

Why We Need Federal Administrative Courts

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Abstract. *Apart from criminal proceedings and a small enclave of constitutional right, virtually all disputes between citizens and federal agencies are decided by agency-appointed tribunals, not judges. Typically, the tribunals' decisions are reversible by the agency and then subject only to highly deferential judicial review. This "appellate review" regime originated well over a century ago. It found its canonical formulation in the Supreme Court's foundational decision in Crowell v. Benson (1932) and, in 1946, was effectively codified in the Administrative Procedure Act. The model has since been overlaid with a blanket of administrative common law, and it has been subject to a great deal of improvisation outside the APA's default provisions. Despite the constant tinkering, however, and despite widely shared misgivings about its constitutional foundations and practical operation, the appellate review model has proven immune to any serious challenge. This Essay mounts that challenge. It confronts the appellate review model with a stark but realistic and highly attractive alternative: a system of independent administrative courts, endowed with the institutional capacity and incentives to provide meaningful protection for citizens' rights. Many countries in the world feature such a judiciary. Prominently, Germany's system of administrative courts rests on constitutional commands that categorically forbid administrative tribunals and instead require that disputes between the executive and private citizens must always be adjudicated by an independent court. While we cannot simply import that model, we can replicate its essential features, well within the confines of the Constitution and our legal traditions. In fact, institutional reforms along "German" lines might help us recover foundational domestic legal traditions that were lost or abandoned in the adoption of the appellate review model.*

¹ Professor of Law, Antonin Scalia Law School. A preliminary version of this Working Paper was presented at a February 2019 panel discussion co-sponsored by the Center for the Study of the Administrative State (CSAS) and the Liberty Fund. <https://administrativestate.gmu.edu/should-congress-replace-aljs-with-administrative-courts/>. A much shorter version of the principal argument appeared earlier on the Liberty Fund's Law & Liberty website <https://www.lawliberty.org/liberty-forum/administrative-law-is-bunk-we-need-a-bundesverwaltungsgericht/>, along with responses. <https://www.lawliberty.org/liberty-forum/bundesverwaltungsgericht-michael-greve-replies-to-his-critics/>. Thanks to the CSAS and Liberty Fund for their sponsorship; to William Bartle, Gelane Diamond, and Benjamin Janacek for splendid research and editorial assistance; and to Florian Becker, James Conde, Chris DeMuth, Rob Gasaway, Greg Katsas, Jeff Lubbers, Aaron Nielson, Ashley Parrish, Jeremy Rabkin, Richard Reinsch, Mike Rappaport, Philip Wallach, Adam White, Steve Williams, and Ilan Wurman for their exceptionally helpful comments and suggestions.

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Prologue

A long time ago in 2004, Michael and Chantelle Sackett acquired a parcel of land near Priest Lake, Idaho, and obtained local permits to build a home in a built-out subdivision, zoned for residential construction. In 2007, when the Sacketts began construction, EPA officials ordered them to stop work and then sent them a “compliance order” claiming that the property contained a federally protected wetland. The order demanded costly restoration work; a three-year monitoring program during which the property must be left untouched; and off-site mitigation and substantial fines. Failure to comply, the EPA warned the Sacketts, might entail civil penalties up to \$75,000 per day, as well as criminal sanctions.

The Sacketts’ administrative complaints met with no meaningful reply. Their subsequent federal lawsuit, contending that the EPA lacked jurisdiction over the property, met with the agency’s objection that the compliance order was not a final agency action and therefore not subject to judicial review at all. In 2012, a unanimous U.S. Supreme Court held that the EPA’s order was indeed subject to judicial review.

Upon remand to the district court, further litigation ensued. In 2019, the district court determined that under the deferential standards of review that apply to the EPA’s interpretation of the Clean Water Act as well as the agency’s own regulations and guidance documents, the EPA’s wetlands determination was supported by adequate record evidence and neither arbitrary nor capricious. At this writing, the ruling is pending on appeal.

The Supreme Court’s decision in *Sackett v. EPA* appears at 566 U.S. 120 (2012). The district court’s opinion is unreported; the case cite is 2:08-cv-00185-EJL (D.ID. Mar 31, 2019).

[The Administrative Procedure Act is] “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government.”

Administrative Procedure Act S. Proceedings, 79th Cong. 298 (1946) (Statement of Senator Patrick McCarran, Senate sponsor of the APA).

Introduction

In serious confrontations between the federal government and its citizens, most of our fellow-citizens are apt to believe, an independent judge will adjudicate the dispute in the exercise of independent judgment. But that is not so. Apart from criminal proceedings and a small enclave of constitutional right, virtually all disputes between citizens and federal agencies are decided by agency-appointed tribunals, not judges. Typically, the tribunals’ decisions are reversible by the agency and then subject only to highly deferential judicial review. This “appellate review” regime originated well over a century ago, in the battle over administrative determinations of railroad

rates.² It found its canonical formulation in the Supreme Court’s foundational decision in *Crowell v. Benson* (1932)³ and, in 1946, was effectively codified in the Administrative Procedure Act (APA). The model has since been overlaid with a blanket of administrative common law, and it has been subject to a great deal of improvisation outside the APA’s default provisions.⁴ Despite the constant tinkering, however, and despite widely shared misgivings about its constitutional foundations and practical operation, the appellate review model has proven immune to any serious challenge.

This Essay mounts that challenge. It confronts the appellate review model with a stark but realistic and, to my mind, highly attractive alternative: a system of independent administrative *courts*, endowed with the institutional capacity and incentives to provide meaningful protection for citizens’ rights.

Many countries in the world feature such a judiciary.⁵ Prominent among them is Germany’s system of administrative courts, described in detail below. It rests on constitutional commands that categorically forbid administrative tribunals and instead require that disputes between the executive and private citizens must *always* be adjudicated by an independent court. While we cannot simply import that model, we can replicate its essential features, well within the confines of the Constitution and our legal traditions. In fact, I shall argue, institutional reforms along “German” lines might help us recover foundational domestic legal traditions that were lost or abandoned in the adoption of the appellate review model. The remainder of this Introduction puts these heterodox propositions into the context of the current, raging debate over the administrative state and its law, and then provides a road map.

Public Administration and Private Rights; Doctrine and Institutions

The administrative law debate of the post-*Chevron* era has been preoccupied with the judicial review of agency rulemakings.⁶ Lately, however, agency adjudication⁷ has re-emerged as a

² Thomas Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953-55 (2011).

³ 285 U.S. 22 (1932).

⁴ For a comprehensive overview see Michael Asimow, *Adjudication Outside the Administrative Procedure Act*, ACUS (Sept. 16, 2016), <https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-updated-draft-report.pdf>. See also Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153 (2019) (noting that most agency adjudication takes place outside the APA).

⁵ France, Italy, and Germany are among those countries. Many other countries have adopted models of adjudication that lie somewhere between the extremes of independent administrative courts and our appellate review model. For a useful discussion see Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3 (2015).

⁶ Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1575 (2013) (noting and lamenting the fact).

⁷ In a narrow sense, “agency adjudication” means administrative hearing procedures and dispute resolution; in a broader sense, it includes enforcement actions and any other individual agency action with external legal effect. Cf. 5 U.S.C. § 551(6)–(7). I will use the term in both senses; the intended meaning will appear from the context.

prominent topic of scholarly debate⁸ and hard-fought litigation.⁹ In some measure, the renewed attention has been prompted by practices that are widely perceived as problematic, irregular, or even abusive. Common examples include the imposition of civil fines by bureaucratic edict;¹⁰ “non-final” enforcement actions that effectively thwart private citizens’ business or use of their land, as in the *Sackett* case described in the Prologue;¹¹ the hold-up of permits or licenses, and their conditioning on well-nigh extortionate demands;¹² sudden changes of agency policy, accomplished by means of adjudication and without fair warning to the parties;¹³ the opportunistic shifting of enforcement proceedings from Article III courts into agency tribunals;¹⁴ and the administrative “death squadding” of invention patents that cannot be canceled in any court of the United States.¹⁵ However, concerns of this sorts (and they are not universally shared) partake of a broader, more fundamental and constitutionally grounded critique of administrative government. Begin with a rock-bottom proposition: in matters of private right, disputes between citizens and the government must be adjudicated by an independent judge. By and large, that still seems to be the Supreme Court majority’s understanding of Article III.¹⁶ However, it turns out that aside from

⁸ See, e.g., Kent H. Barnett, *Against Administrative Judges*, 49 U.C.D. L. REV. 1643 (2016); Kent H. Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515 (2019); Walker & Wasserman, *supra* note __; Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679 (2019); Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097 (2018).

The recent literature on the subject features proposals, similar in many respects to the project of this Essay, to replace agency adjudication with independent courts. See Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 N.D. L. REV. 821, 864-65 (2018); Michael Rappaport, *Replacing Administrative Adjudication with Independent Administrative Courts*, GEO. MASON L. REV. (forthcoming 2019); see also NEW NORMALS? THE TRUMP ADMINISTRATION, THE COURTS, AND ADMINISTRATIVE LAW, <https://administrativestate.gmu.edu/previous-events/new-normals-the-trump-administration-the-courts-and-administrative-law/> (last visited Feb. 17, 2019). For a brief summary and discussion of those proposals see *infra* note __ and accompanying text.

⁹ See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018); *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (discussed *infra* note __ and accompanying text).

¹⁰ Aaron L. Nielson, *D.C. Circuit Review – Reviewed: “I vote for Chenery I, not Chenery II,”* YALE JOURNAL ON REGULATION (Nov. 24, 2017), <http://yalejreg.com/nc/d-c-circuit-review-reviewed-i-vote-for-chenery-i-not-chenery-ii/>.

¹¹ *Sackett v. EPA*, 566 U.S. 120 (2012). See also *U.S. Army Corps of Eng’rs v. Hawkes*, 136 S. Ct. 1807 (2016); *Rhea Lana Inc. v. U.S. Dep’t of Labor*, 824 F.3d 1023 (D.C. Cir. 2016).

¹² PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017); Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623 (2011).

¹³ Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 790 (2015).

¹⁴ Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015), <https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>.

¹⁵ See, e.g., Alden Abbott et al., *Crippling the Innovation Economy: Regulatory Overreach at the Patent Office*, REGULATORY TRANSPARENCY PROJECT (Aug. 14, 2017), <https://regproject.org/wp-content/uploads/RTP-Intellectual-Property-Working-Group-Paper.pdf>; Tony Dutra, *America Invents Act Post-Grant Oppositions After Two Years: Benefit or ‘Death Squad’?*, BNA PAT. TRADEMARK & COPYRIGHT L. DAILY (Sept. 16, 2014); Tony Dutra, *Rader Regrets CLS Bank Impasse, Comments on Latest Patent Reform Bill*, BNA PAT. TRADEMARK & COPYRIGHT L. DAILY (Oct. 29, 2013) (quoting Randall Rader, former chief judge of the Federal Circuit, describing PTAB adjudicators as “acting as death squads, killing property rights”).

¹⁶ The distinction between private and public right and the corollary question of when and to what extent Congress may commit adjudication to administrative rather than Article III adjudication have received notoriously inconsistent treatment in the Supreme Court’s jurisprudence. With all due caution, though, the Court’s recent

criminal convictions and outright violations of constitutional right, virtually *no* government interference with citizens' private sphere of conduct is a matter of private right.¹⁷ Congress may superintend interstate commerce (that is, substantially every private transaction) as a matter of *public* right. It may prohibit such commerce altogether; and it may therefore regulate it, by and large, on such terms as it sees fit. Congress *may* commit the adjudication of disputes between regulatory agencies and private citizens to independent courts. But it may also commit it to administrative agencies, at least so long as those agencies are governed by tolerably fair procedures and some form of judicial review, however deferential, remains available.¹⁸ That, in a nutshell, is the appellate review model, to which Article III adjudication is the exception.¹⁹

The model runs up against the basic intuition that we cannot possibly entrust a single government actor (an administrative agency) to write the rules; to prosecute you under those rules; and to then adjudicate the dispute.²⁰ And, the argument continues, neither the administrative process (that is, the procedural protections of the APA or organic agency statutes, buttressed by some fairly rudimentary constitutional due process requirements)²¹ nor deferential judicial review can cure that basic rule-of-law defect.²² That line of attack, surely, has force. It resonates with deeply held convictions that we cannot sport away the rights of individuals quite so easily.²³

The dominant defense of the appellate review model (commonly called “functionalist,” in contradistinction to “formalist” opponents of that model) is that agency adjudication is constitutionally *acceptable* in one or another version; with this proviso or that tweak.²⁴ And in any

decision and opinions in *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018) suggest that six (and now perhaps seven) Justices hold the position stated in the text: private rights can be adjudicated conclusively only in Article III courts. Justice Gorsuch's dissent, joined by Chief Justice Roberts, stated the position explicitly and claimed that the Court's majority “does not quarrel with this test.” *Oil States Energy*, 138 S. Ct. at 1381. *But see id.* at 1379 (Breyer, J., concurring) (“[T]he Court's opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies. Our precedent is to the contrary.”) (citing *Stern v. Marshall*, 564 U.S. 462, 494 (2011); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853–856 (1986)).

¹⁷ Here and throughout, my account of the public rights “exception” refers to matters within the scope of *administrative* law. Tort and contract disputes with the federal government involve different questions.

¹⁸ *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944).

¹⁹ Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 22 (2017) (noting the Supreme Court has “acknowledged that public rights do not require Article III adjudication, and appeared to sanction a broad definition of public rights”) [hereinafter *Foreword*]; Joshua I. Schwartz, *Nonacquiescence*, *Crowell v. Benson*, and *Administrative Adjudication*, 77 GEO. L.J. 1815, 1839 (1989) (noting that “most administrative adjudication [falls] within the public rights category”).

²⁰ Actually, we can. And we can then commandeer federal and even state courts to make the rulings stick. So says the law. *See Testa v. Katt*, 330 U.S. 386 (1947); *Yakus v. United States*, 321 U.S. 414 (1944).

²¹ *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

²² *See, e.g., Philip Hamburger, Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1196 (2016); Calabresi & Lawson, *supra* note ___, at 864–65.

²³ *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

²⁴ *See, e.g., Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 946–47 (1988). A far more robust defense has come from a scholar who is utterly beyond suspicions of harboring functionalist sympathies: John Harrison, *Public Rights, Private Privileges, and Article III*, GA. L. REV. (forthcoming) <https://ssrn.com/abstract=3361981>.

event, it is the best we can do under modern conditions of social complexity, rapidly changing circumstances, and mass adjudication.²⁵ Those arguments, too, have considerable force.

The point of this Essay—the point of contrasting the appellate review model with a very different system and of suggesting that just perhaps, we might be able to learn from that alien system—is to contest the second, functionalist, “best-we-can-do-under-modern-conditions” set of arguments. Those arguments rest on two suppressed, interconnected premises—one conceptual, the other institutional. The comparative perspective shows that both are highly doubtful.

The conceptual premise is the encompassing sweep of the public rights “exception,” coupled with what Professor Mila Sohoni has called the “rights neutrality” of the APA:²⁶ as a matter of general administrative law doctrines governing judicial review, it makes no difference whether a government agency denies disability benefits or prohibits private citizens from building a house on their own land (for example, because a government agency contends that the place may be a wetland, or because an endangered bird might want to build a nest in the same place). It is against this conceptual backdrop that the functionalist view gains undeniable plausibility and, moreover, ties in with institutional considerations. Tempting though it is to insist on Article III adjudication in many contexts, who in his right mind would want a relative handful of *Article III* courts decide, in the first instance or on de novo review and perhaps with a jury on the premises, millions of disability, veterans’, Social Security, workmen’s comp, or asylum claims? Reimbursement rates for Medicaid providers? Patent claims? Please. And even if *you* want the regular courts to decide those matters, *they* sure won’t.

Within (1) a rights-neutral conceptual framework and (2) given a stark institutional alternative between prompt, expert administration and laborious Article III adjudication, the functionalist defense of the appellate review model looks well-nigh unanswerable. Take a transatlantic step outside that framework, though: lo, the appellate review model and its defense look deeply suspect. In here-relevant respects Germany is a country much like ours: a complex, fast-paced society, with government programs as generous and ambitious as ours.²⁷ And yet: conceptually and institutionally, German administrative law is the polar opposite to our appellate review model.²⁸

The irreducible, constitutionally grounded command of German administrative law is that every administrative act that interferes with citizens’ private sphere of action *must* be subject to de novo determination by an independent court. Anything resembling our form of administrative adjudication is categorically prohibited. The legal system is decidedly *not* rights-neutral. It is organized, to the point of monomania, around private right, not (as ours) on administrative “process.” Its constitutionally grounded purpose is to permit private citizens to go about their lives without undue government interference. The German term for that command is the *allgemeine Handlungsfreiheit*, meaning the general freedom to do as you wish until and unless the government

²⁵ See, e.g., ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 25 (2016); PAUL R. VERKUIL, *VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT* (2017); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000).

²⁶ Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1581 (2013). “Rights neutrality” is a bit of an oversimplification: see *infra* note ___, However, the nuances do not affect the point in the text.

²⁷ Too, and at the risk of cultivating stereotypes, the Germans appear to put a higher premium on administrative efficiency and expertise than do we.

²⁸ For detailed explanation of the following two paragraphs, see *infra* Part II.

tells you, with persuasive and constitutionally permissible reasons, to cut it out. That general, judicially guarded freedom is not boundless; but it is broad indeed.²⁹

The focus on rights in turn drives the institutional arrangements. If you want a judiciary that can guard against deprivations of right—not just sporadically, but on a systematic basis—you need enough judges, with the right training and professional disposition, to perform that task. Accordingly, Germany has built a robust system of independent administrative courts. Those courts adjudicate *nothing but* questions of private right—as distinct from, say, “public interest” complaints over an agency’s failure to follow proper procedures or to act with sufficient speed. But they adjudicate *all* such disputes, de novo on all questions of law and fact. And somehow, that system seems to work, better perhaps than ours, along all relevant dimensions—constitutionality, lawfulness, functionality, public acceptance.³⁰

I hope to show that it would be entirely possible, and highly desirable, to adapt the German model to our legal and institutional traditions and to substitute it for the appellate review model, over a wide range that I will explain. That enterprise would require a substantial legislative re-vamp of the APA and a significant number of organic statutes. For obvious reasons, I harbor no great hopes on that score; but the implied “forget it” objection does not strike me as compelling, either. Even incremental legislative reform proposals confront the harsh reality of congressional incapacity;³¹ so one might as well go for broke. And while any meaningful reform would require an extended debate, on the scale and of the duration of the debate that preceded the APA,³² that debate is well underway.³³ This Essay aims to re-orient it in two ways: away from questions of administrative procedure, and towards questions of private right; and away from doctrinal questions—especially the “standard of judicial review”—towards institutional questions.

That project, and the comparison to the German model, poses challenges all around. The private-rights orientation will be anathema to defenders of an appellate review model that rests on rights

²⁹ A single classic case example, known to every German 1-L, illustrates the point. Plaintiff, an avid rider, attacked as *unconstitutional* a state statute that limited horseback riding in public forests to designated trails. The *allgemeine Handlungsfreiheit*, plaintiff claimed, included a basic right to “free, unrestricted riding.” The Federal Constitutional Court denied relief; but it did not deem the claim frivolous. *See* 80 BVERFGE 137-170 (137), 1 BvR 921/85 (Jun. 6, 1989).

³⁰ The emphasis is on “seems”: robust evidence is hard to come by. (German scholars are not much into empirical legal research, or *Rechtstatsachenforschung*.) Anecdotally, though: one hears and reads quite a bit about excessive bureaucratic rigidity and “judicialization” in Germany. *See, e.g.*, Friedrich Schoch, *Gerichtliche Verwaltungskontrollen*, in GRUNDLAGEN DES VERWALTUNGSRECHTS (WOLFGANG HOFFMAN-RIEM, EBERHARD SCHMIDT-ASSMAN & ANDREAS VOSSKUHL, EDS.) (2d ed. 2012) [hereinafter GRUNDLAGEN] Vol III, 743, 753 (noting scholarly criticism of the “*Justizstaat*”). Complaints about irregularity, unfairness, and inadequate legal protection, akin to those that run through the American debate, appear exceedingly rare.

³¹ *See, e.g.*, Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017) (describing favorable political circumstances for consensual legislative APA reforms). Alas, none of the proposals described by Professor Walker has gone anywhere; and as the author notes, *id.* at 670, Congress has not reformed the APA in over four decades.

³² *Cf.* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

³³ *See, e.g.*, Metzger, *supra* note ____; Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2019); Adam White, *Doing Justice to APA Modernization*, YALE JOURNAL ON REGULATION (Dec. 16, 2019), <https://www.yalejreg.com/nc/doing-justice-to-apa-modernization/> (describing a summit convened by the U.S. Department of Justice to “modernize” the Administrative Procedure Act).

neutrality and an expansive notion of public right. I won't argue with that position (at least not here), except to this extent: The German system shows that there is no empirical, real-world basis for mobilizing supposed administrative imperatives against constitutional form. Thus, the defense of the appellate review model—against full-scale judicial adjudication—must rest on normative convictions about rights. It cannot rest on arguments about the ineluctable demands of the modern administrative state.

The challenge to opponents of the appellate review regime also sounds an institutionalist theme. There are two doctrinal ways to contest that regime: one, to restrict its range; the other, to re-constitutionalize its operation. The former strategy calls—at the end of the day—for a re-assertion of “substantive due process” rights;³⁴ the latter, for overturning judicial deference canons.³⁵ While I am sympathetic to both lines of argument, both confront the objection that Article III courts as currently constituted lack the institutional capacity and the incentives to exercise meaningful control over agency adjudication. If you want to re-think and revise administrative law doctrines from the ground up, you'll want to establish institutions that might be up to that task. You'll want administrative courts.

A Road Map

Part I of this Essay provides a brief description of the U.S. system of administrative adjudication and a conventional restatement of the central rule-of-law problem—that is, the conjunction of prosecutorial and judicial functions within a single government body. The longish Part II describes the German system. While the hyper-conceptualism of that *corpus juris* will seem alien and perhaps obsessive to American lawyers, I hope to elucidate two central, already-mentioned themes. One is the real-world viability, and to my mind the attraction, of an administrative law regime that pivots on the notion of private right. The other is the intimate connection between law and institutions: a rights-protective legal regime requires independent courts that are capable of providing that protection. Part III describes what a system of independent administrative courts, adapted to the U.S. constitutional system, might look like. While many of the details—for example, the judges' precise mode of appointment, or the duration of their terms in office—are open to discussion, I will describe the essential attributes of such a system. Part IV returns to the what-can-we-learn theme of this Introduction. Again, we cannot airdrop Germany's legal and institutional system into the United States; but there is a great deal to learn from it. We can adapt it; and the comparative inquiry may help to re-orient our domestic debate to the very the first question of our very first great Administrative Law case.³⁶

³⁴ Harrison, *supra* note ___, at 43.

³⁵ See, e.g., Hamburger, *Chevron Bias*, *supra* note ___. See also generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018).

³⁶ “1. Has the applicant a right to the commission he demands?” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154 (1803). Cf. Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481 (2004).

I. Administrative Justice and Its Critics

A. The “Hidden Judiciary”

Under an “appellate review” system whose origins date back over a century, virtually all administrative adjudication in the federal system is conducted within agencies. There are fewer than 1,000 Article III judges, and administrative cases constitute only a small portion of their dockets.³⁷ In contrast, there are well over 10,000 adjudicators who decide nothing but administrative cases, numbering in the millions each year.³⁸ Those adjudicators come in numerous variations, and they exercise varying kinds of responsibilities. They adjudicate challenges to agency decisions; enforce orders and impose fines; issue or withhold permits or licenses; and in some cases decide disputes among private parties. Some 2,000 are “Administrative Law Judges” (“ALJ’s”); the great majority of them (85%) serve in the Social Security Administration.³⁹ Other administrative adjudicators bear various titles (*e.g.*, “immigration judge”); for the sake of convenience, I will call all of them “administrative judges,” or “AJ’s.” While their precise number is unknown, there are more than five times as many AJ’s as there are ALJ’s.⁴⁰

ALJ’s as well as AJ’s are attached to a particular agency and are appointed by that agency.⁴¹ Most enjoy a measure of functional independence (such as removal and salary protections), and some agency adjudications—especially those conducted under the APA’s provisions for “formal” adjudication⁴²—are heavily proceduralized. Formal adjudication under the APA generally requires an ALJ to preside over hearings and provides independence for the ALJ from *ex parte* communications, agency oversight, and the obligation to perform other agency duties.⁴³ Parties enjoy substantial procedural protections, including notice of the proceedings, legal counsel, presentation of their case orally or in writing, submission of findings of fact and law, and a reasoned decision with findings of material facts and legal issues supported by substantial evidence

³⁷ See ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jff_1.1_0930.2017.pdf (number of federal judgeships). For statistics on judicial caseloads and types of cases see *Federal Judicial Caseload Statistics 2018*, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018>.

³⁸ Barnett, *Against Administrative Judges*, *supra* note ___, at Appendix A. Information concerning ALJ caseloads is available through the Office of Administrative Hearings, https://oah.dc.gov/sites/default/files/dc/sites/oah/publication/attachments/OAH%20FY13_FY14%20Annual%20Report.pdf.

³⁹ Walker & Wasserman, *supra* note ___.

⁴⁰ *Id.* at 154.

⁴¹ The mode of appointment varies. ALJ’s are screened and selected by the Office of Personnel Management (“OPM”); agencies then appoint ALJ’s from the OPM’s list. AJ’s generally are directly selected by individual agencies, often from the agencies’ “rank and file.” For more detailed description and discussion see Barnett, *supra* note ___, at 1654, 1659-60; and Kent H. Barnett, *Raiding the OPM Den: The New Method of ALJ Hiring*, YALE JOURNAL ON REGULATION (July 11, 2018), <https://yalejreg.com/nc/raiding-the-opm-den-the-new-method-of-alj-hiring-by-kent-barnett/>.

⁴² 5 U.S.C. §§ 554, 556 (2018).

⁴³ 5 U.S.C. §§ 557, 3105 (2018).

in the record as a whole.⁴⁴ However, AJ and ALJ decisions are almost always subject to review and reversal by agency heads. This prospect of reversal distinguishes administrative judges from actual courts and judges.

As a general rule, affected parties must exhaust administrative procedures before contesting a final, adverse administrative decision in an Article III court. Those challenges are “review” proceedings—“re-view,” that is, of an adjudicatory decision that has already been made at least once. Review proceedings are limited to the administrative record; neither the agency nor private parties may submit non-record facts or evidence in the course of litigation.⁴⁵ The standard of judicial review is “rights-neutral”: it depends on the form (or the degree of formality) of the agency action, not on how much or what is at stake for the private litigant.⁴⁶ And it is highly deferential. Courts will overturn agency findings of fact only if they are “arbitrary and capricious” or bereft of “substantial evidence,” depending on the formality of agency action. If the agency acts with sufficient formality and with the force law, courts will also defer to the agency’s legal interpretation of ambiguous statutes and regulations.⁴⁷

How well has this worked? By some measures, the “hidden judiciary”⁴⁸ has operated adequately, or at least sufficiently well to remain out of sight and out of mind. On second thought, however, that may not be saying very much: an agency’s adjudicative machinery has to do something truly dumb or suffer a near-collapse to attract public attention, judicial suspicion, and critical scholarly discussion. Breakdowns have most commonly occurred in adjudication systems that handle a very large volume of cases, such as the immigration system⁴⁹ and the Social Security Administration.⁵⁰ In other instances, agencies with smaller portfolios have been suspected of abusing their adjudication system for political, agenda-driven purposes. In recent years, for example, the Securities Exchange Commission (SEC) has cranked larger numbers of enforcement cases through its own adjudication system rather than the federal courts—arguably, for the purpose of obtaining

⁴⁴ 5 U.S.C. §§ 556, 557, 706 (2018); Barnett, *Against Administrative Judges*, *supra* note ___, at 1699 (“As other studies have demonstrated, the administrative state is balkanized with numerous varieties of hearings, although the trend is towards increased formality.”) (footnote citing other studies omitted).

⁴⁵ 5 U.S.C. § 706 (2018).

⁴⁶ See, e.g., *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009).

⁴⁷ See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

⁴⁸ Barnett, *Against Administrative Judges*, *supra* note ___, at 1645 (quoting Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1478 (2009)).

⁴⁹ Under the Bush administration, newly hired immigration judges were former enforcement personnel; others were poorly qualified. Their bias against asylum seekers and prospective immigrants was sufficiently virulent to prompt federal appellate courts to reverse administrative asylum and deportation decisions at an astounding rate, in very harsh language: Barnett, *Against Administrative Judges*, *supra* note ___, at 1686. More recently, a massive backlog of asylum and deportation cases has again drawn public attention. See, e.g., Maria Sacchetti, *Immigration Judges’ Union Calls for Immigration Court Independent from Justice Department*, WASH. POST (Sep. 21, 2018), https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?utm_term=.44d36cdd70df.

⁵⁰ Under the Obama administration, for example, newspapers generated stories about ALJ’s who approved just about every disability benefit application to cross their desks. Damian Paletta, *New Report Could Increase Scrutiny of Social Security Disability Judges*, WALL ST. J. (Nov. 14, 2014), <https://www.wsj.com/articles/new-report-could-increase-scrutiny-of-social-security-disability-judges-1416006694>.

easier convictions.⁵¹ The National Labor Relations Board (NLRB) has attempted to engineer far-reaching policy changes by means of adjudication, under circumstances that suggest a pronounced anti-employer bias and partisan machinations.⁵²

Irregularities of this sort may be episodic and at most an invitation to piecemeal, agency-specific reforms rather than a wholesale re-think and re-vamp. Underneath that surface, however, lurk graver and more enduring doubts. Some arise from seemingly technical but nonetheless vital separation-of-powers concerns; others have to do with elementary notions of due process and constitutional government.

B. Administrative Adjudication and the Rule of Law

As already suggested, the APA's appellate review system sits and fits somewhat uneasily within the constitutional system. The essence of its "fierce compromise"⁵³ is to substitute functionally independent agency adjudicators for independent Article III judges; agency procedures for due process; and a credible appearance of impartiality for institutionally cemented impartiality. Against all fond wishes, though, the contending forces of society have never come to rest entirely on that compromise.⁵⁴ Lately, it has shown signs of increased strain.

One pressure point is the Supreme Court's increasingly formalistic separation-of-powers jurisprudence.⁵⁵ In *Lucia v. S.E.C.*,⁵⁶ the U.S. Supreme Court held that (certain) AJ's are officers of the United States. They must therefore be appointed in conformity with Article II, either by the President or the heads of "their" agencies. Put that holding together with the Court's earlier pronouncements on the constitutional command to preserve presidential control over officer removal: the AJ's and ALJ's functional independence looks increasingly doubtful. In his *Lucia* concurrence, Justice Breyer warned (not for the first time) against a separation-of-powers jurisprudence that risks "unraveling, step-by-step, the foundations of the Federal Government's administrative adjudication system as it has existed for decades."⁵⁷

⁵¹ Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015), <https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>. But see Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017) (criticizing the findings of the *Wall Street Journal* study); David Zaring, *Enforcement Discretion at the SEC*, 94 TEXAS L. REV. 1155 (2016) (same).

⁵² See Theodore J. St. Antoine, *The NLRB, The Courts, The Administrative Procedure Act, and Chevron: Now and Then*, 64 EMORY L.J. 1529 (2015).

⁵³ Cf. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

⁵⁴ Cf. *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 547 (citing and quoting *Wong Sang Yung v. McGrath*, 339 U.S. 33, 40 (1950)).

⁵⁵ See Kent H. Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013).

⁵⁶ 138 S. Ct. 2044 (2018).

⁵⁷ *Id.* at 2064 (Breyer, J., concurring); see also *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 519 (2010) (Breyer, J., dissenting). See also Walker, *Constitutional Tensions*, *supra* note ____; and Kent H. Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L. J. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3508805 (discussing the acute tension between Article II and due process requirements in the wake of *Lucia*).

Meanwhile, scholars of a disposition very different from Justice Breyer’s have argued that “administrative justice” is an oxymoron and unconstitutional over a wide range.⁵⁸ The principal rule-of-law difficulty is usually conceptualized as a due process concern: we cannot have the same set of officials sit as prosecutors and judges. In some settings, that intuition is still universally shared. For example, constitutional rights must ordinarily be adjudicated by regular courts, not administrators. For another, equally obvious example, we would be horrified if the Department of Justice could adjudicate criminal convictions inside the agency, subject to direction and reversal by the Attorney General and with near-conclusive effect in federal court.⁵⁹ And we would not change our minds on that score if the Department’s internal arrangements conformed to all the niceties of “process.” Ultimately, due process is not just about the “how” but also and mostly about the “who”: the agent who prosecutes you cannot convict you.⁶⁰ That is why we have independent courts; that is how “the Judicial Power” conferred in Article III hangs together with the Due Process Clause.

Why do these basic intuitions give way so readily to an acceptance of administrative adjudication well-nigh across the rest of the board? Perhaps, no judicial determination in the first instance is required when the dispute is not about sending someone to jail but about something less, including private citizens’ money or land.⁶¹ Moreover, short of criminal convictions or messing with constitutional rights, we may *want* agencies to make policy by means of adjudication, the better and more flexibly to employ their expertise. If so, the adjudicators *must* be inside the agencies and reversible by them; and reviewing courts *must* grant deference (at least with respect to fact and probably to law), lest they rather than the agencies wind up as policymakers-in-chief.

Might it be unfair to subject regulated parties to adjudication by decisionmakers who are appointed by the regulating agency; imbued with its mission and institutional perspective; and reversible by that agency? Why, yes. That is why the APA contains often elaborate, formal adjudication procedures and why organic statutes often provide for comparable protections.⁶² For the same

⁵⁸ See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1-2 (2014); Calabresi & Lawson, *supra* note ___, at 865 (“When dealing with executive deprivations of rights, ‘procedural due process,’ not ‘substantive due process,’ is the oxymoronic phrase.”); Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 362 (2017); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L. J. 1672, 1720 (2012); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 32 (2002).

⁵⁹ Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 618 (2007); Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 952 n.208 (“[C]riminal cases traditionally have been regarded as requiring judicial resolution.”); and Sohoni, *supra* note ___, at 1611-12 (noting the criminal law exception from the APA’s “trans-substantive” reach and ambition).

⁶⁰ For extended discussion see Chapman & McConnell, *supra* note ___.

⁶¹ Something like this proposition explains, sort of, why the imposition even of very substantial civil fines does not require Article III adjudication in the first instance. See *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977). However, the “criminal exception” from the APA and *Chevron* canons is actually quite hard to square with the trans-substantive, “rights-neutral” presumptions of general administrative law. For discussion see Sohoni, *supra* note ___, at 1570; see also, e.g., *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730-32 (6th Cir. 2013) (Sutton, J., concurring).

⁶² See 5 U.S.C. §§ 554, 556, 557 (2019); see also, e.g., 15 U.S.C. § 45(b); 49 U.S.C. §§ 46101-111; 49 U.S.C. §§ 501-08, 521-26.

reason, statutory judicial review has come to be overlaid with a “presumption of reviewability” of uncertain origins.⁶³

Nonetheless, numerous scholars have remained uncomfortable with the “fierce compromise” of the APA. Recent reform proposals have included more formalized agency procedures;⁶⁴ more functional independence for AJ’s, comparable perhaps to that enjoyed by ALJ’s;⁶⁵ “fair notice” requirements before an agency changes course by means of adjudication;⁶⁶ and so forth. Other scholars have urged more probing judicial review, at least on questions of law.⁶⁷

None of these proposals, however, gets to the root of the problem—the agency’s dual role as policymaker and adjudicator. Agencies may provide procedures approaching those of ordinary trial courts: at the end of the day, the adjudicator is *meant* to bring a certain bias to the proceeding and to exercise discretion and expertise, consistent with the agency’s mission. Thus, the most one can expect from administrative adjudication is an appearance of impartiality.⁶⁸ Similarly (and to repeat), within the framework of the appellate review model, the case for judicial deference is overwhelming. Ultimately, the judges are reviewing policy decisions; and in that domain, they have no comparative advantage over agency administrators. The cost of running a more legalistic system, if nothing else, will invariably exert a gravitational pull (back) toward deference.⁶⁹ And the reform programs—more judicialized agency procedures, more intense judicial review—pull in opposite directions. The more “process” regulated parties have received within the agency, the less inclined an Article III court will be to second-guess a decision that has already been made at least once.

The only escape from that conundrum is a judicial system that subjects government action, so far as it interferes with a sphere of ordinary private conduct, to comprehensive, genuinely legal and independent judicial control. Supposedly, modern-day administration demands far too much expertise, speed, and flexibility to permit generalist, time-consuming, rigidly rule-oriented constraints. But this is simply not true. Some modern countries operate just such a system, with substantial success and a proud insistence that nothing less will satisfy the basic demands of the rule of law. The prototype is Germany’s system of administrative courts. Part II describes those courts and their law.

⁶³ See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

⁶⁴ Barnett, *Resolving the ALJ Quandary*, *supra* note ___, at 832-35.

⁶⁵ See, e.g., Barnett, *Against Administrative Judges*, *supra* note ___; Barnett, *Regulating Impartiality*, *supra* note ___ (proposing increased transparency with respect to adjudicators’ independence); Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL’Y REV. 184, 226 (2012).

⁶⁶ Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 790 (2015).

⁶⁷ Schwartz, *supra* note ___, at 1820 (arguing that judicial review must entail “effective supervision...of the administrative agencies’ determination of questions of law”). Jeffrey S. Lubbers, *Closing Remarks, Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 621, 627 (2007); Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain* (forthcoming) (proposing to narrow *Chevron* deference to rulemaking proceedings, to the exclusion of adjudicatory proceedings); and sources cited *supra* note ___.

⁶⁸ Cf. Barnett, *Against Administrative Judges*, *supra* note ___, at 1671 (arguing that the “mere appearance of impartiality is as salient as actual bias” because important ends are “protect[ing] the integrity of the adjudicating body and validat[ing] the process”).

⁶⁹ VERMEULE, *supra* note ___, at 2-3.

II. Full-Scale Judicial Adjudication: Germany's *Verwaltungsrichte*

A. Conceptual Foundations

The American notion of “judicial review” combines and conjoins two somewhat different orientations. One is to fend off unwarranted government interferences with private conduct; the other is to ensure the legality and regularity of government conduct across the board. The distinction was reasonably clear so long as what we have come to call “administrative law” was governed by *Marbury* presumptions concerning the nature of judicial power and the separation of powers. The executive must not “sport away” the private, vested rights of individuals, and the courts’ obligation is to prevent any such occurrence.⁷⁰ But that power comes with a built-in limitation: it does *not* imply, and in fact it forbids, a general judicial superintendence over the executive’s conduct. No private right, no judicial review.

This elementary distinction became blurred in the contentions over railroad rates and independent regulatory commissions in the early twentieth century. It is—or rather has become—thoroughly obscured under the APA, which affords judicial relief to any person who has suffered a “legal wrong” *or* to anyone “adversely affected or aggrieved by agency action within the meaning of the relevant statute.”⁷¹ It is yet more thoroughly eviscerated in the contemporary body of administrative common law. “Private attorneys general,” expansive standing doctrines, pre-enforcement review in rulemaking proceedings, elaborate agency procedures, “hard look review,” a “presumption of reviewability”: these and related doctrines and mechanisms all serve to ensure what German lawyers call the “objective legality” (*objektive Rechtmässigkeit*) of executive conduct—irrespective of whether the alleged illegality interferes with anyone’s private sphere of action, or, in German parlance, “subjective public rights” (*subjektive öffentliche Rechte*). Such a “public law” model of judicial review practically compels judicial deference, lest the courts become the de facto Executive. It also entails rights neutrality. With very limited exceptions for constitutional rights and criminal convictions, virtually all rights are “public” and thus subject to agency adjudication and deferential review, under whatever regime Congress may ordain and establish. The interests of “regulatory beneficiaries” are on a par with those of regulated parties, or very nearly so.⁷²

In diametrical contrast, the distinction between a public law model that seeks to ensure across-the-board legality and a private rights model that seeks to block government interferences with citizens’ private sphere of conduct remains very sharp in German lawyers’ and judges’ minds. Just about everyone agrees that the models are not just different but fundamentally incompatible. That consensus is a product of the nineteenth-century struggle to subject the (royal) executive to legal

⁷⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

⁷¹ 5 U.S.C. § 702 (2018). The first, “legal wrong” part of the APA disjunction was intended to capture then-existing forms of non-statutory review, which required some pre-existing right; the second part was meant to capture statutory rights of review. However, the distinction became eviscerated after the Supreme Court’s decision in *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). For a splendid account of this development see Caleb Nelson, “*Standing and Remedial Rights in Administrative Law*,” 105 VA. L. REV. 703 (2019).

⁷² In some scenarios regulated parties may be *worse* off because the governing statute intends only the public’s or its self-appointed guardians’ protection, with the result that the regulated entities lack statutory standing to challenge agency decisions that cost them fortunes. See, e.g., *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012).

constraints. It produced—in legal theory and in institutional practice—*both* models: the private-rights solution (often called the “Southern German” model), and the public law solution (the “Prussian” or “Northern German” model).⁷³ Both models require a very large administrative judiciary; but they entail very different doctrinal and institutional consequences.

For an obvious example, the Prussian model will at the limit permit *anyone* to contest the legality of *any* administrative act for *any* reason. For instance, if we seek to ensure judicial oversight over the legality and the enforcement of every effluent permit issued to industrial facilities, any member of the public should be able to complain. It makes neither practical nor conceptual sense to require a plaintiff to paddle past a permitted power plant and so to demonstrate an “injury in fact.”⁷⁴ Courts that entertain such “public interest” lawsuits, though, would have to be part of the executive, for elementary reasons of both practicality and the separation of powers. (The power to demand the faithful execution and meticulous observance of the laws, and the power to determine whether those duties have been satisfied, is the power to run the system.) Conversely, independent courts that operate on the private rights model must not adjudicate *anything but* disputes over individual rights, lest they lose—in a recurrent, constitutionally fraught and grounded formulation—their “distance” (the German word on this rare occasion is shorter: *Distanz*) from and to the executive. The conceptual apparatus of German administrative law, originally developed around the turn of the twentieth century, largely favored the private rights model. In its original formulation the system had a decidedly positivist tinge, and institutional practice in the various German states during the Weimar years remained muddled. However, the Federal Republic’s 1949 Basic Law made an unequivocal decision in favor of the private rights model; and over time, the foundational doctrines of administrative law have become constitutionalized or heavily overlaid with constitutionally grounded doctrines.⁷⁵ Section B. describes the institutional arrangements; Section C. outlines some of the principal doctrines. Section D. provides brief account of the contemporary scholarly debate and legal landscape.

B. The Constitutional and Institutional Framework

The German Constitution, originally enacted as the *Grundgesetz* (Basic Law) in 1949, provides that the Federal Republic is to be a *Rechtsstaat*. This means that the legislature is bound by the Constitution;⁷⁶ that the basic rights listed in the Constitution bind all branches of government as

⁷³ For discussion see Michael Greve, *The Non-Reformation of German Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law*, 22 CORNELL INT’L L. J. 197, 236-238 (1989).

⁷⁴ But see, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167 (2000); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

⁷⁵ For a splendid overview of German administrative law and its historical development see Florian Becker, *The Development of German Administrative Law*, 24 GEO. MASON L. REV. 453 (2017).

⁷⁶ Art. 20 (3) GRUNDGESETZ [GG] [BASIC LAW], translation at http://www.gesetz-im-internet.de/englisch_gg/englisch_gg.html#p0111 (“The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.”).

directly applicable law;⁷⁷ and that all judges must be “independent and subject only to law.”⁷⁸ Most crucially for present purposes, it means that any citizen whose rights are “violated” (*verletzt*) by a public authority must have access to an independent court.⁷⁹ This foundational commitment is reinforced by an explicit guarantee of a “lawful judge” and an explicit prohibition against extraordinary courts,⁸⁰ as well as a right to be heard in the course of judicial proceedings.⁸¹

Relying on these textual provisions, the Federal Constitutional Court and the administrative judiciary have developed a range of doctrines that give teeth to the principles of the *Rechtsstaat*. For example, statutes as well as executive rules and regulations with the force of law must meet standards of definiteness (*Bestimmtheit*) and proportionality, and the legislature may not delegate “essential” decisions to administrative bodies.⁸² Legal process, especially including access to independent courts, must be prompt, comprehensive, and effective.⁸³

The constitutional architecture just described categorically forbids anything resembling our ALJ’s or AJ’s—that is, administrative “judges” who may be removed by the executive or whose decisions may be directed or revised by the executive.⁸⁴ The Federal Administrative Court (*Bundesverwaltungsgericht*) is an actual independent court—one of six high courts provided for in the Constitution.⁸⁵ The justices are appointed by the Minister of Justice and a federal-state committee; like the regular judges of the lower courts, they may be removed or re-assigned only for exceptional, constitutionally specified reasons.⁸⁶

At variance with the U.S. model, there are no lower federal courts in the German system. The lower courts, trial as well as appellate, are *state* courts. Thus, the Federal Administrative Court—seated since 1997 in Leipzig—sits atop a pyramid of administrative courts that are established by the states.⁸⁷ Their operation, though, is principally governed by the *Verwaltungsgerichtsordnung*

⁷⁷ Art. 1 (3) GG (“The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.”).

⁷⁸ Art. 97 (1) GG (“Judges shall be independent and subject only to the law.”); *see also* Art. 92 GG; Art. 99 GG.

⁷⁹ Art. 19 (4) GG (“Should any person’s rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.”).

⁸⁰ Art. 101 (1) GG (“Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.”). Art. 10 (2) GG provides a narrow exception for legal restrictions that “serve[s] to protect the free democratic basic order or the existence or security of the Federation or of a *Land*[.]” Art. 10 (2) GG.

⁸¹ Art. 103 (1) GG (“In the courts[,], every person shall be entitled to a hearing in accordance with law.”).

⁸² For a discussion of these separate requirements, *see* Franz Reimer, *Das Parlamentsgesetz als Steuerungsmittel und Kontrollmassstab*, in, GRUNDLAGEN Vol. I, 585, 622-39.

⁸³ 84 BVerfGE 34-58 (49), 1 BvR 419/81 (Apr. 17, 1991); 8 BVerfGE 274-332 (326), 2 BvR 4/59 (Nov. 12, 1958).

⁸⁴ The constitutional command of an independent judiciary is reiterated in § 1 of the *Verwaltungsgerichtsordnung* (“VwGO”), the statute that governs the operation of the administrative judiciary: “Administrative jurisdiction shall be exercised by independent courts separated from the administrative authorities.” *Verwaltungsgerichtsordnung* [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BUNDESGESETZBLATT Teil I at 686, last amended by Gesetz [G], October 10, 2013, BGBl at 3786, art. 5 (Ger.), https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html.

⁸⁵ Art. 95 (1) GG (“The Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court, and the Federal Social Court[.]”). The Federal Constitutional Court is provided for in Art. 93 GG and Art. 94 GG.

⁸⁶ Art. 97 (2) GG.

⁸⁷ *Verwaltungsgerichtsordnung* [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 3 (Ger.). States are required to establish the inferior courts.

(“VwGO”), a federal statute enacted in 1960 pursuant to the federal legislature’s concurrent jurisdiction.⁸⁸

Each of the sixteen states has one or more administrative courts.⁸⁹ With a handful of exceptions, the administrative courts serve as courts of first instance in all challenges to administrative action or inaction. Cases are typically heard by panels of three full-time judges with lifetime appointments⁹⁰ and two honorary (lay) judges, who serve for a fixed period of years.⁹¹

There are fifteen appellate administrative courts (one for each state, with Berlin and Brandenburg combined). Appeals from the administrative courts are limited to cases that pose unusually difficult questions. The standard of review (of the administrative act, not the lower court’s decision) is the same as in the administrative trial courts;⁹² and here as there, cases are heard by panels of full-time and honorary judges. In certain cases—foremost, challenges to large and environmentally sensitive public infrastructure projects (such as power plants and airports) and complex planning and rulemaking proceedings concerning such projects—the appellate courts act as trial courts.⁹³

The *Bundesverwaltungsgericht* will entertain further appeals only in cases that are of a precedential nature and, moreover, turn on questions of federal rather than state law.⁹⁴ In contrast to appellate court proceedings, review (*Revision*) in the *Bundesverwaltungsgericht* is limited to questions of law. In a few cases, the Federal Administrative Court has original jurisdiction.⁹⁵

The administrative courts decide around 125,000 cases each year.⁹⁶ The cases range from the mundane (such as the placement of traffic signs or questions of student discipline or promotion) to the momentous, including questions of constitutional right. (The administrative judiciary, not the Federal Constitutional Court, is the principal protector of constitutional rights in the ordinary course of events and government conduct.) The administrative courts’ jurisdiction extends principally to *all* public-law disputes between citizens and the government, with four general

⁸⁸ Art. 74 Rn. 1. GG.

⁸⁹ North Rhine-Westphalia, for example, a state with a population of some 18 million, has seven administrative courts. See Die Justiz des Landes Nordrhein-Westfalen, “Aufgaben und Aufbau der Verwaltungssgerichtsbarkeit: Vielfältige Aufgaben bei öffentlich-rechtlichen Streitigkeiten,” https://www.justiz.nrw.de/Gerichte_Behoerden/fachgerichte/Verwaltungsgericht/aufbau/index.php (last visited Jan. 17, 2020).

⁹⁰ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBL I at 686, § 15, no. 1.

⁹¹ The honorary judges’ appointments and duties are governed by §§ 19-34 VwGO. They are actual judges, not jurors. They participate in all phases of the proceeding and vote on questions of law as well as fact. They must be German citizens, and they may not be lawyers, members of the civil service, legislators, or convicts. Specifics are governed by state law. Certain simple cases may be heard by a single full-time judge.

⁹² Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBL I at 686, § 128 (“The [appellate court] shall review the dispute within the appeal on points of fact and law application to the same degree as the administrative court. It shall also consider newly-submitted facts and items of evidence.”).

⁹³ See *id.* § 48, no. 1 (listing eleven categories of such cases); Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBL I at 686, § 48, no. 2 (original jurisdiction of appellate courts in cases involving official prohibitions of certain private associations).

⁹⁴ See *id.* §§ 132, 137.

⁹⁵ See *id.* § 50.

⁹⁶ Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 25 n.81 (2015). There may have been a sharp uptick in cases after 2015, due to a large number of immigration and asylum cases. However, I have been unable to obtain hard numbers.

exceptions.⁹⁷ *First*, tax matters are committed to a separate system of tax courts. *Second*, benefit determinations under social and health insurance regimes—as one might expect, a large volume of cases—are committed to a separate system of independent “social” courts (*Sozialgerichte*).⁹⁸ *Third*, certain constitutional questions must be adjudicated by constitutional rather than administrative courts.⁹⁹ *Fourth*, the administrative courts have jurisdiction only when government acts in its sovereign capacity and with the force of law (*hoheitlich*). *Private-law* disputes between the government and its citizens—for instance, over government contracts or the executive’s activities as a market participant—are adjudicated by the ordinary civil courts.¹⁰⁰

C. *Verwaltungsrecht* in a Very Small Nutshell¹⁰¹

The *corpus juris* that the administrative judiciary is called upon to apply and adjudicate rests on two elementary principles; both mark a sharp contrast with American administrative law. *First*, administrative adjudication—“judicial review of agency action,” in our parlance—almost always involves the legality of an *individual* administrative act (“adjudication” or enforcement), as distinct from administrative rulemaking.¹⁰² *Second*, judicial review focuses single-mindedly on the plaintiff’s substantive rights, as distinct from questions of procedure.

Basics. The Archimedean point of the German system is the *Verwaltungsakt* (administrative act), meaning a final agency decision that tells an individual citizen, with binding force, what is or is

⁹⁷ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 40, no. 1 (“Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute.”). For “of a non-constitutional nature,” see *infra* note _____. The Bundestag has made more-than-occasional (and to many minds ill-advised) use of the “insofar” clause and committed to the ordinary (civil) courts matters that by all rights belong to “core” administrative law, such as antitrust and energy regulation. For discussion and critique, see Schoch, *supra* note ___, at 799-814. (criticizing the legislature’s and the ordinary courts’ “inflationary” use of the “insofar” exceptions); *id.* at 813-814 (criticizing the “splintering” of judicial controls and the attendant legal uncertainty).

⁹⁸ There is no systematic, theoretically compelling reason to separate the tax and especially the “social” courts from the general administrative judiciary; in fact, there are periodic calls to create a unitary administrative judiciary. Nothing has come of it—perhaps, because the system works well enough; perhaps, because the envisioned change would require an amendment to Art. 95 GG. For discussion, see Friedhelm Hufen, *Ist das Nebeneinander von Sozialgerichtsbarkeit und Verwaltungsgerichtsbarkeit funktional und materiell begründbar?*, 42 DIE VERWALTUNG 405 (2009).

⁹⁹ On its face, the text of § 42, no. 2 (quoted *infra* note _____) seems to preclude *all* constitutional claims in administrative courts. However, according to the dominant legal opinion and the courts’ consistent decisions, the preclusion extends only to “immediate” constitutional claims *by* constitutional actors, which includes political parties and a few other non-governmental actors but not individual citizens or enterprises. For discussion, see Wolf-Ruediger Schenke, *Streitigkeiten verfassungsrechtlicher Art im Sinne des § 40 VwGO*, 131 ARCHIV DES OEFFENTLICHEN RECHTS 117 (2006).

¹⁰⁰ The courts’ respective jurisdictions depend on the characterization of the initial administrative act. The intricate set of doctrines govern this field are beyond the scope of this summary.

¹⁰¹ Unless noted otherwise the rough-and-ready account in this Section is limited to general administrative law, to the exclusion of more specialized fields (such as land use and environmental law).

¹⁰² Limited exceptions are briefly noted *infra* note _____.

not lawful.¹⁰³ An administrative act must be communicated to the addressee, and it must be accompanied by reasons stating the legal basis and (when applicable) discretionary grounds for the act.¹⁰⁴ The act is effective until it is revoked or changed; it does not require further judicial sanction.¹⁰⁵ However, a timely objection or lawsuit will have a suspending effect;¹⁰⁶ and as a matter of both constitutional and statutory law, each and every administrative act *must* be challengeable in an independent court by any individual citizens who can credibly claim that his or her rights were violated by that act.¹⁰⁷ With extremely limited exceptions (such as presidential pardons), the system leaves no room for administrative acts beyond judicial jurisdiction (*gerichtsfreie Hoheitsakte*). It likewise blocks attempts to render acts “committed to agency discretion by law” unreviewable.¹⁰⁸ Judges decide whether executive officials have exercised their discretion within legal bounds and free from error, not whether courts have jurisdiction to review that discretion.¹⁰⁹

Administrative Procedure. German administrative law does provide for means of contesting adverse administrative decisions within the executive branch. The procedures are principally governed by the *Verwaltungsverfahrensgesetz* (VwVfG), a rough equivalent of the APA provisions that govern adjudicatory and rulemaking procedures.¹¹⁰ Leaving aside various informal

¹⁰³ Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BUNDESGESETZBLATT Teil I [BGBl I] at 102, last amended by Gesetz [G], June 21, 2019, BGBl I at 846, § 35, <https://germanlawarchive.iuscomp.org/?p=289> (“An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.”). Note that administrative rules and regulations are *not* administrative acts in this sense, on the theory that they still require an individualized agency decision—an administrative act, in other words—to gain force and effect against individual citizens. Orders and decisions governing the bureaucracy’s internal affairs are likewise not “administrative acts.” However, the universe of administrative acts that are subject to judicial review is broader than the technical definition in § 35 VwVfG. Foremost, “simple” administrative acts (*einfaches Hoheitshandeln* or *schlicht-hoheitliches Handeln*) that are not addressed to anyone in particular *are* administrative acts and may be challenged, under forms of action that parallel those that are available for formal administrative acts.

¹⁰⁴ Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBl I at 102, §§ 39, no. 1, 41.

¹⁰⁵ Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBl I at 102, § 43. The executive need not go to court to enforce its orders. In fact, it cannot do so in administrative matters because it has no rights, only powers.

¹⁰⁶ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 80, no. 1.

¹⁰⁷ Art.19 (4) GG; Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 42, no. 2 (“*in seinen Rechten verletzt*”).

¹⁰⁸ Cf. 5 U.S.C. § 701(a)(2) (2018).

¹⁰⁹ Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBl I at 102, § 40; Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 114. Art 19 (4) GG has been read to limit the legislature’s power to shield the exercise of administrative discretion against judicial control. 84 BVerfGE 34-58 (50), 1 BvR 419/81 (Apr. 17, 1991). For discussion, see Schoch, *supra* note ___, at 926-954.

¹¹⁰ The statute governs federal agencies as well as state agencies insofar as they administer federal law (under Germany’s cooperative federalism, the usual case). State laws largely replicate the VwVfG, often verbatim.

mechanisms, the principal means of contesting an adverse decision is an “objection” (*Widerspruch*), usually addressed to the next-higher level of the bureaucracy.¹¹¹ The process resembles some of the APA’s provisions in some respects. The applicant has a right to be heard (in writing or in person) and to be represented. Third parties whose rights could be affected may participate as of right, and the agency may invite the participation of additional parties in its discretion. The denial of an objection must again be communicated in writing and supported by reasons.¹¹² And as a rule, aggrieved citizen must exhaust this procedure prior to filing suit.¹¹³ For all that, one must not mistake the objection procedure for a scaled-down version of the APA’s adjudicatory provisions. The *Widerspruch* is directed to what is unmistakably and explicitly an executive body—not an administrative law “judge.”¹¹⁴ The right to invoke the procedure is circumscribed by what we would call judicial review provisions: it is limited to persons who could independently bring suit and to acts that are, or would be, subject to judicial review. And by near-universal consensus, the administrative procedure serves a “subserving function” (*dienende Funktion*). It may help individual citizens to obtain relief without litigation. It may help the executive to correct mistakes; enhance public confidence in the bureaucracy’s decisions; and reduce the courts’ caseload. In all events, however, the procedure remains instrumental, and no more, to the protection of individual rights and to the executive’s and the courts’ unvarying obligation to determine the single, *substantively* correct decision in each case. Tellingly, the VwGO characterizes the objection procedure as a “preliminary procedure” (*Vorverfahren*)—“preliminary,” that is, to the judicial determination, which is the actual “administrative process” (*Verwaltungsprozess*).¹¹⁵

The differences between Germany’s rights-based model and the procedure-oriented, rights-neutral U.S. system are reflected in the doctrines governing the legal consequences of procedural mistakes.¹¹⁶ There are no free-standing procedural challenges to administrative acts under German

¹¹¹ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 69. For a concise account of the process see Friedrich Schoch, *Das Widerspruchsverfahren nach §§ 68ff. VwGO*, 2003 JURA 752.

¹¹² Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 73.

¹¹³ The requirement applies to administrative acts in the sense of § 35 VwVfG (but not otherwise). Cf. Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 68, nos. 1-2. The “as a rule” qualification matters because administrative procedures are generally governed by state law, and some states (such as Lower Saxony) have done away with the objection procedure altogether—with the result that there is nothing to “exhaust.”

¹¹⁴ As noted *supra* note ____ and accompanying text, the idea of such a decisionmaker is incompatible with the German system. So far as subjective public rights are concerned, control over executive decisions must be exercised by independent courts, and no one else.

¹¹⁵ Part of the reason for this characterization is that the federal government has concurrent jurisdiction over the administrative courts, Art. 74 Rn. 1 GG, but not over the states’ internal administrative procedures. But the nomenclature remains telling, and it is easily lost in translation—e.g., the common translation of the *Verwaltungsgerichtsordnung* as “Administrative Procedure Code.” What we call “administrative procedure” (or “process”) is the *Vorverfahren*. *Prozess* corresponds closely to the APA’s judicial review provisions.

¹¹⁶ For the sake of brevity, the paragraph in the text glosses over crucial details of this complex—and quite controversial—area of the law. For extensive discussion, see Michael Sachs, *Verfahrensfehler im Verwaltungsverfahren*, in, GRUNDLAGEN Vol II, 799; Eberhard Schmidt-Assmann, *Der Verfahrensgedanke im deutschen und europaeischen Verwaltungsrecht*, in, GRUNDLAGEN Vol II, 495, 549-553.

law: such challenges may be brought only by parties with substantive rights claims, in connection with those claims and at the same time.¹¹⁷ A procedural mistake (either in the original administrative act or in the objection procedure) will render a suit admissible—confer “standing to sue”—only if it may have materially affected the plaintiff’s substantive rights.¹¹⁸ With some exceptions, procedural mistakes may be disregarded as negligible (*unbeachtlich*). Moreover, the executive may “cure” procedural mistakes—for example, a failure to supply adequate reasons for an administrative act—at any point of the ensuing litigation, up to oral argument in the case.¹¹⁹ The Federal Administrative Court has given the executive very wide berth in these respects, with the predictable result that challenges to administrative decisions solely on procedural grounds have become something of a suicide mission.¹²⁰ The flipside is that meticulous observance of procedural niceties will never excuse the executive from de novo judicial review on all questions of law and fact.

Litigation. Administrative litigation in a German court is emphatically not a “review” proceeding in our sense of the term. The court is not bound by or limited to the parties’ submissions, let alone the administrative record (sparse as it is). The court determines the facts de novo and *ex officio* (*von Amts wegen*).¹²¹ If that requires independent experts, the court will appoint them; if it requires witnesses, the court will call them; if it requires site visits, the court will conduct them.¹²² The court’s legal determinations are likewise and always de novo; the idea of judicial “deference” to administrative interpretations of the law is unknown.

This demanding, intense form of judicial review applies in principle to *every* administrative act or omission, and some form of action and some form of effective relief (injunctive, monetary, or declaratory) must be available to any citizens whose rights may have been violated. However, while judicial “review” is much deeper under German law than under ours, it is also much narrower. Access to the administrative courts is afforded every individual who can credibly claim to have been violated “in his rights”—but *only* such individuals, and (with a few exceptions discussed below) no one else. It is incumbent upon the plaintiff to make that showing, and the court will independently ascertain whether it has been made. This inquiry—the *Klagebefugnis* that is the bane of every law student—is far more stringent than our “injury in fact” test, and it differs in kind: it is a *legal* determination.

The individual addressee of an adverse administrative act—a prohibition, or the denial of a legal entitlement—always has standing. In contrast, difficult questions arise when a third party

¹¹⁷ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 44a (“Appeals against procedural acts by authorities may only be asserted at the same time as appeals which are admissible against the factual decision.”).

¹¹⁸ 88 BVerwGE 286 (287); 61 BVerwGE 256 (258); Sachs, *supra* note ___, at 836.

¹¹⁹ Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBl I at 102, §§ 45, 46.

¹²⁰ Sachs, *supra* note ___, at 844-45.

¹²¹ Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBl I at 686, § 86 (1) (“The court shall investigate the facts ex officio; those concerned shall be consulted in doing so. It shall not be bound to the submissions and to the motions for the taking of evidence of those concerned.”).

¹²² While the administrative courts’ inquiry will seem extravagant to American lawyers, it follows the same inquisitorial model that also governs civil adjudication in ordinary courts. Judicial proceedings are governed by the same rules of civil procedure (*Zivilprozessordnung*).

complains of an administrative act in the addressee's favor. (The prototypical case is a building permit that adversely affects a neighbor's property.) Such third-party lawsuits are quite common, but they are subject to very strict rules of admissibility—what we call “standing to sue.” The third-party plaintiff must show that he was arguably affected *in his rights*, not merely his monetary (or aesthetic or ideological) interests. Without that showing, the case will be deemed inadmissible and even an obviously unlawful administrative act will remain valid and in force. The doctrines reflect a near-morbid fear of *Popularklagen*—that is, litigation on behalf of the public, in form or in substance.¹²³ That fear, in turn, reflects the separation-of-powers understanding sketched earlier. The plaintiff has a sacrosanct right to protect his own “subjective” rights. He has absolutely no business to act as a “private attorney general” and to ensure the “objective” legality of government conduct.

What exactly, then, are those “subjective public rights”? Generally speaking, they are not derived from private-law norms. Rather, the rights can from the Constitution. They include, importantly, the right to property¹²⁴ and, yet more importantly, the “general freedom to do as you wish” (*allgemeine Handlungsfreiheit*)—not a textually specified right, mind you, but a judge-made doctrine that underpins the courts’ understanding of administrative law and, in particular, of “protective” statutory law. Statutory provisions create private rights when they “intend” or “aim at” the individual’s protection, in whole or at least in part.¹²⁵ This “theory of (rights-)protective norms” (*Schutznormtheorie*) bears a certain resemblance to the U.S. Supreme Court’s “prudential” or statutory standing analysis, but it is much more stringent than the “not especially demanding” inquiry under U.S. law.¹²⁶ The theory presents no small degree of difficulty, especially with respect to environmental laws and other statutes that serve both collective, public-regarding and rights-protective functions. Sometimes, the courts classify such statutes on a wholesale basis. For example, animal protection statutes protect cats and dogs, but not their owners’ affections or monetary interests.¹²⁷ Statutes for the protection of public forests protect the trees, not private individuals. Much more often, the courts parse the statutes provision by provision. Among the

¹²³ A widely used introductory textbook conveys the flavor: “*The principal reason for the requirement of standing remains the prevention of public interest lawsuits [Popularklagen] [...] Least of all should a citizen turn himself, by means of an administrative lawsuit, into a custodian of the common good and in that way drag the administrative court into a conflict between different interpretations of the public interest.*” FRIEDHELM HUFEN, VERWALTUNGSPROZESSRECHT 237, 238 (10th ed. 2016).

¹²⁴ Art. 14 GG.

¹²⁵ The Federal Administrative Court has adhered to this formulation throughout. *See, e.g.*, 92 BVerwGE 313; 81 BVerwGE 329; 7 BVerwGE 355; 1 BVerwGE 83.

¹²⁶ *See, e.g., Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (citing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)). Under German law, in contrast, the standing analysis often threatens to collapse into the merits; and cynics might suspect that the point of the distinction is to enable law school professors to flunk students regardless of whether they park their analysis under standing (*Zulaessigkeit*) or merits (*Begrundetheit*). However, the crystal-clear purpose of conducting a rigorous standing inquiry—even at the risk of front-loading it with merits questions—is to prevent public interest lawsuits. *See, e.g.*, 17 BVerwGE 87; and *see supra* note ____.

¹²⁷ *E.g.*, Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 2007 NEUE ZEITSCHRIFT FUER VERWALTUNGSRECHT (bird protection regulation protects birds, not the interests of bird watchers or property owners near an airport); Verwaltungsgerichtshof [VGH] [Higher Administrative Court], 1997 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1798, 1997 (Ger.) (animal protection statute).

most common criteria to distinguish protective from non-protective norms is the question of whether the group(s) of individuals who supposedly enjoy protection can be limited and circumscribed, conceptually and as a practical matter. In other settings (for example, competitor lawsuits), the intensity or degree of interference with the third-party plaintiff's expectations may determine the *Klagebefugnis*.¹²⁸ The distinctions are not always entirely clear or convincing. But the decisions leave no doubt about the judiciary's resolve in maintaining the boundaries.

D. Developments and Debate

Among the standard themes of American administrative law, from its Progressive progenitors to its contemporary proponents and defenders, is the notion that a court-centered, rights-focused, rule-bound system of administrative law is incompatible with the demands of a modern, complex society, which requires far more expertise and flexibility than such a system could possibly permit. The German system belies that contention.

To be sure, over the past half-century, the system has shown strains. Acute controversies have arisen over large-scale public projects that affect the rights of potentially thousands of citizens—nuclear power plants at first; then airports, train stations, and similarly massive undertakings. Misgivings over the judicial management and a perceived lack of effective legal protection in such “mass proceedings” were soon joined by more general complaints about an “enforcement deficit” especially in environmental law.¹²⁹ Public agencies, critics charged, often failed to enforce ambitious statutes with sufficient rigor, and potential plaintiffs who might challenge such derelictions in court routinely foundered on the shoals of standing requirements that systematically favor regulated parties over broad public interests. At the same time, legal scholars noted a distressing legislative propensity to legislate in broad, general terms or by way of statutes that—unlike the conditional, “if-then” statutes that are the paradigm of the traditional model—instruct public agencies to optimize multiple, often incompatible objectives along some frontier.¹³⁰ Predictably, statutes of that description have helped to produce a flood of administrative rules and regulations and have strained the administrative judiciary's capacity to exercise legal control.¹³¹ The principal problem in that regard arises not from the sheer number of cases but from the types of cases that the courts are called upon to adjudicate. Statutes conferring broad discretion and goal-oriented decision-making tax the capacity of a judicial system that is designed to subject administrative action and discretion to *legal* controls—and never to a judicial second-guessing of the good sense or utility of administrative decisions. Finally, European integration has caused perplexities. While the EU's growing body of administrative law has often been shaped in analogy to—or direct borrowing from—the German system, certain aspects of that system and foremost its

¹²⁸ For example, mere monetary interests (such as lost profits) do not confer standing to challenge an administrative act (e.g., a business license) in a competitor's favor. See BVerwGE 71, 183 (1993). In contrast, a threat to the plaintiff's “existential livelihood” may satisfy standing requirements in a competitor lawsuit. See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 2012 DIE OEFFENTLICHE VERWALTUNG 621; BVerwGE 30, 191 (197).

¹²⁹ Greve, *supra* note ___, at 203-205; Andreas Vosskuhle, *Neue Verwaltungsrechtswissenschaft*, in, GRUNDLAGEN Vol. I, 1, 8-12.

¹³⁰ Michael Stolleis, *Entwicklungsstufen der Verwaltungsrechtswissenschaft*, in, GRUNDLAGEN Vol I, 65, 116-117.

¹³¹ Reimer, *supra* note ___, at 652-658; Schoch, *supra* note ___, at 954-959.

relentless orientation towards private rights stand in considerable tension with EU law and its interpretation by the European courts.¹³²

Leaving the European dimension aside, much of this will sound familiar to American scholars. Over there as here, environmental concerns (and more recently privacy law, or *Informationsrecht*) have powerfully influenced administrative law. There as here, a principal concern has been to mobilize the courts to remedy administrative inaction—an “enforcement deficit,” or industry “capture.” In some respects and to some extent, German legislators and courts have responded by nudging the law in an “American” direction. As noted,¹³³ the *Bundestag* has in limited areas granted organizations a right to participate in administrative proceedings and to sue, in derogation of the ordinary rules that govern agency procedures and standing to sue. Participation and other procedural requirements have been expanded in domains where judicial controls have been deemed inadequate. And in some areas, the federal legislature as well as the courts have permitted proceedings that strongly resemble our forms of pre-enforcement review. The traditional administrative law model permitted substantially *no* such challenges, on the theory that administrative rules were not administrative acts at all but rather forms of infra-parliamentary legislation and therefore—short of constitutional review—neither susceptible to nor in need of immediate, independent judicial review (inasmuch as any rule or regulation would still require an administrative act to gain legal force vis-à-vis individual citizens). In response to a vast expansion of administration-by-rulemaking, especially in areas of health, safety, and environmental regulation, the VwGO was amended to permit pre-enforcement rulemaking challenges in certain areas of federal law, such as land use planning.¹³⁴ Such actions are adjudicated (as most of them are in the United States) by appellate rather than trial courts; and there as here, the court’s determination will generally preclude any subsequent challenge in the course of enforcement proceedings. In addition, the administrative judiciary has increasingly permitted peremptory

¹³² Because the European Commission lacks sufficient resources to prosecute each and every treaty violation or failure to “transpose” and implement EU directives, every Member State is obligated in certain fields (environment, consumer protection, competition law, internal market law in general) to empower private individuals and interest groups to monitor compliance by giving them standing in national courts—meaning, in Germany, foremost the *Verwaltungsgerichte*. Prominently, the 1998 Aarhus Convention committed the signatory countries (including Germany) to “guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.” Aarhus Convention Art. 1 (available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>); see also EU Directive 2011/92/EU codifying the Convention mandates). A mere eight years later, the Bundestag enacted statutes to transpose this commitment into German law. The most important of these statutes, the *Umwelt-Rechtsbehelfsgesetz* (loosely translated, the Environmental Legal Remedies Act—available at <https://www.gesetze-im-internet.de/umwrg/UmwRG.pdf>), derogates from core principles of general administrative law by effectively granting participatory, procedural rights as well as standing to sue to environmental associations outside the bounds of the subjective public rights model. See Klaus Ferdinand Gaerditz, *Klagerechte der Umweltöffentlichkeit im Umweltrechtsbehelfsgesetz*, EurUP 2010, 210 (2010); and Jan Ziekow, *Das Umwelt-Rechtsbehelfsgesetz im System des deutschen Rechtsschutzes*, 2007 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 259. For the limits of this innovation see *infra* n. and accompanying text.

¹³³ See *supra* note ____.

¹³⁴ Under § 47 VwGO, pre-enforcement challenges to state rules and regulations may be authorized by state law. All states permit such challenges in one form or another. See, e.g., Schleswig Holstein: § 67 *Landesjustizgesetz*. A few organic statutes, most having to do with environmental matters, contain comparable provisions.

rulemaking challenges under a somewhat ill-fitting provision of the VwGO that confers jurisdiction in certain (individual) actions for declaratory relief.¹³⁵

Those pressures, tendencies, and temptations have generated a scholarship calling for a “new science of administrative law” (*Neue Verwaltungsrechtswissenschaft*). From a set of common-sense observations to the effect that many forms of contemporary administration and administrative law do not conform to the traditional model, adherents of the “new science” proceed to the general proposition that administrative law is not simply a means of protecting individuals but also, and perhaps first and foremost, a governmental instrument for the optimization of multiple public-regarding ends.¹³⁶ The protection of individual rights is among those ends—but only alongside equally important objectives, such as the democratic legitimation of administrative decisions; their public acceptance; and the efficacy and accuracy of public administration.¹³⁷

While much of this sounds sensible, even the most committed advocates of the “new science” have readily conceded that German administrative law has shown few signs of yielding to their vision.¹³⁸

The legislature, executive agencies, and the courts have responded to real-world challenges principally by way of compartmentalization and improvisation—and more than occasionally, by retrenchment. For example, the Bundestag has made only sparing use of its authority to expand the intervention and litigation rights of environmental or other public interest organizations. Uniformly, those reforms have come slowly, grudgingly, and in response to demands of international or EU law.¹³⁹ The piecemeal proceduralization of administrative law has been accompanied by countervailing efforts, both at the federal and the state level, to streamline administrative procedures. The executive’s authorization to “cure” procedural mistakes even during the pendency of litigation, for example, was added to the VwGO in 1996.¹⁴⁰ In a similar

¹³⁵ See Sec. 43 (1) VwGO.

¹³⁶ The most rigorous and impressive effort to develop this “new science” is a monumental, three-volume treatise (each volume clicking in at close to 1,500 pages) entitled—with no sign of intended irony—“Foundations of Administrative Law”: GRUNDLAGEN, *supra* note ____.

¹³⁷ See, e.g., Andreas Vosskuhle, *Neue Verwaltungsrechtswissenschaft*, in GRUNDLAGEN Vol. I, 1-63. For critical perspectives, see OLIVER LEPSIUS, STEUERUNGSDISKUSSION, SYSTEMTHEORIE UND PARLAMENTARISMUSKRITIK (1999); and—way harsh—Klaus Ferdinand Gaerditz, *Die “Neue Verwaltungsrechtswissenschaft”: Alter Wein in neuen Schläuchen?* DIE VERWALTUNG BEIHEFT 12, ZUR LAGE DER VERWALTUNGSRECHTSWISSENSCHAFT (MARTIN BURGI, ED.) 105 (2017).

¹³⁸ Gaerditz, *supra* note ___, at 124 (noting that the contributors to the monumental GRUNDLAGEN volumes are actually quite skeptical about the project); see also *id.* at 126, 126 n.171 (collecting cases and literature references to the effect that the “new science of administrative law” has “left no traces on [legal] practice”).

¹³⁹ In particular, the implementation of the Aarhus Convention, *supra* note ___, has been accompanied by a protracted battle between German institutions (both the legislature and the courts) and the European Court of Justice (CJEU), which has repeatedly declared Germany’s reforms inadequate and insisted on full compliance with the Convention. See CJEU, Case C-115/09 (Trianel Judgment); C 72/11 (Altrip Judgment) For a brief account of the ongoing saga see Jerzy Jendroska & Moritz Reese, *The Courts as Guardians of the Environment: New Developments in Access to Justice and Environmental Litigation* (available at <https://iclg.com/practice-areas/environment-and-climate-change-laws-and-regulations/2-the-courts-as-guardians-of-the-environment-new-developments-in-access-to-justice-and-environmental-litigation>).

¹⁴⁰ See Gesetz zur Beschleunigung von Genehmigungsverfahren [GenBeschlG] [Approval Procedure Acceleration Act], Dec. 9, 1996, BGBl I at 1354, art. 6 (Ger.), <https://www.gesetze-im-internet.de/genbeschlgbjnr135400996.html>; Gesetz zur Änderung der VwGO und anderer Gesetze [Law Amending the Code of Administrative Court Procedure and Other Laws], January 11, 1996, BGBl I at 1629 (Ger.);

vein, states have curbed the rudimentary administrative objection procedures; and in what looks like a bit of overkill, a few states have abolished it entirely. The administrative courts for their part have dealt with novel legal problems and instruments principally by assimilating judicial doctrines to the traditional private rights model. Doctrines that govern discretionary agency decisions, for instance, have little in common with our forms of free-wheeling “arbitrary and capricious” review. The focus of the judicial inquiry is whether the alleged arbitrariness concerned or affected *the plaintiff’s rights*; and for reasons explained earlier, that will usually be a question of whether the plaintiff has any business in court in the first place. Similarly, the courts have limited pre-enforcement review—by near-uniform consensus, the *only* form of action and relief that contemplates “objective legality” rather than private rights as the focal point of judicial examination—in accordance with conventional standing norms, so far possible. The traditional private-rights model has not broken by any measure. It has barely even bent to the point of allowing its critics an occasional field goal.

* * *

The German system illustrates that one can in fact have a regime of full-scale, independent judicial adjudication. Is it any better than our system of administrative justice? In part, the answer depends on empirics (which are woefully unavailable);¹⁴¹ in other and probably larger part, on one’s normative priors.

If one places a high premium on administrative flexibility, expertise, and democratic participation in the administrative process, German administrative law is an example of what not do. German administration is far more rigid and legalized than ours. The adjudicators are independent judges. They are generalists, not experts. And the system is not for *soi disant* democratizers. It invites and in fact demands public “participation”—but not in the bureaucracy and in the form of interest group politics, but either in the ordinary electoral process or else (or rather also) on the courts, by individual citizens and for publicly advertised purpose of helping professional judges maintain the constitutionally commanded “distance” from the bureaucracy.¹⁴²

The picture takes on a very different coloration if one places a premium on citizens’ right to do as they wish until and unless the government tells them otherwise—the *allgemeine Handlungsfreiheit* that is rooted in the German Constitution and which suffuses the country’s administrative law.

Consider, by way of simple illustration, how a *Sackett*-style case¹⁴³ would shake out under German law. Up to a point, but only up to a point and not very far in, it depends on how one varies the facts. If the compliance order has binding force (a point not remotely arguable under German administrative law—it’s a prohibitory order addressed to an individual party, explicitly backed by a threat of sanctions) it is contestable in court immediately upon completion of the perfunctory

see also HUFEN, *supra* n __ at 35-36. (describing efforts, especially since the 1990s, to streamline administrative procedures and litigation; collecting statutory cites).

¹⁴¹ See *supra* note __.

¹⁴² See, e.g., HAMBURG ADMINISTRATIVE COURTS, *Leitfaden für Ehrenamtliche Richterinnen und Richter* 3-4 (2018), <https://www.hamburg.de/contentblob/11806806/4e6a47028fa7b898dec640cea6ecfc2f/data/leitfaden-fuer-ehrenamtliche-richter.pdf> (explaining the point); see *id.* at 14-15 (explaining that separation-of-powers concerns bar civil servants and public officials from serving as honorary judges).

¹⁴³ See Prologue, *supra*.

objection procedure described above, and the court's determination will be de novo. If there is no binding administrative act—say, if the agency sends an informal communication with menacing noises rather than a direct order—the landowner is entitled to submit a request for an appropriate permit to the agency. (As a practical matter that process will usually involve formless consultation among the parties, but without any legal consequence.) A timely denial of the permit must be accompanied by reasons; it is contestable in substantially the same manner as a prohibitory administrative act. If the executive fails to act on the request within a statutorily specified time frame (usually three months), the permit is automatically deemed granted.¹⁴⁴ And if for some exotic reason none of these forms of action are available, individuals may file a declaratory action to obtain certainty concerning the state of legal affairs.¹⁴⁵ *Sackett* simply can't happen there. There is something to be said, is there not, for a legal system that stabilizes legitimate private expectations; blocks government agencies from clouding titles for years on end; and protects a sphere of private conduct against unwarranted government interference? If so, Germany's administrative law and its administrative judiciary may be a model. Part III sketches what such a model, adapted to our Constitution and legal traditions, might look like.

III. Administrative Courts, U.S.-Style

In its current configuration American Administrative Law seems to present a stark alternative. Either we accept the appellate review model, meaning rights neutrality, administrative adjudication, and deferential judicial review. Or else, we provide full-scale adjudication by Article III courts in the first instance, as we do for criminal prosecutions and cases involving constitutional rights. The key point that emerges from the German comparison is the omitted third: we could have *independent administrative courts*. That option was considered and rejected, in England as well as the United States, over a century ago.¹⁴⁶ The time may have come to re-consider that fateful

¹⁴⁴ See Sec. 42a VwVfG (“Fictitious approval”).

(1) Upon expiry of a specified decision-making period, an approval that has been applied for shall be deemed granted (fictitious approval) if this is stipulated by law and if the application is sufficiently clearly defined in content. [...]

(2) The decision-making period [...] shall be three months unless otherwise stipulated by law. The period starts upon reception of the complete application documents. It may be extended once by a reasonable period of time if this is warranted by the complexity of the matter. Any such extension of the decision-making period shall be justified and communicated in good time.

Comparable provisions exist under U.S. law. See, e.g. 42 U.S.C. § 7475(c). However, they lack any bite. Typically, agencies can evade the deadline by sending a letter to the effect that the permit (etc.) will be denied on schedule unless the applicant agrees to an extension—in which case the agency might perhaps approve at some point. What gives the German requirement its bite is that the initial denial will be subject to de novo review.

¹⁴⁵ Sec. 43 VwGO.

¹⁴⁶ Jin Banggui, *A Preliminary Study of Comparative Administrative Jurisprudence*, 3 ASIA PACIFIC L. REV. 132 (1994).

decision. Prominent scholars have begun to do so,¹⁴⁷ and a few have proffered institutional proposals to replace the appellate review model with a system of administrative courts.

Professors Steven G. Calabresi and Gary Lawson have proposed that all “current ALJs assigned to agencies whose actions deprive a person of life, liberty, or property be defunded and that Congress should appropriate funds to create new Article III Administrative Law Courts, the judges of which should be nominated by the President and confirmed by the Senate.”¹⁴⁸ The new Article III judges would be called “Federal Administrative Law Judges,” and they would enjoy tenure during good behavior and Article III salary guarantees. Their jurisdiction would be limited to cases coming from the commission, board, or department from which the judges originally came.¹⁴⁹ Vacancies would be filled through the ordinary appointments process of presidential nomination and Senate confirmation. The proposal “would not apply to the hundreds of statutory ALJs and hearing examiners who decide Social Security or disability cases or who rule on tax and immigration claims.”¹⁵⁰ Rather, it would initially cover regulatory agencies such as the EPA, the NLRB, the FCC, the FTC, FERC, the SEC, and OSHA.

Professor Michael Rappaport has proposed a similar scheme.¹⁵¹ His proposal aims to combine the rule-of-rule advantages of independent administrative courts with the advantages of agency adjudication—expertise, and low-cost decisionmaking. Accordingly, Professor Rappaport would divide the newly created independent administrative courts¹⁵² into three sections (medical, scientific, and economic), each staffed with judges with professional expertise in those fields and each tasked with reviewing agency decisions that fall into the respective domain. The courts’ procedures would be somewhat more streamlined than the cumbersome rules of ordinary civil courts. But their decisions would be reviewable only by federal appellate courts, not by agencies; and the agencies would receive either no or reduced deference for their findings. Like Professors Calabresi and Lawson, Professor Rappaport would limit the administrative courts’ jurisdiction to regulatory agencies and their decisions, to the exclusion of benefits or immigration decisions.

The institutional scheme presented in this Part aims in the same general direction.¹⁵³ Like the Calabresi-Lawson and the Rappaport proposals, it seeks to re-constitutionalize judicial control over executive adjudication by means of entrusting that task to independent courts. Like those proposals, this one is limited to regulatory agencies and their adjudicatory and enforcement decisions. What I hope to add to this line of inquiry—advocacy?—is a somewhat more detailed and nuanced examination of the *why*, the *how*, and the *for what* of such a dramatic departure from

¹⁴⁷ William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194945; Harrison, *supra* note ___, at 22; Nelson, *supra* note ___, at 614.

¹⁴⁸ Calabresi & Lawson, *supra* note ___, at 862.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Rappaport, *supra* note __.

¹⁵² Like Professors Calabresi and Lawson, Professor Rappaport would establish the administrative courts as Article III courts. However, he is open to the idea of establishing them as Article I courts instead. *Id.* at 18.

¹⁵³ It differs in some of the details. See *infra* for discussion.

a century-old system of administrative adjudication.¹⁵⁴ In that pursuit I will pay special attention to the question of how the administrative judiciary might fit into, and what it might and should do to, the existing body of American administrative and Federal Courts jurisprudence.¹⁵⁵ Moreover, I will employ a strategy that Professors Calabresi and Lawson forcefully suggest:¹⁵⁶ the comparison to administrative law and courts in many European countries, here in its German instantiation.

Section A. sets the stage. It sketches the basic argument for independent *administrative* courts; stipulates, in bullet-point format, the essential, non-negotiable features of such a judiciary; and explains the range over which those courts should replace the appellate review regime. The following Sections attend to questions of institutional design: the administrative courts' establishment (Section B.) and their proceedings and jurisdiction (Section C.). Throughout, I will draw on the German comparison. And throughout, I will stress the central theme of this Essay—the interplay between institutions and legal doctrine. The point of an independent administrative judiciary is to provide an *institutional* mechanism to counteract, and over time to cure, the *doctrinal* shortcomings of American administrative law. American administrative law needs something resembling the German conceptual category of “subjective public rights” and a judiciary that will affirm and protect those rights. Neither AJ’s nor general-purpose Article III judges are up to that task: the former are designed to compromise rights claims in accordance with their agency’s mission, and the latter operate in *Chevron*’s rights-neutral, deferential universe. A suitably designed administrative judiciary just might be capable of developing, over time, a more rights-centered jurisprudence.

A. Essentials

We need independent courts, for well-rehearsed reasons. But why would one want to separate independent *administrative* courts from ordinary (civil) courts? There are good and bad reasons. The bad reason is the notion that administrative acts are never simply a question of law and right but always implicate considerations of expediency and sound public policy. Pursue that train of thought: invariably, it arrives at the conclusion that the administrative tribunals must be made part

¹⁵⁴ In a sympathetic review of the Calabresi-Lawson and Rappaport proposals, Professor Christopher J. Walker has sensibly urged attention to those questions. Walker, *Constitutional Tensions*, *supra* note __, at 2703. Here you go, Chris.

¹⁵⁵ The question is more complicated than it might seem. *E.g.*, Professors Calabresi and Lawson rest their proposal on the proposition that an independent court must be available for all deprivations of life, liberty, or property but not for other administrative decisions. Calabresi & Lawson, *supra* note __, at 862. And they limit their proposal to regulatory agencies—to the exclusion of benefit agencies and their decisions—for just that reason. *See id.* at 865 (“We find the modern equation of welfare benefits with constitutionally protected property to be quite laughable and wrong.”) (footnote omitted). As will become clear (if it isn’t already), I share the underlying intuition. Under extant law, however, the “deprivation” category is very nearly a null set, *see* Harrison, *supra* note __, at 44; and the “equation” is a *fait accompli*. The proposal presented in this Part seeks to account for the present state of the law and, moreover, to create institutions and incentives to change it.

¹⁵⁶ Calabresi & Lawson, *supra* note __, at 862 (“Comparative constitutional law thus suggests that the U.S. administrative law system is primitive and underdeveloped.”) (“[W]e think this reform [independent administrative courts] borrows something valuable from European administrative law.”).

of the administration, subject to independent judicial control only at the outer limits. That, of course, is our system.

The good reason for a separate system of administrative courts is the recognition that the state (the government, in our parlance) is an actor *sui generis*: unlike private actors, it can unilaterally declare what is to be lawful and what is not. Thus, unlike in ordinary civil litigation, the private litigant against the state never confronts an equal. At some level, legal doctrines will have to reflect that reality. For an obvious example, private citizens may do to or with one another as they wish, within the limits of the law; the executive needs an affirmative legal basis for any act.¹⁵⁷ It may be best to commit those separate inquiries to separate judicial systems.

Pursue *that* thought, and it yields something like the German system. Its essential attributes are as follows:

- Administrative courts must be independent from executive control, supervision, and revision.
- The administrative courts hear *only* administrative cases, but substantially *all* administrative cases or at least, a very wide range of cases. Any further specialization—say, a separate system of environmental courts—would reduce the courts’ “distance” from the executive and thus replicate the inherent dangers of “expert” decisionmaking: tunnel vision; situational decisions; excessive emphasis on short-term results over rules.
- The administrative courts must be open to every citizen who credibly claims to have been violated in his private rights by an administrative act; but they must remain closed to anyone else, especially including “private attorneys general.”¹⁵⁸
- While executive branch agencies may use hearings and other adjudicatory devices, any decision eventually reached by an agency is not owed judicial deference. Every judicial determination must be de novo, on all questions of law or fact.
- There must be *enough* administrative courts to adjudicate a large volume of cases.

As shown in the remainder of this Part, it would be perfectly possible to mimic this institutional design well within the bounds of the United States Constitution and our political and legal traditions; and so to replace the appellate review model with independent administrative courts, over a wide range.

What range, you ask? Good question. Some of the answers are sufficiently easy to be set forth in bullet-point format. Harder questions follow.

- *Administrative* courts should handle *administrative* cases (roughly, cases now falling under the APA). Tort and contract claims against the government fall outside the ambit of administrative law (in the U.S. as in Germany); that should remain so.

¹⁵⁷ On the flipside, of course, the government has defenses that are not available to private litigants, foremost including sovereign immunity. For discussion see Harrison, *supra* note ___, at 20.

¹⁵⁸ Under the German system, even actual attorneys general cannot sue in the administrative courts. That is because the government has no rights, only powers.

- Tax disputes are committed to a separate judicial track, in Germany as here; there is no reason to upset that arrangement.¹⁵⁹
- Internal administrative matters—for a prominent example, government employment disputes—are best handled inside the government, subject to constitutional constraints (for example, due process or First Amendment limitations)¹⁶⁰ and whatever arrangements and access to Article III courts Congress may provide.¹⁶¹ To borrow the Germans’ excellent term once more, keeping those internal matters out of the administrative courts helps them to keep their “distance” from the executive.
- Criminal cases are and should be beyond the administrative courts’ jurisdiction (there as here).

Other questions concerning the administrative courts’ jurisdiction are more involved. The answers aren’t merely matters of administrative convenience or efficiency; they depend on the purposes one intends the administrative judiciary to serve.

I declared *my* purpose in the Introduction: the point is to re-limit the near-boundless sweep of the public rights regime and our rights-neutral APA; to rehabilitate meaningful distinctions between coercive interferences with private conduct and mere benefit programs; and to create an institutional apparatus with the capacity and the incentives to perform those tasks. Accordingly, the administrative courts’ jurisdiction should extend exclusively¹⁶² to *regulatory* agencies and their programs, as opposed to benefit programs. It should extend only to *adjudicatory* agency decisions, to the exclusion of rulemaking proceedings and pre-enforcement challenges. And, jurisdiction should be withheld for cases arising under “citizen suit” or comparably broad statutory review provisions. Proceedings of that nature can and should stay where they are, in Article III courts and *Chevron*’s domain. The following Sections put a bit of flesh and muscle on these bare bones.

B. Establishing a Federal Administrative Judiciary

How might Congress establish independent administrative courts? The most straightforward approach might be to proceed in conformity with Article III and to staff the courts with judges who are nominated by the President, confirmed by the Senate, and serve “during good behavior.”

¹⁵⁹ Unless, perhaps, one holds very strong views about and against “tax exceptionalism.” Cf., e.g., Kristin Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717 (2014). That debate is beyond my purview here.

¹⁶⁰ See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

¹⁶¹ For the current arrangement, see 5 U.S.C. § 1204 (2014) (defining the powers and functions of the Merit Systems Protection Board); 5 U.S.C. §§ 7111-7120, 7701-7703 (2018) (defining the rights and duties of government employees with claims against the government, including a provision granting judicial review).

¹⁶² The “exclusively” point matters. It is implied and presupposed by, but to my mind not sufficiently emphasized in, the Calabresi-Lawson and Rappaport proposals. For example, Professors Calabresi and Lawson insist that all potential deprivations of right must be subject to independent adjudication (see *supra* note __): agreed. They slight the corollary proposition that other administrative decisions need not be *and must not be* subject to judicial “review” at all, lest the judiciary be dragooned into some administrative scheme. I take this to be a central teaching of German administrative law. It entails that pre-enforcement challenges and citizen suits are structurally incompatible with a rights-protective jurisprudence. See *supra* note __ and accompanying text; and see *infra* note __ and accompanying text for further discussion.

Professors Rappaport, Calabresi and Lawson favor that approach, in slightly different variations. It would most closely resemble the German model; and there is no constitutional obstacle to functionally specialized federal judges and courts. (The U.S. Court of Appeals for the Federal Circuit is functionally specialized.) Even so, I am inclined to disagree. It would be far preferable to establish a federal administrative judiciary pursuant to Article I.¹⁶³ The model I have in mind for a Federal Administrative Court (“FAC”) closely resembles the U.S. Tax Court. Technically, the U.S. Tax Court is an executive body, as are the U.S. Court of Federal Claims and the Court of Veterans Appeals. (Not being Article III courts, they cannot be anything else.) However, the judges differ from administrative adjudicators in virtually all relevant respects. They are appointed for fixed terms by the President (with the advice and consent of the Senate), not by an agency. They cannot be removed or directed by any agency; and their decisions are not reversible by any agency, only by an appellate federal court. The FAC could and should be constituted in substantially the same form. It would sit atop a hierarchy of lower administrative courts, sufficient in number to replace agency adjudication and AJ’s over the range described below.¹⁶⁴

Admittedly, the Article I option introduces complications that would not arise if the administrative courts were constituted in conformity with Article III. The constitutional status of the U.S. Tax Court is notoriously uncertain;¹⁶⁵ and one can argue with a great deal of plausibility that the judges, as well as judges operating on the same institutional model, must—as executive officers—be removable by the President.¹⁶⁶ Additionally, it may be the case that constitutional claims, and perhaps certain private disputes arising under federal regulatory schemes, must (under the Supreme Court’s jurisprudence) remain in Article III courts.¹⁶⁷

All else equal, I cheerfully concede, a reform proposal of the scope and ambition here envisioned should solve constitutional difficulties or at least, not create new ones. Even so, several reasons militate in favor of the Article I option and against the Article III option. For one thing, while the possibility of presidential removal may appear to render the administrative judiciary less-than-fully independent, the prospect is exceedingly remote, if not entirely theoretical. For another thing,

¹⁶³ The formulation is a bit misleading, inasmuch as inferior Article III courts, too, are established pursuant to Article I; but I will follow the conventional terminology.

¹⁶⁴ Lower administrative judges could be appointed by the Justices, within legislatively determined parameters and procedures. Again, the U.S. Tax Court provides a model. *See* 26 U.S.C. §§ 7441-7479 (2015). The precise number is a matter of conjecture, and largely dependent on the scope of the administrative courts’ jurisdiction. 100 administrative courts, with at least one administrative court in every state, may be a reasonable guess.

¹⁶⁵ *See, e.g.,* Brant J. Hellwig, *The Constitutional Nature of the United States Tax Court*, 35 VA. TAX REV. 269 (2016).

¹⁶⁶ That, in any event, is Professor Baude’s position. Baude, *supra* note ___, at 49. It is also the general direction—although perhaps not the inescapable conclusion—of the Supreme Court’s separation-of-powers jurisprudence. *See Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010). Statutory law vests the power of removal of judges of the Court of Federal Claims exclusively in the Federal Circuit: 28 U.S.C. § 176(a). The arrangement is unconstitutional unless, perhaps, one thinks that *Morrison v. Olson*, 487 U.S. 654 (1988) was rightly decided on the question of “inter-branch” appointments and, by implication, removal.

¹⁶⁷ The answer depends on how one understands the Supreme Court’s meandering “private rights” jurisprudence and, moreover, on one’s views as to whether and under what circumstances private individuals may by consent waive their right to an independent adjudication of constitutional claims. For discussion of that latter question *see* Baude, *supra* note ___, at ___ and sources cited *id.* note ___. For purposes at hand, I do not and need not express any firm view on those matters.

any attempt to add some 200 federal district court judges would produce heated partisan conflict and, moreover, insurmountable opposition from the existing Article III judiciary.¹⁶⁸ (Federal judges' prestige depends on there not being too many of them.) By far the most important reason, however, is that Article III courts would invariably revert to the appellate review mode of adjudication: on-the-record review; deference to the experts. Reputational and professional incentives cut that way, and the prospect of appellate review will do the rest. Thus, if one wants to re-constitutionalize the domain where the executive threatens to interfere with legitimate private expectations, one needs an administrative judiciary that is independent not only from the Executive but also, so far as possible, from the Article III courts.

Would an administrative judiciary of that description be constitutional? Yes. We know this to the point of metaphysical certainty because as the law stands, all the disputes committed to the proposed administrative courts involve *public* rather than private rights. And for those kinds of deprivations even an agency-appointed, agency-reversible AJ will do, at least so long as some form of judicial review, however deferential, remains available.

What, though, of private litigants' right to gain access to a regular Article III court, somewhere in the course of the proceedings? There are two ways of skinning this particular cat: an adjunct model, and a competitive model.

The "adjunct" model would permit appeals from the Federal Administrative Court to a U.S. Court of Appeals. Suitably arranged, the system would have the administrative courts function as "adjuncts" to Article III courts.¹⁶⁹ The "competitive," far preferable option is to make the Federal Administrative Court's rulings final and preclusive—and, at the front end to give private litigants a *choice* between resort to the administrative courts or else, to the APA's adjudicatory procedures and judicial review provisions. (Resort to the agency process would operate as a waiver of right to invoke the administrative courts' jurisdiction, and vice versa.)¹⁷⁰ This model has several key advantages.

¹⁶⁸ The Article III option would have been the cleanest solution to the Supreme Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which held that bankruptcy-related claims arising under (state) common law cannot be adjudicated by non-Article III tribunals. The Judicial Conference and individual federal judges resolutely opposed proposals to appoint bankruptcy judges pursuant to Article III. RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 130-39 (1999).

Prior to the publication of the *Depravity* article, Professor Calabresi submitted the proposal to increase the number of Article III judges to the U.S. House of Representatives, as part of a broader package of legal reform proposals. The condemnation was instantaneous, and bipartisan. Walker, *Constitutional Tensions*, *supra* note ___, at 2670, 2688.

¹⁶⁹ That, come to think of it, is how the *Crowell* Court explained administrative adjudication, at least to itself. *Crowell v. Benson*, 285 U.S. 22, 42-46 (1932). However, if nothing else, the reversibility of agency adjudicators' decisions by agency heads renders that conceptualization a pure fiction. In contrast, administrative courts as here envisioned could serve as true adjuncts to federal courts, not agencies. For a brief discussion of what that might require see Walker, *Constitutional Tensions*, *supra* note ___, at 2691.

¹⁷⁰ Roughly analogous arrangements exist under patent and trademark law, where a disappointed applicant's decision to seek de novo review in U.S. District Court operates as a waiver of the right to appellate review, and vice versa. See, e.g., 35 U.S.C. §§ 141, 145, 146 (Patent Act); 15 U.S.C. § 1051 *et seq.* (Lanham Act). The tax code provides taxpayers with a choice between contesting an assessment in the U.S. Tax Court or else, payment of the assessment under protest and a subsequent challenge in federal court. See 26 U.S.C. § 7422.

First, it might help ease transition problems that would invariably accompany the introduction of an arrangement that would require substantial amendments to the APA and to dozens of organic statutes with a bewildering array of agency adjudication systems. Under the competitive model Congress could leave the existing machinery in place; it would merely have to create an add-on alternative, operating at private plaintiffs' choice. Second, while the prospect of Article III review may seem reassuring, federal appellate courts would almost surely resist the administrative courts' attempt to develop more rights-protective doctrines, under *de novo* modes of proceeding that are alien to modern American administrative law. Their natural impulse will be to assimilate those proceedings to the existing *corpus juris*, and that enterprise would likely be accompanied by a vocal chorus of "anti-exceptionalist" scholars who insist on the normative force and trans-substantive reach of the APA and the appellate review model.¹⁷¹ When, as here, administrative law "exceptionalism" is the point of the enterprise, that form of institutionalized resistance would prove counterproductive, and perhaps fatal. Third, and perhaps most important, a system of mutual claim preclusion—operating at the private claimant's choice—would protect the administrative judiciary's capacity to develop rights-protective administrative law in a common-law fashion and, moreover, give the courts an incentive to do so. You, dear private litigant (the system says), may have your biased agency proceeding and deferential—and therefore also biased—review in an Article III court. Or you can come to us. That proffer may well prove credible because the administrative judiciary's reputation and prestige would come to depend on its willingness to provide impartial adjudication and effective remedies. Over time, agency adjudication might atrophy. Or perhaps, some administrative agencies might step up their game and protect their own AJ's from irrelevance and unemployment by some means—perhaps, a credible commitment to ensure their impartiality. That's the thing with (institutional) competition: you never know in advance what exactly will happen. What you *can* know or at least predict with reasonable confidence is that the dynamic will generally cut in the right direction.

C. Proceedings and Jurisdiction

Cases brought in the administrative courts would not be appellate actions for "review." Rather, they would be original civil actions—a version of the bill in equity that was once a standard vehicle for judicial "review" and which has survived to this day in a few pockets of public law.¹⁷² The standard of review would be *de novo*. Courts would give zero deference to the administrator, on questions of law or of fact.

The proceedings in the administrative courts would be conducted in accordance with the Federal Rules of Evidence and the Federal Rules of Civil Procedure. They would not be limited to the

¹⁷¹ A small selection of such "anti-exceptionalist" literature includes Kristin E. Hickman, *Administering The Tax System We Have*, 63 DUKE L. J. 1717 (2014) (tax); Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent Law System Can Learn From Administrative Law*, 95 GEO. L.J. 269 (2007) (patents); Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959 (2013) (same); Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413 (2016) (same); Melissa F. Wasserman, *What Administrative Law Can Teach the Trademark System*, 93 WASH. U. L. REV. 1511 (2016) (trademarks).

¹⁷² See, e.g., 35 U.S.C. §§ 145, 146 (Patent Act); 15 U.S.C. § 1051 *et seq.* (2002) (Lanham Act).

agency record. Private plaintiffs or, for that matter, the administrator could introduce extrinsic evidence. The cases would be litigated without a jury; judges would make all determinations of fact as well as law.¹⁷³

Unlike in an appellate review proceeding, the usual form of relief would *not* be a remand to the agency that would require further adjudicatory proceedings; it would be an affirmative, non-reviewable, final order to the agency to give the plaintiff the relief to which he is entitled (excepting claims for monetary relief in the nature of damages). Successful claimants would be entitled to reasonable attorneys' fees.¹⁷⁴

Precisely *who* should be able to invoke the administrative courts' jurisdiction, in a challenge to exactly *what*? I have explained the German answer: the administrative courts are open to anyone who can credibly aver to have been violated "in his rights" by an adverse administrative act—paradigmatically, a coercive interference with the individual's private sphere of action. At first impression, that precept translates quite readily into the U.S. context. Enforcement orders, compliance orders, permit or license denials, the mistaken inclusion of an individual on a governmental "no-fly" list¹⁷⁵—anything that looks like an administrative act (in the German sense) or a final agency order (in ours)¹⁷⁶ in an individual case would be grounds to invoke the administrative courts' jurisdiction. Upon inspection, however, matters are not quite so simple. The complications arise from the Germans' corollary proposition: while the courts must be open to any individual whose rights have been violated, they must remain *closed* to anyone else. Crucially, that includes individuals who at most have an "interest" but no legally protected right; and individuals who sue on behalf of the public. Those limitations do not translate quite so readily; but they are essential. They require some rough distinction between rights and mere privileges or benefits (in our terminology) and, moreover, a bar against pre-enforcement rulemaking challenges and citizen suits. The remainder of this Section considers these matters in turn.

Of Rights and Privileges. At one level, the conceptual distinction between private rights—roughly, a constitutionally protected sphere of private liberty and property—and mere privileges—that is, private claims that arise under and are correlative to a regime of public right¹⁷⁷--is quite intuitive. The government seizure of private land is plainly a coercive interference in a matter of private right, which requires adjudication by an independent court; a land grant (to use the classic 19th century example) belongs on the "public" side. But what is one to do with government licenses? Franchises? Patents? Asylum claims? Or, for that matter, with a vast array of government entitlements, from food stamps to Medicaid claims?

¹⁷³ Obviously, Germany's inquisitorial model (briefly described *supra* note ____ and accompanying text) is incompatible with our legal traditions and institutional arrangements. However, even our party-driven model readily permits courts to obtain or elicit the requisite facts.

¹⁷⁴ For this purpose, the administrative courts could be authorized and instructed to borrow the rules of 42 U.S.C. § 1988.

¹⁷⁵ *Ibrahim v. DHS*, 62 F. Supp. 3d 909 (N.D. Cal. 2014); Alex Kozinski, *How a Pointless Lawsuit Took Off*, WALL ST. J. (Jan 24, 2019), https://www.wsj.com/articles/how-a-pointless-lawsuit-took-off-11548375984?shareToken=st113da124b41d4f6482f70e6531b77dcd&ref=article_email_share.

¹⁷⁶ 5 U.S.C. § 551(6).

¹⁷⁷ See Harrison, *supra* note .

Strikingly, the seeming perplexity never caused any great consternation for German administrative lawyers and courts—far less consternation, certainly, than questions of third-party right, citizen suits, or pre-enforcement review.¹⁷⁸ Conceptually, it isn't all that hard to analogize (say) a license revocation or a denial of disability benefits to a coercive interference. Either way, the object of the challenge is an individual administrative act, and the dispute is (conceptually at least) between the government and the individual addressee of its action. Thus, as early as the 1950s, German administrative courts accommodated the *Leistungsstaat*—the entitlement state—to the inherited conceptual apparatus of administrative law. The accommodation never posed a danger to the administrative judiciary's central role as the first line of defense against government overreach and imposition. The traditional model of administrative law was too deeply entrenched to permit, let alone invite, a displacement of “coercive interference with private conduct” as the lodestar of the entire system. Moreover, the presence of a robust system of administrative and social courts ensured that the judiciary would in fact have the institutional capacity to adjudicate all claims of right independently and in conformity with constitutional commands.

The U.S. scenery presents a wholly different picture. The distinction between government-conferred benefits and private (though regulated) spheres of conduct is almost wholly elusive. The APA makes no such distinction, and the public rights “exception” sweeps the boards. Beginning in the 1960s, moreover, the Supreme Court insisted that some sort of constitutional process was due for the “new property” of government benefits and their administrative denials—not the full-scale due process of independent Article III adjudication, mind you, but some sort of fair administrative process¹⁷⁹ and an arbiter with a sheen of impartiality.¹⁸⁰ Having thus expanded substantive “rights” at one end, the Court contracted due process at the other and decided that the same kind of emaciated due process would also suffice for deprivations that we ordinarily associate with constitutionally protected liberty or property.¹⁸¹

Were we to revisit all those doctrines, agency adjudication might prove unconstitutional in many of its present forms.¹⁸² However, such a revision is a long-term prospect at best. The proposed administrative judiciary represents a kind of institutional shortcut.

Hard though it may be to draw firm distinctions between right and privilege in any particular case, it is not so hard to distinguish between government benefit *programs* and regulatory *programs*; and (more doubtfully perhaps) between the administering agencies. Thus, it should be possible to resurrect the intuitive distinction by conferring jurisdiction over claims arising under the respective programs on one set of courts or another. Disability benefits, veterans' benefits, food stamp entitlements, student loans: those are benefit programs. Their adjudication may leave much to be desired.¹⁸³ However, transferring them to administrative courts as here envisioned would threaten to transform those courts into a kind of small-claims tribunals and, moreover, distract them from their central mission to serve as bulwarks against the regulatory state. It would be best, therefore,

¹⁷⁸ Stolleis, *supra* note ___, at 111-17.

¹⁷⁹ *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁸⁰ *Schweiker v. McClure*, 456 U.S. 188 (1982).

¹⁸¹ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).

¹⁸² Baude, *supra* note ___, at 59-60.

¹⁸³ Much of the recent debate over administrative adjudication has revolved around those high-volume programs. See sources cited *supra* note ___. For reasons explained in the text, those matters are beyond my purview here.

to leave those matters where they are (the appellate review regime) and to limit the administrative judiciary's jurisdiction to *regulatory* or enforcement agencies and their programs.¹⁸⁴ One might start with the EPA, OSHA, the SEC, the FTC, the FCC, the CFPB, the FERC, and the CFTC.

There is no need—certainly not at the outset—to cover *all* regulatory agencies; to embark on a suicide mission of identifying *all* federal regulatory programs that should as a matter of principle fall under the administrative courts' jurisdiction; or to decide with meticulous care what to do about agencies that perform both benefit-granting and regulatory functions on a broad scale (say, the HHS or the HUD).¹⁸⁵ What does matter is to cover a meaningful number of agencies with a wide range of portfolios—health and safety regulation; financial regulation; energy; communications; consumer protection. The signal importance of this point lies in the imperative need to resist the siren song of bureaucratic “expertise” and the concomitant pull toward judicial deference.¹⁸⁶ If prompt, expert decision-making is the point of establishing administrative tribunals, then what can judicial review really contribute to the enterprise?¹⁸⁷ Not a whole lot, is one ready answer.¹⁸⁸ Another ready answer, however, is that we want to have the initial decision examined *from a different perspective* by someone who is a generalist and precisely not a specialist, the better to counteract “expert” tendencies toward tunnel vision and agenda-driven decisionmaking.¹⁸⁹ The appellate review system slights the difference; the point of an independent administrative judiciary is to accentuate it. Functionally specialized courts, seeing the same cases, claimants, and defendant-agencies day in and day out, would soon surrender to cultural capture¹⁹⁰ and tend to develop an administrative “law of the horse.”¹⁹¹ Let them see an FCC licensing case

¹⁸⁴ In this respect, the present proposal parallels the Calabresi-Lawson and Rappaport proposals. *See supra*.

¹⁸⁵ The hardest question, conceptually and politically, may arise over deportation and asylum cases. In Germany, those cases run through the administrative courts, for obvious and sensible reasons. Even so, and with some misgivings, I am inclined to disfavor that solution for the United States. Inclusion would make any proposal for administrative courts look like a managerial answer to an immigration system that is drowning in cases. The better solution is to turn the immigration tribunals into Article I courts, as the head of that system has proposed. Maria Sacchetti, *Immigration Judges' Union Calls for Immigration Court Independent from Justice Department*, WASH. POST (Sep. 21, 2018), https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?utm_term=.44d36cdd70df.

¹⁸⁶ I resist Professor Rappaport's suggestion to staff administrative courts with medical, scientific, and economic experts and to assign cases accordingly (*see* Rappaport, *supra* note ___, at 4). Generalist judges have any number of ways to gather the requisite expertise—for example, from expert witnesses supplied and cross-examined by the parties. The relevant question isn't really expertise but specialization. For reasons explained in the remainder of this paragraph, the administrative judges should remain generalists.

¹⁸⁷ Professor Adrian Vermeule has aptly characterized this query as *Crowell's* “marginalist” question. VERMEULE, *supra* note ___, at 13.

¹⁸⁸ According to Professor Vermeule's insightful analysis, this is why *Crowell's* protections of the judicial role and prerogatives (*i.e.* the insistence on *de novo* review of questions of law and of constitutional and jurisdictional fact) crumbled in very short order: VERMEULE, *supra* note ___, at 28.

¹⁸⁹ *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? (1988).

¹⁹⁰ *Cf.* James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., Cambridge Univ. Press, 2013).

¹⁹¹ *Cf.* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 208 (1996). By way of example: the U.S. Court of Appeals for the Federal Circuit, a functionally specialized court with near-exclusive jurisdiction over decisions by the Patent and Trademark Office, has constructed its very own system of patent-specific

one day, a land use case the next, and some labor dispute the day thereafter: what general legal rules will work over the entire range? The answers are hardly pellucid; but at least, the question is right.¹⁹²

Citizen Suits and Pre-Enforcement Challenges. American law invites myriad of tangentially affected “stakeholders” and regulatory beneficiaries to invoke the federal courts’ jurisdiction, either by statute¹⁹³ or under exceedingly generous doctrines of constitutional and statutory standing.¹⁹⁴ And it routinely permits judicial pre-enforcement review of administrative rulemaking proceedings, either by statute or as matter of administrative common law.¹⁹⁵ These instruments presuppose a rights-neutral conceptual framework, and they make that apparatus operational. They are structurally incompatible with an administrative judiciary whose mission is to protect *this* private party from *that* unlawful executive imposition.¹⁹⁶

The incompatibility is obvious with respect to citizen suits, which explicitly put the interests of “concerned citizens” on a par with the holders of traditional rights to property or liberty. It is a bit less obvious, but nonetheless incontrovertible, with respect to pre-enforcement challenges. As an initial matter, a system of pre-enforcement review typically entails the statutory preclusion of subsequent challenges, which raises the question of what to do about the complaints of regulated parties who were legitimately unaware of—or may not even have existed—at the time of the regulation and its pre-enforcement challenge.¹⁹⁷ But the difficulties are more profound. Pre-enforcement rulemaking review practically *must* be on-the-record review. By definition, there are no as-applied facts. The point of front-loading the process is to provide legal certainty for affected parties and clear sailing for the administration. On that account, and because the appellate court’s determination will usually have preclusive effect, it is hard to resist demands for broad participation in the administrative process and in the judicial proceeding. The proceeding addresses the overall lawfulness and effects of a general rule and is policy-laden, and so naturally pushes toward judicial deference. It puts the interests of “regulatory beneficiaries” on a par with those of regulated parties, and it draws a vast array of claimants into the proceedings. In short, the entire enterprise is an interest group sport, and the reviewing court serves as the forum. The game is adversarial litigation in name only, and often not even that.¹⁹⁸

rules and procedures. The Supreme Court, for one, has not deemed the experiment successful. *See, e.g.*, Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413 (2016).

¹⁹² To be clear, I do not advocate uninformed judicial decision-making. U.S. courts have all sorts of ways to obtain relevant information from the parties or if need be from court-appointed masters.

¹⁹³ *See, e.g.*, 42 U.S.C. § 7604(a) (Clean Air Act).

¹⁹⁴ *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Mass. v. EPA*, 549 U.S. 497 (2007).

¹⁹⁵ *See, e.g.*, 5 U.S.C. § 1951 (1994) (Hobbs Act); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

¹⁹⁶ *See supra* note and accompanying text.

¹⁹⁷ In *PDR Network, LLC v. Carlton & Harris Chiropractic Inc.*, 139 S. Ct. 2051 (2019), a case arising over preclusion under the Hobbs Act, 5 U.S.C. § 1951 (1994), the Court sidestepped the questions suggested in the text. But those questions did occur to the Justices, and they consumed quite a bit of oral argument time. *See* Transcript of Oral Argument, *PDR Network, LLC v. Carlton & Harris Chiropractic Inc.*, 139 S. Ct. 2051 (2019) (No. 17-750), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1705_6k47.pdf.

¹⁹⁸ The most famous administrative law case of all is tellingly captioned *Chevron v. NRDC*—as if the EPA were a mere bystander.

As explained in Part II, German administrative courts have not been immune from these pressures. They have responded by maintaining sharp, rights-based standing requirements and by assimilating pre-enforcement challenges to the paradigmatic forms of administrative action, so far as possible.¹⁹⁹ The problems have proven manageable for German administrative courts because the Bundestag has made only sparing use of either instrument; because the most serious inroads into the private rights model have come from the EU rather than Germany's legislature; and because exceptions and compromises can be tolerated so long as it remains clear to all concerned that the traditional doctrines have nothing to do with docket control or pragmatic concerns and everything to do with the logic of the system: precisely because the courts will protect rights, they must not entertain any other kind of complaint.

None of this is true in the United States. Administrative law makes virtually no distinction between a citizen's claim to use his land free from official interference and another citizen's claim to *demand* that interference. The Congress—all on its own, without supra-national nudging or connivance—has been promiscuous in legislating broad standing and pre-enforcement provisions. And even adamant critics of the administrative state and its law often ignore or overlook the differences between a K-Street brawl and a citizen's fight for his livelihood or possessions: they would not otherwise presume that the same (more aggressive) standard of judicial review should apply across the board, regardless of who sues over what.

Here again, the sensible approach is to engineer an institutional solution: withhold administrative court jurisdiction over cases brought under statutory citizen suit provisions; do likewise with pre-enforcement provisions; and leave both to the Article III courts. Under that arrangement the administrative courts would find it easier to develop, over time, a jurisprudence that re-asserts meaningful distinctions between regulated parties and “stakeholders.”

IV. Conclusion: Herein Once More of Rights and Institutions

How committed am I, *really*, to the proposal just sketched? Call me a despairing optimist. As for despair: The appellate review model is very deeply entrenched, and a reform proposal of the scale I have described quite probably exceeds the capacity of our political institutions. As for optimism: The confluence of the Supreme Court's “dismantling” of AJ independence and the renewed attention to the defects of administrative adjudication²⁰⁰ provides a rare opportunity to confront the appellate review regime with the promising alternative of independent administrative courts. And while a proposal to learn from the administrative courts of Germany (of all places) will raise hairs here and eyebrows there, the notion of separate administrative courts is not entirely outlandish. Congress has in fact considered something of the sort at various times in our history,²⁰¹

¹⁹⁹ *Supra* note and accompanying text; and see Klaus Ferdinand Gaerditz, *Die Resubjektivierung der Umweltverbandsklage zwischen prozessuaem Vorbehalt des Gesetzes und unionsrechtlicher Rechtsschutzeffektuiierung*, 2014 EURUP 39, 39-44 (2014).

²⁰⁰ See *supra* note and accompanying text.

²⁰¹ Notably, in the 1930s, a proposal of this kind surfaced in the early phases of the debates that eventually produced the APA. Nothing came of it, probably (in my understanding of the somewhat confused debate) on account of a lack of imagination: the New Dealers loathed anything that looked like a court, while the old guard, led by the American

and I have suggested that the U.S. Tax Court might provide a model. For additional illumination, Congress might look to the states, some of which have established independent administrative courts quite like the ones I have depicted.²⁰²

The principal cause for optimism—sufficient optimism, at least, to warrant an outside-the-box proposal—is the on-going, roaring debate over the foundations of administrative law.²⁰³ That debate has long sprung the confines of the legal academy and spilled into judicial decisions and public discussion; and administrative adjudication has re-emerged as a central topic. I have sought to contribute to that debate by proposing to re-orient it towards questions of right (not procedure) and institutional capacity and incentives (not doctrinal questions of deference). A few more words on that enterprise are in order.

Any system of public law that is worth having needs a reasonably coherent, robust set of rights that run against the government and serve to fend off coercive interferences with ordinary private conduct—the right to hire and fire; to earn your marginal product in the labor market; to sell your product at a price that willing customers will pay; to use your land as you see fit, without harming others; to go about your business without fear of extralegal impositions. The *allgemeine Handlungsfreiheit*, to borrow a phrase. And to ensure it, you need independent courts.

Those precepts, of course, resound deeply in the Anglo-Saxon tradition of jurisprudence. And yet: they are firmly enshrined in German law—and explicitly repudiated under our law. Germany’s system of “subjective public rights” (and it is a *system*, not a grabbag of entitlements)²⁰⁴ was conceived a century-plus ago in a Kantian and a positivist frame of mind, and it is being drilled in

Bar Association and Roscoe Pound, associated anything short of Article III courts with “administrative absolutism.” Cf. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1568 (1996). Interest group concerns also played a role. The patent bar and the tax bar feared that the Court of Customs and Patent Appeals (CCPA), an Article I court created only in 1929, might be merged into a more general administrative judiciary and so lose its special concern for “its” more narrowly focused constituencies. Sapna Kumar, *The Accidental Agency?* 65 FLA. L. REV. 229, 259 (2013).

²⁰² Approximately half of the states have adopted a “central panel model,” which differs from the federal appellate review model in two and, in some cases, three key respects. First, central panel adjudicators are neither appointed nor removable by any individual line agency. Instead, panel heads are typically appointed in conformity with the respective state constitutions’ provisions for the appointment of what, for purposes of the U.S. Constitution, we call “principal” or “inferior” officers. Second, the central panels’ jurisdiction is not limited to disputes arising from a single agency but spans a wide range of agencies and issues. Third, a few states bar agency reversals of panel decisions. (Louisiana provides a singular arrangement: it prohibits the administrative reversal of panel decisions, and it permits private litigants but not the agencies to appeal adverse panel decisions to the regular courts.) Where panel decisions are non-reversible, the panels begin to resemble ordinary (“Article III”) courts with administrative jurisdiction or—depending on the mode of appointment and the mechanics of appeals to the regular courts—institutional “adjuncts” to those courts. For a description of the states’ central panels models and their development see Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75 (1994) and Allan C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, 21 J. NAT’L ASS’N ADMIN. L. JUDGES 235 (2001).

²⁰³ See sources cited *supra* note .

²⁰⁴ Cf. GEORG JELLINEK, *DAS SYSTEM DER OEFFENTLICHEN SUBJEKTIVEN RECHTE* (2d ed. 1905); and Ottmar Buehler’s yet-more influential treatise, *DIE SUBJEKTIVEN OEFFENTLICHEN RECHTE UND IHR SCHUTZ IN DER DEUTSCHEN VERFASSUNGSRECHTSPRECHUNG* (1914). These century-plus old works have remained well-nigh canonical. See the exhaustive and illuminating treatment by HARTMUT BAUER, *GESCHICHTLICHE GRUNDLAGEN DER LEHRE VOM SUBJEKTIVEN OEFFENTLICHEN RECHT* (1986).

substantially the same form into every law student's head to this day.²⁰⁵ After the horrifying Nazi experience, jurists more fully recognized the inherent logic of a rights-protective regime; and in 1949 and thereafter, that logic became constitutionalized and, moreover, thoroughly institutionalized. In sharp contrast, the adoption of the appellate review model in the United States—hardly inevitable, but a *fait accompli* by the 1930s—in due course produced the rights-neutral, process-centered regime of the APA. (When Senator McCarran famously described the APA as a “bill of rights,” he did not mean substantive rights; he meant the APA’s procedural protections.)²⁰⁶ To my mind Germany’s rights-focused system has enormous appeal. It is a product of (sometimes very bitter) experience, not a conceptual apparatus that one could parachute into the permanent construction site of American administrative law.²⁰⁷ I hope to have shown, however, that one can conceive of institutions—an administrative judiciary—that fit our own legal traditions and that might, over time, provide robust protection for “subjective public rights,” although quite probably not under that heading.

However illusory that prospect may appear, the prospect of leaving administrative law reform to ordinary Article III courts seems equally doubtful.²⁰⁸ For many contemporary critics of the administrative state, judicial deference—*Crowell v. Benson*, *Chevron*, and associated canons—is the great white whale. Harpoon it, which is to say have Article III courts decide questions of law de novo, and behold the rule of law.²⁰⁹ That will not work, because it cannot work. As Professor Adrian Vermeule has powerfully argued, *Crowell*’s appellate review framework systematically pushes toward judicial deference;²¹⁰ and in any event, Article III courts have neither the capacity nor any incentive to review myriad agency decisions on a de novo basis.

An obvious response to this dilemma is to rehabilitate the notion of private right and to re-think the public right “exception.” Here and there one can find judicial opinions that point in that

²⁰⁵ For purposes of this Essay I casually compared the latest available editions of the principal, authoritative textbooks (VERWALTUNGSGERICHTSORDNUNG (WOLF-RUEDIGER SCHENKE, ED., 24TH ED 2018); VERWALTUNGSVERFAHRENSGESETZ (ULRICH RAMSAUER, ED., 19TH ED. 2018)) to the 1978 editions in my when-I-was-a-student bookshelf. They are *the same*, aside from additional case cites and argle-bargle passages about EU law that drip with, nay bleed, not-on-our-watch resentment.

²⁰⁶ The Senator’s famous statement (quoted in the Prologue, *supra*) continues: The APA “is designed to provide guarantees of due process in administrative procedure.” 79 CONG. REC. 2148-67 (1946) (statement of Sen. McCarran).

²⁰⁷ A single example shall suffice. In the 1970s, when a relative handful of German lawyers proposed to introduce U.S.-style citizen suits (*Popularklagen*) into German environmental law, Professor Felix Weyreuther—then President of Germany’s Federal Administrative Court—wrote an entire book condemning the practice and noted that it had been favorably contemplated exactly once: by the Nazi regime and its so-called jurists. FELIX WEYREUTHER, VERWALTUNGSKONTROLLE DURCH VERBAENDE? 82-84 (1975). Justice Weyreuther had a point, *see* Greve, *supra* note ___, at 239 n.215 (discussing Nazi jurists’ advocacy of public interest lawsuits), and he expressed a widely shared, long-held view. *See, e.g.*, OVG Muenster, 1953 MONATSSCHRIFT DES DEUTSCHEN RECHTS 572 (association lawsuit dismissed for lack of standing and criticized as an impermissible delegation of public power that smacks of fascism). Where we see cheerful, selfless defenders of owls and wetlands, the German legal establishment smells a *Blockwart*. You cannot make that up, and you cannot transport the underlying sensibility into American law.

²⁰⁸ I shan’t try to do justice to that large-ish subject here. My limited purpose is to caution against excessive confidence in doctrinal reforms, in isolation from questions of institutional capacity and incentives.

²⁰⁹ *See* sources cited *supra* note ___.

²¹⁰ VERMEULE, *supra* note ___, at 24.

direction; and a handful of intrepid scholars have begun to engage the enterprise.²¹¹ For obvious reasons, I am wholly supportive of their endeavor. Like my own, it zeroes in on the question of right, and it is closely tied to institutional concerns, albeit of a slightly different order.²¹² However, I strongly suspect that the Supreme Court is exceedingly unlikely to revise its public-rights jumble of doctrines except at the outer margins. (It is much more likely to ramp up the standard of appellate review in the vain hope that doing so will somehow restore constitutional order.) Hence, my proposal for an institutional shortcut: commit the adjudication of certain “public” rights, within the scope of the jurisdiction described earlier, to administrative tribunals—just not agency tribunals but actual courts.

I do not hold out administrative courts as a solution to all that ails the administrative state and its law. I have said virtually nothing about the adjudication of benefit programs—the vast bulk of administrative adjudication, and perhaps much in need of pragmatic reform. Nor have I said anything about, say, the non-delegation doctrine or agencies’ resort to “unorthodox” proceedings and maneuvers to evade judicial review;²¹³ and besides, Greve, *what about Chevron* deference? My short answer is that sometimes, intellectual and institutional compartmentalization helps. Administrative courts might make some seemingly intractable questions more manageable and susceptible of more sensible answers.

Start with the *Chevron* question: perhaps, the problem is not so much the doctrine itself but its scope, or “domain.”²¹⁴ It is one thing to call for judicial deference in pre-enforcement challenges. Facts may matter in those proceedings, but they are not the kind of facts on which courts have any comparative advantage. Law matters; but very often one marvels at how little law there is to be had in those cases. (*Chevron* itself is a fine example.) The sorts of questions that courts are good at handling—who did what to whom? How does *that* rule apply to *these* facts?—are of little or no relevance, because no one has done anything to anyone just yet.

It is a very different thing to bring that same mindset to bear on adjudicatory cases, where the question is precisely who did what to whom; where the (“as applied”) facts are readily ascertainable by courts; where the dispute is not among contending interest groups but between a private citizen and the government; and where, typically, a lot more law will be available. It makes

²¹¹ See especially Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); Harrison, *supra* note __; Baude, *supra* note __, at 59-60 (“If one takes a more radical view of these doctrines [*i.e.*, the right-privilege distinction and unconstitutional conditions], one would have to confront the extensive 20th-Century practices and precedents of agency adjudication. When such cases should be overruled is a question about the scope of stare decisis and related doctrines.”) (footnote omitted).

²¹² My own proposal, as noted throughout, focuses on the question of institutional (judicial) capacity. In contrast, the Federal Courts scholarship focuses on the *constitutional* question of which institutions may or must adjudicate what sorts of claims.

My proposal may appear at odds with the position that private rights must always be adjudicated by Article III courts; but that is not necessarily so. For example, if I understand Professor Baude correctly, he would deem either the “adjunct model” or the “competitive model” described in Part III.B. constitutional, at least in some configuration. See Baude, *supra* note __, at 32-35.

²¹³ Cf. Abbe Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015); Michael S. Greve & Ashley Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2014).

²¹⁴ For a powerful argument along these lines see Hickman & Nielson, *supra* note __.

a great deal of sense to have those types of cases decided by judicial bodies that operate outside *Chevron*'s shadow.²¹⁵

The same reasoning applies to other controverted questions of American administrative law. Under the *Chenery II* doctrine, for example, the choice between rulemaking or adjudication is left to the agencies' well-nigh unreviewable discretion, as their "expertise" or convenience might commend. Of late, the doctrine has come under fire, as an open-ended invitation to bureaucratic abuse.²¹⁶ However, Article III courts will be loath to challenge the doctrine, not least because it is hard to think of a plausible theory that would tell us when and why an agency must proceed in one way rather than the other. An administrative court system, in contrast, would render the doctrine a virtual nullity almost by default. Adjudication would be conducted outside of the agencies and de novo, and the verdicts would be unreviewable by the executive. If agencies wanted to make policy and buy themselves deference, they would have to write rules (provided they have the statutory authority), reviewable by Article III courts in the ordinary fashion. No judicial theory or doctrine is needed: the choice is the agencies'.

For a final example, it may be a mistake to have the same "standing to sue" rules apply to rulemaking challenges and to truly adversarial adjudication. The point of pre-enforcement proceedings is to have every interest represented; so perhaps, the standing inquiry ought to focus on the parties' internal governance and legitimation,²¹⁷ as opposed to their ability to identify a single "aggrieved" member with a contrived-for-litigation "injury in fact." In contrast, the point of adversarial adjudicatory proceedings is precisely to focus on rights, and that requires standing doctrines that get any other "concerned citizen" or "aggrieved" party out of the proceedings. The U.S. Tax Court will not tolerate interventions by parties who claim that someone else has failed to pay taxes due; why should administrative courts entertain comparable claims?

* * *

The Administrative Procedure Act is nearing its 75th anniversary. Its "fierce compromise" was forged against the backdrop of the Great Depression and World War II, in the thrall of heroic assumptions about the capacity of expert administrative government and for an administrative machinery that would set railroad rates and dispense radio licenses. None of that has much to do with the modern administrative state and its discontents. There may be reasons to treat an

²¹⁵ Barring the actual adoption of that institutional solution, the mere proposal may help to re-orient the debate.

The logic explained in the text also applies to the so-called "Brand X" problem—that is, the question of whether an agency may depart from an interpretation of an ambiguous statutory provision that has been deemed "reasonable" by an Article III court to another reasonable interpretation of that same provision. The general answer is that it may: *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). However, it is one thing to execute that maneuver by means of notice-and-comment rulemaking. It is a very different and far more problematic thing to effect the change by means of formal adjudication and to spring the new interpretation on an unsuspecting private party who reasonably relied on the old one. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165 (2015). See also Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1040-41 (2005).

²¹⁶ Nielson, *Visualizing Change*, *supra* note .

²¹⁷ In the limited areas where German law permits "association lawsuits," it often requires the plaintiff-organizations to satisfy such requirements.

antediluvian political compromise like an *ersatz* Constitution. Since I cannot think of such a reason, I propose a more modern institutional arrangement that more closely approximates the actual Constitution—even if it's borrowed from someplace else.