IT'S *SAENZ*: FOLLOWING JUSTICE THOMAS'S TEACHING ON THE PUBLIC-RIGHTS EXCEPTION, FROM NON–ARTICLE III ADJUDICATION TO THE FOURTEENTH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE

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INTRODUCTION

According to the Supreme Court, three situations justify adjudication in administrative agencies or in non–Article III courts: courts-martial,[1] territorial courts,[2] and cases involving "public rights."[3] The public-rights cases have produced significant scholarship and several irreconcilable opinions.[4]

Justice Clarence Thomas has recently been the most outspoken Justice in clarifying and delimiting the public-rights doctrine,[5] though his reason for

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[1] Dynes v. Hoover, 61 U.S. (20 How.) 65, 78–79 (1858). *Ortiz v. United States*, 138 S. Ct. 2165 (2018), came to the Supreme Court directly from the Court of Appeals of the Armed Forces, itself a non–Article III court, *id.* at 2170, which provoked a strong dissent from Justice Alito. *Id.* at 2189 (Alito, J., dissenting). Justice Alito argued that the Court can only take appeals from lower Article III courts, and that if it could take appeals directly from non–Article III courts or from executive agencies, then it could have rendered relief on Marbury's appeal from a "judgment" of Madison's imaginary but plausible "Court of Commission Review." *See id.* at 2189–91.

[2] Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828).

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

[4] Between private and public rights exists a middle category called "quasi-private rights," which is cited occasionally. *E.g.*, B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1316–17 (2015) (Thomas, J., dissenting). This category is closer to public rights than to private rights, and Justice Thomas did not use it in his dissent in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), later in the same term as *B & B Hardware*.

[5] *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373–77 (2018) (explaining that petitions to revise and cancel a patent may be adjudicated by the Patent and Trademark Office because, as a "public franchise," a patent is a right granted by the government and because such petitions were heard by agencies of the Crown at the time of the Founding); *Wellness*, 135 S. Ct. at 1968–70 (Thomas, J., dissenting) (arguing that consent cannot validate adjudication in an Article I court if the Constitution requires that the case be adjudicated in an Article III court); *B & B Hardware*, 135 S.

doing so might not be readily apparent. While he advocates for revival of the Fourteenth Amendment's Privileges or Immunities Clause,[6] he dissented from an opinion in which the Court did just that.[7] In that dissent, Justice Thomas cautioned that the Privileges or Immunities Clause should not become a new fountainhead of non-Originalist rights jurisprudence, as the Due Process Clause has become with its substantive gloss.[8] To prevent that, he urged the Court to steer clear of the Privileges or Immunities Clause until it can articulate a cabining principle.[9] One principle he suggested was that the Clause not apply to "public benefits," but rather be confined to those fundamental rights known to the Framers of 1868 (with their own Privileges and Immunities Clause[10]) and to Justice Bushrod Washington in *Corfield v. Coryell*,[11] where he provided an extensive list of privileges and immunities.[12]

But are there connections between public benefits and public rights? After a brief note in Part I regarding the so-called "exceptions" to Article III, Part II of this Article traces the traditional bases for adjudication by agencies and non–Article III courts, with particular attention to Justice Thomas's dissent in *Wellness International Network, Ltd. v. Sharif*.[13] Part III considers *Saenz v. Roe*[14] in the context of the Court's privileges-or-immunities and right-to-travel cases, and compares Justice Thomas's dissent in *Saenz* with both his dissent in *Wellness* and his recent opinion for the Court in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*.[15] This Article

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Ct. at 1316–18 (Thomas, J., dissenting) (discussing how trademark protection is not such a "public right" as to allow the federal trademark agency to issue findings that have a preclusive effect in Article III courts).

6 U.S. CONST. amend. XIV, § 1; *see* Timbs v. Indiana, 139 S. Ct. 682, 691–92 (2019) (Thomas, J., concurring in the judgment) (arguing that the Excessive Fines Clause of the Eighth Amendment applies against the states via the Privileges or Immunities Clause, rather than, as the majority held, the Due Process Clause); McDonald v. City of Chicago, 561 U.S. 742, 805–06 (2010) (Thomas, J., concurring in part and concurring in the judgment) (arguing the same of the Second Amendment).

7 *See* Saenz v. Roe, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting).

8 *See id.* at 528 (warning that "[t]he majority's failure to consider . . . important questions [about the original meaning of the Privileges or Immunities Clause and its place in the Court's Fourteenth Amendment jurisprudence] raises the specter that the . . . Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court'" (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion))).

9 *See id.*

10 U.S. CONST. art. IV, § 2, cl. 1.

11 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

12 *Saenz*, 526 U.S. at 526–27.

13 135 S. Ct. 1932, 1960 (2015) (Thomas, J., dissenting).

14 526 U.S. 489 (1999).

15 138 S. Ct. 1365 (2018).

ultimately argues that Justice Thomas—who takes the long view[16] and tries to return the Court to "first principles"[17]—has a consistent first-principles approach both to non–Article III adjudication and to the Privileges or Immunities Clause of the Fourteenth Amendment.

I. A METHODOLOGICAL NOTE

At this point in examining non–Article III adjudication, authors usually begin by giving a thumbnail sketch of the Constitution's scheme of separated powers and the reasons for it.[18] This is then followed immediately by something about how fealty to the scheme is impossible in the "modern administrative state."[19] But there are problems with presenting a section on how the Supreme Court has or has not cabined the "exceptions" to the Constitution.[20] If something can be called an exception to the Constitution, then it is, very literally, unconstitutional.[21] And since the Constitution is both our agreed-upon source of federal power and of some limits on federal and state power, frankly unconstitutional procedures should not be evaluated in fine shades of

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16 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 601–02 (1995) (Thomas, J., concurring) (urging that the "substantial effects" prong of the Court's test for the validity of federal legislation under the Interstate Commerce Clause—in place since 1942—be reconsidered, and the range of valid federal legislation correspondingly narrowed).

17 *See generally* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1999).

18 One as good as any other can be found in Justice Brennan's plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57–60 (1982) (plurality opinion). A *locus classicus*—cited in *Northern Pipeline* and elsewhere—is James Madison in Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *See, e.g.*, *id.* at 57 (alteration in original) (quoting THE FEDERALIST NO. 47, at 300 (James Madison) (Henry Cabot Lodge ed., 1888)).

19 *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 235 (1990); Laura Ferguson, *Revisiting the Public Rights Doctrine: Justice Thomas's Application of Originalism to Administrative Law*, 84 GEO. WASH. L. REV. 1315, 1319 (2016); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004).

20 *See* Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1050–51 (1998) (explaining that classic areas of non–Article III adjudication are not exceptions to the Constitution).

21 *See* Maryland v. Craig, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting) ("I am persuaded . . . that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals . . . .").

whether or not the unauthorized (i.e., non–Article III) court's ruling is final or not,[22] or whether the parties agreed to use it,[23] or whether "a democratic vote of nine lawyers"[24] shows that the judicial power was or was not too incisively encroached upon.[25] An unconstitutional thing is unconstitutional, and the pressing needs of the modern state cannot change that. If anything, those pressing needs should alert us to persons of good intent who try to evade the Constitution because of the needs of the modern state.[26] With this note in mind, this Article turns to the public-rights "exception" to Article III adjudication.

II. EVOLUTION OF PUBLIC RIGHTS

The origin and evolution of the "public rights" concept as a justification for adjudication outside of Article III courts is an oft-told yet short story,[27] because its landmarks are separated by long stretches of time, from Blackstone to *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[28]

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22 Finality *vel non* of agency determinations was very important to the Court in *Crowell v. Benson*, 285 U.S. 22, 45 (1932) ("The contention under the due process clause of the Fifth Amendment relates to the determination of questions of fact. Rulings of the [executive branch administrator] upon questions of law are without finality."). But later, the Court seemed concerned that matters of fact, no less than matters of law, stay finally in judicial hands:

> The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

Id. at 56–57.

23 *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015) (holding that consent by the parties to adjudication in an Article I court can cure potential constitutional defects in the forum).

24 Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).

25 *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (describing the Court's balancing test—that weighs this and other factors—for the constitutionality of adjudications by a non–Article III court).

26 *See Craig*, 497 U.S. at 861 (Scalia, J., dissenting) ("[T]he Constitution is meant to protect against, rather than conform to, current 'widespread belief' . . . .").

27 *See, e.g.*, *Wellness*, 135 S. Ct. at 1964–68 (Thomas, J., dissenting).

28 458 U.S. 50 (1982) (plurality opinion).

A. *Blackstone*

Some courts and scholars trace the genealogy of public rights as far back as Blackstone.[29] Mining Oxford's first professor of common law for loomings of the administrative state is difficult, not because there were not yet any royal agencies doing extra-judicial judging in his time,[30] but because he writes precisely about the common law. For Blackstone, adjudication outside of common law courts would present the same problem as federal adjudication outside of Article III courts. It was the common-law courts, and not the royal prerogative courts, that exercised "the" judicial power.[31]

Blackstone's theory of public rights is not perfectly suited to the twentieth-century administrative state or to twenty-first-century questions about it. But Blackstone did recognize private rights, which were individual, natural, and "absolute," except where deprivation of them occurred "by the law of the land" (i.e., by a real court exercising due process).[32] He also recognized public rights, but in the context of the tort–crime boundary: criminal law protects against "public wrongs," while the "civil rights"[33]—which may have been violated by the same conduct—may be vindicated by the appropriate writ sworn against the same defendant.[34]

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29 *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566–68 (2007).

30 Even before Professor Philip Hamburger's scholarship, others noted the parallels between twentieth-century administrative law and the Tudor-Stuart prerogative courts such as the Star Chamber and the modernized Court of Chancery. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 130–34 (2014). The difference is that New Frontier-era legal scholars thought these courts were *good* things, rather than instruments of Tudor absolutism. *See* Bernard Schwartz, *The Administrative Agency in Historical Perspective*, 36 IND. L.J. 263, 276–79 (1961) (explaining that the rise of arbitrary prerogative courts in sixteenth-century England happened because "at the end of the Middle Ages the social and economic fetters that had bound man for centuries were suddenly being unshackled").

31 *See* HAMBURGER, *supra* note 30, at 129–36 (discussing courts that were unacknowledged by the common law yet powerful in Tudor-Stuart times and subservient to the Crown).

32 1 WILLIAM BLACKSTONE, COMMENTARIES *119, *133–35. The phrase "by the law of the land" is from Magna Carta itself. *English Translation of Magna Carta*, BRIT. LIBR. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation ("No free man shall be [deprived of his rights] . . . except by the lawful judgment of his equals or by the law of the land."). The Supreme Court first identified this phrase as interchangeable with the Fifth Amendment's (and, later, the Fourteenth Amendment's) "due process of law" in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

33 4 BLACKSTONE, *supra* note 32, at *5 ("The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's social aggregate capacity.").

34 3 *id.* at *22–23 (explaining that there are "two cases . . . wherein the only possible legal remedy would be directed against the very person himself who seeks relief").

But Blackstone may have also had a sense of a then-developing distinction between public and private rights as it is understood today:

> The rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other.[35]

One may doubt whether the rights "incident" to persons "as members of society, and standing in various relations to each other" are the created rights such as workers' compensation,[36] a system of specialized bankruptcy courts,[37] and welfare benefits,[38] as they would be in modern cases on public rights. But the distinction between private rights, which Blackstone calls "absolute," and rights that are "relative" and incident to us "as members of society" reflects the distinction that would unfold over the next several decades.

B. Murray's Lessee v. Hoboken Land & Improvement Co.

The public-rights narrative usually begins not with Blackstone but with *Murray's Lessee v. Hoboken Land & Improvement Co.*,[39] which upheld an executive action that affected private persons' property rights.[40] A U.S. customs official, Samuel Swartwout, had made free with the customs revenue in his office.[41] The solicitor of the treasury issued a distress warrant in 1839 under an executive auditing process authorized by Congress in 1820, which placed a government claim on land formerly owned by Swartwout.[42] The parties in the case each had a claim on this land, and the constitutionality of the government's action would determine which claim was valid.[43]

If the government's action was invalid and the land was still Swartwout's, a levy of execution on what had been Swartwout's land would be in order (Murray's Lessee was his successor in interest).[44] But if that land was forfeited to the government in satisfaction of Swartwout's remittance deficiencies from the customs house, then the government could sell it to

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35 1 *id.* at *119.

36 *See* Crowell v. Benson, 285 U.S. 22, 36–37 (1932).

37 *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938–39 (2015); Stern v. Marshall, 564 U.S. 462, 468–69 (2011); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52–53 (1982) (plurality opinion).

38 *See* Saenz v. Roe, 526 U.S. 489, 492 (1999).

39 59 U.S. (18 How.) 272 (1856).

40 *Id.* at 279–81.

41 *Id.* at 275.

42 *See id.* at 274.

43 *See id.*

44 *See id.*

someone else, such as the Hoboken Land and Improvement Company.[45] The federal judges in the court below certified the question to the Supreme Court:

> [W]hether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff.[46]

Neither Swartwout nor the government was directly before the Court, but the government as regulator was very much an actor in the case[47]—something that many, though not all, consider a prerequisite and a marker for a public-rights case.[48]

Plaintiff's argument, "that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, 'without due process of law,'" drew some respect from the Court.[49] The Court responded with extensive references to medieval English royal practice in recovering debts to the Crown, some so stern that the Magna Carta established curbs on them.[50] Ultimately, the Court concluded that these practices were sufficient to show that "the law of the land," as then understood, "authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance" to the distress warrant at issue.[51]

The Court then, in dictum, began to define public rights by distinguishing "between public defaulters and ordinary debtors."[52] Private (or "ordinary") debts could be worked out in the regular courts. In the Lockean-Blackstonian system, the right of a private citizen to recover a private debt would be a property right.[53] But a "public defaulter" is in debt to the public, not to

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45 *See Murray's Lessee*, 59 U.S. (18 How.) at 274.

46 *Id.*

47 *See id.* at 283–84.

48 *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 503 (2011) (Scalia, J., concurring) ("[O]ur contrary precedents notwithstanding—'a matter of public rights . . . must at a minimum arise between the government and others' . . . ." (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65 (1989) (Scalia, J., concurring in part and concurring in the judgment) (second alteration in original))). The "contrary precedents" Justice Scalia referenced in *Stern* are *Granfinanciera* and *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

49 *See Murray's Lessee*, 59 U.S. (18 How.) at 275–77.

50 *Id.* at 277–78, 282.

51 *Id.* at 278.

52 *Id.*

53 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION § 32, at 113–14 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) ("God and his reason commanded [man] to subdue the earth, *i. e.* improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him."); BLACKSTONE, *supra* note 32, at *134 ("[T]he party suffering shall also have his

any individual. When the government acts to recover the debt, it does so in the zone of public rights. This much seems clear even before the Court begins its oft-quoted dictum on public rights:

> 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.[54]

This definition has two parts. First are those matters that Congress cannot withdraw from Article III courts, including the matters listed in Section 2 of Article III,[55] and others that, by their "nature," cannot be assigned to Article III courts. This might include, for example, requests for advisory opinions.[56] Second are those "public rights" that Congress may assign into or outside of Article III courts. So, according to *Murray's Lessee*, public rights include rights that can be adjudicated in Article III courts (or not), some that *cannot* be adjudicated in Article III courts, and some (those involving individual natural rights) that *must* be.

Though the Court does not provide a substantive description of public-rights cases, the common thread, based on the facts of *Murray's Lessee* and later public-rights cases, is that the government is either a party in the cases, or there is at least some government action that has set the lawsuit in motion and is being challenged. Either form of government action brings the case within Article III—either the United States is a party, or two private parties are in conflict over a situation caused by a U.S. government action. But these public-rights cases do not have to be heard in Article III courts, according to *Murray's Lessee*.

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private action against the person committing, and all his aiders, advisers and abettors . . . ."); 3 *id.* at *109 ("[A]ll possible injuries whatsoever, that did not fall within the cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it's [sic] proper redress.").

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

55 U.S. CONST. art. III, § 2, cls. 1–2. This excludes, of course, Article III jurisdiction over suits against a state filed by a citizen of a different state, which is forbidden by the Eleventh Amendment. *Id.Id.* amend. XI.

56 Advisory opinions were declared to be outside the jurisdiction of Article III courts in a letter from Chief Justice Jay to President Washington. Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (Henry P. Johnston ed., New York, G. P. Putnam's Sons 1891). President Washington, through Secretary of State Jefferson, had requested an advisory opinion from the Court on the United States' rights and obligations under its treaties during the war between England and France. STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 134–37 (1997).

In *Murray's Lessee*, the government was very much present as the party whose action was challenged, even if the procedural customs of the day could only test the constitutionality of that action through a suit by the lessee against the Hoboken Land and Improvement Company.[57] This places the case, if not squarely within a nineteenth-century definition of "public rights"—because one did not exist—then at least squarely within the twentieth-century definition in *Crowell v. Benson*[58] and *Northern Pipeline*.

C. Crowell v. Benson

Despite the beginning of the rise of administrative agencies in the 1880s, the Court did not discuss public rights again until *Crowell v. Benson* in 1932, during the Depression era of government expansion that preceded the New Deal. The Court in *Crowell* held that it was constitutional for an administrative agency (the U.S. Employees' Compensation Commission) to determine the basic facts in an employee injury case, where Congress had set up the agency for that purpose.[59] Writing for the Court, Chief Justice Hughes expressed concern about the possibility that agencies would make final legal determinations.[60] Accordingly, he detailed how the statute made the Commission's finding final only as to facts, leaving aggrieved parties with the right to seek de novo review of legal issues in an Article III court.[61]

The Court offered its own definition of public rights: "[T]hose 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."[62] In other words, public rights are those rights that persons have only as result of lawful action by one of the government's nonjudicial branches. This validation of administrative fact-finding was considered in its time a modest step forward for the administrative state, especially against the background of Justice Brandeis's dissent, which argued against even the minimal constraints the majority insisted on, such as recourse to an Article III court.[63]

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57 Article III courts did not permanently gain general federal-question jurisdiction until 1875. Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 157 (1953).

58 285 U.S. 22 (1932).

59 *Id.* at 46–47.

60 *See id.* at 49.

61 *See id.* at 49–50.

62 *Id.* at 50.

63 *Id.* at 85 (Brandeis, J., dissenting) ("Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to the doctrine that a judicial finding of any fact involved in any civil proceeding to enforce a pecuniary liability may not be made upon evidence introduced before a properly constituted administrative tribunal, or that a determination so made may not be deemed an independent judicial determination.").

In deciding that this was a case that Congress could assign outside of Article III courts, the Court quoted the dictum from *Murray's Lessee*.[64] But, as the Court immediately explained, Congress may do so only as to facts, not law.[65] The questions of law presented in *Crowell*, such as whether an employer-employee relationship existed between a longshoreman and a shipper, are reserved to "the same court that has jurisdiction in admiralty"[66] (i.e., an Article III court[67]). As to its facts, *Crowell* has the features of a public-rights case: it concerns rights granted under a statute for ameliorating the situations of injured longshoremen. In either venue—Article III courts or the U.S. Employees' Compensation Commission—the original complainant could vindicate his injury caused by the responsible party. But with the Commission, the complainant had the additional, entirely government-created right to have his claim adjudicated more quickly and, supposedly, with more expertise.[68]

D. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

The public-rights doctrine next appeared in Justice Brennan's plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, which concerned the reach of bankruptcy courts. Although Justice Brennan attracted only a plurality, his opinion was an ambitious attempt to reorganize and restate the non–Article III adjudication precedents into three categories: courts-martial, territorial courts, and public rights.[69]

In this case, Northern Pipeline filed for bankruptcy and two months later, lest the bankruptcy estate be at less-than-full value, sued Marathon Pipe Line under multiple claims, *all of them* bread-and-butter common-law claims.[70] Marathon moved to dismiss the suit "on the ground that the [Bankruptcy Act of 1978] unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution."[71] According to the plurality, these were not public-rights claims, but quite ordinary private ones:

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64 *Crowell*, 285 U.S. at 49 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) (dictum)); *see supra* text accompanying note 54.

65 *See Crowell*, 285 U.S. at 49.

66 *Id.*

67 U.S. CONST. art. III, § 2, cl. 1 (listing admiralty among the cases over which Article III courts may be given jurisdiction).

68 *Crowell*, 285 U.S. at 46.

69 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66–67 (1982) (plurality opinion).

70 *Id.* at 56 (listing Northern Pipeline's claims for "breaches of contract and warranty . . . misrepresentation, coercion, and duress").

71 *Id.* at 56–57.

> [T]he substantive legal rights at issue in the present action cannot be deemed "public rights." Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, or certificates for common carriers" granted by administrative agencies. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern[Pipeline's] right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 [U.S. 22, 51 (1932)].[72]

Northern Pipeline attempted to restate and apply hornbook separation-of-powers doctrine in such a way as to preserve the role of Article III courts, while not calling into question non–Article III adjudicators themselves. But the limitations it set down in the bankruptcy area, as it turns out, did not quite hold.

With bankruptcy expelled from the club of public rights by *Northern Pipeline*—though by a plurality only—Congress two years later passed a new system of bankruptcy adjudication to restore the function and status of bankruptcy courts.[73] This statute was tested in *Stern v. Marshall*,[74] and found to be partly, but not wholly, successful. The post–*Northern Pipeline* legislation had defined a set of subject matters as "core" to the bankruptcy process.[75] Causes of action outside that core were solely within Article III and had to be tried in Article III courts.[76] *Stern* held, in effect, that Congress had drawn the boundaries too loosely:

> The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection. We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on [Petitioner's] counterclaim, it lacked the constitutional authority to do so.[77]

III. JUSTICE THOMAS'S CONTRIBUTIONS

A. Wellness International Network, Ltd. v. Sharif

One of Justice Thomas's most significant contributions to the public-rights doctrine came in his dissent in *Wellness International Network, Ltd. v. Sharif*. The Court in *Wellness* expanded the jurisdiction of the bankruptcy

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72 *Id.* at 71–72 (one citation omitted).

73 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-531, 98 Stat. 2704 (codified as amended at 5 U.S.C. § 8331(22) (2012)).

74 564 U.S. 462 (2011).

75 *Id.* at 473–75.

76 *See id.* at 475.

77 *Id.* at 469.

courts, nearly mooting its decision four years earlier in *Stern* by holding that parties could, *by consent*—even *implied* consent construed from their actions—legitimize a non–Article III adjudication that *Stern* might otherwise require to be decided by an Article III court.[78]

Chief Justice Roberts filed the principal dissent in *Wellness*, but Justice Thomas filed his own dissent in which he sketched an overview of the public-rights doctrine.[79] He noted first that the Court and the principal dissent had both been unduly detained by the question of what constitutes consent to a constitutionally dubious procedure, and had given too little attention to what kind of exceptions to the Constitution the parties were consenting to.[80] For example, a criminal defendant usually has a right to a jury trial; he may waive this right, but he cannot consent to have his case tried by an ad hoc panel outside of Article III courts or, in the states, outside of the state courts legislatively authorized to try criminal cases.[81] "Disposition of private rights to life, liberty, and property falls within the core of the judicial power, whereas disposition of public rights does not."[82]

After noting the Court's confusing and controversial—if not circular—previous definitions of public rights, Justice Thomas explained:

> Historically, "*public* rights" were understood as "rights belonging to the people at large," as distinguished from "the *private* unalienable rights of each individual." This distinction is significant to our understanding of Article III, for while the legislative and executive branches may dispose of public rights at will—including through non-Article III adjudications—an exercise of the judicial power is required "when the government want[s] to act authoritatively upon core private rights that had vested in a particular individual."
>
> The distinction was well known at the time of the founding. In the tradition of John Locke, William Blackstone in his Commentaries identified the private rights to life, liberty, and property as the three "absolute" rights—so called because they "appertain[ed] and belong[ed] to particular men . . . merely as individuals," not "to them as members of society [or] standing in various relations to each other"—that is, not dependent upon the will of the government. 1 W. Blackstone, Commentaries on the Laws of England 119 (1765) (Commentaries). Public rights, by contrast, belonged to "the whole community, considered as a community, in its social aggregate capacity." 4 Commentaries 5 (1769). As the modern doctrine of the separation of powers emerged, "the courts became identified with the enforcement of private right, and administrative agencies with the execution of public policy."[83]

The distinction is thus "private" and "individual" rights on one hand, and rights "belonging to the people at large" on the other.

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78 *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944, 1947–48 (2015).

79 *Id.* at 1960–63 (Thomas, J., dissenting).

80 *Id.* at 1961.

81 *See id.* at 1961–62, 1961 n.1.

82 *Id.* at 1963.

83 *Id.* at 1965 (alterations in original) (some citations omitted) (first quoting Lansing v. Smith, 4 Wend. 9, 21 (N.Y. 1829) (opinion of Walworth, C.); then quoting Nelson, *supra* note 29, at 569; then quoting Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 413 (1958)).

B. Oil States Energy Services, LLC v. Greene's Energy Group, LLC

Justice Thomas again wrote on private versus public rights in the recent case *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*. That case, in which Justice Thomas wrote for a 7-2 majority, produced a victory for non–Article III adjudication. Although his opinion is arguably in tension with *Stern* and with his dissent in *Wellness*,[84] a closer look at his discussion of public rights reveals a consistent pattern. Regardless of whether *Oil States* was rightly decided, it does not break with Justice Thomas's jurisprudence on public rights.

In *Oil States*, the Court decided that Congress did not violate Article III or the Seventh Amendment when it authorized the Patent and Trademark Office—an executive agency—to adjudicate challenges to the validity of existing patents via "inter partes review" within the agency.[85] "Inter partes" means only that both parties are to be involved; it does not mean judicial review.[86]

The dissent in *Oil States* is more purist with regard to application of Article III. It does not disagree with the majority regarding the general requirements of Article III, but rather the two opinions represent dueling originalisms. Each side argues that its view is better grounded in the English practice that the Framers would have had in mind when drafting the enumeration to Congress of an intellectual-property power.[87] This Article does not decide between the majority and the dissent, but only mines the former for clues about Justice Thomas's view of the public-rights doctrine. Are patent rights, or more specifically, patent validity and the rights it confers on the holder, private rights or public rights? According to Justice Thomas,

> Inter partes review falls squarely within the public-rights doctrine. This Court has recognized, and the parties do not dispute, that the decision to *grant* a patent is a matter involving public rights—specifically, the grant of a public franchise. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration.[88]

Importantly, the *Oil States* Court asserted that the rights held by a patent-holder did *not* exist at common law: "The [government's grant of a public] franchise gives the patent owner 'the right to exclude others from making,

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84 The dissenters in *Oil States*—Justice Gorsuch joined by Chief Justice Roberts—certainly thought so, and cited Justice Thomas's *Wellness* dissent against him. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1384–85 (2018) (Gorsuch, J., dissenting).

85 *Id.* at 1373 (majority opinion) (holding that inter partes review does not violate Article III); *id.* at 1379 (holding the same of the Seventh Amendment).

86 BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 461 (2d ed. 1995) (explaining that "inter partes" means "between parties; involving all parties to a lawsuit," and that it is an unuseful Latinism rather than a term of art).

87 U.S. CONST. art. I, § 8, cl. 8 (Patent and Copyright Clause).

88 *Oil States*, 138 S. Ct. at 1373.

using, offering for sale, or selling the invention throughout the United States.' That right 'did not exist at common law.' Rather, it is a 'creature of statute law.'"[89]

The historical accuracy of this proposition is less important here than its role in defining Justice Thomas's view of public rights. If such rights did not exist at common law, they must be later-arising rights, creatures of statute, granted by the government under certain circumstances. With this in mind, this Article turns to the privileges-or-immunities cases.

IV. PUBLIC RIGHTS AND PRIVILEGES OR IMMUNITIES

A. Shapiro v. Thompson*,* Edwards v. California*, and the Right to Travel*

The Court had discussed the right to travel as part of privileges and immunities of citizenship even before it applied Article IV, Section 2 against the states via the Fourteenth Amendment.[90] But in 1969, the Court in *Shapiro v. Thompson*[91] did something new. It fused the right to travel with welfare rights,[92] as that term was used by the National Welfare Rights Organization, the organization that propelled this movement to its prominence in politics from the mid-1960s to the mid-1970s.[93] But the Court failed to clearly identify where in the Constitution the right to travel is found. Is it inherent in the Privileges and Immunities Clause of Article IV, in the Privileges or Immunities Clause of the Fourteenth Amendment, or in both? Although the Court discussed this issue, it did not pronounce a holding.

In *Shapiro*, plaintiffs in three jurisdictions argued that their states' and D.C.'s one-year durational residency requirements for welfare benefits eligibility were unconstitutional.[94] In *Edwards v. California*[95] nearly thirty years before *Shapiro*, the Court noted with special scorn California's Depression-

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89 *Id.* at 1374 (citations omitted) (first quoting 35 U.S.C. § 154(a)(1) (2012); then quoting Gayler v. Wilder, 51 U.S. (10 How.) 477, 494 (1851); then quoting Crown Die & Tool Co. v. Nye Tool & Mach. Works, 261 U.S. 24, 40 (1923)). This assertion is important to understanding *Saenz v. Roe*, 526 U.S. 489 (1999). *See infra* Section IV.B.

90 *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79–80 (1873); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1868); The Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting). The *Slaughter-House Cases*' application of the Privileges or Immunities Clause was controversial at the time and has remained so ever since. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 808–09 (2010) (Thomas, J., concurring in part and concurring in the judgment).

91 394 U.S. 618 (1969).

92 *See id.* at 631–32.

93 Kazuyo Tsuchiya, *National Welfare Rights Organization (1966–1975)*, BLACKPAST (Jan. 23, 2007), http://www.blackpast.org/aah/national-welfare-rights-organization-1966-1975.

94 *See Shapiro*, 394 U.S. at 621–22.

95 314 U.S. 160 (1941).

era attempt to keep nonresidents out of the state through what came to be called its "anti-Okie law."[96] This law criminalized knowingly "bring[ing] or assist[ing] in bringing into the State any indigent person who is not a resident of the State."[97] The Court held this was an unconstitutional burden on interstate commerce.[98]

While the Court based its holding in *Edwards* on the Dormant Commerce Clause, much of *Shapiro*, in contrast, reads like an Equal Protection opinion, though it used a means–ends test that resembles strict scrutiny in a case where the Court was unable to find a suspect classification.[99] It stated clearly, however, that "[w]e have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."[100]

B. Saenz v. Roe *and Privileges or Immunities*

The issue arose again in 1999 in *Saenz v. Roe*.[101] The Court decided that the textual home for the right to travel was, after all, the Privileges or Immunities Clause of the Fourteenth Amendment.[102] It held that the right to travel had three components: (1) the right to traverse state lines; (2) the right to be treated as a "welcome visitor" when in a different state; and (3) the right to equality as a new citizen of the state to which one has moved.[103] Chief Justice Rehnquist, in a dissent joined by Justice Thomas, argued that of these three components, only the first finds support in the Court's right-to-travel cases.[104] It was this freedom to traverse state lines that the Court protected

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96 Guy Logsdon, *Okie*, OKLA. HIST. SOC'Y, http://www.okhistory.org/publications/enc/entry.php?entry=OK007 (last visited Mar. 5, 2019).

97 *Edwards*, 314 U.S. at 171 (quoting CAL. WELF. & INST. CODE § 2615 (1937)).

98 *See id.* at 174. While nonetheless invalidating the statute, the Court construed it as containing exceptions for—or simply not applying to—those bringing in friends or relatives whom they planned to care for. *See id.* at 172.

99 *See Shapiro*, 394 U.S. at 638. Later, the *Saenz* Court read *Shapiro* as having "held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause 'unless shown to be necessary to promote a *compelling* governmental interest,'" but also that *Shapiro* reached this holding "[w]ithout pausing to identify the specific source of the right." Saenz v. Roe, 526 U.S. 489, 499 (1999) (quoting *Shapiro*, 394 U.S. at 634).

100 *Shapiro*, 394 U.S. at 630.

101 *Saenz*, 526 U.S. at 492. The Court invalidated other durational residency requirements, outside of the welfare benefits context, between *Shapiro* and *Saenz*. *See* Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 269 (1974) (indigents receiving medical care at county's expense); Dunn v. Blumstein, 405 U.S. 330, 359–60 (1972) (voting in state elections). In *Memorial Hospital*, the Court acknowledged an equal-protection issue but sidestepped it for lack of a suspect classification, or of a fundamental right, or of five votes to change the law on either of these, and moved toward a right-to-travel theory instead. *See Mem'l Hosp.*, 415 U.S. at 253–55.

102 *See Saenz*, 526 U.S. at 502–03.

103 *Id.* at 500.

104 *See id.* at 511–13 (Rehnquist, C.J., dissenting).

when it invalidated California's "anti-Okie law" on Dormant Commerce Clause grounds.[105] But it is the third component—the right to equality as a new citizen of a state—that the *Saenz* majority specifically stated was protected by the Fourteenth Amendment's Privileges or Immunities Clause.[106]

Justice Thomas, in his separate dissent joined by Chief Justice Rehnquist, argued that "the majority attributes a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified."[107] The majority relied on the Court's precedents, as it did in *Shapiro* and other durational-residency cases resolved under the right-to-travel theory.[108]

Justice Thomas advocates for returning to the Privileges or Immunities Clause and its origins. He acknowledges that, apart from the wrongness of the Court's holding in the *Slaughter-House Cases*,[109] there is widespread disagreement over what the Clause meant as an original matter.[110] But in seeking

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105 *See id.* at 511–12; *id.* at 500 (majority opinion).

106 *Id.* at 502–03 (majority opinion).

107 *Id.* at 521 (Thomas, J., dissenting).

108 *See Saenz*, 526 U.S. at 498–500 (majority opinion). The trend of the Court relying on its own precedents for a right not clearly spelled out in the Constitution dates back to Civil War–era cases such as *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), and the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849). The link between travel and Article IV's Privileges and Immunities Clause goes as far back as *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

109 83 U.S. (16 Wall.) 36 (1873).

110 *Saenz*, 526 U.S. at 522 n.1 (Thomas, J., dissenting). In footnote 1, Justice Thomas divides the legal scholarship into seven schools of thought on the Privileges or Immunities Clause: (1) it is an anti-discrimination provision, *id.* (citing DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 341–51 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992)); (2) it incorporates the first eight amendments, *id.* (citing 2 WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1089–95 (1953)); (3) it incorporates the rights in the Bill of Rights and other fundamental rights, *id.* (citing MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 100 (1986)); (4) it guarantees a Lockean concept of natural rights, *id.* (citing BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 46–71 (1987); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 521–36 (1989)); (5) it "was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists . . . or in any specific way gives directions for finding," *id.* (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 28 (1980)); (6) it forbids racial discrimination with respect to the rights contained in the Civil Rights Act of 1866, *id.* (citing RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 30 (2d ed. 1997)); and (7) it is "inscrutable and should be treated as if it had been obliterated by an ink blot," *id.* (citing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990)). Here, Justice Thomas finds common ground among scholars who are usually seen as at odds. For example, Professor Bernard Siegan's judicial nomination failed because he was seen as too libertarian, while Professor Bruce Ackerman is a self-described liberal. *See* Bruce Ackerman, *We Answer to the Name of Liberals*, AM. PROSPECT (Oct. 22, 2006), http://prospect.org/article/we-answer-name-liberals-0; Margalit Fox, *Bernard Siegan, 81, Legal Scholar and Reagan Nominee, Dies*, N.Y. TIMES (Apr. 1, 2006), https://www.nytimes.com/2006/04/01/us/01siegan.html.

the Clause's origins, he argues that it is necessary to go back even further than the Court's own cases. To that end, Justice Thomas looks to the *1606 Charter of Virginia* as the earliest trace of "the phrase (or its close approximation)."[111] That Charter provided that "all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realme of *England*."[112]

The qualifying phrase "as if they had been abiding and born, within this our Realme of England" could be taken to mean that the "Liberties, Franchises, and Immunities" are those not of individuals in nature, but only of Englishmen, and potentially revocable by the King of England. But the wording of the whole provision suggests the exact opposite: that these are rights that *would* have been applicable in England, but which are *not* lost by emigrating to the colonies.

The appearance of the words "privileges" and "immunities" became more frequent the closer the colonies came to declaring independence.[113] Justice Thomas identifies several documents from 1765, including the *Massachusetts Resolves*, which stated that "this inherent Right [of property], together with all other essential Rights, Liberties, Privileges and Immunities of the People of Great Britain have been fully confirmed to [the British citizens of Massachusetts] by *Magna Charta*," and the *Virginia Resolves*, which referenced "all Liberties, Privileges, and Immunities of Denizens and natural Subjects, to all Intents and Purposes, as if they had been abiding and born within the Realm of *England*."[114]

Private and public rights have been moving ever closer to a distinction between private rights held by the individual person—preexisting government but protected by it (i.e., natural-law rights)—on one hand, and public rights granted to the political community by its government, on the other.

Justice Thomas goes on to quote *Corfield v. Coryell* and its long list of rights protected by Article IV's Privileges and Immunities Clause. That list is, perhaps, too long to be used as a checklist, in part because it contains, for example, "the elective franchise," which before the Civil War was widely

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111 *Saenz*, 526 U.S. at 522–23.

112 *Id.* at 523 (quoting 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3788 (Francis Newton Thorpe ed., 1909)).

113 *See id.*

114 *Id.* n.3 (first quoting THE MASSACHUSETTS RESOLVES, OCTOBER 29, 1765 (1765), *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 56, 56 (Edmund S. Morgan ed., 1959); then quoting THE RESOLUTIONS AS PRINTED IN THE JOURNAL OF THE HOUSE OF BURGESSES (1765), *reprinted in* PROLOGUE TO REVOLUTION, *supra*, at 47, 48 (*Virginia Resolves*)).

considered a "political right" rather than a "civil right" and thus more open to regulation.[115]

The length of that list might emphasize that Article IV's privileges and immunities are indeed capacious, given that the plaintiff in *Corfield* lost his lawsuit based on them. Mr. Corfield, a Pennsylvania citizen, owned a fishing boat that was sold by the state of New Jersey, per statute, as a penalty for the illegal oyster-dredging done on it.[116] The New Jersey statute at issue prohibited any person who was not an "actual inhabitant and resident of this state" from dredging for oysters in New Jersey waters.[117] Corfield *lost* even though the out-of-stater who had rented his boat for oyster dredging was not given the same opportunity that in-staters had to pursue this otherwise lawful calling.[118] This has some of the makings of a Privileges and Immunities violation, except that New Jersey's oyster beds were probably something like the college education in *Vlandis v. Kline*,[119] which noted that states have a legitimate interest in charging out-of-staters higher tuition at state universities.[120] Both education and oysters are easily exportable (e.g., oysters in 1823, to Pennsylvania or Delaware), and oysters are within the competence of the people of New Jersey to regulate.[121] So, the *Corfield* Court's list of privileges and immunities is not as illimitable as it looks. It has a dividing line somewhere—along the line between *private* and *public* rights. The right to earn a living is a private right, but the asserted right to earn it off New Jersey's sovereignly owned oysters is a public right, not covered by Article IV's privileges and immunities.

In *Saenz*, Justice Thomas seeks to avoid turning a public right into a private one, by making welfare a matter of privileges or immunities, even under the veil of the right to travel. A "public right" is a right that Congress can allocate for jurisdiction outside of Article III courts. It is one that arises through government and can usually be removed by the same procedure that created it. But (and of greatest importance here), a private right is a right that people have naturally, before government, which government is to preserve, and not (as public rights are) ones that people have only as members of a given community, that were created by that community—or by its government—and that are removable by the same authority.

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115 *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 100 (1990).

116 Corfield v. Coryell, 6 F. Cas. 546, 547 (C.C.E.D. Pa. 1823) (No. 3230).

117 *Id.* at 550.

118 *See id.* at 555.

119 412 U.S. 441 (1973).

120 *Id.* at 452–53.

121 Writing for the Court, Justice Washington also relied on teachings from Grotius: "The sovereign . . . who has dominion over the land, or waters, in which the fish are, may prohibit foreigners . . . from taking them." *Corfield*, 6 F. Cas. at 552 (quoting 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 433 (Richard Tuck ed., Liberty Fund, Inc. 2005) (1625)).

So, according to Justice Thomas, are welfare benefits a private, individual right, existing before government, or are they a result of government, accruing to qualifying citizens as members of the political community? In the Court's account of reality as presented in *Shapiro* and *Saenz*, state regulations of welfare are tested constitutionally as regulations on the right to travel. But no right-to-travel case since the unusual grouping of them in the immediate pre– and post–Civil War era[122] has vindicated that right *except* in the context of welfare. The right to travel did not carry an associated right with it over the goal line when that associated right was discounted tuition,[123] divorce within a required durational residency period,[124] or hunting and fishing licenses at the same cost as required from in-staters.[125] Only in the context of welfare has the right to travel vindicated an associated but distinguishable right. Welfare and other travel-associated rights, other than the core right to cross state boundaries, are, according to Justice Thomas, the result of living in a political community; they are not pre-political rights existing in a Lockean state of nature that people bring with them into society.

After comparing Colonial- and Founding-era documents, Justice Thomas concluded:

> [In *Corfield*, Justice]Washington rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all public benefits (such as the right to harvest oysters in public waters) that a State chooses to make available. Instead, he endorsed the colonial-era conception of the terms "privileges" and "immunities," concluding that Article IV encompassed only *fundamental* rights that belong to all citizens of the United States.[126]

The key is "public benefits." "[T]he right to harvest oysters in public waters" in *Corfield* was a "public benefit," something over which the state could exercise jurisdiction.[127] Mr. Keene, the oysterman who rented Mr. Corfield's boat, arguably had a right to it—a public right. Most of the definitions of this term discussed above would lead one to expect that New Jersey could have adjudicated Mr. Keene's and Mr. Corfield's rights in an administrative agency, and it probably could have. But it is not a public right *because* of

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122 *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); The Passenger Cases, 48 U.S. (7 How.) 283 (1849).

123 Vlandis v. Kline, 412 U.S. 441 (1973).

124 Sosna v. Iowa, 419 U.S. 393 (1975).

125 Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371 (1978). *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), is not an exception because state-paid medical care for indigents is treated as a welfare benefit. *Id.Id.* at 259 ("[M]edical care is as much 'a basic necessity of life' to an indigent as welfare assistance." (quoting STAFF OF H. COMM. ON WAYS & MEANS, 86TH CONG., MEDICAL RESOURCES AVAILABLE TO MEET THE NEEDS OF PUBLIC ASSISTANCE RECIPIENTS 74 (Comm. Print 1961))). *Dunn v. Blumstein*, 405 U.S. 330 (1972), is an exception because it was voting rights in state elections—not a right assimilable to welfare benefits—that carried the right-to-travel claim over the finish line. *See id.* at 342.

126 Saenz v. Roe, 526 U.S. 489, 525–26 (1999) (Thomas, J., dissenting).

127 *See id.* at 525.

that. It is theoretically adjudicatable in an administrative agency because it is a public benefit, a creation of the state, and not a natural right—not, that is (for Justice Thomas), a privilege or immunity.

After identifying Mr. Corfield's claim as one of "public benefits," Justice Thomas makes the familiar and uncontroversial connection between *Corfield* and the Fourteenth Amendment's Privileges or Immunities Clause,[128] and concludes:

> [A]t the time the Fourteenth Amendment was adopted, people understood that "privileges or immunities of citizens" were fundamental rights, rather than every public benefit established by positive law. Accordingly, the majority's conclusion—that a State violates the Privileges or Immunities Clause when it "discriminates" against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefits—appears contrary to the original understanding and is dubious at best.[129]

Here again, Justice Thomas contrasts "public benefits" with "fundamental rights." What parallels or similarities can be drawn between "public benefits," as mentioned in *Saenz,* and "public rights"?

Justice Thomas does not announce the parallel himself, as there was no occasion to do so in *Saenz*: no agency or non–Article III court was involved, so the case did not call for any discussion of whether any could have been. But according to Justice Thomas—in both his *Wellness* dissent and his opinion for the Court in *Oil States*—the rights that can be determined by agencies or non–Article III courts are "public rights," while the rights that are provided out of the public's benevolence are "public benefits."[130] Neither are part of the package of rights humans possess in the Lockean state of nature, and therefore they are all subject to limitation in a way that privileges and immunities are not.

If, as Justice Thomas asserts before closing his *Saenz* dissent, the Fourteenth Amendment's Privileges or Immunities Clause protects fundamental rights, is there any danger that this clause may become a tool of judicial activism, according to any reasonable definition of that term? According to Justice Thomas,

> [W]e should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or

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128 *Id.* at 526.

129 *Id.* at 527.

130 Part of this Article's overall claim is that these two expressions are not different, though in a Justice Thomas world, the word "rights" is more likely to arise in cases about adjudicative competence, while "benefits" is more likely to arise in a privileges-or-immunities case. Furthermore, nothing in this Article's analysis draws into question the Court's holdings in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), concerning what level of procedure is required before the government can withdraw benefits already granted. These holdings were not questioned in *Saenz* either.

> Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the "predilections of those who happen at the time to be Members of this Court."[131]

Justice Thomas thus closes his dissent by using a private–public distinction to stake out the limits of a future Privileges or Immunities jurisprudence, possibly welcoming such a revival, but warning against its possible excessive use. And one excessive use would be using the Privileges or Immunities Clause to give to *public* rights the protection traditionally given to *private* ones.

CONCLUSION

The Constitution allows Congress to create Article III courts "inferior to the supreme Court," enjoying the same structural guarantees of independence.[132] Congress may give such courts, when created, the subject-matter jurisdictions listed in Article III, Section 2. In addition to these, Congress has for a long time assigned adjudication-like functions to executive agencies and to bodies it has set up for limited adjudicative purposes.[133] Although these adjudicative bodies are often called "courts" and their members "judges," these "judges" do not exercise "the judicial power of the United States." Their fulfillment of their congressionally assigned functions is not a per se violation of Article III, which contains no express prohibitions on such agencies of "Article I courts." But due regard for their own independence and for citizens' rights to an independent forum has kept the Supreme Court at least somewhat vigilant about making sure that a core of rights remains within Article III's exclusive purview. That core is "private rights." "Public rights," with various reservations and qualifications, some of which this Article has examined, and about which the Court is still split, are eligible to be farmed out.

A debate has also taken place on whether the welfare benefits that the U.S. federal government and the states make available to those meeting defined-needs criteria are "rights" in the strong, Lockean sense of the word, or whether they are similar to "public rights" in the sense that they can be more easily limited than "private rights." This has, by design, not been a normative Article on welfare rights, but rather an attempt to make a connection.

According to Justice Thomas—whether writing for the Court[134] or in dissent[135]—public rights can be identified by having been created by

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131 *Saenz*, 526 U.S. at 528 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).

132 U.S. CONST. art. I, § 8, cl. 9; *see id.* art. III, § 1.

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

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

135 *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1960 (2015) (Thomas, J., dissenting).

government and by the existence of a tradition at the time of the Founding of disposing of them in administrative agencies, even if they could also be heard in the "regular courts"—meaning "the Courts at Westminster in 1789"[136]—or our Article III courts. "Public benefits," contrasted by Justice Thomas in his dissent in *Saenz v. Roe*, are distinguished from private or natural ones in a very similar way: private rights, but not public benefits, inhere in the human person as such, and they can be vindicated in courts and not only in agencies, whether or not those agencies are given some of the attributes of courts.[137]

By thus establishing an intelligible link between public rights and public benefits, and between the private analogues of each, Justice Thomas has built a distinction that may keep non-Article III adjudication within its limits without foregoing the advantages it brings. Justice Thomas may also keep the Privileges or Immunities Clause of the Fourteenth Amendment, which he wishes to revive,[138] within limits that will allow it to protect rights important to the Framers of both 1787 and 1868 without becoming a loosely interpreted vehicle for rights claims supported mainly by the predilections of the Court's personnel.[139]

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136 Stern v. Marshall, 564 U.S. 462, 484 (2011) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment)).

137 If they are given *all* the attributes of courts, then they are courts. *See generally* Frank H. Easterbrook, *"Success" and the Judicial Power*, 65 IND. L.J. 277 (1990) (arguing, in response to Professor Paul Bator, *supra* note 19, that it would not be so unworkable after all if more administrative decision-makers became Article III judges).

138 *See* cases cited *supra* note 6.

139 Of course, to hard-bitten legal realists, rights-claims in the Court are only *ever* guided by the predilections of its members. Justice Powell foresaw this situation with foreboding in the difficult case of *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion), which Justice Thomas quoted in closing out his dissent in *Saenz*. For a still-instructive debate on this problem, see Justice Brennan's dissent in *Michael H. v. Gerald D.*, 491 U.S. 110, 137, 141 (1989) (Brennan, J., dissenting), and Justice Scalia's reply on behalf of the plurality. *Id.* at 127 n.6. (plurality opinion).