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Interagency Litigation Outside Article III

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Interagency Litigation Outside Article III

ADAM CREWS

For over seventy years, the Supreme Court has said that a justiciable controversy can exist when one agency in the federal executive branch sues another. Although this raises intuitive concerns under both Article II (relating to presidential control) and Article III (relating to standing), scholars and judges have paid scant attention to the constitutional foundation for interagency litigation. Of those who have explored the topic, defenders and opponents alike agree on one thing: the foundation—or lack of one—depends on Article III’s case-or-controversy requirement.

That is mistaken. A better approach to understand interagency litigation is to step outside Article III and turn attention to Article I. When authorized by Congress, adjudicating interagency litigation is a function that a federal court can perform outside ordinary Article III justiciability rules because the resulting decision is not necessarily an exercise of the judicial power. The adjudication’s finality flows not from Article III, but from Congress’s providing a statutory decision rule that renders the court’s resolution conclusive of the litigated issues—a decision rule that the President must respect under Article II’s Take Care Clause. The central constitutional question is whether the Necessary and Proper Clause allows Congress to assign this function to federal courts. Significant historical practice suggests that it can.

This novel Article I theory of interagency litigation has many advantages over competing theories: it best explains existing cases; comports with text, history, and precedent on judicial independence; and gives due respect to all branches of government. It may also shed light on other current issues in administrative law, ranging from Chevron to remedies.

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ADAM CREWS*

INTRODUCTION

For over seventy years, the Supreme Court has blessed what intuitively seems absurd: sometimes, two agencies in the federal executive branch can sue each other in federal court.¹ This was no one-off holding. Although scholars quibble over whether to describe this interagency litigation as “common” or “rare,”² these cases undoubtedly arise with regularity.³ That is often by design. Congress has provided by statute for interagency litigation as a means to resolve intrabranch legal disputes across the administrative state, including (for example) in regulation of the federal civil service, aviation, the postal service, and the financial swaps markets.⁴ And these cases matter. In the modern administrative state, interagency litigation has often been an important tool to “shift power toward the priorities of executive agencies,” that is, those directly accountable to the President, “at the expense of independent agencies.”⁵

Despite its importance, interagency litigation has received limited scholarly attention.⁶ To be sure, important recent work has looked at

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¹ See, e.g., *United States v. Interstate Com. Comm’n*, 337 U.S. 426, 430–31 (1949); *infra* Subsection II.A.1 (discussing the canon of Supreme Court interagency litigation cases).

² Compare Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 646 & n.12 (2020) (stating that interagency litigation “as a whole is common”), with Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1464 (2017) (stating that “overall such disputes are rare”).

³ See, e.g., *Pham v. Nat’l Transp. Safety Bd.*, 33 F.4th 576, 578 (D.C. Cir. 2022) (resolving the Federal Aviation Administration’s petition for review of National Transportation Safety Board action); *infra* Subsection II.A.2 (describing modern interagency litigation in the lower federal courts).

⁴ See *infra* Subsection II.A.2 (discussing interagency litigation statutes affecting the Federal Labor Relations Authority, Merit Systems Protection Board, Office of Personnel Management, Federal Aviation Administration, National Transportation Safety Board, Postal Service, Postal Regulatory Commission, Commodity Futures Trading Commission, and Securities and Exchange Commission).

⁵ Shah, *supra* note 2, at 646–48.

⁶ See *id.* at 646 & n.12 (reporting that scholars have largely ignored interagency litigation and, even among those who study it, “cases involving litigation between executive and independent agencies” are cited “only sporadically”).

interagency litigation's dynamics within the executive branch.⁷ But less attention has been paid to why these cases are justiciable in Article III courts.⁸ That question has vexed the Department of Justice and prominent judges for decades,⁹ yet scholars have offered only two comprehensive theories to explain interagency litigation's place in our constitutional system.¹⁰ These existing explanations for interagency litigation share a premise and approach: they take as a given that justiciable interagency disputes must satisfy Article III's case-or-controversy requirement and then try to explain what makes cases sufficiently adverse to meet that bar.

This Article proposes a markedly different way to think about interagency litigation's justiciability. In short, Article III is largely beside the point. The important question is not whether an interagency dispute is a "case" or "controversy,"¹¹ but whether the *function* of resolving that dispute is something that Congress can assign to federal courts under its Necessary

⁷ See, e.g., *id.* at 646 (analyzing interagency litigation as "a longstanding and more consistent mechanism of executive administration," i.e., control by executive agencies rather than on the President's behalf); Farber & O'Connell, *supra* note 2, at 1464–69 (analyzing how the possibility of interagency litigation can affect agency behavior).

⁸ See Farber & O'Connell, *supra* note 2, at 1466–68 (briefly surveying the topic).

⁹ See *infra* Subsections II.B.1–2 (discussing theories advanced by the Office of Legal Counsel, Justice Kavanaugh, and Judges Bork and Rao).

¹⁰ See generally Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217 (2013) (proposing an Article III framework); Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (proposing an Article II framework). To be sure, others have given less thorough theoretical treatment to the issue. See William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1213–15 (1999) (arguing that there is no Article III problem if "Congress has the power to insulate from direct presidential control" an agency's manner of executing the law); Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOLOGY L.Q. 317, 324–41 (1990) (canvassing and applying the relevant case law without offering a first principles theory); Lee A. Albert & Larry G. Simon, *Enforcing Subpoenas Against the President: The Question of Mr. Jaworski's Authority*, 74 COLUM. L. REV. 545, 552–58 (1974) (discussing possible Article III bars to judicial resolution of an intra-executive branch lawsuit); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 298–300 (1961) (discussing one of the canonical interagency litigation cases); Note, *Judicial Resolution of Inter-Agency Legal Disputes*, 89 YALE L.J. 1595, 1609–22 (1980) (discussing potential obstacles to justiciability); Note, *Judicial Resolution of Administrative Disputes Between Federal Agencies*, 62 HARV. L. REV. 1050, 1053–58 (1949) (same). Still others have written on interagency litigation without in-depth consideration of the justiciability question. See generally Shah, *supra* note 2 (exploring how executive agencies exert influence via litigation against independent agencies); see also Farber & O'Connell, *supra* note 2, at 1466–67 (briefly arguing "that Article III does not categorically exclude litigation between agencies with inconsistent legal positions on regulatory matters"); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 685–86 (2016) (briefly discussing interagency litigation); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 291 & n.127 (2006) (discussing how *Chevron* deference applies in interagency litigation); Andrea Nishi, Comment, *Ortiz and the Problem of Intra-branch Litigation*, 120 COLUM. L. REV. F. 118, 125–30 (2020) (leveraging interagency litigation scholarship to discuss government appeals from military tribunals).

¹¹ U.S. CONST. art. III, § 2.

and Proper Clause power.¹² Based on centuries of practice and precedent, the answer is that Congress can.

To defend that conclusion, this Article first defines with specificity the federal government’s judicial power. After all, if an interagency dispute is not an Article III “case” or “controversy,” that means only that the “judicial Power of the United States” cannot resolve it.¹³ But the judicial power serves a particular role: it can act on private rights in a way that the government’s other powers cannot.¹⁴ In interagency litigation, however, the feuding agencies are both part of the sovereign United States, so the dispute is ultimately over public rights, not private ones.

That matters. Under its “legislative powers,”¹⁵ Congress can prescribe any number of decision rules for disputed public rights. One option is to channel legal disputes over those rights into federal court, where the judges can apply familiar Administrative Procedure Act (APA) statutory review standards.¹⁶ Whether that is a constitutionally valid choice for “carrying into Execution” the “Powers vested by [the] Constitution in the Government of the United States” depends exclusively on whether the assignment to the federal court is “necessary and proper.”¹⁷

There are good textual and historical reasons for why it is. Congress has long used federal courts as adjuncts to federal administration, including at the Founding.¹⁸ That makes sense: under the Constitution’s text and structure, federal judges are “[o]fficers of the United States” imbued with authority by virtue of Article II.¹⁹ As it can with other officers, Congress can designate a role for federal judges in administrative processes, including resolving interagency legal disputes.²⁰ To be sure, Congress’s power is not unlimited. Longstanding legal precedent and conventions teach that a constitutionally “proper” interagency judicial review scheme must include two important structural features: (1) finality and the absence of review in another branch (to preserve judicial independence) and (2) a decision limited to questions of law arising from a closed record (to prevent judicial intrusion into political decisions).²¹ Most interagency litigation proceeds under statutory review schemes with these central features.

¹² *Id.* art. I, § 8, cl. 18.

¹³ *Id.* art. III, §§ 1–2.

¹⁴ *See infra* Subsection III.A.1.

¹⁵ U.S. CONST. art. I, § 1.

¹⁶ *See* 5 U.S.C. § 706 (limiting review to whether the action is arbitrary, capricious, and abuse of discretion, or otherwise contrary to law; without required procedures; or unsupported by substantial evidence).

¹⁷ U.S. CONST. art. I, § 8, cl. 18.

¹⁸ *See infra* Section III.B (discussing the historical roles of federal courts as adjuncts to administrative processes at the Founding and in the early modern administrative state).

¹⁹ U.S. CONST. art. II, § 2, cl. 2.

²⁰ *See infra* Section III.B.

²¹ *See infra* Section III.C (explaining the Article I framework’s fealty to doctrines protecting judicial independence).

Altogether, these principles support a novel and non-Article III justification for interagency litigation: where two federal executive agencies have a legal dispute over a discrete matter that affects both, Congress can authorize a federal court to resolve that dispute when, by statute, the court's determination is conclusive in the proceeding and limited to the closed record on review. When that occurs, the *legislative* power—coupled with the *executive* obligation faithfully to carry out the law—resolves the dispute. Because the *judicial* power is not the basis for the conclusive determination, the dispute need not be a case or controversy under Article III.

This Article adds to the literature in two ways. First, the Article updates the debate over interagency litigation's justiciability in light of important developments in judicial precedent and federal courts scholarship. On the doctrinal front, the Supreme Court has continued a formalistic approach to Article III standing, most recently by narrowing the universe of judicially cognizable injuries by reference to common-law analogues.²² Meanwhile, important new scholarship has sharpened once-conventional understandings of Article III in ways that were not available when earlier scholars were writing about this topic.²³ In short, this Article bridges the gap between the interagency litigation scholarship and the remainder of the federal courts world.

Second, the Article aims to start a broader conversation about the relationship between federal courts and agencies with stakes beyond the narrow issue of interagency litigation. If Congress can authorize federal courts to use nonjudicial power when reviewing agency action, that could have important ramifications across administrative law. This includes preserving Freedom of Information Act (FOIA) litigation in the face of strict standing requirements, better understanding the remedial power of federal courts in pre-enforcement petitions for review, and evaluating Article III objections to administrative deference doctrines.²⁴

This contribution to administrative law is also timely. The dearth of theory around interagency litigation persists even as leading jurists question

²² See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

²³ See generally, e.g., James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015) (arguing that Article III does not require adversity) [hereinafter Pfander & Birk, *Article III*]; Michael T. Morley, Essay, *Non-Contentious Jurisdiction and Consent Decrees*, 19 U. PA. J. CONST. L. ONLINE 1 (2016) (responding to Pfander and Birk); Ann Woolhandler, *Adverse Interests and Article III*, 111 NW. U. L. REV. 1025 (2017) (responding to Pfander and Birk with a distinction between adverse parties and adverse interests); James E. Pfander & Daniel Birk, *Adverse Interests and Article III: A Reply*, 111 NW. U. L. REV. 1067 (2017) (responding to Woolhandler's refined adversity requirement) [hereinafter Pfander & Birk, *Reply*]. For more discussion of this debate, see *infra* note 47.

²⁴ See *infra* Section III.D (exploring the theory's ramifications for FOIA litigation, statutory remedies, and Article III-based objections to *Chevron* deference).

interagency litigation's constitutional foundations.²⁵ Of particular note, Justice Kavanaugh argued while a judge on the D.C. Circuit that interagency litigation "is in tension with the constitutional structure designed by the Framers and set forth in the text of the Constitution" because it undermines the President's unitary control of the executive branch and inserts federal courts into disputes that "do not appear to constitute a case or controversy for purposes of Article III."²⁶ He concluded that interagency litigation is defensible only as a consequence of *Humphrey's Executor v. United States*,²⁷ the case that famously approved so-called independent agencies.²⁸ Since that writing, the Supreme Court (with Justice Kavanaugh's support) has decided a series of cases casting doubt on *Humphrey's Executor's* future.²⁹ If *Humphrey's Executor* falls, as some Justices have urged and some litigants have invited,³⁰ then interagency litigation—a staple of the modern administrative state that Congress has authorized across many statutory schemes³¹—could fall with it. But as this Article shows, that would be a mistake for formal (and not merely functional) reasons.

The Article proceeds in four parts. Part I briefly explains Article III standing rules and their relationship to broader separation of powers doctrine to shed light on the concerns that have driven the interagency litigation discourse to this point. Part II first provides a concise history of interagency litigation, with particular attention to the seminal Supreme Court cases and the disputes most common on modern judicial dockets. That Part then surveys the various theories that have been offered to explain these cases. Part III advances this Article's novel theory, under which federal courts can often decide questions of law in congressionally authorized interagency litigation regardless whether the dispute is an Article III case or controversy.

²⁵ See, e.g., *SEC v. Fed. Lab. Rels. Auth.*, 568 F.3d 990, 996–98 (D.C. Cir. 2009) (Kavanaugh, J., concurring); *U.S. Postal Serv. v. Postal Regul. Comm'n*, 963 F.3d 137, 143–44 (D.C. Cir. 2020) (Rao, J., concurring); *infra* Subsection II.B.2.

²⁶ *SEC*, 568 F.3d at 997 (Kavanaugh, J., concurring).

²⁷ 295 U.S. 602, 618 (1935).

²⁸ See *SEC*, 568 F.3d at 997–98 (Kavanaugh, J., concurring).

²⁹ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2198–200, 2198 n.2 (2020) (characterizing *Humphrey's Executor* as a narrow exception to a general rule with a rationale that "has not withstood the test of time"); *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (reaffirming *Seila Law*); Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 446 (2021) (arguing that *Humphrey's Executor* is "skating on melting ice" after *Seila Law*).

³⁰ See *Seila Law*, 140 S. Ct. at 2212 (Thomas, J., joined by Gorsuch, J., concurring in part and dissenting in part) ("In a future case, I would repudiate what is left of this erroneous precedent."); Petition for Writ of Certiorari at 32 n.4, *Axon Enter., Inc. v. FTC*, No. 21-86 (U.S. July 20, 2021) (arguing that the case would be an appropriate vehicle to reconsider *Humphrey's Executor*). To be fair to Justice Kavanaugh, as a circuit court judge he criticized *Humphrey's Executor* while describing it as "entrenched" and "protected by stare decisis." *In re Aiken County*, 645 F.3d 428, 440–48 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

³¹ See Shah, *supra* note 2, at 646 (discussing a dataset of approximately 120 interagency litigations "from 1945 through the present day"); *infra* Subsection II.A.2 (discussing common interagency litigation contexts).

That Part first identifies the judicial power's central purpose, then refocuses attention to Congress's Necessary and Proper Clause power, and then leverages historical practice to defend the propriety of modern interagency litigation. Part III also considers how this Article I framework might inform other cornerstones of modern administrative litigation. Finally, Part IV responds to potential objections and offers a qualified defense of interagency litigation as a dispute resolution tool.

I. STANDING AND THE SEPARATION OF POWERS

This Article's central purpose is to explain when and why federal courts can resolve disputes between two parts of the federal executive branch. In other words, when are disputes of this sort justiciable? Justiciability can be a confusing concept because—like the word “jurisdiction”—it can have “many,” and perhaps even “too many,” meanings.³² In a broad sense, justiciability refers to general fitness for resolution in court, not just a court's ability to exercise the Article III judicial power.³³ Nevertheless, we often think about justiciability through the lens of constitutional law and various doctrines elaborating on the Constitution's allocations of power.³⁴ So too with interagency litigation: courts and commentators tend to explain these cases in terms of the balance between the Article III judicial power on the one hand and the Article II executive power on the other.³⁵ So, this Part sets the stage by providing an overview of the relevant Article III doctrines that dominate the discussion in this area to shed light on the concerns underlying the existing discourse.

Among the most important justiciability doctrines is standing, which cuts to the heart of the Constitution's allocations of power.³⁶ Article III vests

³² Cf. *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1848 (2019) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)).

³³ See, e.g., *Powell v. McCormack*, 395 U.S. 486, 512 (1969) (“As we pointed out in *Baker v. Carr*, 369 U.S. 186, 198 (1962), there is a significant difference between determining whether a federal court has ‘jurisdiction of the subject matter’ and determining whether a cause over which a court has subject matter jurisdiction is ‘justiciable.’”). Indeed, many justiciability doctrines have nothing to do with the scope of judicial power. See, e.g., *United States v. Windsor*, 570 U.S. 744, 756–57 (2013) (holding that adverse argument is a mere prudential justiciability consideration); John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 509 (2017) (arguing that the “political question doctrine does not rest on limits on the federal courts’ authority to decide cases”).

³⁴ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (suggesting that a dispute is “justiciable” only if it meets Article III’s conception of a case or controversy).

³⁵ See Farber & O’Connell, *supra* note 2, at 1465–66 (conceding that there “presumably are some limits under Article II” that limit judicial review of interagency litigation); Mead, *supra* note 10, at 1254 (agreeing “that Article II may be relevant to the inquiry”); Herz, *supra* note 10, at 960–61 (analyzing justiciability by reference to a court’s “trenching on the President’s authority to execute the laws”).

³⁶ See, e.g., *Lujan*, 504 U.S. at 560 (calling standing a “landmark[]” for understanding Article III’s allocation of power). To be sure, modern standing doctrine’s pedigree has been the subject of much debate that is beyond this Article’s scope. Compare, e.g., Cass R. Sunstein, *What’s Standing After Lujan?*

the “judicial Power of the United States” in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”³⁷ But federal courts “do not possess a roving commission to publicly opine on every legal question”;³⁸ rather, Article III restrains the “judicial Power” to nine specific categories of “Cases” and “Controversies.”³⁹ An Article III court cannot exercise the federal judicial power unless the dispute submitted for resolution fits one of the categories to which the judicial power extends.⁴⁰

Modern standing doctrine strives to identify what counts as a “case” or “controversy.” Under current precedent, those disputes have at least “three elements” that are “the irreducible constitutional minimum” for resolution via the Article III judicial power.⁴¹ An Article III case or controversy requires (1) a claimant who “suffered an injury in fact that is concrete, particularized, and actual or imminent”; (2) “that the injury was likely caused by the defendant”; and (3) “that the injury would likely be redressed by judicial relief.”⁴²

These elements explain why people generally cannot sue themselves.⁴³ Implicit in the second and third elements of standing is the idea of a person or entity—separate from the claimant—who intruded on the claimant’s legally protected interests such that the judicial power can fix the rights and obligations between the parties.⁴⁴ This implicit feature of a case or controversy has come to be described as an adverse-party requirement. For well over a century, the Supreme Court has explained the judicial power as “the right to determine actual controversies arising between *adverse litigants*, duly instituted in courts of proper jurisdiction.”⁴⁵ Importantly,

Of Citizen Suits, “Injuries,” and Article III, 91 MICH. L. REV. 163, 166 (1992) (calling the doctrine an “invention” of federal judges), with, e.g., Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (arguing “that history does not *defeat* standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution’s meaning”).

³⁷ U.S. CONST. art. III, § 1.

³⁸ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

³⁹ U.S. CONST. art. III, § 2; see also *id.* amend. XI (providing that Article III should not be construed to reach certain cases).

⁴⁰ This Article uses “Article III court” as a rough shorthand for “federal courts with access to the federal judicial power,” by contrast to federal adjudicatory bodies without that power (so-called “Article I courts”). Cf. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 109–10 (1982) (White, J., dissenting).

⁴¹ *Lujan*, 504 U.S. at 560.

⁴² *TransUnion*, 141 S. Ct. at 2203 (citing *Lujan*, 504 U.S. at 560–61).

⁴³ See, e.g., *United States v. Interstate Com. Comm’n*, 337 U.S. 426, 430 (1949) (observing that “many cases . . . establish the long-recognized general principle that no person may sue himself”).

⁴⁴ For this idea’s deep roots in the Anglo-American legal tradition, see, e.g., Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1568 & n.29 (2002) (“For centuries, Anglo-American lawyers have thought that the very existence of most kinds of judicial proceedings depends upon the presence (actual or constructive) of adverse parties.”).

⁴⁵ *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (emphasis added); see also, e.g., *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (citing and applying *Muskrat* for this proposition).

however, a careful reading of standing doctrine reveals two separate adversity requirements. As a *prudential* matter, the Court typically requires adverse arguments that sharpen the legal issues for resolution—arguments we might expect to get when genuinely adverse parties are present.⁴⁶ But as a *constitutional* matter, the essential aspect of a case “is a requirement of adverse legal interests that will be affected by a decree.”⁴⁷ The cornerstone of an Article III case is not adverse parties, but adverse legal interests.

That requirement for a case amenable to the judicial power seems particularly relevant to interagency litigation. For one, interagency litigation looks like judicial resolution of a lawsuit against oneself—an exercise of judicial power in a context with no truly adverse legal interests and with the potential for collusion to obtain a particular judicially sanctioned outcome.⁴⁸ And every overstep by the courts is a direct intrusion upon the President, who otherwise would theoretically wield control over the agencies and officers in the executive hierarchy.⁴⁹ For those concerned about avoiding imbalance of power between the courts and the President, the easiest solution is to say that interagency litigation runs afoul of Article III because two agencies with the same ultimate head cannot in any meaningful sense be adverse to each other.⁵⁰ In response, those less concerned about presidential control have focused on identifying which features might render

⁴⁶ See *United States v. Windsor*, 570 U.S. 744, 761 (2013) (stating that “sharp adversarial presentation of the issues satisfies the prudential concerns”); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (citing *Windsor* for the proposition that “any prudential concerns with deciding an important legal question [where the parties agree on the merits] can be addressed by the practice of entertaining arguments made by an *amicus*” (quotation marks omitted)).

⁴⁷ See Woolhandler, *supra* note 23, at 1032–33. In recent scholarship, this distinction between adverse legal arguments (which are neither “sufficient” nor “always necessary” for a case) and adverse interests (which are “necessary and often sufficient” for a case) emerged to make sense of Article III’s requirements. See *id.* (developing the distinction). The construct emerged after James Pfander and Daniel Birk challenged the conventional view of the adversity requirement and instead posited—based on text and history—that Article III embraces both “contentious” and “non-contentious” jurisdiction. See generally Pfander & Birk, *Article III*, *supra* note 23, at 1346. Ann Woolhandler responded with the adverse-interest construct, which she argued explains modern doctrine and addresses Pfander and Birk’s examples of supposedly non-contentious jurisdiction. See generally Woolhandler, *supra* note 23, at 1033. Although Pfander and Birk “applaud[ed]” this “proposed recharacterization of the adverse-party requirement,” they continue to question whether Article III requires adversity of interests. See Pfander & Birk, *Reply*, *supra* note 23, at 1085–88. But whatever the case may be as an original matter, it is common ground that modern doctrine “widely accept[s] the proposition that the federal judicial power can be exercised only when a court is presented with a concrete dispute between parties possessed of adverse legal interests.” Pfander & Birk, *Article III*, *supra* note 23, at 1359.

⁴⁸ See Mead, *supra* note 10, at 1224–25 (discussing “the concern with collusive suits” and the “rule against self-suing”); Herz, *supra* note 10, at 895 (noting the “talismanic ‘a person cannot sue herself’” rule).

⁴⁹ See, e.g., *Seila Law*, 140 S. Ct. at 2197 (stating that “lesser officers must remain accountable to the President, whose authority they wield”).

⁵⁰ E.g., *SEC v. Fed. Lab. Rels. Auth.*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (“[B]ecause agencies involved in intra-Executive Branch disputes are not adverse to one another (rather, they are both subordinate parts of a single organization headed by one CEO), such disputes do not appear to constitute a case or controversy for purposes of Article III.”).

interagency disputes just adverse *enough* to qualify as Article III cases.⁵¹ So, the common ground in the discourse to date has been a focus on adversity and on the reach of Article III's judicial power vis-à-vis Article II's executive power.

II. INTERAGENCY LITIGATION IN THEORY AND PRACTICE

With an overview of modern standing doctrine in hand, this Part first summarizes the history of modern interagency litigation in the federal courts and then discusses the efforts to date to explain these cases.

A. *Interagency Litigation in the Federal Courts*

1. *The Canon of Supreme Court Interagency Litigation Precedent*

The Supreme Court has addressed interagency litigation's justiciability only sporadically, in cases that span from 1949 to 1995.⁵² This Subsection considers them chronologically.

i. *United States v. Interstate Commerce Commission*

The earliest case in the canon is *United States v. ICC*.⁵³ During World War II, the United States relied on rail lines to ship goods.⁵⁴ At the time, the Interstate Commerce Commission (ICC) approved rail tariffs that governed the amounts charged.⁵⁵ When a rate dispute arose between a rail company and the federal government, in its capacity as a railroad customer, the United States filed an administrative complaint with the ICC.⁵⁶ After the ICC ruled for the railroads, the United States went to court to set aside the Commission's order.⁵⁷ Because then-applicable federal law required a suit to set aside an ICC order to be brought before a three-judge district court "against the United States,"⁵⁸ the United States was "named as both the petitioner and as the defendant."⁵⁹ In view of this "anomaly," the district court dismissed the case.⁶⁰

⁵¹ See, e.g., Farber & O'Connell, *supra* note 2, at 1466–67 (proposing that "inconsistent legal positions on regulatory matters" are justiciable when Congress authorizes the litigation); Mead, *supra* note 10, at 1278 (proposing that adversity turns on whether "a common law interest is a stake"); Herz, *supra* note 10, at 990 (proposing that adversity turns on "the capacity in which the litigating agencies appear").

⁵² Other interagency litigations have made their way to the Supreme Court, albeit without discussion of justiciability. See, e.g., *NASA v. Fed. Lab. Rels. Auth.*, 527 U.S. 229 (1999).

⁵³ *United States v. Interstate Com. Comm'n*, 337 U.S. 426 (1949).

⁵⁴ *Id.* at 428.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 429.

⁵⁸ 28 U.S.C. § 46 (1946); see *id.* § 47 (providing for a three-judge court).

⁵⁹ *United States v. Interstate Com. Comm'n*, 78 F. Supp. 580, 582 (D.D.C. 1948).

⁶⁰ *Id.* at 582, 584.

On direct appeal to the Supreme Court,⁶¹ the ICC (and the railroads as intervenors) argued that the dispute was nonjusticiable because the United States was suing itself.⁶² But the Court disagreed. As an initial matter, the Court acknowledged the general rule invoked that “no person may sue himself,” which the Court grounded in the requirement that “courts only adjudicate justiciable controversies.”⁶³ Then, in a terse paragraph of analysis, the Court identified the bases for justiciability. First, the underlying issue was not a dispute between government actors, but a dispute between the United States and the railroads, that is, “controversies of a type which are traditionally justiciable.”⁶⁴ Moreover, a challenge to an ICC order usually “would be enough to present a justiciable controversy.”⁶⁵ In short, the Court “look[ed] behind [the] names” on the docket and identified sufficiently adverse interests between the United States and the railroads that were presented in a traditionally justiciable form.⁶⁶ Notably, however, the Court did not expressly ground its discussion of justiciability in Article III.⁶⁷

ii. *United States ex rel. Chapman v. Federal Power Commission*

A few years after *ICC*, interagency litigation returned to the Court. In *United States ex rel. Chapman v. FPC*, the Federal Power Commission granted a license to construct a hydroelectric generating station on public land.⁶⁸ The Secretary of the Interior challenged that decision and petitioned for review in federal court.⁶⁹ The Fourth Circuit held that the Secretary was not an aggrieved party within the meaning of the judicial review statute; he had no “special interest” under the law that had been “adversely affected by the action attacked.”⁷⁰ The Fourth Circuit distinguished *United States v. ICC* as holding “merely that suit by the United States to protect its interests is not precluded merely because the suit must be brought against a governmental agency.”⁷¹ But that holding did not mean “that an officer of the government may go into court against such agency to protect the public’s interest with respect to a matter as to which he is charged with no duty or responsibility.”⁷²

On certiorari to the Supreme Court, the Secretary defended his standing by reference to his powers under the Flood Control Act of 1944.⁷³ In a

⁶¹ See 28 U.S.C. § 47a (1946) (providing for direct review).

⁶² 337 U.S. at 430.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 431.

⁶⁶ *Id.* at 430, 431.

⁶⁷ *Id.*

⁶⁸ *United States ex rel. Chapman v. Fed. Power Comm’n*, 345 U.S. 153, 154 (1953).

⁶⁹ See *United States ex rel. Chapman v. Fed. Power Comm’n*, 191 F.2d 796, 799 (4th Cir. 1951) (citing 16 U.S.C. § 825(b) (1946) (providing for review of FPC orders)).

⁷⁰ *Id.* at 800.

⁷¹ *Id.*

⁷² *Id.*

⁷³ 345 U.S. at 155.

paragraph even more terse than the analysis in *ICC*, the Court held that the Secretary had standing.⁷⁴ But no rationale was given: “Differences of view . . . preclude[d] a single opinion of the Court,” and the Court elected not to “set out the divergent grounds in support of standing” for fear that “[i]t would not further clarification of this complicated specialty of federal jurisdiction[.]”⁷⁵ On its facts, however, *Chapman* allowed two executive officers or entities—each carrying out duties in furtherance of the same sovereign interest—to take their dispute over a point of law to federal court.

iii. *United States v. Nixon*

The doctrine reappeared a few decades later in *United States v. Nixon*, which concerned (among other things) whether a justiciable controversy existed between the President and the United States (acting through a special prosecutor) over enforcement of a criminal subpoena.⁷⁶ Relying on *ICC*, the Court first observed that “[t]he mere assertion of a claim of an ‘intra-branch dispute,’ without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry.”⁷⁷ The Court then highlighted the unique context of the subpoena fight: the dispute arose in “a judicial proceeding in a federal court alleging violation of federal laws” that was “brought in the name of the United States as sovereign.”⁷⁸ That context mattered because “a federal criminal prosecution . . . is within the traditional scope of Art. III power.”⁷⁹ In that regard, *Nixon* is the first of these interagency litigation cases to ground its justiciability determination directly in Article III. But *Nixon* is also a uniquely easy case on that score; a criminal prosecution arising under federal law is a paradigmatic Article III case.⁸⁰

The remainder of the Court’s analysis reflected nonjurisdictional considerations. President Nixon’s principal justiciability argument rested on the political question doctrine.⁸¹ The Court reasoned, however, that the

⁷⁴ *Id.* at 156.

⁷⁵ *Id.*

⁷⁶ *United States v. Nixon*, 418 U.S. 683, 692 (1974).

⁷⁷ *Id.* at 693.

⁷⁸ *Id.* at 694.

⁷⁹ *Id.* at 697.

⁸⁰ See, e.g., William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265–66 (1990) (demonstrating that “case” was a “term[] of art” that referred to “all cases, whether civil or criminal”); see also Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 672 (2014) (“[I]t may be that the constitutional requirements for a criminal ‘case or controversy’ differ from those of a civil ‘case or controversy.’”).

⁸¹ *Nixon*, 418 U.S. at 693. In particular, Nixon relied on *Baker v. Carr*, which recognized that the political question doctrine, under which federal courts decline independently to decide certain issues chiefly assigned to political actors, does not bear on the judicial power. Compare *Baker v. Carr*, 369 U.S. 186, 198–204 (1962) (discussing subject matter jurisdiction), with *id.* at 208–37 (discussing justiciability); accord *Powell v. McCormack*, 395 U.S. 486, 512 (1969) (reiterating this “significant

special prosecutor was acting under the authority of statutes and regulations empowering the Attorney General and his subordinates to conduct federal criminal litigation.⁸² Stressing “the uniqueness of the setting,” the Court concluded that “the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability” because the dispute was one that is traditionally justiciable, arose in a traditional judicial proceeding, involved concrete adversity in representation and argument, and involved both officers’ invocations of lawful sources of authority (i.e., the President’s constitutional role under Article II and the special prosecutor’s statutory and regulatory authority).⁸³

iv. *Office of Workers’ Compensation Programs v. Newport News*

Most recently, interagency litigation returned to the Court in the context of statutory jurisdiction over petitions for review of agency action. In *Director, Office of Workers’ Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, the Court addressed whether a Labor Department officer has statutory standing to seek judicial review of decisions by the Benefits Review Board, a federal body, where the officer views the decision as “deny[ing] claimants compensation to which they are entitled.”⁸⁴ After the Board denied compensation to a claimant, the Labor Department officer—but not the claimant—petitioned for judicial review,⁸⁵ raising the question whether the officer was a “person adversely affected or aggrieved” by the Benefits Review Board’s order.⁸⁶ If not, then the officer would have no statutory basis to petition for review, regardless whether the Board’s decision “injures [the officer] because it impairs her ability to achieve the Act’s purposes and to perform the administrative duties the Act prescribes.”⁸⁷

The Court held that the Labor Department officer lacked statutory standing. The Court distinguished *ICC* as involving a lawsuit in the federal government’s “capacity as a member of the market group that the statute was meant to protect,” that is, shippers.⁸⁸ That context, the Court reasoned, was materially different from the “business of deciding intrabrand and intra-agency policy disputes,” a role “that would be most inappropriate” for

difference between determining whether a federal court has ‘jurisdiction of the subject matter’ and determining whether a cause over which a court has subject matter jurisdiction is ‘justiciable’); Harrison, *supra* note 33, at 497–504 (explaining that “*Baker* classifies the political question doctrine as one of non-judicial finality, not as a limitation on Article III or statutory jurisdiction”).

⁸² *Nixon*, 418 U.S. at 694.

⁸³ *Id.* at 697.

⁸⁴ *Dir., Off. of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 123 (1995).

⁸⁵ *Id.* at 124.

⁸⁶ *Id.* at 126.

⁸⁷ *Id.*

⁸⁸ *Id.* at 128.

judicial resolution.⁸⁹ This statutory case, however, may have a constitutional dimension.⁹⁰ The Court acknowledged that “Congress *could* have conferred standing . . . without infringing Article III,” but it had simply not done so.⁹¹

2. *The Persistence of Interagency Litigation*

With the Supreme Court’s apparent blessing, interagency litigation became a regular feature of federal court dockets. In years past, some interagency litigation arose in contexts where one agency brought a common law action against another, thereby implicating interests in money or property. In general, courts agreed that these cases were nonjusticiable.⁹² There were occasional exceptions; one court, for example, concluded from *Nixon* that a justiciable contract dispute existed between the Tennessee Valley Authority and the Department of Energy.⁹³ But in general these common law actions are treated differently from cases, like *ICC* and *Chapman*, involving litigation channeled through a special statutory review scheme.

The bulk of contemporary interagency litigation is more like the Supreme Court canon outlined above, that is, statutory judicial review of agency action.⁹⁴ In one recent study, Bijal Shah identified “approximately 120 cases” in which the Department of Justice “opposed an independent agency in an Article III court,” finding that litigation of this sort “has existed under every presidential administration beginning with Franklin D. Roosevelt until the present day,” with no apparent limitation by office holder, time period, or political party.⁹⁵ The vast majority of these cases—102, or eighty-eight percent of the total—are what Shah termed “executive administration cases,”⁹⁶ which use judicial review to accomplish

⁸⁹ *Id.* at 129. The Court explained, for example, that a federal court could not resolve a lawsuit brought by the Department of Transportation “to reverse the Federal Communications Commission’s approval of rate increases on second phone lines used for modems” on the ground that the rates would frustrate the Department’s “policy interest” in “encouraging so-called ‘telecommuting’ in order to reduce traffic congestion.” *Id.*

⁹⁰ *But see* Farber & O’Connell, *supra* note 2, at 1466 (cabining the case “as based on statutory grounds rather than constitutional grounds”).

⁹¹ *Newport News*, 514 U.S. at 133; *see* Farber & O’Connell, *supra* note 2, at 1466 (describing the case as “acknowledging the validity of interagency suits to protect a sovereign interest when authorized by Congress”).

⁹² *See, e.g.*, *Landmark Land Co. v. FDIC*, 256 F.3d 1365, 1380 (Fed. Cir. 2001) (no justiciable breach of contract claim where “none of the money paid by the government in satisfaction of such a judgment would leave the government”); *United States ex rel. Tenn. Valley Auth. v. Easement & Right of Way*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962) (no justiciable controversy over land condemnation); *Def. Supplies Corp. v. U.S. Lines Co.*, 148 F.2d 311, 312–13 (2d Cir. 1945) (no justiciable controversy between the United States and government-owned corporation for property damage).

⁹³ *See* *Dean v. Herrington*, 668 F. Supp. 646, 650–53 (E.D. Tenn. 1987).

⁹⁴ *See* Shah, *supra* note 2, at 732 tbl.B.4, 746 tbl.B.5 (cataloguing interagency litigation in the Clinton, George W. Bush, Obama, and Trump administrations).

⁹⁵ *Id.* at 712.

⁹⁶ *Id.* at 713 tbl.A.1.1.

goals like disputing an independent agency's efforts to regulate another agency,⁹⁷ defending an agency's statutory jurisdiction from encroachment by an independent agency,⁹⁸ and challenging certifications of monopolies.⁹⁹

These cases generally arise under statutes authorizing a petition for review, through which an aggrieved party can contest an agency action's lawfulness directly in a circuit court of appeals.¹⁰⁰ Here are some important examples:¹⁰¹

- The Federal Labor Relations Authority (FLRA) administers the statute governing unfair labor practices in the federal civil service.¹⁰² A federal agency aggrieved by an FLRA order can petition for judicial review.¹⁰³ The reviewing court's jurisdiction "shall be exclusive and its judgment and decree shall be final."¹⁰⁴
- The Postal Regulatory Commission regulates rates and classes for the Postal Service's market-dominant products.¹⁰⁵ Disputes between the Commission and the Postal Service—both of which are "an independent establishment of the executive branch of the Government of the United States"¹⁰⁶—arise every few years.¹⁰⁷ The D.C. Circuit has exclusive jurisdiction over these disputes,¹⁰⁸ including the power to set aside the Commission's orders as unlawful.¹⁰⁹

⁹⁷ *Id.* at 661–62.

⁹⁸ *Id.* at 663–66.

⁹⁹ *Id.* at 666–67.

¹⁰⁰ *See, e.g.,* Adam Crews, *The Mandate Rule*, 73 S.C. L. REV. 263, 301 (2022) (describing this "cornerstone of modern federal administrative law litigation").

¹⁰¹ Based on Shah's dataset, these agencies account for fifty-three out of sixty-three (over eighty-four percent of) interagency litigations since President Clinton took office. *Compare* Shah, *supra* note 2, at 713 tbl.A.1.1 (cumulative cases), *with id.* at 732 tbl.B.4 (cases in the Clinton, George W. Bush, and Obama administrations) *and* 746 tbl.B.5 (cases in the Trump administration). A few other cases involve the National Transportation Safety Board (NTSB), which adjudicates challenges to certain Federal Aviation Administration (FAA) actions. 49 U.S.C. § 44709(d). The FAA's Administrator "may obtain judicial review" of NTSB orders that "will have a significant adverse impact on carrying out" the statute the FAA administers, *id.* § 44709(f), but this scheme "does not appear to contemplate any role for the [NTSB] as a party in judicial review proceedings," so the D.C. Circuit has held that the NTSB cannot represent itself in court. *Hinson v. Nat'l Transp. Safety Bd.*, 57 F.3d 1144, 1147 n.1 (D.C. Cir. 1995) (striking the NTSB's brief because it "is not a proper party").

¹⁰² *See* 5 U.S.C. §§ 7105, 7116(a).

¹⁰³ *Id.* § 7123; *see, e.g.,* U.S. Dept. of Just. v. Fed. Lab. Rels. Auth., 875 F.3d 667 (D.C. Cir. 2017).

¹⁰⁴ 5 U.S.C. § 7123(c).

¹⁰⁵ 39 U.S.C. § 3622.

¹⁰⁶ *Id.* §§ 201 (Postal Service), 501 (Postal Regulatory Commission).

¹⁰⁷ *E.g.,* U.S. Postal Serv. v. Postal Regul. Comm'n, 963 F.3d 137 (D.C. Cir. 2020); U.S. Postal Serv. v. Postal Regul. Comm'n, 886 F.3d 1253 (D.C. Cir. 2018); U.S. Postal Serv. v. Postal Regul. Comm'n, 785 F.3d 740 (D.C. Cir. 2015); U.S. Postal Serv. v. Postal Regul. Comm'n, 676 F.3d 1105 (D.C. Cir. 2012); U.S. Postal Serv. v. Postal Regul. Comm'n, 599 F.3d 705 (D.C. Cir. 2010).

¹⁰⁸ 39 U.S.C. § 3663.

¹⁰⁹ 28 U.S.C. § 2342.

- The Merit Systems Protection Board (MSPB) decides appeals by federal civil servants against whom an agency has taken adverse employment action.¹¹⁰ The Director of the Office of Personnel Management can petition the Federal Circuit for review of certain Board orders and decisions.¹¹¹

These review schemes are not relics; Congress continues to design agency-against-agency petition-for-review statutes. The Dodd-Frank Act is a relatively recent example.¹¹² That statute divides regulatory authority over the swaps markets between the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC), with either agency authorized to petition for review of the other agency's rules, regulations, or orders that conflict with the statute's requirements.¹¹³ Thus, even recent Congresses have seen value in channeling material interagency legal disputes through federal judicial review. As Daniel Farber and Anne Joseph O'Connell have observed, "direct resolution of agency conflict may be an attractive design choice to congressional committees that cannot agree or to a Congress skeptical of resolution by the White House."¹¹⁴

These examples show that the justiciability of interagency litigation is not just an academic concern. The Supreme Court's reversal of course on cases like *ICC* and *Chapman* could usher in a dramatic change in administrative law litigation and frustrate the potential for intrabranched conflict resolution schemes that Congress might find attractive.

B. Existing Perspectives on Interagency Litigation

Given the proliferation of interagency litigation over the past several decades, government attorneys, prominent jurists, and legal scholars have advanced several competing rationales to explain interagency litigation's justiciability in Article III courts. This Section canvasses these existing views and identifies vulnerabilities in each.¹¹⁵

1. The Real-Party-in-Interest Rationale

Initial attempts to explain interagency litigation's justiciability focused on the presence of a private real party in interest separate from the supposedly adverse executive branch actors. As early as the 1970s, the

¹¹⁰ 5 U.S.C. § 7513(d).

¹¹¹ *Id.* § 7703(d); e.g., *Colbert v. Miller*, 800 F.3d 1340, 1342 (Fed. Cir. 2015); *Archuleta v. Hopper*, 786 F.3d 1340, 1343 (Fed. Cir. 2015).

¹¹² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. § 5301-5641).

¹¹³ 15 U.S.C. § 8302(a), (c).

¹¹⁴ Farber & O'Connell, *supra* note 2, at 1467.

¹¹⁵ When evaluating these vulnerabilities, I take as a given doctrines like Article III standing and *Humphrey's Executor* as they exist today. That is, I am not grounding my criticisms in any first-principles view of what the law *should* be. Rather, this Article aims to explain interagency litigation in a way that has value because it fits with existing doctrine and therefore has practical use.

Department of Justice's Office of Legal Counsel (OLC), which provides authoritative legal advice to executive agencies,¹¹⁶ adopted this view to explain the Supreme Court's canon of interagency litigation cases. In a 1977 opinion advising on a tax dispute between the Postal Service and the IRS, the OLC distilled from *ICC*, *Chapman*, *Nixon*, and their progeny in the lower courts a requirement that "a nongovernmental real party in interest" be present to render interagency litigation justiciable.¹¹⁷ This view persisted. In a memorandum regarding the justiciability of a potential lawsuit between the Nuclear Regulatory Commission and the Department of the Air Force, the OLC again opined that the real-party-in-interest rationale "explains [the] cases in which the Supreme Court has appeared to decide a case between two members of the executive branch."¹¹⁸

On the judicial front, Judge Bork advanced the same view, likewise arguing that this rationale explained both *ICC* and *Chapman*.¹¹⁹ As Judge Bork emphasized, the "real opponents" of the United States in *ICC* "were railroads from which it sought reparations in its proprietary, not its governmental, capacity."¹²⁰ Thus, the government's petition for review was no different from a petition for mandamus directed to a district court; although the court is named on the petition, "the real adversary is the party on the other side of the litigation."¹²¹ As for *Chapman*, that case featured challenges by both the Secretary "and an association of rural electric cooperatives."¹²² Because there were "private parties on both sides of the dispute, the one defending its rights to the license it had been granted by the Commission, the other claiming that its right to a preference in sales of surplus power by the Secretary had been impaired," the Court's separate holding that the Secretary had standing as an intervenor before the Commission "was not strictly necessary to decide the merits."¹²³

The real-party-in-interest rationale tracks neither the Supreme Court's conclusions nor analysis. It requires dismissing *Chapman*'s holding that both petitioners—the Secretary and the electric cooperatives—"have

¹¹⁶ See, e.g., Farber & O'Connell, *supra* note 2, at 1394; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1464–65 (2010) (describing "the settled practice of treating OLC's advice as binding"). But see Shah, *supra* note 2, at 657–59 (identifying limitations on OLC's influence).

¹¹⁷ Proposed Tax Assessment Against the United States Postal Service, 1 Op. O.L.C. 79, 80–84 (1977) (quotation marks omitted).

¹¹⁸ Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force, 13 Op. O.L.C. 131, 140 (1989).

¹¹⁹ See *Barnes v. Kline*, 759 F.2d 21, 63–65 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated and remanded sub nom. Burke v. Barnes*, 479 U.S. 361 (1987). *Barnes* did not involve an intrabranched dispute; it pitted legislative against executive officials in a fight over a "pocket veto." See *id.* at 23 (majority opinion). But *Barnes* relied, in part, on interagency cases like *ICC* and *Chapman*. See *id.* at 27.

¹²⁰ *Id.* at 63 (Bork, J., dissenting).

¹²¹ *Id.* at 64.

¹²² *Id.*

¹²³ *Id.*

standing.”¹²⁴ But the ordinary rule is that where a decision rests on two grounds, each is an independent basis for the judgment and binding in its own right.¹²⁵ So, Judge Bork’s observation that it “was not strictly necessary” to decide the Secretary’s standing does not diminish that the Court actually decided that issue,¹²⁶ albeit without providing its reasoning.

The real-party-in-interest rationale is also hard to square with broader doctrine, which pegs justiciability on adverse *legal interests* rather than on an adverse *party*.¹²⁷ Modern administrative law converts into public law issues many disputes that would once have been private.¹²⁸ Consider *ICC*: The Interstate Commerce Act took an old common law duty not to charge more than a reasonable rate and converted it into an administrative scheme under which the rates that a railroad filed with the ICC were the legal rates unless the ICC determined the rates were unreasonable.¹²⁹ The law interposed the ICC as the initial arbiter of reasonableness, rather than a common law court as in times past.¹³⁰ Under the real-party rationale, whether a particular interagency dispute between the United States and the ICC was justiciable would have turned solely on whether the railroads actually intervened when the dispute moved from the ICC to the courts. In terms of a legal interest, though, there is not obviously a material difference between (1) a petition for review of an ICC order that the railroads refuse to defend as intervenors and (2) a common law action against the railroads directly in which the railroads refuse to participate or defend themselves.¹³¹ Few would

¹²⁴ *United States ex rel. Chapman v. Fed. Power Comm’n*, 345 U.S. 153, 156 (1953).

¹²⁵ *See, e.g., Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (“[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.”); *Massachusetts v. United States*, 333 U.S. 611, 623 (1948) (holding that, in cases where the Court “decided both issues” presented, “the judgment rested as much upon the one determination as the other” and “the adjudication is effective for both”).

¹²⁶ *Barnes*, 759 F.2d at 64 (Bork, J., dissenting).

¹²⁷ *See supra* note 47 and accompanying text. Others have questioned this rationale for related reasons. Herz criticized the real-party explanation as a formalistic “sleight of hand” and argued that a private real party in interest does not uniquely further the values that adversity protects. Herz, *supra* note 10, at 944, 946. Although “the presence of an outsider may ensure . . . effective advocacy,” that same “adversity” can “easily exist” in interagency litigation without a private real party. *Id.* at 946. Mead argued that the Supreme Court does not appear to have viewed *Nixon* as turning on the President’s “private capacity”—i.e., a nongovernmental real party in interest—particularly because the underlying dispute was about the invocation of executive privilege, which was necessarily bound up in President Nixon’s official position. *See Mead, supra* note 10, at 1250. One possible answer to this objection is that the Court rested its Article III analysis on the proceeding’s criminal nature, which necessarily made the litigation an Article III case. *See supra* notes 79–80 and accompanying text.

¹²⁸ *See, e.g., Cass R. Sunstein, Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 350 (explaining the administrative state’s genesis in “grave dissatisfaction with private law principles”).

¹²⁹ *See, e.g., Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 128–29 (1990) (citing the Interstate Commerce Act provisions codified at 14 U.S.C. §§ 10701, 10741, 10761–10762 (1982)).

¹³⁰ *Id.* at 129 (citing *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 384–85 (1932)).

¹³¹ *See, e.g., Woolhandler, supra* note 23, at 1032 (explaining requirements for adversity in past litigation between the ICC and the United States).

dispute that the latter is a justiciable controversy.¹³² That is because the plaintiff is vindicating a protected legal interest; a private party's showing up to contest liability is not the dispositive factor because it is the adverse *interest* that matters, not the adverse party.¹³³ And even if the real-party proponents are using the private party as proxy for a private interest, another problem remains: on one account, the modern administrative state grew out of concern that the common law did not protect all the right interests.¹³⁴ The consumer interest that the United States was vindicating in *ICC* is therefore not obviously the type of interest with which the judicial power was historically concerned at all.¹³⁵

Even if one narrows *ICC* and *Chapman* on real-party-in-interest grounds, that rationale cannot explain the proliferation of interagency litigation in the courts of appeals. In cases that pit, for example, one agency against the FLRA or the Postal Service against the Postal Regulatory Commission, the aggrieved agency *is* the real party in interest. The real-party-in-interest rationale cannot explain these cases; it can only suggest that they are wrongly decided.¹³⁶ But the Supreme Court has suggested otherwise. Recall that, in *Newport News*, the Court stated that Congress could have authorized a petition for review by a Labor Department official against another agency even without the real party's participation.¹³⁷

2. *The Independent Agency Rationale*

As the real-party-in-interest rationale was developing, so too was an alternative explanation: *ICC* and *Chapman* turned on the presence of an independent agency not accountable to the President. Judge Bork even offered this as further support for his narrow reading of those cases.¹³⁸ This rationale posits that justiciability turns on whether the President can resolve

¹³² *Id.* (noting that default judgments are permissible because “unopposed transfers of legal interests are not necessarily voluntary transfers” and “adversity of legal interests” underlies the case).

¹³³ *See id.* Herz advanced similar criticism. In his view, a focus on the real party in interest obscures the presence of an otherwise unresolvable conflict within the executive branch. Herz, *supra* note 10, at 944. He contended that the “logical implication” of requiring a private real party in interest is “that the governmental respondent should not actually participate in the litigation” but just let the private party “litigate on its own behalf.” *Id.* at 944–45.

¹³⁴ *See* Sunstein, *supra* note 128, at 350.

¹³⁵ *See id.* (identifying “interests . . . of consumers” as among those that the common law did not adequately protect). A discussion of the judicial power's traditional role in acting on private interests follows *infra* at Subsection III.A.1.

¹³⁶ Herz identified a related problem, in that some lower courts have dismissed cases as nonjusticiable despite the apparent presence of a private real party in interest. *See* Herz, *supra* note 10, at 941–42. Under a real-party rationale, these cases were likewise wrongly decided.

¹³⁷ *See supra* note 91 and accompanying text.

¹³⁸ *See* *Barnes v. Kline*, 759 F.2d 21, 64–65 (D.C. Cir. 1985) (Bork, J., dissenting).

the dispute, with judicial intervention available only when that resolution is impossible or impractical.¹³⁹

The independent agency rationale still has important defenders in the federal judiciary. Before his appointment to the Supreme Court, Justice Kavanaugh questioned interagency litigation's constitutional basis and argued that the President's control of the executive branch under Article II called into doubt judicial involvement in "legal or policy disputes between two Executive Branch agencies."¹⁴⁰ Turning to Article III, he argued that two executive branch agencies "are not adverse" to each other because "they are both subordinate parts of a single organization headed by one CEO" and therefore a dispute between them would "not appear to constitute a case or controversy for purposes of Article III."¹⁴¹ Ultimately, however, then-Judge Kavanaugh concluded that interagency litigation is justiciable where an independent agency is involved because existing Supreme Court precedent blesses less-than-total presidential control of these agencies.¹⁴² Judge Rao has since joined Justice Kavanaugh, her predecessor on the D.C. Circuit, in explaining interagency litigation by reference to agency independence, ultimately agreeing that these disputes would not ordinarily be Article III cases or controversies.¹⁴³

The independent agency rationale has its own shortcomings. As others have noted, the Supreme Court's seminal interagency litigation cases "have attached no significance to the independence of one of the parties,"¹⁴⁴ and "the mere presence of an independent agency has not been held to be a necessary or sufficient requirement in any of the cases."¹⁴⁵ But an independent agency rationale is also unsatisfactory on its merits as an Article III theory for reasons similar to the real-party rationale. Agency independence might give rise to adversity of *argument* or *position*, but it does not obviously create adversity of *legal interest* as Article III requires.¹⁴⁶ As Mead argued, "one fundamental flaw with interagency

¹³⁹ See *id.* at 65 (arguing that *Chapman* was justiciable because the "solution to the dispute was not within the legal control of the President"); Kelley, *supra* note 10, at 1213–15 (arguing that there is no Article III problem if "Congress has the power to insulate from direct presidential control" an agency's manner of executing the law); Herz, *supra* note 10, at 949 ("In regard to Article III, if the President cannot resolve a dispute involving an independent agency merely by telling it what to do, then a case or controversy may exist in a way that one does not exist between two executive agencies.").

¹⁴⁰ SEC v. Fed. Lab. Rels. Auth., 568 F.3d 990, 996–97 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

¹⁴¹ *Id.* at 997.

¹⁴² *Id.*

¹⁴³ See *U.S. Postal Serv. v. Postal Regul. Comm'n*, 963 F.3d 137, 143–44 (D.C. Cir. 2020) (Rao, J., concurring).

¹⁴⁴ Herz, *supra* note 10, at 947.

¹⁴⁵ Mead, *supra* note 10, at 1251. Thus, for example, Judge Bork carefully cabined the independent agency rationale as merely "suggest[ed]" by the cases. *Barnes v. Kline*, 759 F.2d 21, 64 (D.C. Cir. 1985) (Bork, J., dissenting); see also *id.* at 65 (accepting that *Chapman* was "allowable" under ICC if the independent agency rationale explains the doctrine).

¹⁴⁶ See *supra* note 47 and accompanying text (explaining the adversity of interest construct).

disputes over regulatory policy is that both agencies rely on the same interest—that of the United States”—a problem that “applies equally to independent agencies.”¹⁴⁷

Recent doctrinal developments have made independence an even more tenuous basis for justiciability. In 2010, the Court concluded that the Constitution generally empowers the President to keep federal officers accountable, including by removal from office.¹⁴⁸ A decade later, the Court cast its prior decisions as leaving in place only “two exceptions to the President’s unrestricted removal power.”¹⁴⁹ One of those exceptions is for “multimember expert agencies that do not wield substantial executive power,” that is, independent agencies like the Federal Trade Commission.¹⁵⁰ But at the same time, the Court suggested that this exception may not have “withstood the test of time” because powers once thought of as quasi-legislative or quasi-judicial (and therefore capable of insulation from the President) are now seen as purely executive.¹⁵¹ And the Court even more recently said “that disobeying an order is generally regarded as ‘cause’ for removal”¹⁵²—a statutory interpretation point that might suggest broader presidential power to control many officers once viewed as independent.¹⁵³ In short, recent cases recognize significantly more control for the President, including potentially over multimember agencies similar to the (now-defunct) ICC and FPC at the heart of the Court’s interagency litigation canon.¹⁵⁴ If the independent agency rationale is the only justification, then

¹⁴⁷ Mead, *supra* note 10, at 1251–52. Herz seemingly agreed, noting that many interagency litigations boil down to “disputes about executing the law.” Herz, *supra* note 10, at 951. If “independence is the critical factor,” then the “Department of Agriculture could sue the ICC over the establishment of transportation rates that it considers injurious to farmers, but it could not sue [the] EPA, whose administrator serves at the President’s pleasure, for canceling registration of a pesticide,” even though both disputes implicate the singular sovereign interest in law execution. *Id.*

¹⁴⁸ See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483–84 (2010). This case postdates Herz’s article by almost two decades, but even when Herz was writing in 1991, he catalogued a “large body of scholarship” questioning whether disputes involving independent agencies were in any meaningful way more adverse than other interagency disputes. Herz, *supra* note 10, at 952; see *id.* at 951–54.

¹⁴⁹ *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2198 (2020).

¹⁵⁰ *Id.* at 2199–200. See generally *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (announcing the exception).

¹⁵¹ *Seila Law*, 140 S. Ct. at 2198 & n.2.

¹⁵² *Collins v. Yellen*, 141 S. Ct. 1761, 1786 (2021) (citing *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464, 475 (1953)).

¹⁵³ See Herz, *supra* note 10, at 952 (“The most common rule of thumb is that an agency is independent if the President can remove its head or heads only for cause.”). The independent counsel from *Morrison v. Olson*, 487 U.S. 654, 663 (1988), for example, was removable “for good cause.” 28 U.S.C. § 596(a)(1) (1988). Of course, not all for-cause removal provisions actually say “for cause”; many use more limited terms like “inefficiency,” “neglect,” or “malfeasance.” *Collins*, 141 S. Ct. at 1786 (collecting examples).

¹⁵⁴ The Federal Energy Regulatory Commission (FERC) replaced the FPC in 1977, 42 U.S.C. § 7134, and the ICC was abolished effective January 1, 1996, see *ICC Termination Act of 1995*, Pub. L. No. 104-88, §§ 2, 101, 109 Stat. 803, 804.

much of modern interagency litigation may be doomed,¹⁵⁵ and decades' worth of judgments may have been in excess of jurisdiction.¹⁵⁶

3. *The Presidential Power Rationale*

In the wake of these unsatisfactory explanations, Michael Herz advanced a novel rationale built around Article II.¹⁵⁷ Herz dismissed as “absurdly formalistic” that the “usual bar on litigation by one person against herself” should apply to the complex modern federal government.¹⁵⁸ He instead proposed recognizing two categories of interagency litigations as justiciable: (1) disputes between an agency as regulator and an agency as a regulated party¹⁵⁹ and (2) “turf wars” asserting that the decision-making agency usurped the challenger agency’s role.¹⁶⁰ By contrast, he proposed that disputes in which two agencies with the same law enforcement interest disagree about how to proceed should not be justiciable.¹⁶¹ The important factor is the extent to which judicial resolution would interfere with the President’s Article II prerogative to manage the executive branch.¹⁶²

Herz’s Article II framework has its own vulnerabilities. Since Herz wrote, the Court has sharpened the law of standing, distilling the doctrine to three essential elements and grounding those elements in historical practice.¹⁶³ That Article III adversity turns on a functional analysis of interference with Article II control is hard to square with this modern doctrine, which more formalistically asks whether a dispute is of the sort traditionally amenable to judicial resolution. Moreover, Herz’s theory does not try to make sense of all existing cases. For example, he rejects *Chapman* as “wrongly decided.”¹⁶⁴ So for those interested in finding order among chaos, Herz’s theory cannot account for every piece of the puzzle.

¹⁵⁵ See, e.g., *SEC v. Fed. Lab. Rels. Auth.*, 568 F.3d 990, 997–98 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (concluding that interagency litigation turns on *Humphrey’s Executor*); Kelley, *supra* note 10, at 1222 (“Assuming that it would not constitute good cause for removal if the head of an agency refused to follow the President’s directions as to how to execute the law”—an assumption put in at least some doubt under *Collins*, 141 S. Ct. at 1786—“the difference between executive and independent agencies thus seems to make all the difference.”).

¹⁵⁶ Cf., e.g., William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1811 (2008) (explaining that a valid exercise of “the judicial power” extends only to “disputes within the court’s jurisdiction”) [hereinafter Baude, *Judgment Power*].

¹⁵⁷ See generally Herz, *supra* note 10.

¹⁵⁸ *Id.* at 906–07.

¹⁵⁹ See *id.* at 959–63.

¹⁶⁰ *Id.* at 977–81.

¹⁶¹ See *id.* at 966–77.

¹⁶² See *id.* at 990.

¹⁶³ See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The three essential elements are described *supra* text accompanying note 42.

¹⁶⁴ Herz, *supra* note 10, at 944 n.198.

4. *The Sovereign-or-Proprietary-Interests Rationale*

In the most recent thorough scholarly treatment of the topic, Joseph Mead advanced an Article III theory of justiciability that distinguishes the federal government's sovereign and proprietary interests.¹⁶⁵ On this view, if both sides of a dispute “assert an interest as a sovereign—an interest in enforcing the law or regulating third parties—then both sides are asserting the same interest, and there is no controversy.”¹⁶⁶ By contrast, “if at least one agency appears in a proprietary or commercial capacity—as a market participant or a regulated entity—then there can be a justiciable dispute.”¹⁶⁷ According to Mead, that is because government agencies can suffer “a common law injury no different from any private corporation’s” that is “divorced from” any sovereign interest.¹⁶⁸

Mead’s Article III framework has vulnerabilities as well. As Mead acknowledged, distinguishing sovereign from proprietary interests has been criticized as “incoherent,”¹⁶⁹ although courts pursue it in other contexts, like state governments’ standing.¹⁷⁰ But with respect to the *federal* government, the Supreme Court has resisted a sovereign-versus-proprietary distinction,¹⁷¹ which does not bode well for its importation into Article III standing doctrine. Nor is it clear that this distinction solves the justiciability dilemma under now-existing doctrine. Consider, for example, the dispute between the IRS and Postal Service over tax liability that prompted an early OLC opinion on this topic.¹⁷² The nonsovereign interest at stake was nothing but “the allocation of funds between two executive agencies.”¹⁷³ If “paying out money” is at the heartland of proprietary interests,¹⁷⁴ then it is not clear that the interests are adverse when the only dispute is over which agency’s

¹⁶⁵ See Mead, *supra* note 10, at 1254–58.

¹⁶⁶ *Id.* at 1255.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1262.

¹⁶⁹ *Id.* at 1257 & n.226 (citing Herz, *supra* note 10, at 962; Tara Leigh Grove, *Standing as an Article III Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 805 n.103 (2009)); *cf., e.g.*, Chapman v. Tristar Prods., Inc., 940 F.3d 299, 305 (6th Cir. 2019) (noting difficulties in distinguishing quasi-sovereign from sovereign or proprietary interests).

¹⁷⁰ See Mead, *supra* note 10, at 1255 n.208.

¹⁷¹ See *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941) (holding that “with respect to every function which it performs,” the federal government “is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental”); see also *Fed. Land Bank v. Bd. of Cnty. Comm’rs*, 368 U.S. 146, 150–51 (1961) (“[O]ur decisions have made it clear that the Federal Government performs no ‘proprietary’ functions.”); *cf. Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383–84 (1947) (“Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.”).

¹⁷² See *supra* note 117 and accompanying text.

¹⁷³ Proposed Tax Assessment Against the United States Postal Service, 1 Op. O.L.C. 79, 79 (1977).

¹⁷⁴ See Mead, *supra* note 10, at 1262.

account should hold the public's money. Indeed, courts have held disputes of this sort nonjusticiable for that reason.¹⁷⁵

5. *The Turn to Article I*

Reacting to Mead's framework, Farber and O'Connell recently raised an additional concern and, in doing so, began orienting attention to Article I.¹⁷⁶ Mead's Article III framework would not allow litigation over what Herz called "turf wars"¹⁷⁷ and what Farber and O'Connell describe as "litigation between two government agencies over the scope of their powers."¹⁷⁸ While acknowledging that scope-of-authority disputes are "a questionable basis for federal jurisdiction," Farber and O'Connell concluded that they are permissible "when authorized by Congress."¹⁷⁹ Their reasoning was largely pragmatic: if a private regulated party caught between contrary agency positions could sue "and let the two agencies fight out their legal claims," then there "seems no reason why the Constitution should block the more direct mechanism of a suit directly between those parties, provided the suit is authorized by statute."¹⁸⁰ Farber and O'Connell do not further develop this argument or situate it in existing Article III doctrine (a topic far afield from their main focus), although they note that *Newport News* suggested that this would be permissible.¹⁸¹ In my view, their intuition is correct, and the remainder of this Article aims to complete the turn to Article I.

III. AN ARTICLE I THEORY OF INTERAGENCY LITIGATION

The existing perspectives on interagency litigation have something in common: each one works within Article III, assuming that interagency litigation is resolved by the judicial power of the United States and taking as a given the standard rules for adjudicating cases and controversies. My view differs markedly. I reject the assumption that interagency litigation is (or must be) in every instance an exercise of the Article III "judicial Power,"¹⁸² and by extension I reject that ordinary Article III standing doctrine must always apply.¹⁸³ Instead, most of these disputes require only that courts perform customary judicial *functions* (e.g., the interpretation and application of law on a closed record) in a constitutionally permissible *form* (i.e., an

¹⁷⁵ See, e.g., cases cited *supra* note 92 and accompanying text.

¹⁷⁶ See Farber & O'Connell, *supra* note 2, at 1466–67.

¹⁷⁷ See Herz, *supra* note 10, at 977–81.

¹⁷⁸ See Farber & O'Connell, *supra* note 2, at 1466.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1467.

¹⁸¹ See *id.* at 1466–67.

¹⁸² U.S. CONST. art. III, § 1.

¹⁸³ To be clear, I accept that there may be cases—perhaps many of them—in which one of the existing perspectives on interagency litigation justifies an exercise of the federal judicial power. My point is that resolving disputes via interagency litigation does not *necessarily* require courts to exercise that power.

adjudication that is nonreviewable in another branch). The important constitutional question—rooted in Article I—is the scope of Congress’s power to channel interagency litigation through the federal courts even in the absence of a final exercise of judicial power.

To justify this shift of attention from Article III to Article I, this Part first explains why Article III is largely, and perhaps counterintuitively, beside the point. Making that claim requires unpacking the relationship between the federal government’s powers and distinguishing the judicial power as such from the *form* in which it is usually exercised and the *functions* that it ordinarily entails. This Part then explains why the more apt constitutional question—if resolving interagency litigation does not need the judicial power—is whether Congress can direct federal courts to perform traditionally judicial functions that are not backed by the judicial power. In answering that question, I explain why the historical record supports Congress’s power to provide for interagency litigation so long as two structural safeguards are in place: (1) conclusiveness and the absence of further review in another branch; and (2) limitation of the judicial role to deciding questions of law on a closed administrative record.

A. *The Groundwork for an Article I Theory*

This Section is largely conceptual; it argues that resolving interagency litigation does not necessarily require a final judgment backed by the judicial power. I support that claim by (1) identifying the central purpose of the judicial power as separated from the legislative and executive powers, (2) distinguishing the judicial power from its typical forms and functions, and then (3) distinguishing an Article III judgment from an Article I decision rule.

1. *Distinguishing the Judicial from the Legislative and Executive Powers*

It is familiar territory that the Constitution divides up the federal government’s powers: legislative to Congress, executive to the President, and judicial to the federal courts.¹⁸⁴ But differentiating these powers is notoriously difficult.¹⁸⁵ We can start, however, with some conventional wisdom and settled doctrine.

¹⁸⁴ U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

¹⁸⁵ See, e.g., John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 147 (2019) [hereinafter Harrison, *Public Rights*] (observing the “well-known constitutional difficulty” that “arises because important components of the government seem[s] to combine” each of the powers); John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 295–96 (2016) [hereinafter Harrison, *Legislative Power*] (“That legislative and judicial power are conceptually distinct may seem obvious, but explaining the difference between them is not so easy.”); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1779 (2012) (observing that “distinguishing between the constitutional functions of the legislature, executive, and

The federal legislative power is the power “to prescribe general rules for the government of society”; the “application” of those general rules is left to the “other departments,” that is, the executive and the judicial.¹⁸⁶ In important respects, then, the executive and judicial powers look the same: both involve ascertaining the law and implementing it.¹⁸⁷ But that does not mean that the executive and judicial powers are identical or coextensive. The judicial power has a unique attribute: under current doctrine, it is understood as “the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a “judicial power” is one to render dispositive judgments.’”¹⁸⁸ So, for example, “Congress . . . may not ‘retroactively command the federal courts to reopen final judgments.’”¹⁸⁹ An exercise of judicial power settles conclusively the rights and obligations between specific parties with respect to a past occurrence in a way that is immune from future legislative interference.¹⁹⁰

This conception of judicial power has deep roots in American law, and in particular the concept of private rights. These private rights traditionally included personal security, personal liberty, private property, and contract

judiciary is ‘daunting, if not impossible.’” (quoting M. Elizabeth Magill, *The Real Separation of Powers Law*, 86 VA. L. REV. 1127, 1193 (2000)); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565 (2007) (“[T]he Constitution does not specify exactly what ‘judicial’ power is or when its use is necessary.”).

¹⁸⁶ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); see THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing legislative power as “prescribing the rules by which the duties and rights of every citizen are to be regulated”); cf. *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion) (stating that Congress cannot usurp judicial power by directing how old law applies to a pending case (citing *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323, 1338 n.17 (2016))). But cf. Harrison, *Legislative Power*, *supra* note 185, at 297 (explaining that “the power to make rules is in effect a perfect substitute for the power conclusively to apply them”). Note that the generality requirement is qualified; Congress has long legislated not only with respect to specific persons but also in ways that are retrospective. See Harrison, *Legislative Power*, *supra* note 185, at 299–303.

¹⁸⁷ The precise content of the Article II executive power is the subject of a robust debate beyond this Article’s scope. For such a discussion, see, e.g., Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1178–82 (2019) (canvassing “at least three ways to understand Article II’s reference to the executive power”). There is general agreement, however, that the executive power encompasses the implementation of federal statutory law. See *id.*; see also, e.g., Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704 (“At bottom, the executive power is the power to execute the laws.”).

¹⁸⁸ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)); cf., e.g., Baude, *Judgment Power*, *supra* note 156, at 1814 (“[T]he Constitution gives the Judiciary final power to decide cases within its jurisdiction.”).

¹⁸⁹ *Bank Markazi*, 136 S. Ct. at 1323 (alteration omitted) (quoting *Plaut*, 514 U.S. at 219).

¹⁹⁰ See Harrison, *Legislative Power*, *supra* note 185, at 298 (“When they decide lawsuits, courts . . . conclusively resolve disputed questions of law and fact.”). I use the qualified “past occurrence” because legislation can sometimes alter the prospective effect of injunctions. See *Miller v. French*, 530 U.S. 327, 344–48 (2000) (“[W]hen Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law.”); *Plaut*, 514 U.S. at 232–33.

enforcement.¹⁹¹ A public right, by contrast, was something belonging to the people as a whole: the government's proprietary rights, like public land and the treasury; servitudes available to all, like the right to traverse public roads; and the general right to compliance with law.¹⁹² At the Founding, only an exercise of the judicial power—not the legislative or executive power—could alter a vested private right.¹⁹³ And to this day, the private-versus-public rights distinction informs the Supreme Court's doctrines on Article III judicial power and its protections from infringement.¹⁹⁴

From this background, we can distill two important principles about the judicial power under existing doctrine. First, one purpose of the judicial power as separated from the legislative and executive powers is to protect private rights; Congress cannot remove federal adjudication of private rights from the Article III domain.¹⁹⁵ Second, the judicial power can create new vested private rights.¹⁹⁶ An exercise of the judicial power can create new obligations—like the obligation that a defendant pay damages to a plaintiff—that are immune from later legislative interference.¹⁹⁷ In short, an exercise of the judicial power has at least two unique and defining attributes: it can (1) divest private rights and (2) bind parties conclusively with respect to a particular dispute, including by creating new private rights.¹⁹⁸

¹⁹¹ See Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1020–21 (2006). This cursory presentation of the distinction conceals nuances around so-called “core” private rights versus mere “privileges” and “franchises.” See, e.g., Nelson, *supra* note 185, at 566–67. Because this Article focuses on litigation of government (i.e., public) interests, I can set those nuances aside.

¹⁹² See Woolhandler, *supra* note 191, at 1020–21.

¹⁹³ See, e.g., Harrison, *Legislative Power*, *supra* note 185, at 306 (“Only the judiciary, not the legislature or the executive, could ‘declare that a competent private individual no longer retained core private rights previously vested in him.’” (quoting Nelson, *supra* note 185, at 565)); Chapman & McConnell, *supra* note 185, at 1727 (citing as the “classic example” of early invalidated statutes one “that took a vested property right from *A* and gave it to *B*”).

¹⁹⁴ See, e.g., *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1373 (2018) (noting Congress’s “significant latitude to assign adjudication of public rights to entities other than Article III courts”); *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 32 (2014) (discussing the distinction between “‘public rights,’ which may be removed from the jurisdiction of Article III courts, and cases involving ‘private rights,’ which may not”).

¹⁹⁵ Of course, private rights can be litigated under judicial power other than that of the United States, most obviously the judicial powers of the various states. See, e.g., William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1522–23 (2020) [hereinafter Baude, *Adjudication*].

¹⁹⁶ See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995); Harrison, *Legislative Power*, *supra* note 185, at 298.

¹⁹⁷ See *Plaut*, 514 U.S. at 240 (“The Constitution’s separation of legislative and judicial powers denies” to Congress the power to “requir[e] an Article III court to set aside a final judgment.”); Harrison, *Legislative Power*, *supra* note 185, at 298 (describing a judgment’s effect).

¹⁹⁸ See, e.g., Baude, *Adjudication*, *supra* note 195, at 1513–14; Harrison, *Legislative Power*, *supra* note 185, at 298 (noting that judgments “conclusively resolve disputed questions of law and fact” and “can also involve the creation of new legal rules that bind the parties”); Baude, *Judgment Power*, *supra* note 156, at 1809 (arguing “that the judicial power vested in Article III courts allows them to render binding judgments that must be enforced by the Executive Branch so long as those courts have jurisdiction over the case”).

2. *Distinguishing Powers from Forms and Functions*

Given the judicial power's potency, it makes sense that Article III would place strict limits on its use. The judicial power can act only on disputes taking a particular *form*: an Article III case or controversy.¹⁹⁹ As discussed in Part I, these cases and controversies have certain essential features.²⁰⁰ The process of adjudicating a case or controversy, however, is not on the whole an exercise of the judicial power.²⁰¹ To see why, we need to think about the *functions* that adjudication entails, many of which are neither strictly judicial in character nor part of the judicial power itself.

Start with a general proposition: constitutional institutions regularly perform functions that overlap with other institutions, even though each institution is generally vested with only one government power.²⁰² Recall, for example, that interpreting and applying existing law to specific circumstances is both a judicial and executive function.²⁰³ The executive branch engages in law application when arresting a lawbreaker, just like the judiciary applies the law when it imposes the final judgment. Law interpretation is similar; the President cannot execute the law without understanding it any more than a judge can decide a case without discerning the applicable legal rule.²⁰⁴

Article III courts are no exception to the trend. Although adjudication is often thought of as “the core of Article III,”²⁰⁵ it is well settled that adjudication can occur outside of the judicial branch because adjudication is just a way of conducting business.²⁰⁶ Within adjudication, Article III courts perform many judicial *functions* that are not per se exercises of the judicial *power*. Federal district courts instruct juries, rule on evidentiary objections and nondispositive motions, manage their dockets, and hold parties and counsel in contempt, to name just a few.²⁰⁷ And federal appellate courts supervise district courts in various ways, like directing specific proceedings

¹⁹⁹ U.S. CONST. art. III, § 2 (identifying to which disputes the “judicial [p]ower shall extend”).

²⁰⁰ See *supra* notes 41–42 and accompanying text.

²⁰¹ See, e.g., Baude, *Adjudication*, *supra* note 195, at 1513, 1520 (arguing that “Article III’s vesting of the judicial power is not about the *process* of adjudication” and “adjudication need not signal judicial power”); cf. Harrison, *Legislative Power*, *supra* note 185, at 299 (explaining the conceptual issue with characterizing the judicial power as merely “law-applying power”).

²⁰² For a recent, extended theory of separation of powers law as distinguishing exclusive from nonexclusive functions, see generally Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735 (2022).

²⁰³ See *supra* note 186 and accompanying text.

²⁰⁴ See Easterbrook, *supra* note 188, at 905 (“No one would take seriously an assertion that the President may not interpret federal law” because “[b]efore he can implement he must interpret.”).

²⁰⁵ See, e.g., Jeffrey L. Rensberger, *Of Hats and Robes: Judicial Review of Nonadjudicative Article III Functions*, 53 U. RICH. L. REV. 623, 630 (2019).

²⁰⁶ See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (noting that agencies can conduct adjudications taking a judicial form because they are exercises of executive power); Harrison, *Public Rights*, *supra* note 185, at 158 (discussing executive adjudication); Baude, *Adjudication*, *supra* note 195, at 1520 (discussing non-Article III adjudications).

²⁰⁷ See Rensberger, *supra* note 205, at 630–31, 648.

on remand or removing judges from a case.²⁰⁸ These functions do not act on private rights or finally decide cases or controversies—the core of the judicial power—but instead apply statutes, rules, or so-called “inherent” powers that are merely secondary and incidental to the actual judicial power vested via Article III.²⁰⁹

Moreover, some functions that Article III courts perform are best understood as principally executive. As one example, the Constitution allows Congress to authorize “the Courts of Law” to perform “the Appointment of . . . inferior Officers,”²¹⁰ which the Supreme Court has described as “properly executive.”²¹¹ Article III courts also engage in rulemaking when they promulgate (for example) the Federal Rules of Civil Procedure.²¹² Rulemaking activities, the Court has said, “take ‘legislative’ . . . forms” but generally “*must be*” an executive function—if they were legislative, they would be an unconstitutional delegation.²¹³ And the Court has upheld judicial rulemaking from separation-of-powers attacks,²¹⁴ reasoning that “Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”²¹⁵

The central point is this: both the Constitution’s plain terms and existing doctrine recognize that Article III courts can perform functions that are (1) not exclusively judicial and (2) sometimes understood as traditionally executive. And what is more, courts can exercise some of these functions in forms that are neither cases nor adjudications. The meaningful

²⁰⁸ See 28 U.S.C. § 2106 (providing that courts “of appellate jurisdiction . . . may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances”); *Liteky v. United States*, 510 U.S. 540, 554 (1994) (citing § 2106 for authority to reassign a case on remand).

²⁰⁹ See, e.g., 28 U.S.C. § 2106 (statute defining the determination powers of federal appellate courts); FED. R. CIV. P. 12(f) (rule governing nondispositive motion to strike); *id.* 23(d) (rule governing management of class actions); *id.* 51 (rule governing jury instructions); *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) (inherent power to manage dockets and courtrooms); *Liteky*, 510 U.S. at 554 (statutory power to reassign cases).

²¹⁰ U.S. CONST. art. II, § 2, cl. 2.

²¹¹ *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). More recent cases have qualified this description, stating that “the power to appoint inferior officers . . . is not in itself an ‘executive’ function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior officer in the ‘courts of Law.’” *Morrison v. Olson*, 487 U.S. 654, 695 (1988). This perhaps conflates a power/function distinction; *Morrison* concerned whether the Constitution’s division of powers forbade an independent counsel, *id.* at 659–60, so the Court’s central point was that the Constitution’s express contemplation of judicial appointments of executive officers necessarily means those appointments do not violate the separation of powers.

²¹² 28 U.S.C. § 2072; see Michael Blasie, Note, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 594 (2011) (noting that “the Constitution’s text does not explicitly confer [rulemaking] power on any branch”).

²¹³ *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). For an argument that federal courts draw in part on inherent authority when creating procedural rules, see Blasie, *supra* note 212, at 612–24.

²¹⁴ See *Mistretta v. United States*, 488 U.S. 361, 386–87 (1989) (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941)).

²¹⁵ *Id.* at 388.

constitutional limit is that the judicial *power* can be exercised only in the form of a case or controversy,²¹⁶ which entails performance of traditionally judicial functions.²¹⁷

3. *Distinguishing Judgments from Decision Rules*

The distinction between the exercise of judicial power and the performance of judicial functions raises a related issue about the distinction between the outputs of these activities.

An exercise of the judicial power results in a judgment that resolves the case; it settles the facts and legal effects of a dispute arising from a particular transaction.²¹⁸ Thus, there is a symmetry between the nature of the judicial power and the effect of a judgment: a valid Article III judgment is the expression of the power's exercise and the way we know that a dispute has been conclusively resolved with the court's judicial power.²¹⁹ Simply put, a fair reading of current doctrine is that the judicial power is the power to enter a judgment with these dispositive effects.²²⁰ That is why, for example, many federal officials with titles like “bankruptcy judge” or “magistrate judge,” who perform adjudications and judicial functions like case management or resolution of nondispositive motions, nevertheless cannot enter a final judgment binding the parties and affecting private rights—they lack access to the Article III judicial power.²²¹

Even when not using the Article III judicial power to determine rights, federal judges perform many other functions that have their own degrees of finality under doctrines other than the law of judgments. When a federal district judge rules on an interlocutory motion, for example, background rules about motions for reconsideration counsel against changing course later in the litigation.²²² And once issues are resolved on appeal, doctrines like “law of the case” and the “mandate rule” require adherence to the initial

²¹⁶ U.S. CONST. art. III, § 2.

²¹⁷ See, e.g., William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 24 (“[T]he customary duty of judicial departments was merely to apply the law to the case once the meaning . . . of the law [was] established.”).

²¹⁸ See RESTATEMENT (SECOND) OF JUDGMENTS §§ 24(1), 27 (AM. L. INST. 1980). For a critical analysis of the view that Article III compels a transactional view of preclusion, see Harrison, *Legislative Power*, *supra* note 185, at 311–14.

²¹⁹ See, e.g., Baude, *Judgment Power*, *supra* note 156, at 1809–11.

²²⁰ See, e.g., *id.* at 1811 (“In sum, the judicial power is the power to issue binding judgments and to settle legal disputes within the court’s jurisdiction.”).

²²¹ See, e.g., *Stern v. Marshall*, 564 U.S. 462, 487 (2011) (holding that a non-Article III bankruptcy court cannot enter final judgment on state common law claims); Baude, *Adjudication*, *supra* note 195, at 1575 (arguing that “bankruptcy courts must be sustained—if at all—as a tribunal that exercises no independent power”).

²²² See, e.g., *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (stating that motions for reconsideration should be “rare” and address misunderstandings or errors of apprehension, but not of reasoning (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983))).

resolution in later stages of the same litigation.²²³ Decisions like these are conclusive—or near conclusive—because some source of law external to the judicial power says so. The mandate rule, for example, ultimately rests on a statute governing the scope of appellate courts’ determinations.²²⁴ But an appellate mandate is not a final judgment; the mandate has the effect of constraining future stages of litigation because the statute—an exercise of Article I power—supplies a valid decision rule that courts must follow.²²⁵ In short, some judicial determinations are conclusive because of a statutory decision rule, not because of an exercise of judicial power.

4. *Who Needs Article III?*

The preceding distinctions suggest that resolving interagency litigation may not require an exercise of Article III judicial power. As discussed, an exercise of judicial power is unique in two key respects: its capacity to divest *private* rights and to bind parties conclusively, without later interference or second-guessing from other branches.²²⁶ But adjudicating the federal government’s own interests as between two federal agencies is a matter of *public* right,²²⁷ and Congress’s power under the Necessary and Proper Clause should usually be sufficient to bind the federal government to a particular course of action with respect to those public rights.²²⁸

This is so for textual and historical reasons. Under the Necessary and Proper Clause’s text, Congress generally has significant leeway to provide decision rules applicable to the other branches for disputes that affect only the federal government’s own interests, that is, the disputes that become interagency litigation.²²⁹ And assigning those disputes to Article III courts for conclusive resolution—even if not invoking the Article III judicial power—is one possible decision rule. Of course, Congress’s power is not unlimited; as Gary Lawson and Patricia Granger have argued (and as I accept for purposes of this argument), the Clause’s “proper” requirement was intended in part to preclude laws that “tread on . . . the prerogatives of

²²³ See, e.g., *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (“When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate.”); see also Crews, *supra* note 100, at 265–67 (explaining the mandate rule).

²²⁴ See 28 U.S.C. § 2106; Crews, *supra* note 100, at 270–83 (explaining the doctrine’s statutory basis).

²²⁵ See Crews, *supra* note 100, at 307 (proposing this judgment-versus-decision rule distinction).

²²⁶ See *supra* note 198 and accompanying text.

²²⁷ See *supra* note 192 and accompanying text.

²²⁸ See U.S. CONST. art. I, § 8, cl. 18 (conferring to Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” Congress’s additional powers “and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

²²⁹ *Id.*

federal executive or judicial departments.”²³⁰ The central constitutional question, then, is whether statutory interagency litigation schemes are “proper,”²³¹ or whether they improperly interfere with the executive or empower the federal judiciary.

To determine the constitutional propriety of an interagency litigation scheme, we need to identify the structural safeguards that insulate the federal judiciary and ask whether, for a given scheme, Congress flouted those safeguards. On that score, history holds the important lessons.²³² The Supreme Court, for example, has drawn on James Madison’s understanding that “a regular course of practice” can “liquidate & settle” the Constitution’s meaning to conclude that historical practice is “an important interpretive factor” when discerning the Constitution’s structural safeguards.²³³

²³⁰ Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 272, 333 (1993) (“[A] ‘proper’ law for carrying into execution the powers of any department of the national government must confine that department to its peculiar jurisdiction.”); see also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 112–13 (2005) (arguing that the “proper” requirement was a “global safeguard” against pretexts that might subvert the separation of powers, federalism, or rights). The Supreme Court has endorsed Lawson and Granger’s theory of “proper” as a freestanding limitation, albeit in the federalism (and not separation of powers) context. See *Printz v. United States*, 521 U.S. 898, 924 (1997) (citing Lawson & Granger, *supra*); Robert J. Pushaw, Jr. & Grant S. Nelson, *The Likely Impact of National Federation on Commerce Clause Jurisprudence*, 40 PEPP. L. REV. 975, 987 n.75 (2013) (identifying Lawson and Granger’s “general thesis” in the majority views expressed in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012)). For an example of the theory’s influence on separation of powers doctrine, see *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 48–50 (2015) (Thomas, J., concurring in part and dissenting in part) (applying the theory).

²³¹ U.S. CONST. art. I, § 8, cl. 18.

²³² For contemporary government powers cases that look to history for guidance, see, e.g., *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (recess appointment power); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483–84 (2010) (presidential power to remove executive officials); *Mistretta v. United States*, 488 U.S. 361, 397–401 (1989) (judiciary’s exercise of nonadjudicatory functions). And as noted previously, historical practice has taken on a particularly important role in the Court’s recent Article III precedents. See *supra* note 163 and accompanying text. To be sure, some scholars have criticized overreliance on historical practice when resolving federal courts issues in particular. See generally, e.g., Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739 (2015) (cautioning that early Congresses had not necessarily worked through and correctly resolved many complicated issues of judicial power). But history is at least *relevant* to the separation of powers question that interagency litigation presents. Cf., e.g., *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1373 (2018) (drawing on the historical public-versus-private rights distinction); *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 32 (2014) (same).

²³³ *Noel Canning*, 573 U.S. at 525 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)); see also *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (explaining that the “longstanding practice” of nonjudicial dispute resolution between Congress and the executive is a relevant consideration when the Court decides cases allocating power between those two branches). For further exploration of the Madisonian conception of constitutional liquidation, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 8–35 (2019). This Article takes no position whether the nation has liquidated the meaning of “proper” in the Necessary and Proper Clause to encompass interagency litigation as often presently designed. Some might take that strong view: the Clause is susceptible to liquidation, see *id.* at

Although individual members of the Court disagree about what history might matter,²³⁴ there is broad consensus that history informs difficult structural questions.²³⁵ The next Section explores how two significant historical periods—one at the Founding, the other at the dawn of the modern administrative state—inform the structural issues that interagency litigation implicates.

B. *The Historical Record*

1. *Nonadverse Judicial Administration at the Founding*

At the Founding, early Congresses saw no problems with statutes that “effectively transformed the federal courts into a proto-bureaucracy” supporting executive officials.²³⁶ The First Congress required federal judges to entertain *ex parte* petitions for relief from penalties and forfeitures for certain failures to declare cargoes; the courts would then transmit their findings to the Secretary of Treasury for a final decision.²³⁷ The Second Congress pressed federal judges into resolving *ex parte* pension claims for Revolutionary War veterans; they took evidence—including an examination of wounds—and made nonfinal recommendations to the Secretary of War, whose decisions were further reviewable by Congress.²³⁸ The defining features of both statutory schemes were: (1) Article III judges (2) exercising some sort of power (3) in a form that was not traditionally adjudicatory (i.e., lacking a present adverse party) (4) with further review in the Executive or Legislative branches.²³⁹

These statutes were controversial within the judiciary. In the conventional narrative, concerns over these schemes came to a head in

21–22, insofar as propriety is indeterminate, *cf. id.* at 13–16, and one might read the history discussed in this Section as demonstrating a course of deliberate practice that settled the question of interagency litigation’s validity, *cf. id.* at 16–21. In my view, however, the Article I theory for interagency litigation does not need to qualify as liquidated to have better doctrinal and historical grounding than the competing rationales. *See infra* Subsection III.C.2.

²³⁴ Compare *Noel Canning*, 573 U.S. at 525 (stating that practice matters “even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era”), with *id.* at 572 (Scalia, J., concurring) (stating that practice matters if it “has been open, widespread, and unchallenged since the early days of the Republic”).

²³⁵ See sources cited *supra* note 232; see also, e.g., *Mazars*, 140 S. Ct. at 2031 (applying the *Noel Canning* majority’s view); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2567 (2019) (applying the *Noel Canning* concurrence’s view).

²³⁶ Morley, *supra* note 23, at 7.

²³⁷ Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23; see Morley, *supra* note 23, at 7 (explaining this Act).

²³⁸ Act of Mar. 23, 1792, ch. 11, §§ 2–3, 1 Stat. 243, 244; see Morley, *supra* note 23, at 6 (arguing that this Act “blatantly abrogated the cornerstone principle of judicial finality”); Pfander & Birk, *Article III*, *supra* note 23, at 1364, 1425–32 (describing judicial objections to this Act).

²³⁹ See Act of May 26, 1790, *supra* note 237, ch. 12, § 1; Act of Mar. 23, 1792, *supra* note 238, ch. 11, §§ 2–3.

Hayburn's Case, concerning the veteran pension state.²⁴⁰ Although the Supreme Court never ultimately ruled in that case, five Justices expressed views while riding circuit that the statute violated the Constitution's separation of powers.²⁴¹ They shared two objections: (1) to a lack of finality because their decisions were subject to further review in other branches and (2) that the proceedings were not conducted in a "judicial manner."²⁴²

The Justices may well have had different views about how these objections interacted to form a constitutional problem. The New York circuit court, which included Chief Justice Jay and Justice Cushing, seemed to view the objections as related.²⁴³ In their opinion, the Constitution did not allow Congress to "assign to the Judicial [branch] any duties, but such as are properly judicial, and to be performed in a judicial manner."²⁴⁴ The provision subjecting pension decisions to further review in the other branches was evidence that the duties were not properly judicial.²⁴⁵ The Pennsylvania circuit court, which included Justices Wilson and Blair, may have viewed the objections as alternatives. In the first instance, they viewed "the business directed by [the] act" as "not of a judicial nature" and not "part of the power vested by the Constitution in the courts."²⁴⁶ But, had they proceeded with "that business" as an exercise of judicial power, the act would have violated the separation of powers because of the "revision and controul [sic]" granted to the Secretary of War and Congress.²⁴⁷ Justice Iredell, as part of the North Carolina circuit court, took a more qualified view. As he explained, a constitutional problem can arise either because Congress authorizes courts to exercise "any power not it in its nature judicial, *or*, if judicial, not provided for upon the terms the Constitution requires."²⁴⁸ Ultimately, he seized on the latter problem, reserving the question "whether the power . . . is properly of a judicial nature" and instead objecting to the "mode of revision."²⁴⁹

The conventional view is that the "judicial nature" objection was to the courts' resolution of nonadverse claims.²⁵⁰ If that is right, it would seem to doom some interagency litigation, which will sometimes lack the necessary

²⁴⁰ 2 U.S. (2 Dall.) 409 (1792); see Tyler, *supra* note 232, at 1744 (calling *Hayburn's Case* "a defining moment in the early charting of the contours of the judicial power").

²⁴¹ See 2 U.S. (2 Dall.) at 410 n.

²⁴² See *id.*; Pfander & Birk, *Article III*, *supra* note 23, at 1425–26.

²⁴³ See 2 U.S. (2 Dall.) at 410 n.

²⁴⁴ *Id.*

²⁴⁵ See *id.* ("[T]he act itself does not appear to contemplate [the duties] as [judicial]; in as much as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the legislature . . .").

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* (emphasis added).

²⁴⁹ *Id.*

²⁵⁰ See, e.g., Pfander & Birk, *Article III*, *supra* note 23, at 1426–27; cf. *Mistretta v. United States*, 488 U.S. 361, 385 (1989) ("As a general principle, . . . executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." (quotation marks omitted) (ultimately citing *Hayburn's Case*)).

adversity of legal interest. But conventional wisdom is not always correct; it sometimes “confuses the familiar with the necessary, the desirable with the constitutionally mandated.”²⁵¹

Recent scholarship suggests that the conventional adversity-focused view is “anachronistic.”²⁵² Previously overlooked original documents—including Justice Iredell’s personal notes from argument in *Hayburn’s Case*—might suggest instead that the objection was grounded in the nature of the functions; in particular, the examination of claimants’ wounds.²⁵³ As James Pfander and Daniel Birk report, Justice Iredell’s notes reflect that someone at argument raised the example of the common law “mayhem” claim as a situation in which judges were called to examine wounds.²⁵⁴ This perhaps suggests that the litigation centered on whether that function was traditionally judicial.²⁵⁵

Another plausible defect was the statute’s grant of potentially overbroad discretion to the court. Beyond the determination of pension eligibility, the statute afforded the court the power to recommend pension *amounts*, including what “proportion of the monthly pay” is “equivalent to the degree of disability ascertained” and what “arrears” the court “may think just.”²⁵⁶ That broad discretion was perhaps incompatible with Founding-era views that the judicial role should entail the strict application of law to fact.²⁵⁷ This explanation (like Pfander and Birk’s) also fits with much of the language in the circuit court writings, most notably the New York court’s objection to certain “duties” and the Pennsylvania court’s objection to certain “business.”²⁵⁸

More prominent in *Hayburn’s Case*, though, was an objection to *form*. The only issue on which the documentary evidence suggests that the Justices agreed was their opposition to review and revision by other branches.²⁵⁹ So,

²⁵¹ Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 905 (1984).

²⁵² Pfander & Birk, *Article III*, *supra* note 23, at 1426–27.

²⁵³ *See id.* at 1428–31.

²⁵⁴ *Id.* at 1430–31.

²⁵⁵ *See id.*

²⁵⁶ Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 243, 244.

²⁵⁷ For example, Montesquieu argued that “judgments” should “be always conformable to the exact letter of the law” and not merely “the private opinion of the judge.” 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 167 (A. Donaldson & J. Reid eds., 3d ed. 1762). His views were influential on the Founders. *See, e.g.*, THE FEDERALIST, *supra* note 186, No. 47, at 300–03 (James Madison); Mortenson, *supra* note 187, at 1217–18. Indeed, Hamilton famously defended Article III’s judiciary as having “neither force nor will, but merely judgment.” THE FEDERALIST, *supra* note 186, NO. 78, at 465 (Alexander Hamilton).

²⁵⁸ *See Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n. (1792). The two possibilities presented here might be related; one can imagine that an analogy to common law mayhem might have been aimed at illustrating that judicial assessment of wounds can be done in a way bounded by the common law (as opposed to entrusted to raw judicial discretion). Regardless, we might expect that, if the objection were actually to the lack of a present adverse party, at least one of the courts would have said that more clearly.

²⁵⁹ *Id.* at 410 n.

as Pfander and Birk summarize the evidence, *Hayburn's Case* perhaps teaches a narrow lesson: Article III courts “can act only where their decision will have a binding, legally determinative effect.”²⁶⁰

That view accords with later precedent. The antebellum Court, in *United States v. Ferreira*, faced a situation similar to *Hayburn's Case*: an Act of Congress assigned federal district judges to receive and to adjust Spanish officers' claims arising from U.S. army operations in Florida, and the judges would report their findings to the Secretary of Treasury for a final determination of payment.²⁶¹ *Ferreira* read *Hayburn's Case* for the narrow principle that the federal courts could not exercise the “judicial power” over the pension claims if their decisions were subject to review and revision outside the judicial branch.²⁶² As later elaborated, *Ferreira* “was decided on the . . . principle” of a distinction

between judicial power in the sense in which these words are used in the Constitution, and a power given by law to examine a particular class of cases, and to certify an opinion as to their respective merits to an officer of the Executive Department, who might or might not act on it.²⁶³

The critical language is the last part; an exercise of the Article III judicial power must be conclusive. Indeed, this focus on finality and conclusiveness continues to dominate descriptions of *Hayburn's Case* well into recent years.²⁶⁴ But, excising the finality problem, nothing necessarily forecloses use of “a power given by law”—separate from Article III's vesting of

²⁶⁰ Pfander & Birk, *Article III*, *supra* note 23, at 1432.

²⁶¹ 54 U.S. (13 How.) 40, 45–47 (1851).

²⁶² *Id.* at 50.

²⁶³ *Gordon v. United States*, 117 U.S. 697, 703 (1864) (emphasis added). An important qualification about *Gordon* is that Chief Justice Taney's reported opinion “was not the opinion of the Court” but “a memorandum of his views prepared before his death and circulated among, but not adopted by, his brethren.” *Glidden Co. v. Zdanok*, 370 U.S. 530, 568–69 (1962) (plurality opinion). In the end, however, the Court adopted the view—just as in *Hayburn's Case*—that “revisory authority” vested in an executive branch official was the determinative defect. *See id.* (citing *United States v. Jones*, 119 U.S. 477, 478 (1886)).

²⁶⁴ *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (stating that *Hayburn's Case* “stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch”); *Mistretta v. United States*, 488 U.S. 361, 394 n.20 (1989) (describing “the issue” in *Hayburn's Case* as whether Article III courts could “render judgments that were reviewable by an executive officer”). To be sure, judicial performance of administrative functions—like the pension claims—predominantly occurs in contexts with adverse interests (e.g., the pensioner's interest in payment against the government's interest in nonpayment). Thus, when the Court applies *Hayburn's Case*, it is usually in situations where judicial power perhaps *could* be exercised *if not* for a finality problem. That is one plausible reason why the Court has emphasized *Hayburn's Case* as about finality—whatever the case has to say about proper judicial functions or adversity simply comes up less often. But a fair reading of the documentary evidence supports Pfander and Birk's finality-focused view. *See supra* note 260 and accompanying paragraph.

judicial power—to “certify an opinion” to the executive branch outside of an Article III case where that opinion has a binding legal effect.²⁶⁵

What should we take from this history? First, from our earliest days Congress assigned to Article III judges functions that have some executive character to be carried out in forms that are not adjudications with present adverse parties. Second, the constitutional objections to this practice arose in two contexts: when the function was wholly nonjudicial (e.g., entailing too much policy discretion) and, more pressingly, when the form of proceeding included review by another branch. So, when we think about what *Hayburn’s Case* and its progeny teach us about so-called judicial independence,²⁶⁶ the early evidence points, at most, to two settled structural safeguards that limit Congress’s Necessary and Proper Clause power: (1) judicial functions must be appropriately constrained and guided by law and (2) resolution of claims by Article III judges cannot be subject to review and revision in another branch.²⁶⁷

2. *Judicial Roles at the Rise of the Modern Administrative State*

Moving forward to the rise of the modern administrative state, several statutes in the late nineteenth and early twentieth centuries continued to confer on courts functions that the Supreme Court described as legislative

²⁶⁵ *Gordon*, 117 U.S. at 703. Although *Mistretta* later drew from *Morrison v. Olson* and its predecessors a “general principle” against assigning executive duties “of a nonjudicial nature” to Article III judges, 488 U.S. at 385, that somewhat misstates *Morrison*, which carefully qualified in an accompanying footnote “that Article III ‘judicial Power’ does not extend to duties that are more properly performed by the Executive Branch.” 487 U.S. 654, 677 n.15 (1988) (emphasis added). *Morrison*’s qualification—that federal courts cannot exercise the judicial power when performing a non-case-or-controversy adjudication—is consistent with my argument, which does not presume a formal exercise of judicial power.

²⁶⁶ See, e.g., *Mistretta*, 488 U.S. at 409 (“[T]he independence of the Judicial Branch must be ‘jealously guarded’ against outside interference . . .”); cf. Baude, *Adjudication*, *supra* note 195, at 1515 (discussing the centrality of judicial independence in federal courts scholarship).

²⁶⁷ On this view of “judicial independence” as a judicially enforceable safeguard rooted in the Necessary and Proper Clause, a statute could violate the Constitution without infringing an express structural protection, for example, good behavior or salary protections. That is, certain safeguards apply even when Article III courts or judges are performing functions that do not carry out the federal judicial power. That makes sense in two dimensions. Doctrinally, it accords with precedent that derives broad principles (e.g., “state sovereignty”) from specific structural provisions and then enforces that general principle as a limitation on “proper” federal legislation that does not offend the specific exemplary protections. See *Printz v. United States*, 521 U.S. 898, 918–19, 923–24 (1997). And normatively, there is value in protecting judicial functions that are not per se exercises of judicial power; imagine the risks involved if the political branches could review and revise important interlocutory orders. Cf. *supra* note 207 and accompanying text (identifying federal district court activities that are not inherently uses of judicial power). Limiting the latter safeguard—nonreviewability in other branches—to resolution of *claims* both captures the facts of the relevant precedents (which did not involve traditional adjudications) and reconciles my conclusion with judicial rulemaking, under which Congress can review and revise the procedural rules that the Supreme Court promulgates. See *Mistretta*, 488 U.S. at 388 (explaining the separate line of authority governing “nonadjudicatory activities” like “judicial rulemaking”); see also Blasie, *supra* note 212, at 635–36 (defending the legality of congressional review of judicial rulemaking).

or executive in nature—essentially making the court part of the administrative process.²⁶⁸ The Radio Act of 1927, for example, provided for judicial review of radio station licensing decisions in an appellate court,²⁶⁹ which would “hear, review, and determine the appeal” on the agency record and any additional evidence admitted, with the power to “alter or revise the decision appealed from and enter such judgment as to it may seem just.”²⁷⁰ These *revising* powers—that is, the power “to review the entire record, and to make the order or decree which the Commission . . . should have made”—were central to many separation of powers cases in the era.²⁷¹ Because the Supreme Court, on appeal, would have the same scope of power as the initial reviewing court, it routinely dismissed appeals from these courts on the rationale that Congress could not confer power of this sort on Article III courts.²⁷²

Ultimately, Congress’s solution was simply to replace the revising power with more limited review. Consider the Radio Act again: within two months of the Supreme Court’s determination that it could not review “an administrative proceeding” from an inferior court,²⁷³ Congress amended the judicial review provision by (1) limiting the appellate court’s review to questions of law and sufficiency of evidence and (2) authorizing the appellate court to “remand the case” to the agency “to carry out the judgment of the court.”²⁷⁴ That solved the constitutional problem. In the seminal case *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, the Court held that by confining reviewing courts to questions of law—that is, compliance with “the legislative standards validly set up” for carrying out

²⁶⁸ See, e.g., *Fed. Radio Comm’n v. Gen. Elec. Co.*, 281 U.S. 464, 467 (1930) (stating that the court acted as “a superior and revising agency” under the Radio Act); *Postum Cereal Co. v. Cal. Fig Nut Co.*, 272 U.S. 693, 699 (1927) (stating that the trademark statute made courts “part of the machinery of the Patent Office for administrative purposes”); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 444 (1923) (holding that the Supreme Court could not assume “legislative or administrative jurisdiction” to “review the entire record” and “to make the order or decree which the Commission and the District Courts should have made”); *Butterworth v. United States*, 112 U.S. 50, 60 (1884) (stating that the patent statute made appeal to a district court “one step in the statutory proceeding” and “conclusive upon the Patent Office itself”). This arrangement was not unique to the federal system. In *Prentiss v. Atlantic Coast Line Co.*, for example, the Supreme Court held that a federal court should not review the Virginia State Corporation Commission’s rate orders until they had been appealed in state court, which acted in a revising capacity with power that was “legislative in [its] nature.” 211 U.S. 210, 224–26 (1908).

²⁶⁹ See *Gen. Elec. Co.*, 281 U.S. at 468.

²⁷⁰ Radio Act of 1927, ch. 169, § 16, 44 Stat. 1162, 1169.

²⁷¹ *Keller*, 261 U.S. at 444; see also *Gen. Elec. Co.*, 281 U.S. at 467, 468 (applying *Keller*); *Postum Cereal*, 272 U.S. at 700 (same); cf. *Butterworth*, 112 U.S. at 60 (noting the “revision” power).

²⁷² See *Gen. Elec. Co.*, 281 U.S. at 470; *Postum Cereal*, 272 U.S. at 701; *Keller*, 261 U.S. at 444; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 994 (2011) (identifying the Court’s concern as “that it would violate Article III to permit the Supreme Court to hear appeals from such judgments [in Article I courts], because this would convert the Court into ‘a superior and revising agency,’ and render its decision administrative rather than judicial in nature”).

²⁷³ *Gen. Elec. Co.*, 281 U.S. at 470.

²⁷⁴ Act of July 1, 1930, ch. 788, 46 Stat. 844, 845.

the statute—the courts were performing a constitutionally appropriate function that did not intrude on the executive.²⁷⁵

Review of that sort is now standard, as Congress continued to model agency judicial review statutes on what the Court upheld in *Nelson Bros.* One important example is the Administrative Orders Review Act (or the “Hobbs Act”),²⁷⁶ which governs judicial review of several agencies’ final orders subject to familiar APA standards.²⁷⁷ Review provisions like this govern the bulk of today’s interagency litigation in the federal courts.²⁷⁸

This more modern history further informs interagency litigation’s constitutional basis. As Thomas Merrill has argued, the cases rejecting Article III involvement under the earlier revising statutes were animated by “the fear of contamination—of drawing federal courts into matters regarded as being the province of the other branches of government.”²⁷⁹ *Hayburn’s Case* and the threat of executive revision was one form of contamination, but so too was the possibility that courts would revise decisions of a purely administrative, executive, or political nature.²⁸⁰ What ultimately settled these separation of powers concerns was the transition to judicial review only of questions of law—questions like whether an agency acted within its legal authority, whether substantial evidence supported a factual finding, and whether a decision was arbitrary or capricious.²⁸¹ In short, anxiety about Article III involvement turned on the scope of the function and whether it had the necessary judicial character. The rule that emerged was this:

²⁷⁵ 289 U.S. 266, 275–76 (1933); see Merrill, *supra* note 272, at 995 (stating that *Nelson Bros.* “served to resolve any doubts” about constitutional issues with “contamination of judicial authority” in reviewing administrative action).

²⁷⁶ Ch. 1189, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341–51). This Act “should not be confused with the criminal Hobbs Act, which prohibits ‘robbery or extortion’” affecting interstate commerce. Jason N. Sigalos, Note, *The Other Hobbs Act: An Old Leviathan in the Modern Administrative State*, 54 GA. L. REV. 1095, 1098 n.4 (2020) (citing 18 U.S.C. § 1951(a)).

²⁷⁷ See 28 U.S.C. § 2342 (providing for review of agency actions); 5 U.S.C. § 706 (limiting review to whether the action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . without observance of procedure required by law; . . . or unsupported by substantial evidence”); see, e.g., *PDR Network, LLC v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051, 2053 (2019) (applying the Hobbs Act); see also, e.g., 39 U.S.C. § 3663 (review of Postal Regulatory Commission orders is “in accordance with” the APA and Hobbs Act); cf. 15 U.S.C. § 8302(c)(3)(B) (review of swaps orders is “based on the determination of the court as to whether the rule, regulation, or order is in conflict with” the statute).

²⁷⁸ As discussed in Subsection II.A.2, much of modern interagency litigation occurs in petitions for review of agency action under APA standards. See, e.g., *U.S. Postal Serv. v. Postal Regul. Comm’n*, 963 F.3d 137, 139–40 (D.C. Cir. 2020) (Postal Regulatory Commission review); *U.S. Dep’t of Just. v. Fed. Lab. Rels. Auth.*, 875 F.3d 667, 672 (D.C. Cir. 2017) (FLRA review); *Cobert v. Miller*, 800 F.3d 1340, 1347–48 (Fed. Cir. 2015) (Merit Systems Protection Board review); *Huerta v. Ducote*, 792 F.3d 144, 153 (D.C. Cir. 2015) (NTSB review).

²⁷⁹ Merrill, *supra* note 272, at 990.

²⁸⁰ See *id.* at 990–91.

²⁸¹ See *id.* at 994–95 (discussing *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 276–77) (1933)).

As long as the function of a court is truly appellate in nature, that is to say, as long as the court reviews a record and resolves the same kinds of questions it would resolve in reviewing a record generated by a trial court, the reviewing court is acting in a perfectly judicial manner.²⁸²

But acting in a judicial manner is not necessarily the same as exercising the judicial power.²⁸³

This makes sense. When a federal court interprets and applies the law in an adjudication to determine whether an agency erred, it performs functions that are neither strictly judicial nor executive.²⁸⁴ If the court goes beyond the mere application of a legal standard to the facts—that is, if it enters the policy-making or revising domain—it begins to perform functions that the Constitution generally assigns to the political branches and not to courts.²⁸⁵ This is a mere extension of one species of concern from *Hayburn’s Case*: a separation of powers issue can arise when Article III courts perform functions that are not appropriately constrained or guided by law.²⁸⁶

C. *It Takes a Theory to Beat a Theory*

Because it takes a theory to beat a theory,²⁸⁷ this Section synthesizes the preceding lessons into a novel Article I theory of interagency litigation and puts that theory up against the competing rationales discussed in Section II.B. In short, this Section argues that much of modern interagency litigation can be justified solely on Article I grounds, that is, as a valid exercise of Congress’s Necessary and Proper Clause power that does not require Article III courts to overstep limitations on their own judicial power.

²⁸² *Id.* at 995.

²⁸³ *Cf. supra* Subsection III.A.2.

²⁸⁴ *See supra* note 203 and accompanying text (explaining that law interpretation and application is both a judicial and executive function).

²⁸⁵ *Cf. Nelson, supra* note 185, at 562 (“When government deals with rights held in common by the public at large, it makes sense for government to be responsive to the people as a whole.”). Legal realists who view law as an instrumental tool of policy likely disagree that courts lack discretionary, policy-making authority even when exercising judicial power. *See, e.g.,* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 546 (3d ed. 2005). But legal realism culminated in the 1920s and 1930s, in particular through the work of attorneys central to the New Deal. *See id.*; Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982). The appellate model of agency review, including its settlement of important separation of powers questions, was built on an older and more formal view that “separation of powers requires the establishment and maintenance of three separate and nonoverlapping spheres of power.” Merrill, *supra* note 272, at 987–88 (noting that this view “continued to dominate judicial thinking during the period in question”).

²⁸⁶ *See supra* notes 266–67 and accompanying text.

²⁸⁷ *See Pfander & Birk, Reply, supra* note 23, at 1085 (citing Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1566 (1990)).

1. *Interagency Litigation's Adherence to Structural Safeguards*

The Article I theory is straightforward: under its Necessary and Proper Clause power, Congress can authorize interagency litigation in Article III courts when (1) the court is assigned a constrained and traditionally judicial function, like the interpretation and application of law, (2) to be performed in a traditionally judicial form (i.e., an adjudication presenting adverse positions), which includes (3) a final decree that is conclusive of the dispute and unreviewable by another branch.

As argued in Section III.B, *Hayburn's Case* established (and *Nelson Bros.* reinforced) a basic idea: absent a specific authorization (like the Appointments Clause),²⁸⁸ the relevant structural rule for assigning functions to Article III courts is that the functions must have a traditionally judicial character (e.g., be appropriately constrained to questions of law).²⁸⁹ Functions such as the interpretation and application of statutory standards have that character.²⁹⁰ So, judicial review of administrative action is an acceptable judicial function when limited to deciding purely legal questions and applying legal standards to a particular record—for example, checking for compliance with mandatory procedural rules, due process, and substantial evidence.²⁹¹ That is all that most interagency litigation calls for.²⁹²

The form, too, is appropriately judicial. Adjudication is just a form of doing business; it is not inherently an Article I, Article II, or Article III procedure.²⁹³ To be sure, there are limits. Accepting a strong reading of *Hayburn's Case* and its progeny, the Constitution demands a form that protects the finality of judicial decisions even when courts are not called to exercise the Article III judicial power.²⁹⁴ But Congress can design a system in that mold by providing that these decisions are final and nonreviewable in other branches. Congressionally sanctioned interagency litigation under petition-for-review statutes generally has that feature.²⁹⁵ Under these review schemes, Congress has neither assigned policy-making discretion to the

²⁸⁸ See *supra* notes 210–11 and accompanying text.

²⁸⁹ See, e.g., *supra* note 252 and accompanying paragraph (*Hayburn's Case*); *supra* note 282282 and accompanying text (*Nelson Bros.*).

²⁹⁰ See, e.g., *supra* notes 186–87 and accompanying text.

²⁹¹ See *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 276–77 (1933); *supra* Subsection III.B.2.

²⁹² See *supra* note 2788 and accompanying text.

²⁹³ See generally *supra* Subsection III.A.2.

²⁹⁴ See generally *supra* Subsection III.B.1.

²⁹⁵ See, e.g., 5 U.S.C. § 7123(c) (“judgment and decree” on FLRA action “shall be final”); 16 U.S.C. § 8251(b) (same for FERC actions); 28 U.S.C. § 2342 (power of determination is “exclusive”); 49 U.S.C. § 46110(c) (same for NTSB actions).

reviewing court,²⁹⁶ nor threatened judicial independence by making a judicial function subject to revision or review by another branch.²⁹⁷

That leads to another point about finality. Without a case or controversy, an Article III court ordinarily could not bind parties; if the power to bind flows from the judicial power, then an Article III case or controversy is a necessary precondition.²⁹⁸ Interagency litigation, however, is subject to a unique binding mechanism. Because both litigants are part of the federal government, Congress can bind the agencies with a statutory rule of decision. If Congress ascribes finality to the review process, that exercise of the Necessary and Proper Clause power operates as a decision rule that triggers the President's obligation to "take Care that the Laws be faithfully executed."²⁹⁹ The decision rule legislatively creates the same type of binding finality that a judgment backed by the judicial power would provide.³⁰⁰

Legitimate interagency judicial review is also appropriately constrained under the Article I theory. Many defenders of the presidency would likely object to a system that purported to resolve legal issues within the executive branch for all purposes—something like a statutory Office of Legal Counsel run by Article III judges instead of officers accountable to (i.e., removable by) the President.³⁰¹ But to satisfy the structural safeguards that limit Congress's Article I power, proper interagency litigation must be limited to applying the law to a specific record on review.³⁰² Thus, a valid statutory decision rule constrains the President (or inferiors) *only* with respect to the particular dispute in which the executive was carrying out a particular law

²⁹⁶ See *supra* note 285285 and accompanying text.

²⁹⁷ Cf. *Mistretta v. United States*, 488 U.S. 361, 383 (1989) ("In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' . . . and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.'" (citations omitted) (first quoting *Morrison v. Olson*, 487 U.S. 654, 680–81 (1988); then quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986))).

²⁹⁸ U.S. CONST. art. III, § 2 (identifying to which disputes the "judicial Power shall extend"). See generally *supra* Subsection III.A.1 (discussing the federal judicial power). In future work, I hope to explore more thoroughly whether the capacity to bind is inherent in the judicial power vested under Article III or whether it is merely a secondary consequence of how multiple structural features in the Constitution interact.

²⁹⁹ U.S. CONST. art. II, § 3; see *id.* art. I, § 8, cl. 18. For purposes of this argument, I assume that the Take Care Clause imbues the President with an obligation and accompanying authority to supervise other officers within the executive branch, including by enforcing compliance with decisions that resolve any particular interagency litigation. Cf. Gillian B. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875–78 (2015) (analyzing the Clause's text and structural context).

³⁰⁰ See *supra* Subsection III.A.3; cf. Baude, *Judgment Power*, *supra* note 156, at 1809 (arguing "that the judicial power vested in Article III courts allows them to render binding judgments that must be enforced by the Executive Branch so long as those courts have jurisdiction over the case").

³⁰¹ See *supra* notes 148–53 and accompanying text (discussing modern presidential removal doctrine); cf., e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (holding that assigning to the general public a cause of action to vindicate public rights is inconsistent with the Take Care Clause).

³⁰² See generally *supra* Subsection III.B.2.

on a particular record.³⁰³ From the Republic's earliest days, the Supreme Court has understood that the Take Care Clause³⁰⁴ requires respect for "limits" in statutes by which "the legislature . . . prescribed . . . the manner in which [a] law shall be carried into execution."³⁰⁵ The Article I theory enforces that principle: valid interagency litigation cannot purport to bind the President in executing the law generally, but only with respect to discrete agency proceedings with discrete records.

By placing the legislative power at the center of the analysis, the Article I theory also prevents agencies from flooding the federal courts with nonadverse litigation that Congress does not specifically want channeled through a judicial review scheme. So, for example, the rare interagency litigation that arises outside of the petition-for-review context—for example, mere fights over property interests³⁰⁶—are properly dismissed. Because those disputes are not cases or controversies in the Article III sense, the judicial power cannot render a binding decision. And without a congressional authorization for the litigation that renders the decision otherwise final so far as the federal government is concerned, neither can Article I. In that situation, then, courts may be right to dismiss the disputes as seeking a traditional Article III judgment that the court cannot provide.³⁰⁷

2. *Advantages Over Competing Theories*

Apart from these doctrinal, historical, and practical justifications for an Article I theory of interagency litigation, this approach also has advantages when compared to alternative rationales.

i. *Explaining the Cases*

The Article I theory explains every major category of interagency litigation at the Supreme Court and in the courts of appeals. It accounts for (1) the Supreme Court's decisions in *ICC* and *Chapman* (the latter of which Herz's theory rejects³⁰⁸), as well as the significance that *Nixon* and *Newport News* afforded to Article I;³⁰⁹ (2) the circuit court petition-for-review cases,

³⁰³ To be sure, some courts have claimed authority to require (and perhaps supervise) certain agency action on remand from a petition for review. For an argument that this may often exceed the scope of statutory authority, see, e.g., Crews, *supra* note 100, at 301–13.

³⁰⁴ U.S. CONST. art. II, § 3.

³⁰⁵ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660–61 (1952) (opinion of Clark, J.) (citing *Little*).

³⁰⁶ See, e.g., cases cited *supra* note 92.

³⁰⁷ I qualify that these decisions "may" be right because this Article (which aims to turn attention to Article I) takes no position on the debate over the adversity required to sustain an Article III case—a debate that includes Pfander and Birk's position that no adversity is required. See *supra* note 47.

³⁰⁸ See *supra* note 164 and accompanying text.

³⁰⁹ See *supra* note 82 and accompanying text (*Nixon*); *supra* note 91 and accompanying text (*Newport News*).

including those that Mead’s theory excludes;³¹⁰ and (3) the relatively rarer cases in which courts have held disputes nonjusticiable—that is, the common law cases outside the petition-for-review context—that are incompatible with Mead’s theory.³¹¹ By accounting for each category of case, including those without a private real party in interest, the Article I theory has better explanatory value than the Herz, Mead, and real-party rationales.³¹²

The Article I theory also compares favorably to the independent agency rationale, which in a world without *Humphrey’s Executor* would suggest that federal courts have been acting lawlessly for decades by injecting themselves into executive disputes. By situating these cases in a broader constitutional tradition that stretches back to the Founding, the Article I theory avoids the awkwardness of delegitimizing seventy years’ worth of Supreme Court and lower court decisions. To be clear, I take no position on the wisdom of Congress’s assigning interagency litigation to Article III courts.³¹³ But recognizing that choice as constitutionally legitimate offers stability in the face of doctrinal change, whether from further tightening of Article III standing or the fall of *Humphrey’s Executor*.

ii. Consistency with Rationales

The Article I theory also does not require a comprehensive reworking of existing rationales. *ICC* never expressly analyzed justiciability through an Article III lens,³¹⁴ and in *Chapman* the principal litigated issue was whether the Secretary fell within the judicial review statute’s scope—a question better suited to the Article I theory than to Article III.³¹⁵ As for *Nixon*, the only Article III issue in that case was easy: criminal prosecutions are well-accepted “cases” in the Article III sense.³¹⁶ The remainder of the justiciability analysis was prudential, and the dispositive considerations in favor of justiciability turned on the presence of valid statutes—the same

³¹⁰ See Mead, *supra* note 10, at 1257 (rejecting *United States v. Fed. Maritime Comm’n*, 694 F.2d 793, 799 (D.C. Cir. 1982) (en banc) (per curiam), which resolved a petition for review under the Hobbs Act).

³¹¹ See cases cited *supra* note 92; Mead, *supra* note 10, at 1256, 1278 (advocating for an Article III approach that protects common law interests).

³¹² The one case mentioned in this Article that the Article I theory does not explain is *Dean v. Herrington*, 668 F. Supp. 646, 651–53 (E.D. Tenn. 1987), which found a justiciable interagency controversy over a common-law contract claim. See *supra* note 93 and accompanying text. *Dean* erroneously derived from *Nixon* a generally applicable Article III lesson; however, *Nixon*’s Article III analysis was limited to the case’s *criminal* nature, and the remaining analysis—on which *Dean* drew—dealt with prudential concerns and the nonjurisdictional political question doctrine. See *Dean*, 668 F. Supp. at 651–52 (discussing *United States v. Nixon*, 418 U.S. 683, 692 (1974)); *supra* notes 76–83 and accompanying text (explaining an alternative reading of *Nixon*, including the relevance of statutes).

³¹³ Cf. Farber & O’Connell, *supra* note 2, at 1468 (noting that among the “variety of mechanisms for resolving disputes between adversarial agencies, . . . litigation is not necessarily the best of them”).

³¹⁴ See *supra* note 67 and accompanying text.

³¹⁵ See *supra* note 70 and accompanying text.

³¹⁶ See *supra* note 80 and accompanying text.

basic idea as the Article I theory.³¹⁷ And *Newport News* is also consistent with the Article I theory, in that its dicta suggested that Congress could confer policy-motivated standing on the Labor Department official who petitioned for review.³¹⁸

For these reasons, the Article I theory fits with existing rationales better than the competing theories. As previously noted, the Supreme Court has never justified its cases on real-party-in-interest or independent agency rationales.³¹⁹ Nor has the Court explained itself in Article II terms (Herz's theory) or on the distinction between sovereign and proprietary interests (Mead's theory).³²⁰ Given what the Court has actually said (which is very little by way of Article III) and the contexts for these statements, the Article I theory fits better across the board.

iii. Adherence to Broader Doctrine

The Article I theory also fits broader separation of powers doctrine and history. For one, the idea that Article III looks to adverse legal *interests*, and not adverse *parties*,³²¹ casts doubt on the real-party-in-interest and independent agency rationales for justiciable interagency litigation, both of which turn on the presence of a particular type of litigant.

For their parts, both Herz and Mead operate within existing Article III doctrine, but that doctrine is hard to square with their frameworks.³²² The Article I theory is unburdened by Article III's case-or-controversy constraint and therefore does not threaten existing standing doctrine. Instead, Farber and O'Connell's intuitions about the role of Article I are exactly right: congressional authorization is crucial.³²³ The Article I theory builds on that intuition and (1) explains the basis for Congress's centrality, (2) imposes meaningful limits that protect the interests at the heart of the apt separation of powers cases, and (3) grounds the justification in text and historical practice.

D. Future Directions and Further Applications

The Article I theory may also provide a roadmap for solving other conundrums at the intersection of administrative law and federal courts.

³¹⁷ See *supra* note 82 and accompanying text.

³¹⁸ See *supra* note 91 and accompanying text.

³¹⁹ See *supra* notes 124, 144–45 and accompanying text.

³²⁰ See *supra* notes 163 and 171 and accompanying text.

³²¹ See Woolhandler, *supra* note 23, at 1033 & n.31. If Pfander and Birk are correct, however, that Article III does not require adversity, that could be an independent basis justifying interagency litigation. See Pfander & Birk, *Reply*, *supra* note 23, at 1095 (“Cases, unlike controversies, encompass the exercise of jurisdiction over uncontested assertions of a claim of right.”).

³²² See *supra* note 163 and accompanying text (discussing that Herz wrote before *Lujan* and its progeny); *supra* note 171 and accompanying text (noting that Mead's theory assumes a distinction between interests that the Supreme Court has never embraced).

³²³ See generally *supra* Subsection II.B.5.

Although beyond this Article's purview, in future work I plan to develop how this theory informs other debates in modern administrative law.

1. *Understanding the Power of Article III Courts*

The Article I theory relies on the idea that some final adjudications by Article III courts do not necessarily call for a formal exercise of judicial power. That raises an obvious question: What power are they using, then? There are a few possible answers worth exploring.

Pure functionalists might say that it does not really matter. For them, the central goal of separation of powers doctrine is preserving each branch's essential functions and the basic balance of control among the branches that underlies the Constitution's design.³²⁴ So a functionalist might be content to say that adjudicating interagency legal disputes without using judicial power is simply a permissible function that Congress can assign to federal courts, given the Necessary and Proper Clause's text and the historically developed grounds to support these review schemes as "proper."

Others might agree with this functions-based view on more formal grounds. Some have criticized the traditional formalism-versus-functionalism debate in separation of powers law,³²⁵ and recent work has suggested instead a theory of exclusive or nonexclusive functions.³²⁶ On this view—as with the functionalist perspective—one might say that resolving interagency legal disputes is a function assignable (under appropriate conditions) either to executive branch officers or to federal courts.

But what about purer formalists, who emphasize identifying the precise power being used and then ensuring that it is being exercised by an official with proper access to that power?³²⁷ For them, the power at issue—if not judicial—is likely executive. After all, recall that carrying a statute (including a statutory review scheme) into execution is the traditional core of the executive power.³²⁸ Making the formalist case for judicial access to executive power would require a more thorough examination of Enlightenment political theory, textual and structural constitutional analysis, and American legal history than this Article allows. In future work, however, I intend to explore the bases for characterizing interagency litigation

³²⁴ See, e.g., Magill, *supra* note 185, at 1142–43 (noting functionalism's focus on achieving "an appropriate balance of power among the three spheres of government"); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21–22 (1998) (discussing functionalism's focus on "adaptability" and "pragmatic values").

³²⁵ See, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–46 (2011) (discussing the shortcomings in traditional functionalist and formalist views).

³²⁶ See generally Wurman, *supra* note 202 (proposing this theory of separation of powers).

³²⁷ See Magill, *supra* note 185, at 1139–40.

³²⁸ See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 314–15 (2021) (advocating that executive power is "authority to carry out projects defined by a prior exercise of legislative power"); see also *supra* note 187.

(and other statutory administrative review contexts) as constitutionally permissible uses of executive power.

2. *Relevance to Other Administrative Review Schemes*

The Article I theory may also inform other types of agency litigation. Consider first the more general problem of Article III standing: as the Supreme Court has limited cognizable injuries to those with a traditional common law analogue,³²⁹ some have worried that this logic threatens litigation under statutes like FOIA,³³⁰ which creates a statutory right of access to certain federal government records—an interest that did not historically exist at common law.³³¹ The Article I theory may justify FOIA litigation independent of Article III standing. If the Article I theory is correct, then there is arguably no structural problem if Congress directs agencies to hand over documents when a federal court conclusively determines, based on the application of FOIA’s terms to a specific request, that an agency committed legal error in withholding certain material. FOIA may be just another statutory decision rule that respects proper judicial functions and judicial independence. Of course, absent an exercise of the judicial power, Congress could enact legislation to unravel any particular FOIA ruling before it was implemented without intruding on vested private rights. But that is likely true in any event; FOIA is currently understood to govern equitable power,³³² and Congress can generally alter the prospective effect of injunctions.³³³

And the Article I theory may address Article III objections to modern administrative law in ways that go beyond standing. The same types of judicial review statutes that underlie modern interagency litigation have also been at the center of debate about what it means for a particular court’s jurisdiction to review agency action to be “exclusive.”³³⁴ That a single reviewing court’s determination of invalidity settles the matter for all other courts, some have said, “conflicts” with “fundamental precepts of the federal court system” under Article III.³³⁵ Relatedly, review of agency action under these statutes often implicates the well-known *Chevron* framework, under which an agency’s interpretation or construction of an ambiguity or gap in

³²⁹ See *supra* note 163 and accompanying text.

³³⁰ 5 U.S.C. § 552.

³³¹ See Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 270–71 (2021); Sunstein, *supra* note 128, at 371–72.

³³² *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 18 (1974).

³³³ *Miller v. French*, 530 U.S. 327, 344–48 (2000).

³³⁴ 28 U.S.C. § 2342; see, e.g., *PDR Network, LLC v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051, 2053 (2019).

³³⁵ *Gorss Motels, Inc. v. FCC*, 20 F.4th 87, 99 (2d Cir. 2021) (Menashi, J., dissenting).

the statute it administers can receive controlling deference.³³⁶ Some have questioned whether that framework violates Article III’s vesting of judicial power or judges’ obligations in exercising that power.³³⁷ If some judicial review of agency action—in particular, review under statutory review schemes like those discussed in this Article—results in an exercise of non-Article III power, then these Article III objections may melt away.

IV. IN DEFENSE OF THE ARTICLE I THEORY

In this final Part, I briefly defend the Article I theory from four potential objections.

A. *Consistency with Statutes*

The first potential objection is that, contrary to my claim, the Article I theory cannot save much of modern interagency litigation because the statutes authorizing the litigation presume an exercise of the judicial power. Indeed, many of these statutes speak of a “judgment,”³³⁸ which I have argued is usually the output of an exercise of judicial power.³³⁹ But not all of the statutes call for a judgment, and many instead reference a “decree” or more general determination.³⁴⁰ In any event, we should not fixate on the word “judgment”; that an exercise of judicial power yields a judgment does not necessarily mean that everything we call a judgment was an exercise of judicial power.³⁴¹ Congress often assigns labels that do not neatly track the constitutional power at work. A “bankruptcy court” provides an apt illustration;³⁴² despite the name, it is well settled that these courts lack access to the Article III judicial power.³⁴³

³³⁶ See *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984) (articulating how a court should determine whether an agency’s construction of a statute it administers is owed controlling deference).

³³⁷ See, e.g., *Michigan v. EPA*, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (questioning *Chevron*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155–56 (10th Cir. 2016) (Gorsuch, J., concurring) (similar); cf. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring) (expressing similar concerns about deference to agency interpretations of ambiguous regulations); see also, e.g., Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1208 (2016) (arguing that *Chevron* violates an Article III duty of independent judgment); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1262 (2002) (collecting Article III objections).

³³⁸ E.g., 5 U.S.C. § 7123(c); 16 U.S.C. § 8251(b).

³³⁹ See generally *supra* Subsection III.A.3.

³⁴⁰ See, e.g., sources cited *supra* note 2955.

³⁴¹ As Ann Woolhandler observed when reviewing some of the same history I have discussed: “A matter . . . could result in a ‘judgment’ and be ‘judicial in [its] nature’ without being an Article III case, as Chief Justice Taney pointed out . . . in *Ferreira*.” Woolhandler, *supra* note 23, at 1063–64 (footnote omitted) (citing *Gordon v. United States*, 117 U.S. 697, 699 (1885); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 48 (1852)).

³⁴² 28 U.S.C. § 151.

³⁴³ See *supra* note 221 and accompanying text.

B. *Advisory Opinions*

A second potential objection, to which Farber and O’Connell alluded when they first nodded to an Article I framework, relates to advisory opinions: How can federal courts expound the law for the executive branch outside an Article III case?³⁴⁴

As often recited, federal courts “do not issue advisory opinions,” a rule that constrains federal courts to “decide only matters of a Judiciary Nature.”³⁴⁵ This rule has deep historical roots in the United States, tracing back to correspondence between the Supreme Court and the executive branch in 1793.³⁴⁶ That year, Secretary of State Jefferson wrote to the Court on President Washington’s behalf to ask whether the President could “refer questions” that were “abstract”—“on the construction of our treaties, on the laws of nature and nations, and on the laws of the land”—to the Court for the Court’s “advice.”³⁴⁷ Chief Justice Jay responded for the Court and declined the invitation, citing the separation of powers, the Court’s status as a tribunal of “last resort,” and the President’s power to call on executive department heads for written advice.³⁴⁸

Two important features separate the Article I theory from the traditional rule against advisory opinions. First, the original rule rested on a structural concern that interagency litigation does not implicate. Article II expressly addresses the President’s power to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon

³⁴⁴ Farber and O’Connell cabin their concern to situations “where the authority to make final decisions for both agencies resides in the [P]resident,” Farber & O’Connell, *supra* note 2, at 1468 n.567, which I understand to mean where no independent agency is involved. There may be good reason to think that disputes like this will never come to litigation, but in any event, I propose that the finality requirement addresses this issue. By submitting such a supposed “dispute” to litigation—say, by having a Cabinet department petition for review of an EPA order—the President is agreeing to treat the ruling on the petition as conclusive of the particular dispute (subject, of course, to his firing the EPA director and instructing the replacement to rescind the order that survived judicial review). Herz might say this violates Article II because it delegates law execution to the federal courts. *See* Herz, *supra* note 10, at 973. But that would not necessarily follow; the EPA has already executed the law via its order, and the executive branch is now bound by the rule until it is lawfully repealed or set aside. For a fuller explanation of why interagency litigation might in this situation be a boon for the President, *see infra* Section IV.D.

³⁴⁵ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quotation marks omitted).

³⁴⁶ *See* *Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968). *But see generally* Christian R. Burslet, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621 (2021) (arguing that judges throughout the common law world, not just in the United States, turned against advisory opinions in the second half of the eighteenth century).

³⁴⁷ Letter from Thomas Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486, 486–87 (Henry P. Johnston ed., 1890) [hereinafter *Jefferson Letter*].

³⁴⁸ Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 347, at 488, 488–89 [hereinafter *Jay Letter*].

any subject relating to the Duties of their respective Offices.”³⁴⁹ That is a limitation on the President, and a sharp break from the English tradition, in which the sovereign’s Privy Council (which often included judges) could be pressed into advising on public and private matters.³⁵⁰ A structural limit on the President does not necessarily inform what *Congress* can require of federal judges.

Second, modern doctrine recognizes that the prohibition simply carries out general justiciability rules: “Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.”³⁵¹ As I have argued, the Article I theory respects these separation-of-powers limits, including by rendering the judicial determination conclusive of the dispute. In that regard, the Article I theory again differs from the advisory opinion rule’s origin, when President Washington sought from the Court mere nonbinding *advice*.³⁵²

C. *Officers and Commissioners*

The third objection relates to whom Congress can designate to resolve interagency legal disputes. If Congress can specify that an Article III court’s decision is conclusive even absent an exercise of judicial power, then why can it not specify some other decision maker, like members of Congress or any random citizen? After all, if the Article III judicial power is unnecessary, then there is no need to limit the universe of adjudicators to persons who can exercise it.

The short answer is that Congress’s decision rule requires a ruling by an officer of the United States. Under existing doctrine, any person who wields the congressionally conferred authority to conclusively decide interagency litigation would be “exercis[ing] significant authority pursuant to the laws of the United States” and therefore be an “Officer” as that term is used in Article II.³⁵³ That means the person must be appointed to their office in compliance with Article II’s requirements,³⁵⁴ and it excludes members of

³⁴⁹ U.S. CONST. art. II, § 2; see Jay Letter, *supra* note 348, at 488–89 (noting that the President’s power “of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments”).

³⁵⁰ See AMAR, *supra* note 230, at 187.

³⁵¹ *Flast*, 392 U.S. at 97.

³⁵² Jefferson Letter, *supra* note 347, at 487.

³⁵³ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976) (per curiam)). The Court has held that officials with a continuing office who perform adjudicatory functions with significant discretion are “officers” under the Constitution, even when those adjudications are not backed by the judicial power. See *Lucia v. SEC*, 138 S. Ct. 2044, 2052–54 (2018); *Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991). Although the “significant authority” test remains somewhat opaque, see *Lucia*, 138 S. Ct. at 2052 (declining to “refine or enhance the test”), it seems satisfied if one can bind the United States in one’s own name, *cf. id.* at 2051–52 (noting differing views on the test).

³⁵⁴ See U.S. CONST. art. II, § 2.

Congress.³⁵⁵ So, the universe of eligible persons includes Article III judges and duly-appointed executive branch officers (who, in turn, would generally be removable by the President).³⁵⁶ Vesting this power in judges simply entails a tradeoff: because the judge is not removable by the President,³⁵⁷ the judge cannot have policy discretion but instead must simply be checking the record for compliance with legal procedures.³⁵⁸

A related potential objection is that Article III judges have not been appointed to perform non-Article III resolution of interagency litigation. This objection has historical legs. As early as *Hayburn's Case*, it was suggested that judges could perform executive functions as “commissioners,”³⁵⁹ an argument that the Court ultimately rejected in *United States v. Todd*, an unreported case decided without published opinion.³⁶⁰ But as this Article has argued, *Hayburn's Case* and its progeny principally concern situations in which the function is entirely nonjudicial in nature or there is a lack of finality (which can be independent evidence that Congress did not see the function as judicial).³⁶¹ On that view, *Hayburn's Case* is not particularly strong evidence of a generally accepted rule against pressing judicial officers into performing customary adjudications—with finality—that (as the Article I theory would have it) simply do not result in an exercise of judicial power.

Nevertheless, Pfander and Birk note that *Todd* “could have reflected a variety of considerations,” among them that “Congress lacks power to appoint commissioners by legislative act.”³⁶² If that is the takeaway, perhaps there is an Appointments Clause problem if Congress assigns Article III judges to perform non-Article III interagency adjudication *after* their initial appointment. But if the function of interagency adjudication is assigned to the court by statute *at the time of appointment*, the judge’s initial commission would seem sufficient to confer the power to carry out that function.

³⁵⁵ See *id.* art. I, § 6 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

³⁵⁶ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2198 (2020) (discussing the President’s power to appoint and to remove executive officers).

³⁵⁷ U.S. CONST. art. III, § 1.

³⁵⁸ See generally *supra* Subsection III.B.2 (explaining that the parameters of the courts’ authority allow for reviewing only questions of law and forbid policymaking).

³⁵⁹ 2 U.S. (2 Dall.) 409, 410 n. (1792) (stating the opinion of the circuit court for the district of New York).

³⁶⁰ See *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52–53 (1852) (describing the *Todd* decision); see also Woolhandler, *supra* note 23, at 1056 & n.150, 1059–61 (discussing Article III judges as commissioners).

³⁶¹ See generally *supra* Subsection III.B.1 (discussing judicial functions and finality).

³⁶² Pfander & Birk, *Reply*, *supra* note 23, at 1080; see also Woolhandler, *supra* note 23, at 1059–60 (noting that the statute assigned the work to the judges, not to the court).

D. Presidential Control

Perhaps the most pressing concern is interagency litigation's potential intrusion on presidential control of the executive branch. When confined to its proper sphere, however, interagency litigation could be a valuable presidential tool.

One objection to interagency litigation is that it seems to undermine the President's obligation to "take Care that the Laws be faithfully executed."³⁶³ The Article I theory, however, applies only to that narrow set of judicial review schemes that graft courts onto the end of an administrative process. The basic idea of these schemes is that Congress provides, by statute, that preliminary disputes over lawfulness will occur in a court with judicial resolution that is conclusive so far as the United States is concerned. In a sense, this process is the law that the President is to faithfully execute—allow the process to play out and respect the judgment reached, in line with Congress's design for the administrative apparatus. The theory does not necessarily undermine presidential control; it informs instead how we should think about what that law requires.

Setting aside that doctrinal point, a more normative presidential control objection to interagency litigation arises when there is a perception that courts have left the law-applying sphere and entered the policy-making sphere. Thus, for example, both *Herz* and *Mead* exclude from their frameworks cases that, in their respective views, crossed that line. For *Herz*, *Chapman* was wrongly decided because it submits to judicial resolution a mere dispute between agencies "as regulators."³⁶⁴ *Mead* objects to cases like *United States v. Federal Maritime Commission*,³⁶⁵ which "allowed the DOJ to sue the Federal Maritime Commission and others over policy disagreements."³⁶⁶ The thrust of these criticisms is that interagency litigation should not be the venue for resolving policy disputes. Under the Article I theory, it is not: valid interagency judicial review statutes must limit the justiciable disputes to points of law.³⁶⁷ To be sure, the *motive* for these cases may be that one agency disagrees with another, but the *substance* of the lawsuit turns on whether the respondent agency acted arbitrarily and capriciously, in excess of authority, without substantial evidence, or otherwise contrary to law.

This makes sense. Most interagency litigation involves directly accountable agencies that sue independent agencies to drive an agenda.³⁶⁸

³⁶³ See U.S. CONST. art. II, § 3; see also, e.g., *SEC v. Fed. Lab. Rels. Auth.*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (suggesting that Article II properly assigns "legal or policy disputes between two Executive Branch agencies" to "the President or his designee").

³⁶⁴ See *Herz*, *supra* note 10, at 943–44, 944 n.198, 990.

³⁶⁵ 694 F.2d 793 (D.C. Cir. 1982) (en banc) (per curiam).

³⁶⁶ *Mead*, *supra* note 10, at 1257.

³⁶⁷ See *supra* notes 288–92 and accompanying text.

³⁶⁸ See *Shah*, *supra* note 2, at 646–47.

The presidential control concern that lurks beneath the surface seems to be about the independence: if the President could just fire the independent agency decision makers—or even subject them to the Office of Information and Regulatory Affairs (OIRA) regulatory review process³⁶⁹—then there would be no mismatch between agency agendas.³⁷⁰

But assume that does not happen: *Humphrey's Executor* is never overruled; or it is, but the President nevertheless declines to spend political capital on terminations; or the President decides not to add to OIRA's workload by including formerly independent agencies. In that world, independent agencies may still reach decisions and enact rules with which the President disagrees. But official agency action with which a President disagrees can still have the force of law. Even if the President fires agency decision makers responsible for a rule, the rule does not just go away. New decision makers need to be named, and the agency then needs to follow the legal process for amending or rescinding the rule—all of which takes time.³⁷¹

Interagency litigation can promote presidential control by letting the President (or directly accountable inferiors) sidestep this process. If directly accountable agencies use a petition for review to identify some legal error to a reviewing court, that court's decision could wipe the rule from the books without the disruption of termination and new rulemaking. After all, procedural rules constrain the President (and directly accountable officers) even when these officials independently conclude that an administrative action was unlawful.³⁷² Interagency litigation to set aside those actions as unlawful, if the court's decision is favorable, can enable the President to achieve goals more quickly than even a robust conception of Article II power to terminate officers might allow. In that sense, the interagency litigation that the Article I theory justifies is a procedural shortcut that can inure to the President's benefit.³⁷³ Presidential control concerns may be overblown in both theory and practice.

³⁶⁹ OIRA, part of the Office of Management and Budget, has responsibility “to review and approve (or decline to approve) federal rules from executive agencies,” but its review does not extend to “so-called independent agencies.” Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1838–39, 1839 n.3 (2013).

³⁷⁰ *Cf.*, e.g., SEC v. Fed. Lab. Rels. Auth., 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

³⁷¹ See 5 U.S.C. § 553 (procedure for rulemaking); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (describing rulemaking as “an extraordinarily lengthy, complicated, and expensive process”).

³⁷² See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907–15 (2020) (holding that a policy rescission was unlawful where the administration revoked the policy as illegal ab initio without considering reliance interests); Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1760 (2021) (arguing that the Court has used APA arbitrariness review to reject “buck-passing explanations” like unlawfulness and instead required administrations to pay the political price for their actions).

³⁷³ See Shah, *supra* note 2, at 646–47 (explaining how interagency litigation has generally been used at the expense of independent agencies to further presidential administrations).

CONCLUSION

Interagency litigation is an important part of the modern administrative state, but its constitutional basis is difficult to identify. Thus, it may be tempting to dismiss interagency litigation as a doctrinal relic of a bygone era when courts were more open to agency independence under Article II and less focused on restrained judicial power under Article III.

That would be a mistake. The prevailing discourse around interagency litigation has almost always overlooked the significance of Article I. From its earliest days, Congress could—and did—assign functions to federal courts that were not necessarily adjudications culminating in the exercise of judicial power. Over time, a constitutional balance was struck: limiting federal courts in judicial review of agency action to conclusively deciding questions of law on specific records is sufficient to preserve separation of powers. Given that history, Congress’s Necessary and Proper Clause power should justify most contemporary interagency litigation on Article I grounds. Where Congress provides that a judicial ruling on an agency action’s lawfulness is conclusive of a legal dispute so far as the federal government is concerned, that is a valid decision rule that supplies finality to the court’s determination and binds the federal government for reasons rooted in Article I. It therefore simply does not matter whether an interagency dispute subject to such a valid decision rule is an Article III case or controversy. If it is, the judicial power applies and conclusively determines the matter; if it is not, the legislative power steps in and does the same thing.

