DUE PROCESS FOR ARTICLE III—RETHINKING *MURRAY'S LESSEE*

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INTRODUCTION

Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts" that "Congress may . . . establish."[1] These courts' judges "shall hold their Offices during good Behaviour, and shall . . . receive . . . a Compensation, which shall not be diminished during their Continuance in Office."[2] The judicial power extends to, among other things, all "Controversies to which the United States shall be a Party."[3] From this text, one might have presupposed that the protected judges of Article III courts must preside over cases in which the U.S. government is a party.

Not so. Instead, based largely on notions of historical practice and efficiency, the Supreme Court has consistently reduced Article III's domain when the government is a party under the "public-rights" exception. In its current formulation, the public-rights exception reaches, in brief, to cases "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[4] Article III does not apply to public rights. In contrast, resolution of some kind by Article III courts is required for "private rights": those matters concerning "the liability of one individual to another under the law as defined,"[5] and suits at common law, equity, or admiralty.[6] Public rights have, however, extended even to cases over liability between two private parties as part of a complex regulatory scheme.[7] As this brief description suggests, this exception presents "a most difficult area of

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1 U.S. CONST. art. III, § 1.

2 *Id.*

3 *Id.* § 2, cl. 1.

4 Crowell v. Benson, 285 U.S. 22, 50 (1932).

5 *Id.* at 51.

6 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) ("[W]e do not consider congress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty . . . .").

7 *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985).

constitutional law," where "precedents are horribly murky" and "doctrinal confusion abounds."[8]

The modern formulation of the public-rights exception was neither compelled nor inevitable. Public rights may have taken several forms under the seminal yet enigmatic precedent, *Murray's Lessee v. Hoboken Land & Improvement Co.*[9] They potentially existed whenever Congress sought to use non–Article III courts to administer programs under its Article I authority, whenever the U.S. government was a party, or whenever the dispute concerned privileges (also referred to as benefits) from the government. But in the decades since its inception, the second of these three possible grounds won out. The public-rights exception came to stand for, at least, those matters in which the government was a party—whether a dispute concerning privileges or benefits, or one of regulatory enforcement. The exception's expansive domain stands in tension with Article III's purpose of promoting judicial independence from the other two branches. In cases where the government is a party and thus has an interest in the litigation, opposing parties have become least entitled to Article III judges. And in cases where the government is not a party and has minimal interests in the litigation, private parties have become most entitled to Article III's independent judges.

This Essay for the *George Mason Law Review*'s "Agency Adjudication and the Rule of Law" symposium argues that a narrow interpretation of *Murray's Lessee*—as extending the public-rights exception, in general, only to matters concerning privileges or benefits—is best. Not only does the best reading of the decision's text support this limited exception, but this narrow interpretation would also have permitted the public-rights exception to develop in a more justifiable, coherent manner. A limited benefits-based exception could have simply had an inverse relationship with the Due Process Clause: the public-rights exception would apply only whenever government action fails to trigger the Due Process Clause. This understanding, as Professors Nathan Chapman and Michael McConnell have recently reminded scholars,[10] would have been consistent with the Due Process Clause's often forgotten purpose of preserving separation of powers and respecting Article III. Under traditional notions, the Due Process Clause only applied when, as relevant here, the government deprived individuals of a vested property right.

This Essay concludes by considering the benefits and costs of having Article III evolve alongside due process. Under modern doctrine, due process extends to deprivations of legitimate claims of entitlements and not merely to vested property rights, as are most relevant here. Regardless of whether Article III and due process should track one another precisely, tying them to

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8 H.R. REP. NO. 95–595, at 70 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6030 (letter from Thomas G. Krattenmaker).

9 59 U.S. (18 How.) 272 (1856).

10 *See* Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1803 (2012).

one another would provide a more coherent and predictable public-rights exception that recognizes Article III's purpose.

This Essay's discussion is limited in nature. First, it assumes that the Court would retain the public–private distinction. Second, it does not consider exactly what Article III requires when it applies. For instance, it may be that meaningful appellate review,[11] including current review under the Administrative Procedure Act (APA),[12] satisfies Article III minima. And instead of focusing on the reach of private rights and their status under Article III, this Essay concentrates on the other, oft-obscured side of the public–private-rights coin. Finally, given the space restraints, what follows is not an exhaustive historical or doctrinal account of Article III or the public-rights exception. Rather, the purpose of this Essay is to encourage scholars and courts to consider a more coherent public-rights exception and to facilitate a better understanding of *Murray's Lessee*.

I. THE TEXT AND PURPOSE OF ARTICLE III

Article III does two key things, as relevant to the public-rights exception. First, it prescribes two mechanisms to promote federal judges' independence. Second, it defines, to some extent, "[t]he judicial Power of the United States," which is vested in these judges.[13] The former clarifies, in large part,[14] what the debate over the exception is about, and the latter helps us consider the reach of Article III.

The two indicia of independence are familiar: judges "hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[15] These two protections directly addressed concerns in the Declaration of Independence over judges' dependence on the King for their jobs and pay.[16] They also serve two interrelated purposes: first, they seek to promote

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11 Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918 (1988) ("Thus the central claim of my appellate review theory: adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article III."); *see also* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 227 (arguing that meaningful appellate review could satisfy Article III concerns).

12 *See* 5 U.S.C. § 706 (2012).

13 U.S. CONST. art. III, § 1.

14 Aside from a neutral forum, parties seeking an Article III tribunal may also be seeking a jury trial. *See* U.S. CONST. amend. VII. Matters concerning public rights do not require Article III courts or juries under the Seventh Amendment. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 n.4 (1989).

15 U.S. CONST. art. III, § 1.

16 THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776) ("He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 4 (7th ed. 2016). One disagreement concerned whether Congress could increase Article III judges' salaries. *See* Lawrence Gene Sager, *Foreword: Constitutional*

impartial decision-making by shielding judges from the Damocles sword of removal or pay cuts.[17] Second, they provide a meaningful separation of the judicial and political branches, allowing judges to serve as an effective weapon against tyranny by checking other branches that transgress constitutional or statutory boundaries.[18] Ultimately, these criteria help protect the unpopular—whether in litigation with the government or with other individuals—from the competing branches' (and agencies') favorites.[19]

These protections were not controversial to the constitutional drafters.[20] Instead, as Dean Erwin Chemerinsky has noted, the most significant debate was over whether the federal government even needed inferior federal courts or could simply rely on the state courts with potentially limited rights of appeal to the Supreme Court.[21] A compromise allowed Congress to decide whether to establish inferior courts and modify the Supreme Court's appellate jurisdiction.[22] As explained below, this grant of discretion to Congress to establish inferior courts is relevant to debates over Article III's scope.

Article III judges of the Supreme Court and any inferior courts Congress chooses to create are vested with "[t]he judicial Power of the United States."[23] It may have surprised the Founders how much confusion has come to surround this phrase, given that the second section of Article III provides an extremely detailed description, relative to other constitutional provisions, of that power. In fact, as relevant here, this definition would appear to indicate that the Article III judiciary must resolve cases in which the United States is a party or cases which concern federal law. The judicial power extends to, among other things, "*all* Cases, in Law and Equity, arising under [the] Constitution, [or] the Laws of the United States," not to mention "Controversies to which the United States shall be a Party."[24] Alexander Hamilton argued

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Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 61 (1981). Over James Madison's objection, the constitutional language permits increases, but not reductions. *Id.* at 61 n.136.

17 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting) (discussing Founders' intent to provide judicial independence by not permitting the political branches to control reappointments for a term of years and salary fluctuation); THE FEDERALIST NO. 79, at 471–73 (Alexander Hamilton) (Clinton Rossiter ed., 2003); Maryellen Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOK. L. REV. 207, 211 (1983).

18 *See* THE FEDERALIST NO. 78, at 464–65, 469–70 (Alexander Hamilton) (Clinton Rossiter ed., 2003); Fullerton, *supra* note 17, at 211–12.

19 *Oil States Energy Servs., LLC*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting).

20 *See* Sager, *supra* note 16, at 61 ("[T]he decision to secure radical independence for the federal judiciary found a rare degree of consensus among the framers.").

21 *See* CHEMERINSKY, *supra* note 16, at 214–15; *see also* James Madison, *Notes of Debates in the Federal Convention of 1787*, at 72–73 (Adrienne Koch ed., Ohio Univ. Press) (1966) [hereinafter *Madison's Notes*].

22 *See Madison's Notes*, *supra* note 21, at 72–73.

23 U.S. CONST. art. III, § 1.

24 *Id.* § 2, cl. 1 (emphasis added).

during debates over the Constitution's ratification that any plan other than one that referred "Controversies between the nation and its members or citizens" to federal courts "would be contrary to reason, to precedent, and to decorum."[25]

II. ARTICLE III EXCEPTIONS

As Professor Richard Fallon noted about thirty years ago, "[b]y nearly universal consensus, the most plausible construction of [Article III's text] would hold that if Congress creates any adjudicative bodies at all, it must grant them the protections of judicial independence that are contemplated by article III."[26] But the Supreme Court has taken a different path, creating a significant space for non–Article III tribunals in three key areas: territorial courts, courts martial, and public rights. This Essay concentrates on the last area.

Congress has permitted both non–Article III courts and executive agencies to adjudicate claims based on public and private rights, as described in more detail below. The difference between public and private rights is that the former requires no Article III involvement, while the latter requires some kind of minimal Article III oversight.[27] The First Congress, in fact, permitted executive officials to decide disputes concerning veterans' benefits and customs duties.[28] As Fallon has noted, because "the First Congress—whose decisions often are viewed as a repository of insight into the historical intent underlying article III—vested responsibilities in executive officers of the Treasury Department that might instead have been assigned to constitutional courts," the text of Article III appears to yield to some kind of exception.[29] It is the nature of this exception to which this Essay now turns.

A. Murray's Lessee *and the Possibilities of Public Rights*

The genesis of the public-rights exception to Article III arises from the 1856 decision of *Murray's Lessee v. Hoboken Land & Improvement Co.* In

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25 THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 2003). An earlier draft of the Constitution from August 6, 1787 did not include the provision of jurisdiction where the United States was a party; it referred only to the Supreme Court's jurisdiction. *Compare id.* at 538 ("Mr. MADISON & Mr. Govr. MORRIS moved to insert after the word 'controversies' the words 'to which the U. S. shall be a party.' which was agreed to nem: con:"), *with Madison's Notes*, *supra* note 21, at 393.

26 Fallon, *supra* note 11, at 916.

27 *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 632 (1984) ("[T]he whole point of the 'public rights' analysis was that *no judicial involvement at all* was required—executive determination alone would suffice.").

28 *See* Fallon, *supra* note 11, at 919.

29 *Id.* (footnote omitted).

that case, the government had audited the accounts of Samuel Swartwout, the federal government's tax collector at the port of New York, and determined that more than $1 million was missing.[30] After Swartwout fled the country, the Treasury Department, as permitted by statute, issued a distress warrant for the sale of Swartwout's property to satisfy in part his debt to the government.[31] The defendant purchased the property under the distress warrant.[32] The plaintiff obtained the property as part of an execution of a judgment before the sale to the defendant but after the issuance of the warrant.[33] Although Swartwout had the statutory right to challenge the distress warrant before the sale in court, he did not appear to do so.[34] In resolving a dispute between parties seeking to assert title to Swartwout's land, the Court rejected both the plaintiff's Fifth Amendment Due Process claim and his Article III claim in his attempt to invalidate the warrant and sale to the defendant.

The Court first held that the Treasury's use of the distress warrant did not offend due process. Aside from longstanding British practice, the Court relied upon state and federal practices after the Declaration of Independence and the Constitution's ratification that permitted the government summary processes for collecting public debts.[35] The Court recognized that due process "generally . . . includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings," but the Court said that an exception exists for the government's actions against a public debtor's body, goods, or land.[36]

The Court next held that the distress-warrant proceedings did not offend Article III. The Court first established that not all adjudication qualifies as the judicial power. Executive officials frequently must determine facts and apply them to law.[37] The Court pointed to Congress's Article I authority to raise revenue and then, once again, relied upon the historical authority of the executive to decide matters related to revenue and taxing.[38]

As what appears to be a fallback argument, the plaintiff contended that, even if the subject matter could be purely executive in nature, the matter was purely judicial in this particular case because Congress had permitted the courts to review executive determinations (whether collectors owed money

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30 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 275 (1856).

31 *See id.* at 274.

32 *Id.*

33 *See id.* at 280; *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 67 (1989) (Scalia, J., concurring in part and concurring in the judgment).

34 *See Granfinanciera*, *S.A.*, 492 U.S. at 67 (Scalia, J., concurring in part and concurring in the judgment).

35 *See Murray's Lessee*, 59 U.S. (18 How.) at 278–80.

36 *Id.* at 280 ("There may be, and we have seen that there are cases, under the law of England after *Magna Charta*, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial.").

37 *See id.*

38 *See id.* at 281–82.

to the government).[39] The Court disagreed. The government, by waiving its sovereign immunity, could and did permit the matter to be both executive and judicial in character.[40] Congress has authority to set the terms of its immunity waiver in judicial proceedings and thereby treat the government's action like a private party's.[41]

The Court then attempted, in a well-known paragraph, to clarify its view that some matters are purely judicial, some are purely nonjudicial, and some can partake of both the judicial and executive character, as Congress chooses:

> To avoid misconstruction upon so grave a subject, we think it proper to state 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, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[42]

Accordingly, public rights are those matters that do not concern common law, equity, or admiralty, and which, at Congress's election, do not mandate any judicial determination or review.[43] Instead, Congress can treat these matters as executive ones, judicial ones, or both. Private rights, in contrast, are all rights that are not public rights.[44] Exactly what distinguishes private from public rights, however, is far from clear, as is the justification for the distinction. But the decision suggested four possible explanations or justifications.[45]

First, *Murray's Lessee* suggested that public rights broadly concerned matters for which Congress had the "power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect."[46] The obvious problem with this rationale is that if Congress can evade Article III whenever it has the substantive authority to

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39 *See id.* at 282.

40 *See id.* at 283.

41 *See Murray's Lessee*, 59 U.S. (18 How.) at 284.

42 *Id.*

43 *See* Strauss, *supra* note 27, at 632 ("[T]he whole point of the 'public rights' analysis was that *no judicial involvement at all* was required—executive determination alone would suffice.").

44 The contrast between private and public matters was foundational to the nineteenth-century legal zeitgeist. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) ("Although one can find the origins of the idea of a distinctively private realm in the natural-rights liberalism of Locke and his successors, only in the nineteenth century was the public/private distinction brought to the center of the stage in American legal and political theory.").

45 Dick Fallon has suggested four justifications, some of which overlap with those identified here: those based on sovereign immunity, historical understanding of public rights tied to separation of powers and broad discretion, the distinction between rights and privileges, and functional necessity. *See* Fallon, *supra* note 11, at 952–53.

46 *See Murray's Lessee*, 59 U.S. (18 How.) at 281.

regulate, Article III becomes a dead letter. Indeed, the Court unanimously rejected a similar argument in another separation-of-powers decision by explaining that Congress may use its substantive power "so long as the exercise of that authority does not offend some other constitutional restriction."[47] And, at any rate, identifying Congress's permissible substantive authority provides no obvious distinction between private and public rights, at least when grounded in federal statutory law.

Second and relatedly, the Court suggested a more limited exception, relying on the fact that all or nearly all governments, due to "[i]mperative necessity," had treated matters related to public taxes as exclusively nonjudicial.[48] The benefit of this rationale is that it appears relatively narrow and enjoys, based on the Court's discussion, significant provenance. Moreover, a tax-related exception is consistent with Hamilton's contention during the time of the Constitution's ratification that tax sales were appropriately excepted from jury trials—which would occur in Article III courts—because of efficiency and the needs of the public.[49] But of course, if the exception grows to include other instances in which Article III proves more costly than other adjudicatory options, the exception could digest the rule.[50]

Third, again with broad implications, the Court indicated that public rights included matters in which the United States was a party (by having waived its sovereign immunity).[51] The benefit of this justification is that it is easy to administer: simply evaluate the parties to the dispute. But even if one exempts criminal matters from the public-rights exception, this justification would permit agencies or Article I courts to resolve matters without Article III oversight on all regulatory matters as long as an agency is a party. The public-rights exception would then have force in those cases in which the reasons for Article III are at their zenith—where the government has an interest in the litigation. A party-based exclusion has the additional

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47 Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam).

48 *Murray's Lessee*, 59 U.S. (18 How.) at 282.

49 THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 2003). Note, however, that Hamilton was discussing the right to a jury trial and not the reach of Article III.

50 Indeed, Professor Martin Redish has argued that "[i]n each instance in which the Court has employed such an approach—either explicitly or implicitly—the competing legislative interest has been relatively minimal, but nonetheless has proved victorious." Redish, *supra* note 11, at 222. In fact, when Congress in the twentieth century changed the name of the United States Court of Custom Appeals to the United States Court of Patent and Customs Appeals and enlarged its jurisdiction, the House appeared to endorse such a broad exception. The House included comments from Representative (and former University of Pennsylvania law professor) George Graham in the Congressional Record to "establish the constitutionality of the act." 68 CONG. REC. 3181 (1927). Graham argued that Article III permitted subject-matter exceptions, such as those for intellectual property, taxation, public land, and Indian Affairs. *See id.* at 3181–82 (quoted in Wilber Griffith Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 922–23 (1930)).

51 *See Murray's Lessee*, 59 U.S. (18 How.) at 283.

awkwardness of excluding controversies from courts' jurisdiction that Article III expressly describes as part of the judicial power.

Finally, *Murray's Lessee* suggested that public rights consisted of matters related to dispensed privileges, such as the privilege to sue the government because it had waived its sovereign immunity from suit.[52] This final understanding would not reach all matters in which the United States was a party. Instead, in Professor Gordon Young's words, it would reach only those kinds of claims "that Congress may dispose of itself or delegate to the executive branch."[53] The benefit of this approach is that it fits well with a structural understanding that Congress (through private bills) or the executive (through statutory directive) can bestow benefits without implicating due process or the necessity of judicial intervention. Decisions concerning benefits would not trigger due process because, as is most relevant here, they would not deprive one of liberty or property.[54] Indeed, as to the role of Article III courts, the Court in *Decatur v. Paulding*[55] had already indicated that it had no concern with the Executive deciding to whom to deny benefits and that judicial interference should be discouraged.[56] A privilege-based understanding is also consistent with *Murray's Lessee*'s citation to decisions concerning the bestowed privileges of land grants.[57] But this justification, like the others, permits Congress to ignore Article III's reach to matters governed by federal law, despite the lack of any textual basis for doing so.

As to the final two rationales, a sovereign-immunity-based justification—either as a necessary predicate for the government to be a party or as a government-bestowed benefit—has its own difficulties. Despite received wisdom, immunity did not arise from the idea that the king could do no wrong. Instead, it arose from feudal concepts: unlike a serf to her lord or a peer to his sovereign, no one sat above the king in a hierarchy to judge him.[58] Of course, as the Supreme Court itself has recognized, American constitutional government does not suffer from these feudal problems because it

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52 *See id.* at 283–84. In one of its more recent Article III decisions, the Supreme Court relied upon sovereign immunity in justifying the public-rights exception in *Murray's Lessee*. *See* Stern v. Marshall, 564 U.S. 462, 489 (2011) ("The challenge in *Murray's Lessee* to the Treasury Department's sale of the collector's land likewise fell within the 'public rights' category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity. The point of *Murray's Lessee* was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all." (internal citations omitted)).

53 Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 793 (1986).

54 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

55 39 U.S. (14 Pet.) 497 (1840).

56 *Id.* at 516.

57 *See* Young, *supra* note 53, at 799.

58 Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1039 (1994); *see also* Nevada v. Hall, 440 U.S. 410, 414–15 (1979), *overruled by* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485 (2019).

creates three separate branches of government with assigned functions.[59] And because the British sovereign could in some circumstances be sued in the common law courts by 1791, it is far from clear that the constitutional drafters would have intended for sovereign immunity to permit the government's broad exception from Article III courts.[60] What is more, the drafters expressly identified controversies in which the United States was a party as falling within the judicial power of Article III courts. Finally, if waiver of sovereign immunity is a sufficient benefit to ground the privileges-based rationale, the privileges-based rationale becomes coextensive (or nearly so) with the party-based approach and suffers from the latter's substantial drawbacks.

Even normatively, the sovereign-immunity rationale is problematic. Sovereign immunity promotes governmental efficiency by keeping the government out of litigation and removed from judicial oversight. But this efficiency undermines competing notions of rights having remedies and of limited, checked government.[61] Relatedly, as Professor Martin Redish has argued, the "'greater-includes-the-lesser' argument," that Congress can create its own non–Article III fora whenever it allows itself to be sued, runs contrary to the maxim that Congress cannot include unconstitutional conditions on benefits or other legislation.[62]

Young argued that, of these rationales, the privileges-based understanding was likely the one that the Court had in mind.[63] He notes that the case was one of many (before and after *Murray's Lessee*) that concerned the executive's awarding of benefits, the most significant manner in which the federal government would have impacted private interests.[64] Both kinds of executive decisions proved, in practice, nearly unreviewable.[65] Young concluded:

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59 *See* United States v. Lee, 106 U.S. 196, 206 (1882) (noting the difference between British and American forms of government, and stating "it is difficult to see on what solid foundation of principle the [government's] exemption from liability to suit rests").

60 *See* Klein, *supra* note 58, at 1039–45. Klein notes that three of five justices in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), discussed the federal government's sovereign immunity and came to different conclusions. *Id.* at 1044. Despite the earliest Justices' disagreement on the issue, Chief Justice Marshall, without analysis, later deemed the government's sovereign immunity as "universally received opinion" in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411 (1821). *See also* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 18 (1963) (concluding that history "suggest[ed] that the so-called doctrine of sovereign immunity was largely an abstract idea without determinative impact on the subject's right to relief against government illegality" by the time of the American Revolution).

61 *See* Fallon, *supra* note 11, at 954–55.

62 *See* Redish, *supra* note 11, at 212–13.

63 *See* Young, *supra* note 53, at 795–801.

64 *See id.* at 797. Perhaps *Murray's Lessee*, as opposed to a case founded on the benefit of waived immunity, could be best considered a case concerning an executive determination (audit and levy) related to a prior granted privilege (employment as a tax assessor).

65 *See id.* at 819.

> [T]he language of . . . later [Supreme Court] cases and the failure of litigants to seek review by means of certiorari, reflect a perspective from which executive adjudication in benefits cases had come to be seen as legitimate executive action and truly a thing apart from the judicial in its constitutional sense.[66]

To be sure, Young argued, the Court did not refer to *Murray's Lessee* in refusing to interfere with executive decisionmaking in later benefits cases; instead, it relied on notions of delegated congressional authority, proto-notions of standing, or limits on mandamus relief.[67] But the failure of the Court to refer to *Murray's Lessee* may not be as problematic as it may first seem. The benefits cases arose, Young argues, in an era before the concept of unified administrative law had purchase on the bar and legal scholars.[68]

The problem with Young's theory of how to understand *Murray's Lessee* is that he must extend the notion of governmental privilege to its breaking point. The putative benefit at issue in *Murray's Lessee* was the waiver of sovereign immunity. The government there was not bestowing any benefits in the nature of money or land on anyone. Instead, it was taking property from a public debtor to satisfy an existing debt. The parties invoking the courts were only seeking to determine who owned the realty at issue. *Murray's Lessee* seems different in kind than other benefits cases (such as land grants, veterans' benefits, etc.), and this difference may explain its absence from the Court's benefits cases. Nonetheless, even if *Murray's Lessee* does not fit into the privileges mold, *Murray's Lessee* can still support, as discussed in Part III, a privileges-based rationale.

B. *The Expansion of Public Rights*

With the expansion of the federal administrative state came the expansion of the public-rights exception. The key extension came with the understanding of public rights to include governmental regulation of private parties that affected public interests, such as the Interstate Commerce Commission's regulation of common-carrier railroads.[69] And from there came the expansion of public rights to include federal regulation by the Federal Trade Commission ("FTC") and the Department of Agriculture of ordinary businesses that did not qualify as common carriers.[70] With these later cases, there was no bestowed privilege or benefit, even in the broad sense of permitting a common carrier (with monopoly-like power) to operate; instead, it was a form of everyday enforcement of statutory standards.[71]

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66 *See id.* at 802 (footnote omitted).
67 *See id.* at 802–03.
68 *Id.* at 799–800.
69 *See* Young*, supra* note 53, at 817–19.
70 *See id.* at 818.
71 *See id.* at 821.

By extending public rights to matters in which the government regulated businesses that were not common carriers (and thus received no governmental common-carrier privilege), the understood justification for the public-rights exception changed. And more than once. Sometimes the justification was party-based. For example, a few decades later, the Supreme Court in *Crowell v. Benson*[72] defined public rights as "those [cases] which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[73] Other times the justification was subject-based. In a decision a term before *Crowell*, the Court in *Phillips v. Commissioner*[74] explained that *Murray's Lessee* was not limited to suits involving the government and a tax collector, who had the privilege of being the government's agent.[75] Instead, the "underlying principle . . . was . . . the need of the government promptly to secure its revenues."[76] The shift from a benefits-based to a party-based or subject-based justification is not surprising. After the extension of public rights to general regulatory actions that bestow some public benefits, Professor John Dickinson, a leading administrative-law scholar in the early twentieth century, recognized that the distinction between public and private rights was difficult to maintain; to varying degrees of directness or remoteness, private rights impact public welfare.[77]

By the end of its development decades later, the public-rights exception was potentially all consuming. In *Thomas v. Union Carbide Agricultural Products Co.*,[78] the Court considered arbitration proceedings held under the Federal Insecticide, Fungicide, and Rodenticide Act.[79] Before registering a pesticide, manufacturers had to submit safety and environmental data to the EPA.[80] To render the registration process more efficient, the statute permitted

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72 285 U.S. 22 (1932).

73 *Id.* at 50.

74 283 U.S. 589 (1931).

75 *Id.* at 596.

76 *Id.* As Young notes, *Phillips* continued the expansion of public rights by "permit[ting] the federal government to use agencies to determine, at the trial level, monetary obligations, imposed under otherwise constitutional statutes, owed it by private citizens." Young, *supra* note 53, at 836. Notably, during debates over agency adjudication under the Customs Administrative Act of 1890, representatives (including then-Representative and later Associate Justice Joseph McKenna) discussed exceptions from Article III in terms of privileges and benefits. *See* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 715–16 (2018).

77 JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 28 n.49 (1927). The Supreme Court echoed Dickinson's sentiments in *Nebbia v. New York*, 291 U.S. 502, 524–25 (1934) ("No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property.").

78 473 U.S. 568 (1985).

79 *Id.* at 571.

80 *Id.*

manufacturers to rely on another manufacturer's previously submitted data.[81] The relevant statute provided arbitration for disputes over the appropriate compensation for the data-sharing manufacturer.[82] The arbitrator's decision was nearly unreviewable.[83] The Court held that the arbitration proceedings, whose rule of decision was federal law, qualified for the public-rights exception and thus did not offend Article III.[84]

Once again, the Court relied upon a different rationale for invoking the public-rights exception. By applying the exception to disputes between two private parties, it rendered a party-based rationale inapplicable.[85] In fact, it expressly stated that *Crowell* had never created a bright-line test based on whether the government was a party; instead, the Court took a functionalist approach to Article III.[86] Likewise, because the compensation at issue in *Thomas* was between two private parties, the Court could not and did not rely upon the revenue or taxing exception. Although the data was part of a licensing scheme and thus might have related to governmental benefits, the Court did not (at least directly) use a benefits-based rationale. Instead, the public-rights exception applied because the "registration serve[d] a public purpose as an integral part of a program safeguarding the public health" and because "Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication."[87] The rationale sounds similar to the suggestion in *Murray's Lessee* that Congress can except matters from Article III courts when those matters properly fall under Congress's substantive authority under Article I, limited perhaps by functional necessity or agency expertise in administering a complex program.[88] *Thomas* demonstrated that the public-rights exception was a Rubenesque doctrine: large, baroque, and strangely seductive.

Since the exception's high-water mark in *Thomas*, the Court has candidly recognized the doctrine's inconsistency[89] and suggested narrower

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81 *Id.*

82 *See id.* at 574 n.1.

83 *See id.* Courts could review the arbitral decision only for "fraud, misrepresentation, or other misconduct." *Id.* at 573–74 (quoting 7 U.S.C. § 136a(c)(1)(F)(iii) (2012)).

84 *See Thomas*, 473 U.S. at 589.

85 In fact, the Court stated, "[i]nsofar as appellees interpret that case and *Crowell* as establishing that the right to an Article III forum is absolute unless the Federal Government is a party of record, we cannot agree." *Id.* at 586. The Court later stressed that *Crowell* concerned private rights not because of the parties, but because Congress had substituted a statutory cause of action for a preexisting right in admiralty. *See id.* at 587; *see also* Young, *supra* note 53, at 855.

86 *See Thomas*, 473 U.S. at 585–87.

87 *Id.* at 589.

88 To ensure that no potential justification from *Murray's Lessee* went ignored, in concurring with a later decision, Justice Scalia relied upon the sovereign-immunity rationale when fashioning the boundaries of public rights and criticizing *Thomas*' capacious understanding. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 68 (1989) (Scalia, J., concurring in part and concurring in the judgment).

89 Stern v. Marshall, 564 U.S. 462, 488 (2011).

rationales. In *Stern v. Marshall*,[90] the Court, in considering the Article I bankruptcy court's resolution of certain state-law claims, described the holding in *Murray's Lessee* as based on notions of sovereign immunity, but also acknowledged the Court's more functional approach in *Thomas* and later cases.[91] Likewise, in its most recent decision, *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*,[92] the Court considered whether a federal administrative agency, the Patent and Trademark Office, could reconsider and revoke earlier granted patents upon the request of a patent owner's competitor.[93] In holding that the public-rights exception applied to reconsideration of a granted public franchise, the Court relied in tandem on the party-based and benefits-based rationales.[94]

Given the numerous potential theoretical justifications for the public-rights exception and its functional orientation, it is not surprising that non–Article III adjudication has a wide berth. As Fallon noted after *Thomas*,

> [A]rticle I courts [through various exceptions to Article III, including the public-rights exception] not only enjoy entrenched status; they have been permitted to adjudicate, at least in some circumstances, virtually all of the kinds of cases that are heard in article III courts, including criminal cases and civil disputes arising under the Constitution, laws, and treaties of the United States.[95]

C. *The Public-Rights Paradox and Criticism*

The public–private-rights dichotomy has taken on a life of its own, having severed its umbilical cord with the purposes of Article III. Categorizing rights as public or private—whether based on the government's status as a party, a particular subject matter, the presence of government benefits, or a complicated regulatory scheme—largely, if not entirely, does the heavy lifting in Article III doctrine. But these categories' existence is, at the very least, odd. They find no obvious basis in the text of Article III. And they act indifferently, if not contrary, to Article III's purposes. In other words, categories that had been intended to be the means of identifying Article III's reach have become ends in themselves.[96] In fact, even Justice White, who adopted a functional approach to Article III that generally limited its reach, indicated that his position arose from precedent, not first principles. He acknowledged

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90 564 U.S. 462 (2011).

91 *See id.* at 488–92.

92 138 S. Ct. 1365 (2018).

93 *Id.* at 1372.

94 *See id.* at 1373.

95 Fallon, *supra* note 11, at 923 (footnote omitted).

96 For example, the Court recently in *Oil States* quickly declared victory after identifying the patent reconsideration as concerning public rights without considering the purposes or text of Article III. *See Oil States*, 138 S. Ct. at 1373.

that the robust Article III position of the formalists, such as Justice Brennan and many scholars, was "well founded in both the documentary sources and the political doctrine of separation of powers that stands behind much of our constitutional structure."[97]

To begin, the text of Article III does not support the public-rights exception.[98] The text says nothing about public or private rights. Yet, if anything, what it does say cuts against exceptionalism for public rights. When defining "the judicial Power" of Article III courts, recall that Article III includes "all Cases, in Law and Equity, arising under this Constitution [or] the laws of the United States," as well as "Controversies to which the United States shall be a Party."[99] To be sure, the Founders understood that state courts could be the only trial courts to hear disputes concerning federal law and thus that non–Article III courts could entertain these cases.[100] But the state courts' existence and jurisdiction do not mean that Article III permits Congress to establish non–Article III courts or permit executive agencies to hear similar cases. The use of state courts separates the federal political branches from the judiciary and thus provides a separation of powers via federalism. The use of Article I courts or agencies does not do so.[101]

Furthermore, the purposes of Article III do not support the exception. Recall that Article III seeks to provide judicial impartiality and ensure separation between the judicial and political branches. But by denying Article III tribunals when the government is a party, waives its sovereign immunity, seeks to raise revenue, or awards benefits, the public-rights exception permits Congress to ignore Article III courts when the political branches have an interest in the litigation.[102] This is most obviously true when the government is

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97 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 93 (1982) (White, J., dissenting).

98 *See* Redish, *supra* note 11, at 205 ("[T]he language and logic of article III do not justify the public-private right dichotomy.").

99 U.S. CONST. art III, § 2, cl. 1.

100 *See supra* notes 20–22 and accompanying text; *see also* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.").

101 *See* Redish, *supra* note 11, at 225–26 n.169.

102 *See* Fullerton, *supra* note 17, at 231; *see also* Redish, *supra* note 11, at 210 ("The danger of both potential federal governmental domination of the federal judiciary and potential governmental displeasure with judicial decisions is at a minimum in suits between private individuals involving state-created common law rights."); *id.* at 213–14; Young, *supra* note 53, at 836–37 (noting that government is more likely to influence judges on matters related to revenue). One scholar has noted that a similar paradox exists with the Seventh Amendment, which the Supreme Court has indicated does not apply to public rights decided in a non–Article III forum, saying: "[T]he Seventh Amendment is grounded on the concept of the citizens' right to check government power. Therefore, the most unlikely exception to the amendment would be in cases involving the government as a party." Klein, *supra* note 58, at 1015.

a party (or waives its sovereign immunity).[103] Indeed, as Young has noted, Congress's expanded authority under the Commerce Clause in the past century only heightens concerns over Congress's interest in influencing disputes to which the government is a party.[104] Conversely, when private parties have a dispute (usually concerning matters of state law), Article III offers its most robust protection. Of course, it is in these cases that the political branches would usually have the least interest.[105]

The public-rights exception's indifference to Article III should not be surprising. The Court in *Murray's Lessee*

> did not attempt in any of these decisions to ground the dichotomy in the language, policies, or history of article III; Justice Curtis in *Murray's Lessee* appeared to do little more than assert the dichotomy, and subsequent decisions by the Court have assumed the *Murray's Lessee* analysis to be correct.[106]

Nonetheless, even Justices who are more skeptical of a robust public-rights exception lean heavily on *Murray's Lessee*. When dissenting in *Oil States*, Justice Gorsuch relied upon *Murray's Lessee* as providing the "original public meaning" of Article III's extension to "suit[s] at the common law, or in equity, or admiralty."[107] But given that *Murray's Lessee* was decided nearly seventy years after the Constitution's ratification, provided no citations for this limitation to Article III, and failed to discuss Article III's purposes or even the context of its drafting, *Murray's Lessee* provides little aid in deciphering original public meaning.

III. RECONCEIVING PUBLIC RIGHTS

In light of the doctrinal and theoretical mess that has become the public-rights exception, the preferable way to interpret the exception (and *Murray's Lessee*) is the privileges-based rationale, grounded in due process. This Part argues that Article III should be understood as coextensive with the reach of the Due Process Clause, and accordingly the public-rights exception should have an inverse relationship with due process's domain. Aside from their

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103 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68 n.20 (1982) (plurality) ("Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual.").

104 Young, *supra* note 53, at 859.

105 *See N. Pipeline*, 458 U.S. at 116–17 (White, J., dissenting) ("Bankruptcy matters are, for the most part, private adjudications of little political significance.").

106 Redish, *supra* note 11, at 207–08. The same ipse dixit occurred later in *Northern Pipeline*. *See id.* at 212.

107 Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856)).

joint concern for impartial adjudicators,[108] due process and Article III both seek to promote separation-of-powers values. This relationship between Article III and due process has a longstanding, although often overlooked, provenance. Traditionally, Article III only applies when the government is depriving one of vested rights. It would not apply to applications for benefits, or to those benefits' continuance.

Despite the advantage of a privileges-based approach tied to due process, the theory presents two issues that this Part considers in more detail. The first issue is that *Murray*'s *Lessee* should itself be understood as relying on a separate, narrow subject-matter exception (revenue raising), while referring to the privileges-based approach in its larger discussion of public rights. The other is that due process's domain has changed since the time of *Murray's Lessee*. This Part considers, without resolving, whether the public-rights exception should evolve alongside due process or track the traditional triggering conditions for due process.

A. *Due Process and Separation of Powers*

Contrary to the received wisdom that due process, unlike Article III, has no "important separation-of-powers dimension,"[109] the relationship between due process and separation of powers was an essential concept at the Founding and for decades after, including at the time of *Murray's Lessee*. Chapman and McConnell recently reminded scholars that due process incorporates structural constitutional notions and governs Congress, not only courts:

> [S]tatutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees were subject to judicial review, and acts by the legislature that deprived specific individuals of rights or property were subject to similar challenge, either in the legislative forum itself or in the course of subsequent judicial consideration.[110]

Indeed, one of the American colonists' chief complaints was Parliament's deprivation of specific individuals' property rights by its own decree.[111] The legislature's taking of property and giving it to another without judicial intervention was a "paradigmatic example"[112] of early due process challenges.[113] Such an act was not lawmaking—the prospective enactment of law for the general welfare. Instead, it was a quasi-judicial act—a specific action

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108 *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 873–74 (2009) (discussing due process); *supra* note 17 and accompanying text (discussing Article III).

109 *See* Fallon, *supra* note 11, at 942–43 ("[I]n contrast to the due process clause, article III has an explicit and important separation-of-powers dimension.").

110 Chapman & McConnell, *supra* note 10, at 1679.

111 *See id.* at 1703.

112 *Id.* at 1755.

113 *Id.* at 1755–59 (discussing early American examples).

against an individual based on past actions.[114] As Alexander Hamilton argued, courts have an institutional advantage over legislatures in providing the procedural safeguards that due process required before deprivation, such as counsel, rules of evidence, and testimony.[115]

The Constitution nonetheless gives Congress certain, defined judicial powers. The House can impeach, the Senate tries impeachments, each house can determine the elections, returns, and qualifications of its own members, and each can punish and expel members.[116] On the other hand, the Constitution makes explicit that Congress does not have certain judicial powers. It cannot enact bills of attainder that punish individuals with death,[117] or, as explained later by the Supreme Court, other lesser punishments or deprivations.[118] But what Congress can do is enact private bills that grant privileges to specific individuals, such as awarding compensation for tort victims,[119] pensions for veterans and their families, or franchises or other benefits.[120] Granting privileges—including not renewing them or even taking the privilege back after a conditional grant—would not implicate due process because the grant of privileges did not deprive an individual of a right.[121]

Chapman and McConnell note that Article III is part of structural due process, but they accept some kind of public-rights exception (as well as other exceptions) that would permit Congress to allow other fair and adequate tribunals.[122] They do so even after acknowledging—with what appears to be little affection—the growth of public rights alien to the common law and the Court's application of *Mathews v. Eldridge*'s[123] balancing test to assess due process's satisfaction.[124] It is enough for their argument that "Article III limited the range of cases in which Congress could violate due process by

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114 *See id.* at 1727, 1755.

115 *See id.* at 1716.

116 *See* Chapman & McConnell, *supra* note 10, at 1719.

117 *See* U.S. CONST. art. I, § 9, cl. 3.

118 *See, e.g.*, United States v. Brown, 381 U.S. 437, 461 (1965); United States v. Lovett, 328 U.S. 303, 315–17 (1946); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377–78 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323–24 (1867). Raoul Berger criticized the Court's expansive view of bills of attainder, arguing that the Founders understood them to include only "legislative condemnation to death without trial for either treason or felony, accompanied by corruption of blood." Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 356 (1978).

119 As William Baude notes, the plaintiff in a suit against the government for harm that the government caused may think of the government as having deprived him or her. But the claim is a "judicial nullity" because the government has sovereign immunity in the absence of its waiver. *See* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. __, *29 (draft) (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194945.

120 *See* Mathews v. Eldridge, 424 U.S. 319, 340–41 (1976).

121 *See* Chapman & McConnell, *supra* note 10, at 1719–20.

122 *See id.* at 1720, 1801–04.

123 424 U.S. 319 (1976).

124 *See* Chapman & McConnell, *supra* note 10, at 1781.

exercising quasi-judicial power."[125] But their demonstration that due process under the Fifth Amendment had a structural component provides insight into how to define public rights.

The fact that Congress can refrain from creating federal tribunals does not counsel against tying together Article III and due process. To be sure, Congress was not required to establish lower federal courts and instead could have relied on state courts in large part or in toto, depending on the necessity of appeals to the Supreme Court.[126] But when Congress creates federal tribunals, it must create Article III tribunals unless a textual or historical exception applies, say, for impeachments, territorial tribunals, or courts martial. Otherwise, Article III and the Constitution's overarching separation of powers becomes nugatory. Indeed, as Fallon has noted, exceptions must be narrowly circumscribed or else threaten the rule of law itself.[127] In other words, receiving proceedings before a federal tribunal that complies with Article III is part of the process that is due, as would receiving a state tribunal that complies with a state's structural requirements.

Likewise, the fact that the Court in *Murray's Lessee* discussed due process and Article III separately does not undermine Chapman and McConnell's argument, although it does suggest that the Court was still working out the provisions' relationship. To be sure, the Court did not simply say that Article III and due process follow along the same path. But the Court relied, at least in part, on the same historical analysis for its due process and Article III discussions.[128] Due process would normally apply to deprivations of property such as seizing one's real estate, yet historical practice suggested the existence of a revenue-collector exception.[129] The Court relied upon history as part of its Article III exceptionalism in *Murray's Lessee*[130] before, as discussed in Part III.C, it went further in dicta to provide more guidance on the scope of Article III.[131]

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125 *Id.* at 1720.

126 *See generally* CHEMERINSKY, *supra* note 16, § 3.2, at 176–91.

127 *See* Fallon, *supra* note 11, at 953.

128 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280–82 (1856). The Supreme Court's recent distinction between Article III and due process in *Oil States* presents a similar issue. The Court did not treat the issues as related. In fact, after holding that the agency at issue could reconsider and revoke issued patents under the public-rights exception, it expressly reserved due process questions. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373–75, 1379 (2018). But the holding is not necessarily contrary to a structural understanding of due process. If the public-rights exception applies, neither due process nor Article III requires Article III involvement. Due process, however, has other dimensions under modern doctrine: the fairness of its process, see *Murray's Lessee*, 59 U.S. (18 How.) at 276–77, and impartiality, see Schweiker v. McClure, 456 U.S. 188, 196–97, 200 (1982) (noting that due process requires impartial agency adjudicators).

129 *See Murray's Lessee*, 59 U.S. (18 How.) at 281–82.

130 *See id.*

131 *See id.* at 284–85.

The relationship between due process and Article I thus helps inform the reach of the public-rights exception.

First, the public-rights exception should account for separation of powers, the concern that due process and Article III share. By limiting legislatures to lawmaking and not the adjudication of specific individuals' rights unless the Constitution permits otherwise, due process cabins the branches' functions. For its part, Article III promotes the separation of powers by protecting judges from the political branches, limiting judges to exercising judicial power, and broadly defining federal jurisdiction to include cases concerning federal law and controversies in which the United States is a party. Their shared purpose is important because separation of powers was a novel feature of the American Constitution. Britain's parliament could make law and its House of Lords served as the court of last resort.[132] But American states, which had followed Britain's lead, quickly provided at least some separation of powers after declaring their independence.[133]

Second, due process's structural coloring provides support for distinguishing the deprivation of rights from the granting of privileges for triggering both due process and Article III. Indeed, Chapman and McConnell noted that "[a]ntebellum courts upheld private acts that were challenged on due process and separation-of-powers grounds precisely because the legislature had not deprived anyone of a right."[134] Early American courts largely focused their due process efforts on vested property rights, not mere expectations for a future vested right.[135] Divesting vested property rights was a judicial function according to two leading early constitutional scholars, Justice Joseph Story and Theodore Sedgwick.[136] These protected vested rights included those that arose from public charters.[137] Consistent with this understanding, the Supreme Court later in the nineteenth century noted that the legislature could not take the following actions consistent with due process of law: "acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation."[138]

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132 *See* Chapman & McConnell, *supra* note 10, at 1729–30.

133 *See id.*

134 *See id.* at 1734.

135 *Id.* at 1737–38.

136 *Id.* at 1738. As Chapman and McConnell note, the legislature could still regulate the use of property, regulate liberties prospectively, and take vested property if it paid just compensation, as required under the Fifth Amendment. *See id.* at 1739–40.

137 *See id.* at 1762.

138 Hurtado v. California, 110 U.S. 516, 536 (1884).

B. *Uniting Article III and Due Process*

By understanding *Murray's Lessee* in the context of structural due process, the privileges-based rationale comes forward as the preferable way of grounding the public-rights exception. Limiting public rights to those that concern the granting of privileges does not offend the separation of powers. Congress has the authority on its own—without any Article III involvement—to grant privileges or compensatory awards to individuals through private bills.[139] This concept may also extend to the prospective regulation of common carriers who have, in essence, the benefit of a monopoly. Likewise, due process, as originally understood, permits the government to reconsider conditionally vested rights.[140] It is this authority that Congress can delegate to executive agencies to limit the burdensomeness of determining whom to privilege—whether by providing land grants, war pensions, legal residence status, or compensation for the government's torts.[141]

What Article III and due process would not countenance is Congress or the Executive depriving someone of property already vested or a liberty right already exercised. This dichotomy between what Congress can and cannot do on its own accord are part of even twentieth-century descriptions of public rights, which are limited to that which Congress "itself [has] the power to decide."[142] Congress may delegate to courts or to the executive those matters that Congress can decide.[143] But Congress cannot deprive an individual of his or her vested rights or delegate to agencies the power to deprive vested rights.[144] Under a privileges-based approach, the Court took a wrong turn in permitting agencies to adjudicate enforcement actions against firms or individuals who simply enter commerce or have some effect on a federal interest (like the waters of the United States). These individuals do not benefit from any granted interest. Nonetheless, current doctrine permits agencies like the

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139 Although the Court has appeared to accept Congress's ability to enact private bills, see, e.g., United States v. Muniz, 374 U.S. 150, 154 (1963), the constitutional basis for Congress's power to do so has never been the subject of significant judicial inquiry, see Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1685 (1966).

140 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1375–76 (2018) (discussing public franchises); Young, *supra* note 53, at 805 ("In the early cases, the courts sought to determine whether the interest under consideration was a vested property right or something close to it.").

141 *See* Young, *supra* note 53, at 797–98.

142 Crowell v. Benson, 285 U.S. 22, 50 (1932) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

143 *See id.*

144 *See* Chapman & McConnell, *supra* note 10, at 1803 ("That is, Congress may authorize courts *at all* only because the Constitution either expressly or implicitly gives it power to do so. It has no inherent judicial power that it may delegate to another body.").

FTC to issue cease-and-desist or stock-divestiture orders to those who have simply entered interstate commerce.[145]

The Supreme Court's most recent foray into Article III in *Oil States* echoes these structural concepts, and its decision is consistent with them. The majority determined that Congress could permit an agency to reconsider a granted patent or franchise because the grant was conditioned.[146] This understanding is consistent with early understandings that conditional franchises, to which the majority pointed, had not fully vested and thus permitted executive determination.[147] Justice Gorsuch, in dissent, more expressly revived the privileges–rights distinction. He argued that Article III courts had to decide whether to revoke, as opposed to grant, a patent: "[j]ust because you give a gift doesn't mean you forever enjoy the right to reclaim it. And, as we've seen, just because the Executive could *issue* an invention (or land) patent did not mean the Executive could *revoke* it."[148] His reading of the history was that divestment of patents and land grants implicated Article III.[149] Indeed, he relied on a statement from an 1898 decision that said that executive revocation of a patent would "deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive."[150] Regardless of their narrow disputes over the appropriate understanding of the history of patent revocation, the *Oil States* opinions are consistent with the benefits-based rationale because they are getting at whether the rights at issue had fully vested and, accordingly, whether a deprivation had occurred.

The other rationales for the public-rights exception in *Murray's Lessee* do not align as well with a structural understanding of due process. The congressional-authority rationale guts the separation-of-powers goals of due process and Article III. It permits Congress, anytime acting under its Article I authority, to place the judicial role within courts that it controls or within agencies that also enforce the law. The party-based rationale is less capacious but more offensive. It would not expand to all matters based on congressional authority to regulate, but it would permit the government to avoid Article III whenever it is a party and thus has the greatest interest in a dispute. These

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145 15 U.S.C. § 45(b), (g)(4) (2012). Professor Thomas Merrill noted that "large numbers of agency adjudicators today—including every administrative law judge employed by the Social Security Administration—has the power to issue self-executing orders," although these adjudicators may be doing so in matters related to the provision of benefits. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 982 (2011) (footnote omitted).

146 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1370 (2018).

147 *Id.* at 1377.

148 *Id.* at 1385 (Gorsuch, J., dissenting).

149 *See id.* at 1381.

150 *See id.* at 1384 (quoting McCormick Harvesting Mach. Co. v. Aultman, 169 U.S. 606, 612 (1898)). The majority distinguished the quotation upon which Justice Gorsuch relied as discussing a statute that required judicial revocation. *See id.* at 1376 n.3 (majority opinion). Under the majority's view, the quotation, therefore, concerned what the statute, not the Constitution, required as due process.

matters are the ones in which the government would be most likely to interfere. For this reason, treating the waiver of sovereign immunity as a sufficient privilege to invoke the public-rights exception goes too far. It would, in practice, permit the government to avoid Article III whenever it is a party. Finally, the topics-based approach fares no better. Although it may be the narrowest of these competing justifications, the topics-based approach still permits the government to avoid Article III courts in matters in which the government can have a significant interest, such as tax or Indian Affairs. Each of these three justifications also fails to account for structural due process to the extent that it reaches more than the granting of benefits. If, say, the taking of individuals' money to pay a tax debt or deprivation of Indian treaty rights falls under the public-rights exception, the due process complexion of Article III grows pale.

A privileges-based public-rights exception would lead to one key change in current doctrine. Article III's minima (whatever that may be) would apply to all agency actions that deprive individuals of property or liberty. For instance, agencies like the FTC could not preside over enforcement actions that do not arise from a government privilege (including perhaps monopoly privileges for common carriers) without satisfying Article III's requirements. Nonetheless, agencies could continue, without regard to Article III, to adjudicate matters related to the granting or reconsideration of conditional benefits—whether social-security benefits, stockbroker licenses, or common-carrier privileges. If Article III judicial review under the APA is sufficient to satisfy Article III for enforcement matters,[151] as it typically is for private rights,[152] then very little would change about current agency adjudication. Yet, the benefits-based rationale would permit the public-rights exception to have a much more coherent theoretical grounding and require some kind of Article III oversight.

C. *Reconsidering Murray's Lessee*

All of these considerations, together, indicate how problematic *Murray's Lessee* itself is. The most readily identifiable benefit in *Murray's Lessee* is the government's waiver of sovereign immunity, whereby the tax-collector debtor could have sought (but apparently did not seek in *Murray's Lessee* itself[153]) judicial review of the Treasury department's audit before the

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151 *See* 5 U.S.C. § 706(2) (2012) (setting out the standards of review for fact and law).

152 *See* Stern v. Marshall, 564 U.S. 462, 493–94 (2011) (discussing how Article III is more jealous of nonagency tribunals deciding private rights than agencies); CFTC v. Schor, 478 U.S. 833, 849–50 (1986) (holding that Article III permits agencies to adjudicate state-law counterclaims between private parties when Article III courts have judicial review, the parties consented to the agency's authority, and Congress did not intend to impugn integrity of Article III courts).

153 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 67 (1989) (Scalia, J., concurring in part and concurring in the judgment).

distress sale.[154] To the extent that such waiver permitted the individual to recover money damages, it fits the benefits paradigm because Congress could have paid money as a reimbursement or as damages with a private bill (as it could for tort or breach-of-contract damages). But if the case instead is understood as permitting the government to deprive one of a property interest and then subject itself as a party to a Court's nonmonetary remedies, the case does not fit well. And indeed, it appears that the debtor in *Murray's Lessee* would have had to seek merely equitable remedies after the government seized his property to have the government's distress warrant set aside.[155] Framed this way, the government's actions look much more like the government depriving the debtor of a property interest and the debtor then having to seek an equitable, nonmonetary recovery for the deprivation.

Professor William Baude has recently argued for another limited understanding of *Murray's Lessee*. He argues that the decision is best understood as reaffirming the permissibility of limited temporary deprivations, such as arrest before trial, before judicial review.[156] This understanding is attractive because it helps fit *Murray's Lessee*, where the government seized property and the landowner could have sought judicial intervention, within a larger, well-recognized exception.[157] Indeed, the Court later in *United States v. James Daniel Good Real Property*[158] understood earlier decisions concerning tax-and-revenue matters as fitting exceptions to due process into the temporary-deprivation exception—usually for matters concerning public health, public safety, or fiscal emergency—with the "apparent rationale . . . of executive urgency."[159]

The problem with relying on the temporary-deprivation exception is that the *James Daniel Good* Court recognized that the government's deprivation should be only as great as necessary to protect exigent or other important interests. The Court in that case refused to permit the government to seize a criminal suspect's real property because the government had not shown that "less restrictive measures" (such as a *lis pendens* or bond) would not have protected the government's interest.[160] It is difficult to see how a *lis pendens* or other lesser action would not also have protected the government's interest in *Murray's Lessee*. In fact, the *James Daniel Good* Court hinted as much by

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154 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280, 284 (1856).

155 *See id.* at 284 ("When, therefore, the act of 1820 enacts, that after the levy of the distress warrant has been begun, the collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court . . . .").

156 *See* Baude, *supra* note 119, at *36–*37.

157 *See* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.6, at 838 (5th ed. 2010) (discussing temporary deprivations under due process).

158 510 U.S. 43 (1993).

159 *Id.* at 59–60.

160 *Id.* at 62.

noting that it was not "revisiting [the revenue] cases."[161] Accordingly, although *Murray's Lessee* can fit within the temporary-deprivation exception, its fit is not perfect and appears subject to further consideration. The true justification appears to rest not on an exigency or limited procedure, but instead on the subject matter at issue.

The best way to resolve the *Murray's Lessee* paradox—that the case relied upon a benefits-based rationale but failed to satisfy its own rationale—is to recognize that its discussion of public rights and benefits was something akin to dicta. The Court began its analysis, consistent with its due process discussion, by saying that Article III did not apply to the revenue-raising function at issue.[162] The plaintiff even appeared to concede the historical basis for the revenue exception.[163] The Court only then addressed the plaintiff's backup argument that, because the government had waived its immunity to permit judicial review of its auditing decision before any distress sale, the matter had morphed from an executive to a judicial matter.[164] Only in rejecting this argument does the Court turn to its discussion of the government as a party and go on "[t]o avoid misconstruction upon so grave a subject."[165] The government's waiver of sovereign immunity, and the terms of that waiver, demonstrate that Congress sought for the matter in *Murray's Leesee* to have both an executive and judicial character, although Congress, at its election, could have selected only one in isolation.[166] This formulation simply raises the following question: What matters can be executive, judicial, or both? Based on the Court's holding, they include revenue-related matters. They also appear to include matters related to benefits because the Court specifically referred to the land-grant determinations and judicial decisions approving of these determinations (indeed, these are the only precedents to which the Court refers).[167] But, notably, the Court did not mention these matters as directly applying to the case at hand; instead, it referred to land-grant determinations as an additional example—what it referred to as "a striking instance of such a class of [public rights] cases."[168]

Public rights, accordingly, may be best thought of as including the bestowal of privileges and narrow, historical subject matter—not all waivers of sovereign immunity, not all instances in which the government is a party, not all instances in which the Congress can appropriately act. To be sure, the

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161 *Id.* at 59.

162 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280–81 (1856).

163 *See id.* at 282 ("It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance.").

164 *See id.* at 282–84.

165 *Id.* at 284.

166 *See id.* at 282–84.

167 *See id.* at 284.

168 *Murray's Lessee*, 59 U.S. at 284.

limited subject-matter exception is inconsistent with the goals of due process and Article III. But, as the Court discussed, the exception as it relates to revenue—unlike a broad public-rights exception that reaches all cases in which Congress acts or the government is a party—had significant historical provenance that excluded it from due process's and Article III's domain. This Essay's proposed understanding of *Murray's Lessee* could explain, in part, the decision's absence from numerous nineteenth-century decisions that recognized the privileges–rights distinction[169] and the Supreme Court's description of *Murray's Lessee* in the early twentieth century as pertaining to "the need of the government promptly to secure its revenues."[170]

D. *The Expansion of Due Process's Domain*

If, as this Essay has proposed, Article III and due process have a symbiotic relationship, should Article III's domain evolve to meet due process's well-known development in the later twentieth century? The answer is not obvious.

Modern due process has broader reach. Gone are the days when it only applied to the deprivation of rights, but not the granting of privileges.[171] Instead, due process now applies to the continuation or deprivation of legitimate claims of entitlement.[172] In practice, this expansion means that due process applies not only to the deprivation of vested rights but also to the cessation of statutory entitlements.[173] The main effect of expanding Article III coextensively with modern due process is that Article III would apply to the denial of already-granted benefits (for, say, no longer meeting statutory requirements)[174] and perhaps also to reconsiderations of initially granted benefits.[175] This extension of Article III to matters concerning legitimate claims of entitlement does not necessarily mean a large disruption for much of the

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169 *See* Young, *supra* note 53, at 795–99.

170 Phillips v. Comm'r, 283 U.S. 589, 596 (1931).

171 *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (rejecting the privileges–rights distinction for purposes of triggering due process).

172 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). That said, a plurality opinion in one of the Court's most recent due process cases appears to revive the privileges–rights distinction, much to the dissenters' astonishment. In *Kerry v. Din*, the plurality, in rejecting a wife's claim that she had a liberty interest in her husband's visa status, described spousal immigration as a "matter of legislative grace rather than fundamental right." 135 S. Ct. 2128, 2136 (2015) (plurality opinion). The dissenting justices noted that the plurality's "argument rests on the rights/privilege distinction that this Court rejected almost five decades ago . . . ." *Id.* at 2143 (Breyer, J., dissenting).

173 Whether modern due process applies to the denial of an application for benefits is less clear. *See generally* PIERCE, *supra* note 157, § 9.4, at 777–78, 781–83 (collecting cases).

174 *See Goldberg*, 397 U.S. at 262–63 (stating that beneficiary had a legitimate claim of entitlement in benefits that government sought to stop providing).

175 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284–85 (1856).

current administrative state. As noted in the Introduction, this Essay does not take a position on what Article III requires when it applies. It may be that current judicial review under the APA suffices.[176]

Having Article III track modern due process furthers certain values. First, it respects the historical connection between these two concepts and provides a coherent and relatively consistent way of limiting the public-rights exception. Second, it further limits the public-rights exception that seems largely anathema to Article III's text and purpose. Indeed, Fallon argued that as due process expanded the notion of protected rights and as standing expanded which rights were judicially enforceable, "[A]rticle III [should] keep[] pace with other aspects of constitutional law."[177]

But having Article III follow modern due process has its own theoretical problems. A privileges-based version of the public-rights exception makes sense because it does not require judicial involvement in those matters that Congress could decide for itself. Traditionally, due process respected the branches' separated powers—Congress can grant and discontinue privileges, while courts can deprive individuals of rights after certain process. Accordingly, congressional delegations to agencies to award or discontinue privileges also did not require judicial involvement. But the legitimate-claims-of-entitlement paradigm disrupts this symmetry. Congress can still provide benefits by itself and discontinue them without judicial involvement. But if Congress delegates that same authority to agencies, then due process can apply if there is a statutory entitlement and a deprivation. In other words, although the relationship between Article III and modern due process can continue superficially, closer inspection reveals that they would not be fully bonded. If due process and Article III do not track each other, one subset of claims to which due process applies (legitimate claims of entitlement) would be able to operate outside of Article III, while all other deprivations of life, liberty, or property would require some kind of Article III intervention.

CONCLUSION

This Essay has proposed that the Supreme Court could better read *Murray's Lessee* to cabin the public-rights exception in a coherent fashion—a fashion that honors the purposes of Article III. In short, the public-rights exception should be understood within the context of structural due process and reach only matters related to privileges (or matters, such as the revenue matters at issue in *Murray's Lessee* itself, that have arguably always rested outside Article III). This Essay rejects grounding the exception, as the Court has done in inconsistent ways, on the government's status as a party, waivers of sovereign immunity, or Congress's use of its Article I authority. The public-rights exception's most noticeable change under this proposal is that it would

176 *See* 5 U.S.C. § 706 (2012); Fallon, *supra* note 11, at 979–80; Redish, *supra* note 11, at 227–28.

177 Fallon, *supra* note 11, at 967.

not include agency actions to deprive one of vested rights (and perhaps entitlements). But agency proceedings concerning the granting of benefits, and perhaps their reconsideration and future termination, depending on whether modern due process applies, can continue—and in a manner that promotes Article III's values.