concurring) ("It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States."); 2 WILLIAM BLACKSTONE, COMMENTARIES \*122 (1803).

<sup>108</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1965 (2015).

<sup>109</sup> See BLACKSTONE, *supra* note 107, at \*122; see also *supra* note 71 and accompanying text. Some tension exists because community rights arguably have positive law and natural law aspects. Moreover, questions arise as to whether they are universal or specific to a particular society and social contract.

<sup>110</sup> See BLACKSTONE, *supra* note 107, at \*124.

<sup>111</sup> *Id.*

lic rights transferred over to the newly formed United States of America and was a continuing presence in the judicial opinions of the time. American lawyers not only distinguished between private and public legal interests, they also recognized that public rights could differ between different political societies.<sup>112</sup> Early cases reinforced this belief: for example, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*,<sup>113</sup> the Court described the right of navigation as “a public right common to all.”<sup>114</sup>

Private rights, on the other hand, refer to individual rights to life, liberty, and property that every citizen possesses independent of the state.<sup>115</sup> Private rights in the early Americas were important, although somewhat less defined.<sup>116</sup> The early lawyers differentiated between “core” private rights and “privileges.”<sup>117</sup> Core private rights referred to natural rights, developed out of Lockean tradition.<sup>118</sup> Privileges developed as a separate way to distinguish rights that public authorities created purely for reasons of public policy.<sup>119</sup> The goal of privileges was to create entitlements that would operate like private rights—for example, forming the basis for private claims against other individuals—but would actually enable private citizens to use civil power for the public benefit, in effect allowing private citizens to carry out public ends.<sup>120</sup>

---

112 Nelson, *supra* note 92, at 566 (citing the three different categories of public rights belonging to the people at large in early America: “(1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and (3) less tangible rights to compliance with the laws established by public authority ‘for the government and tranquillity [sic] of the whole.’” (citations omitted)).

113 *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).

114 *Id.* at 431; *see also* *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). Other cases reinforced the concept of public rights as unique to a given society. *See* *Beard v. Smith*, 22 Ky. (6 T.B. Mon.) 430, 452–53 (1828); *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829).

115 BLACKSTONE, *supra* note 107, at \*123–24.

116 *See* Nelson, *supra* note 92, at 566–67.

117 *Id.* at 566–68.

118 *Id.* at 567; *see* BLACKSTONE, *supra* note 107, at \*129.

119 *See* Nelson, *supra* note 92, at 567–68; *see also* *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) (“discussing claims ‘arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it’” (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))).

120 *See* Nelson, *supra* note 92, at 567–68; *see also* *B&B Hardware*, 135 S. Ct. at 1317 (Thomas, J., dissenting). Privileges should likely be viewed as a statutory entitlement to be governed through statutory interpretation rather than as an issue of public rights.

Quasi-private rights are an invention of the modern bureaucratic state and have no place in an originalist interpretation.<sup>121</sup> Although quasi-private rights have their core in public rights, they implicate private rights, which may—and likely do—require Article III adjudication. Justice Thomas did not fully distinguish the issues raised by quasi-private rights in his dissents. He instead evaluated quasi-private rights as possible historical exemptions.<sup>122</sup> This is an appropriate interpretation if one evaluates the historical background of the right at issue, whether it had a longstanding tradition in common law, and the nature of the right.<sup>123</sup>

The originalist framework delineates certain categories of exceptions from the requirement of Article III review. The natural exceptions are those that the Court has already recognized: military courts, courts overseeing the territories, and public rights cases.<sup>124</sup> Under an originalist framework, the “public rights” framework is more restrictive, focusing just on the rights of the community at large that have been historically recognized by courts and the government.<sup>125</sup> But the originalist framework allows for certain private rights to be exempt from Article III adjudication.<sup>126</sup> Bankruptcy, Justice Thomas reasoned in *Wellness International*, could be one such exception because of the Court’s longstanding acceptance of bankruptcy courts’ adjudication of private rights.<sup>127</sup> In order to maintain a functioning bureaucratic state, other exceptions likely exist, which scholars and lawyers may identify through further study.

---

121 See *supra* Part II. Quasi-private rights were never envisioned in early America; in fact, the entire quasi-private rights doctrine may be constitutionally suspect. Yet such rights are a part of our administrative framework today; it would be nearly impossible to eliminate them. It is also important to distinguish whether the right at issue has its roots in positive law, natural law, or the community. Indeed, that determination could be dispositive. This is, however, a topic for further study.

122 *B&B Hardware*, 135 S. Ct. at 1316–18 (Thomas, J., dissenting).

123 Although this analysis likely suffices, and is necessary due to the extensive administrative framework of U.S. law, it was not part of originalist design. A pure originalist interpretation would forego these rights and focus exclusively on historical private and public rights.

124 See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1967–68 (2015) (Thomas, J., dissenting); Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 934 (2015).

125 See *supra* notes 67–79, 100–08 and accompanying text.

126 The Court in *Crowell* noted a series of exemptions that had already been historically noted. See *supra* note 35 and accompanying text. Moreover, other categories will likely be identified with further study. Thus an originalist reinterpretation need not completely rework the modern bureaucratic state. To be sure, some administrative functions may need to be reworked to better accommodate the classes of the cases at issue. But ultimately, the originalist approach is superior not only because of its more protective effect on separation of powers principles, but also because it protects these principles *while maintaining a bureaucratic state*.

127 See *Wellness Int’l*, 135 S. Ct. at 1967–68 (Thomas, J., dissenting).

Immigration disputes could be considered another categorical exception to Article III adjudication. Immigration cases have historically required government adjudication because of its public nature.<sup>128</sup> Today, the executive branch makes the ultimate factual determination about a person's immigration status because the Supreme Court assumes Congress may authorize executive officers to make those determinations without judicial examination.<sup>129</sup> Indeed, government control of immigration status is likely necessary given national security concerns.<sup>130</sup> Legal disputes over immigration status and statutes, however, can implicate constitutional rights.<sup>131</sup> These private elements of immigration statutes would thus require at the very least de novo appellate review, if not Article III adjudication in itself.<sup>132</sup>

Categorizing cases as separate exceptions serves to protect separation of powers principles, even in situations where Article I courts adjudicate cases that would, in a perfectly formalist world, fall under Article III's purview.<sup>133</sup> Part of the danger in allowing malleable definitions is that administrative agencies can adjudicate private rights to no end.<sup>134</sup> And the Court's two frameworks, Justice Brennan's formalist test and Justice O'Connor's functionalist test, are unworkable because the tests are too rigid and too flexible, respectively.<sup>135</sup> Both misread *Crowell's* intent: *Crowell* drew lines between the branches of power but recognized specific instances where Congress could step within the power of the judiciary.<sup>136</sup> By expressly endorsing this

---

128 *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932); *see also, e.g.*, *The Japanese Immigrant Case*, 189 U.S. 86, 97–99 (1903); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–60 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (noting congressional discretion to bring public rights disputes “within the cognizance of the courts”); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 466–67 (2009).

129 *See Crowell*, 285 U.S. at 50–51 (using immigration as an example of a public right that was addressed administratively as a matter of well-established practice).

130 *See Cox & Rodríguez, supra* note 128, at 462 n.10.

131 *See Fallon, supra* note 11, at 935.

132 *See generally id.* at 918 (advocating de novo review of agency adjudications). Although other scholars may determine the extent of the new exception noted here, it is enough for this Essay's purposes to highlight that new exceptions can exist in the originalist framework. It is these exceptions that make an originalist framework more functional than *Northern Pipeline's* bright-line formalism.

133 *See supra* notes 124–28 and accompanying text.

134 *See supra* notes 26–40 and accompanying text.

135 *See supra* notes 41–46, 50–53 and accompanying text.

136 *See supra* notes 35–36 and accompanying text; *see also Crowell v. Benson*, 285 U.S. 22, 50–51 (1932) (“Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities

view—and noting that such infringement did not inappropriately “sap” judicial power—the Court effectively outlined a system of categories that later generations misinterpreted.<sup>137</sup>

The categories approach allows for an overlapping separation of powers model that better serves to protect people’s rights, and yet accommodates much of the modern administrative state.<sup>138</sup> This model recognizes that private rights require adequate Article III adjudication. But this model only requires judicial adjudication of a private right if it does not fall into a historically recognized category. Further, a categorical approach limits congressional overreach by avoiding a slippery slope; although some overlap may be desired, there is a core of each branch that must remain separate and independent.

Moreover, this approach effectively maintains a large, functional, bureaucratic state while employing a much-needed judicial check on the bureaucracy’s power. It serves to better protect the people’s rights, safeguarding them from legislative or executive tyranny—a central concern of the Founding Fathers<sup>139</sup>—but it does not fundamentally adjust the balance of power. The Court in *Crowell* and *Murray’s Lessee* noted several categories of exemptions.<sup>140</sup> With further study, there will likely prove to be more.

## CONCLUSION

A categorical approach to the public rights doctrine more effectively serves the goals of the public rights doctrine, the administrative state, and separation of powers principles than does the balancing test the Supreme Court currently uses. For these reasons, this approach deserves further consideration by the legal community. Ultimately, an originalist re-invigoration of the public rights doctrine would have dramatic implications for administrative and constitutional law. Although administrative cases come before courts every year and constitute most of the adjudication in this country,<sup>141</sup> the language of Article

---

of the post office, pensions, and payments to veterans.”). In dicta, the Court discussed public rights claims as a class of cases under which some claims are not subject to the Article III mandate, even though the claim at issue in the case was a private rights claim. *Id.* In so doing, *Crowell* laid out the categorical approach Justice Thomas uses in his exceptions-based theory of public rights.

<sup>137</sup> See *supra* notes 50–51, 56–57 and accompanying text.

<sup>138</sup> See *supra* note 126 and accompanying text.

<sup>139</sup> See THE FEDERALIST NO. 47 (James Madison).

<sup>140</sup> See *supra* notes 23–25, 36 and accompanying text.

<sup>141</sup> See *supra* note 10 and accompanying text.

III itself creates questions as to whether any such nonjudicial adjudication is actually permissible within the constitutional scheme.<sup>142</sup> Because there is heightened concern that our administrative state is growing exponentially, it is time to revisit the public-rights basis of the adjudications in order to ensure fair opportunity for litigants.

---

<sup>142</sup> See *supra* notes 11–13 and accompanying text.