

Is Judicial Deference to Agency Fact-Finding Unlawful?

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ABSTRACT

Judicial deference to fact-finding by federal administrative agencies took root and developed alongside the modern administrative state. This fact deference is of great consequence to people who are charged with regulatory violations by agencies. Such violations are often initially adjudicated, not in federal courts by Article III judges, but in administrative proceedings by employees of the agency that is seeking to impose fines or other penalties. While review can later be sought in federal court, judges broadly defer to the factual findings made by agency adjudicators in the course of administrative proceedings—and those findings can be determinative of whether a regulatory violation has taken place. Although fact deference was initially constructed by the Supreme Court, it now has the express command of the Administrative Procedure Act of 1946 (APA) behind it. Section 706(2)(E) of the APA provides that fact-finding in formal administrative adjudication may be overturned by reviewing courts only if an agency’s factual determinations are found to be “unsupported by substantial evidence.”

*Although longstanding administrative law doctrines that command judges to defer to agency interpretations of statutes and regulations have received intense academic and judicial scrutiny in recent years, fact deference has received comparatively little attention. This Article provides an overview of the origins, development, and present state of fact deference and subjects fact deference to a constitutional critique. It concludes that in cases involving administrative deprivations of what I will refer to as core private rights to “life, liberty, or property,” fact deference violates both Article III and the Due Process of Law Clause of the Fifth Amendment. It then proposes an alternative: *de novo* determination of questions of fact in Article III courts prior to any binding judgment that deprives people of core private rights.*

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INTRODUCTION

Judicial deference to fact-finding by federal administrative agencies took root and developed alongside the modern administrative state. This fact deference is

of great consequence to people who are charged with regulatory violations. Such violations are often initially adjudicated, not in federal courts by Article III judges, but in administrative proceedings by employees of the agency seeking to impose fines or other penalties. While review can later be sought in federal court, judges broadly defer to the factual findings made by agency adjudicators in the course of administrative proceedings—and those findings can be determinative of whether a regulatory violation has taken place.

Although longstanding administrative law doctrines that command judges to defer to agencies have received intense academic¹ and judicial² scrutiny, deference by judges to findings of fact made during administrative proceedings has received comparatively little attention.³ Policy analysts, government officials, and pundits have become familiar with doctrines that require judges to defer to agency interpretations of statutes and regulations—doctrines that are associated with *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*⁴ and *Auer v. Robbins*, respectively.⁵ The same cannot be said for judicial deference to agency fact-finding—few today are familiar with *Crowell v. Benson*,⁶ *Consolidated Edison Co. v. NLRB*,⁷ *FTC v. Cement Institute*,⁸ or *Universal Camera Corp. v. NLRB*.⁹

Philip Hamburger's path-breaking book, *Is Administrative Law Unlawful?*, is a notable exception to the general neglect of fact deference. Hamburger argues

1. See, e.g., David Schoenbrod, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2015); CHARLES MURRAY, *BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION* (2015); BRUCE P. FROHNNEN & GEORGE W. CAREY, *CONSTITUTIONAL MORALITY AND THE RISE OF QUASI-LAW* (2016).

2. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., dissenting) (lamenting that “[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean” and calling for the Court to revisit precedents endorsing judicial deference to administrative interpretation of regulations); *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring) (raising “serious questions about the constitutionality . . . of deferring to agency interpretations of federal statutes”); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 n.5 (10th Cir. 2015) (questioning the constitutionality of “delegating to the Executive the power to legislate generally applicable rules of private conduct”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (questioning the constitutionality of judicial deference to agency interpretations of statutes).

3. Fact deference has received some scholarly attention. See, e.g., Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 205 (questioning “[w]hether there is ‘meaningful’ review” under the substantial evidence standard courts apply to agency fact-finding); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246–48 (1994) (stating that substantial-evidence review “arguably fails to satisfy Article III” and that “Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as ‘judicial’ activity”); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569 (2013) (arguing that reviewing courts should apply “more robust review to agency adjudication where private rights are at stake” and that the substantial evidence standard “skew[s] too far in favor of agencies”).

4. 467 U.S. 837 (1984).

5. 519 U.S. 452 (1997).

6. 285 U.S. 22 (1932).

7. 305 U.S. 197 (1938).

8. 333 U.S. 683 (1948).

9. 340 U.S. 474 (1951).

that fact deference violates “several constitutional principles,” including “the Constitution’s grant of judicial power to the courts” and the Constitution’s “guarantee of due process of law,” and he argues that fact deference not only leads judges to ratify constitutional violations by agencies but also *requires* judges “to engage in [their] own violation[s].”¹⁰ This Article explores the constitutionality of fact deference at a level of depth not possible in Hamburger’s book, owing to the author’s coverage of a tremendous amount of historical and legal ground.

I conclude that judicial deference to agency fact-finding is unconstitutional in cases involving deprivations of what I refer to as *core private rights* to life, liberty, and property. In such cases, fact deference violates Article III’s vesting of “[t]he judicial power” in the federal courts; constitutes an abdication of the duty of independent judgment that Article III imposes upon federal judges; and denies litigants due process of law. Because section 706(2)(E) of the Administrative Procedure Act of 1946 (APA) provides that agency fact-finding in administrative adjudications implicating core private rights may be overturned by reviewing courts only if an agency’s determinations are found to be “unsupported by substantial evidence”—a standard which requires broad deference to administrative findings—judges cannot comply with section 706(2)(E) in such cases without violating the Constitution.¹¹

Judicial recognition of the unconstitutionality of fact deference in core-private-rights cases would not make it impossible for the modern administrative state to function. It would not even require a major departure from current doctrine. It *would* require agencies to proceed against individuals through Article III courts with independent, impartial fact-finders in such cases. It would also require that facts be determined without deference to agencies prior to any binding judgment.

In Part I, I provide an overview of the origins, development, and present state of fact deference. I briefly describe an *independent model* of judicial review of governmental action that was applied from the Founding Era until the late nineteenth century and that rested upon a distinction between deprivations of *core private rights* (which triggered independent, non-deferential review of questions of law and questions of fact in court) on the one hand, and deprivations of *privileges* and *public rights* (which could be resolved within the political branches) on the other. Additionally, I detail how the Supreme Court in the early twentieth century constructed an *appellate model* of review of administrative actions that entailed deferential review of agency fact-finding even in core-private-rights cases. Finally, I discuss subsequent legal developments, including the continued expansion of the category of public rights to embrace deprivations of property that once triggered independent review in court. In Part II, I subject fact deference in core-private-rights cases to a constitutional critique, focusing on Article III and the Fifth Amendment’s Due Process of Law

10. HAMBURGER, *supra* note 1, at 318–19 (2014).

11. The APA’s judicial review provisions are codified at 5 U.S.C. § 701–706 (2012).

Clause. In Part III, I propose jettisoning fact deference in core-private-rights cases and sketch an alternative: independent determination of questions of fact by independent, impartial fact-finders in Article III courts prior to any binding judgment. In Part IV, I consider objections to my proposed alternative. I conclude by emphasizing the gravity of the problem that fact deference in core-private-rights cases presents and summarizing how it can be resolved.

I. THE ORIGINS, DEVELOPMENT, AND PRESENT STATE OF FACT DEFERENCE

It might initially be thought that judicial deference to agency fact-finding took root through the APA. Section 706(2)(E) of the APA provides that, in general, factual findings made by administrative agencies must be rejected by reviewing courts only if those findings are “unsupported by substantial evidence.”

Yet fact deference was constructed by the Supreme Court prior to the enactment of the APA, and the precise contours of fact deference have changed in important ways over the years. Below, I summarize the relevant history, beginning with what I refer to as an *independent model* of judicial review of questions of law and fact—a model which was applied from the Founding Era until the late nineteenth century—and identifying key judicial departures from that model.

A. *The Independent Model of Judicial Review*

During the first two centuries of our republic, judicial review of governmental action was both narrow and deep. It was narrow in that complaints about governmental activity often did not entitle individuals to judicial review. It was deep in that, if individuals *did* have a complaint that triggered judicial review, that complaint was adjudicated in an especially rigorous way.

What kinds of complaints triggered judicial review? As Caleb Nelson has shown, only complaints arising from governmental burdens on “core private rights” guaranteed individuals a day in court.¹² Core private rights fell into three major categories that tracked those set forth in Sir William Blackstone’s highly influential *Commentaries on the Law of England*: (1) the right to life, or “personal security,” encompassing a person’s “legal and interrupted enjoyment of life, his limbs, his body, his health, and his reputation”; (2) the right to “personal liberty,” encompassing the “power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law”; and (3) the right to private “property,” encompassing the “free use, enjoyment, and disposal of all [one’s] acquisitions, without any control or diminution, save

12. See generally Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007). See also John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2516 (1998) (explaining that “the measure of judicial involvement was private right . . . the extent to which the judiciary reviewed actions and legal determinations of the executive depended on private right”).

only by the laws of the land.”¹³ Blackstone followed Locke, who affirmed that it was *these* rights—derived from human nature, rather than from government largesse—that legitimate governments are designed to secure.¹⁴

In contrast, complaints involving private rights that Anglo-American lawyers referred to as “privileges,” as well as complaints involving what the Supreme Court in 1856 termed “public rights,”¹⁵ did not guarantee one a day in court. “Privileges” were interests “created purely for reasons of public policy and which had no counterpart in the Lockean state of nature”—that is, government-created entitlements or benefits allocated to discrete individuals.¹⁶ “Public rights” included claims that were understood to be held by the people as a whole, including:

- (1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury;
- (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and
- (3) less tangible rights to compliance with the laws established by public authority “for the government and tranquility of the whole.”¹⁷

Complaints involving privileges and public rights could be handled by the courts or handled within the political branches, at the discretion of the political branches. Pursuant to this model, if government officials wished to take action against the core private rights of individuals in particular cases, they had to do so through the courts or not at all; and those courts had to have a particular structure, be staffed with particular personnel, and follow particular procedures. Relevant to our purposes, adjudication of cases involving core private rights

13. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 83–117 (Oxford Univ. Press ed. 2016) (1765). On Blackstone’s influence, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 112 (2d ed. 1985) (remarking upon the “ubiquity of Blackstone” among eighteenth-century American lawyers, who “referred to Blackstone constantly”); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFFALO L. REV. 205, 209 (1979) (characterizing the *Commentaries* as “the single most important source on English legal thinking in the 18th century” and finding that “it has had as much (or more) influence on American legal thought as it has had on British”); Nelson, *supra* note 12, at 111 (explaining that “the *Commentaries* grounded the legal education of Founding Era Americans and remained enormously important throughout the nineteenth century”).

14. Nelson, *supra* note 12, at 567 (internal citations omitted) (“Just as Locke had argued that the ‘great and chief end’ of government was to make individual life, liberty, and property more secure than they would be in the state of nature, Blackstone asserted that the maintenance and proper regulation of the ‘absolute’ rights of individuals was ‘the first and primary end of human laws.’”).

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

16. Nelson, *supra* note 12, at 567.

17. *Id.* at 566. See also *Lansing v. Smith*, 4 Wend. 9, 21–22 (N.Y. 1829) (“The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large. They are not the private unalienable rights of each individual. Hence the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the people at large[,] provided they do not interfere with vested rights which have been granted to individuals.”).

entailed interpretation of the relevant law, determination of the relevant facts, and application of the law to the facts. Judges would interpret the law and instruct juries concerning the law; juries would generally determine the facts.¹⁸ There was no “deference” to the beliefs or desires—the will—of legislative or executive branch officials. Neither those officials’ interpretations of the law nor their factual assertions were regarded as presumptively valid.¹⁹

Hamburger discusses an illustrative example: *United States v. Irving*,²⁰ an 1843 case. Samuel Swartwout, a customs collector for the port of New York, embezzled over a million dollars and made off for England with the sum, which left the United States to seek to recover Swartwout’s debt from his sureties.²¹ The United States did not rely on the Treasury’s general accounts in seeking recompense but instead on a Treasury restatement of Swartwout’s account. The sureties sought to exclude the latter as evidence, arguing that the Treasury’s general accounts were “conclusive on the government.”²² The Supreme Court rejected this argument, stating that “the transcript of restatement of the account, was . . . only prima facie evidence,” and that “[t]he jury will determine what effect it shall have.”²³ Hamburger explains that because “both the general accounts and the restatements . . . were merely the records of one of the parties in the case,” the Court concluded that they “had no presumptive verity or validity.”²⁴ The jury would independently decide the factual question.

This independent model of review coexisted with the exercise of certain governmental powers that we associate today with the administrative state. Government at all levels in the late-eighteenth and early-nineteenth centuries enforced embargoes, awarded patents, regulated trade with Indian tribes, disposed of public land, issued licenses to use government property, distributed pensions and other benefits, collected tariffs, and granted charters.²⁵ Yet these exercises of power could only be challenged in court as a matter of right when core private rights were somehow implicated. As Thomas Merrill puts it, “[E]ither a court had authority to review administrative action or not, and if it did, it decided the whole case.”²⁶ In the early twentieth century, a different approach would be constructed by the courts.

18. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 941 (2011).

19. *Id.* at 946.

20. 42 U.S. (1 How.) 250 (1843).

21. HAMBURGER, *supra* note 1, at 297.

22. *Irving*, 42 U.S. (1 How.) at 260.

23. *Id.* at 263.

24. HAMBURGER, *supra* note 1, at 297.

25. Merrill, *supra* note 18, at 942. *See generally* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE-HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

26. Merrill, *supra* note 18, at 943.

B. *The Appellate Model of Judicial Review*

The transformation of judicial review of administrative action began around 1910, in connection with the Supreme Court's review of rate and service orders issued by the Interstate Commerce Commission (ICC).²⁷ The Court's review was widely criticized on the ground that it thwarted the ICC's efforts to protect small carriers against the imposition of unreasonable and discriminatory rates by railroads.²⁸ Populist and progressive congressional representatives in the West and South aligned with small shippers and identified the judiciary generally—and the Supreme Court in particular—as an impediment to much-needed regulation.²⁹ In the words of Stephen Skowronek, these politicians were “determined to overthrow this judicial imperialism . . . [by] grant[ing] sweeping ratemaking powers to the ICC and radically restrict[ing] the scope of judicial review.”³⁰

After the inauguration of President Theodore Roosevelt, whose campaign had focused on the need to toughen railroad regulation, heated congressional debate broke out over the proper standard of judicial review of ICC orders.³¹ But in 1906 that debate produced a bill—the Hepburn Act—that did not specify a standard of review.³² Indeed, while some congressmen would no doubt have been delighted to do away with judicial review of rate regulation entirely, all contemplated that judicial review would be independent—that is, without deference—wherever judicial review was constitutionally required. The message seemed to be that members of Congress were dissatisfied with how the Court was reviewing the ICC's rate orders but that the Court would have to construct a new standard of review on its own—in the context of what Merrill describes as “the implied threat that if the Court did not back off . . . more drastic action would be in the offing.”³³

The Supreme Court would indeed back off—and promptly. In *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, decided the following year, the Court held that the Interstate Commerce Act preempted civil actions that were grounded in the common-law duty of common carriers to charge only reasonable rates.³⁴ Critically, the Court stressed that the ICC, not the judiciary, was empowered to determine the reasonableness of rates and that absent preemption, “a conflict would arise which would render the enforcement of the act impos-

27. For a comprehensive account of the controversy surrounding the Supreme Court's review of the ICC's rate and service orders and the political climate in which the Hepburn Act was enacted, see generally STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF ADMINISTRATIVE CAPACITIES 1877–1920* (1982). A concise account can be found in Merrill, *supra* note 18, at 946–50.

28. Merrill, *supra* note 18, at 947.

29. *Id.*

30. SKOWRONEK, *supra* note 27, at 255.

31. Merrill, *supra* note 18, at 955.

32. Hepburn Act, 59 Cong. ch. 3591, 34 Stat. 584 (1906).

33. Merrill, *supra* note 18, at 959.

34. 204 U.S. 426, 440–41 (1907).

sible.”³⁵ In a subsequent case involving the Illinois Central Railroad Company—which I will refer to as “*Illinois Central I*,” to differentiate it from a later, identically-named case—the Court would strike a similarly deferential posture in rejecting a series of proposed “rules or principles” put forward by counsel for the railroad for determining factual circumstances when railroad rates would be deemed reasonable.³⁶ The Court held that because such determinations “turned on matters of fact,” those determinations fell “peculiarly within the province of the Commission,” and stated that it would not assess whether the Commission “gave too much weight to some parts of [the testimony] and too little weight to the other parts.”³⁷ The Court formalized a standard for judicial review of the ICC’s factual determinations in *ICC v. Union Pacific Railroad Co.*³⁸ There, the Court stated that “the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.”³⁹

The relationship thus created between the Court and agencies—one according to which the Court broadly deferred to the factual records created by agencies but independently resolved questions of law—resembled the relationship between appellate and trial courts.⁴⁰ The Court would justify its new appellate model of review on pragmatic grounds, drawing upon an assessment of comparative institutional competence. In another case involving the Illinois Central Railroad Company (*Illinois Central II*), the Court described its power to review ICC orders as encompassing: (1) “all relevant questions of constitutional power or right”; (2) “all pertinent questions as to whether the administrative order is within the scope of the delegated authority”; and (3) whether the exercise of authority “has been manifested in such an unreasonable manner as to cause it” to exceed the scope of delegated authority.⁴¹ The Court emphasized that it could not “under the guise of exerting judicial power, usurp merely administrative functions,” reasoning that it lacked the institutional competence to determine “whether the administrative power has been wisely exercised.”⁴²

The appellate model was well-received by the political branches. The circumstances surrounding the creation (in 1910) of a “Commerce Court” that was charged with reviewing ICC decisions indicate approval of the appellate model.⁴³ Witnesses before the Senate Commerce Committee praised the Supreme Court’s

35. *Id.* at 441.

36. Ill. Cent. R.R. Co. v. Interstate Commerce Comm’n (*Illinois Central I*) 206 U.S. 441, 454 (1907).

37. *Id.* at 466.

38. Interstate Commerce Comm’n v. Union Pac. R.R. Co., 222 U.S. 541, 548 (1912).

39. *Id.* This was the first judicial opinion to use the phrase “substantial evidence” in articulating a standard for reviewing administrative action. See E. Blythe Stason, “*Substantial Evidence*” in *Administrative Law*, 89 U. PA. L. REV. 1026, 1040–41 (1941).

40. Merrill, *supra* note 18, at 944.

41. Interstate Commerce Comm’n v. Ill. Cent. R.R. Co. (*Illinois Central II*), 215 U.S. 452, 470 (1910).

42. *Id.*

43. Merrill, *supra* note 18, at 966.

recent decisions, singling out *Illinois Central II* in particular, and called for an amendment affirming that the Commerce Court would not have “any jurisdiction or authority not now possessed by the circuit courts.”⁴⁴ The Commerce Court would be abolished in 1913 in part because it engaged in independent review of factual questions—that is, because it failed to follow the Supreme Court’s lead.⁴⁵ The Supreme Court continued to apply the appellate model, exercising independent judgment in interpreting the law but reviewing factual determinations under deferential substantial-evidence review, with the result that substantial-evidence review not only became an established means of resolving ICC cases but also spread to judicial review of other agency decisions, namely, those of the Federal Trade Commission.⁴⁶

The appellate model would later find an academic evangelist in John Dickinson, a brilliant and tremendously energetic scholar who made lasting contributions to our administrative law. Dickinson extolled the virtues of the appellate model in his highly influential 1927 book, *Administrative Justice and the Supremacy of the Law in the United States*.⁴⁷ In that book, Dickinson articulated an elaborate pragmatic justification for the appellate review model, arguing that independent judicial review agency findings of fact brought nothing but “trouble and expense to both the public and the parties” because courts were institutionally incapable of contributing marginal epistemic value to the fact-finding process.⁴⁸ He further claimed that the very institutional features that gave agencies an epistemic advantage in fact-finding rendered agencies inferior to courts in determining questions of law. Dickinson wrote, “[t]he technical equipment which the commissions are supposed to possess, and the limited and specialized nature of their work . . . operate to unfit them for the task of developing general rules of law.”⁴⁹ Thus, according to Dickinson, by delegating fact-finding to agencies and law-finding to the courts, the appellate model effectuated a division of labor that enabled agencies and courts to capitalize on their respective comparative advantages.

C. The Crowell Compromise

By providing the Court-developed appellate model with an attractive pragmatic justification, Dickinson contributed to the further extension and entrenchment of that model. The triumph of the appellate model was achieved in Chief

44. See *Court of Commerce, Railroad Rates, Etc.: Hearing on S. 3376 and S. 5106 Before the S. Comm. on Interstate Commerce*, 61st Cong. 34-35 (1910) at 201 (testimony of Martin A. Knapp).

45. Merrill, *supra* note 18, at 967.

46. Merrill, *supra* note 18, at 969–72.

47. For a thorough and illuminating review of this neglected classic, see Jeffrey A. Pojanowski, *Neoclassical Administrative Common Law*, THE NEW RAMBLER (Sept. 26, 2016), <http://newramblerreview.com/component/content/article?id=168:neoclassical-administrative-common-law> [https://perma.cc/J33H-94PW].

48. JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW IN THE UNITED STATES* 202 (1927).

49. *Id.* at 234.

Justice Charles Evans Hughes's seminal opinion for the Court in the 1932 case of *Crowell v. Benson*.⁵⁰ Hughes's opinion in *Crowell* remains the most systematic attempt by the Supreme Court to justify the appellate model, and it contains arguments and analogies that track those in *Administrative Justice and the Supremacy of the Law*.

Crowell concerned a statute that empowered administrative tribunals to adjudicate workers' compensation claims arising from injuries on navigable waters. The statute required federal courts to defer to agencies' findings of fact in adjudication between private parties, as if they were appellate courts reviewing facts found by district courts—in essence, this is what the Court had been doing on its own. In his opinion for the Court in *Crowell*, Chief Justice Hughes explained that, in general, the courts' only constitutionally-required role in such cases was to review for errors of law—courts were to treat agency fact-finding as final, with narrow exceptions.⁵¹ He concluded that the statute's requirements were constitutionally unproblematic, analogizing fact-finding by agencies to fact-finding by juries and emphasizing that “[t]o hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administra-

50. See generally *Crowell v. Benson*, 285 U.S. 22 (1932).

51. The exceptions were “constitutional” and “jurisdictional” facts, which were to be determined independently by judges. Constitutional facts were “facts upon which the enforcement of the constitutional rights of the citizen depend”—facts that had to be present if a challenged action was to be upheld as constitutional. *Crowell*, 285 U.S. at 56–57. Jurisdictional facts were facts “indispensable to the application of [a] statute”—the facts that had to be present if an agency was not to have exceeded its statutory authority. *Id.* at 63. As the Court would put it in a subsequent case, “an agency may not finally decide the limits of its statutory power. That is a judicial function.” *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946). For an in-depth analysis of this aspect of *Crowell*, see generally MARK TUSHNET, *The Story of Crowell: Grounding the Administrative State*, in *FEDERAL COURT STORIES* (Vicki C. Jackson and Judith Resnik, eds., 2010).

These exceptions have not had much life beyond *Crowell* itself. The constitutional fact doctrine subsequently turned up in the First Amendment context. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–85 (1964); *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Bose Corp. v. Consumers Union of the U.S. Inc.*, 466 U.S. 485, 508–09 n.27 (1984). The Court has also held that the voluntariness of confessions is a matter for “independent federal determination” on appeal. See *Miller v. Fenton*, 474 U.S. 104, 110 (1985).

The category of “jurisdictional” facts seems to have vanished entirely. See David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 *CARDOZO L. REV.* 1001, 1021 (2008) (detailing how, although it “has not been formally overruled, it currently plays no active role in the Court’s cases concerning the restrictions imposed by Article III on administrative adjudicatory bodies”). Aditya Bamzai has raised the possibility that the reference to “findings . . . in excess of statutory jurisdiction” in section 706 (2)(c) of the APA may have incorporated the category. See Aditya Bamzai, *The “Administrative Process” in the 1940s Court*, 17–19 (2017), https://www.hoover.org/sites/default/files/pages/docs/bamzai_-_admin_in_the_1940s_court_.pdf [<https://perma.cc/TMV4-7T2H>]. If it did, judges may be prohibited from deferring to agency determinations of fact where the existence of those facts is “a condition precedent to the operation of [a] statutory scheme.” *Crowell*, 285 U.S. at 54–55. The Court may therefore have erred in *City of Arlington v. FCC* in stating that “there is no principled basis for carving out some arbitrary subset of . . . claims” that an agency has exceeded its statutory authority as “jurisdictional.” 569 U.S. 290, 298 (2013).

tive agency,”⁵² and which “experience [had shown] to be essential in order [for Congress] to apply its standards to the thousands of cases involved.”⁵³ Just as Dickinson was careful to carve out a role for the courts, so too did Hughes: In *Crowell*, he noted that the judiciary retained “complete authority to insure the proper application of the law.”⁵⁴

The broad contours of the model set forth in *Crowell* would be incorporated into the APA. Thus, while section 706 of the APA provides that “the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions”—language that denotes independent review—it states that, as a general matter, courts are only to ascertain whether facts found in formal adjudication are supported by “substantial evidence.”⁵⁵ Agencies were generally to handle the facts, courts were to handle the law, and the public would receive the benefits of an administrative state that operated consistently with the law of the land, as independently ascertained and applied by those whose constitutional function it is to “say what the law is.”⁵⁶

D. *The Collapse of Crowell*

If Chief Justice Hughes’ opinion in *Crowell* was an effort to reach a compromise between the modern administrative state and independent judicial review, that compromise has long since come undone.⁵⁷ Federal courts now defer broadly to agency interpretations of law, pursuant to doctrines of deference associated with the Court’s decisions in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*⁵⁸ and *Auer v. Robbins*.⁵⁹ Further, while core private rights to life and liberty remain protected by independent judicial review—agencies cannot take over the trial of criminal cases or sentence people to death or

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

53. *Id.* at 54.

54. *Id.* Dickinson himself was highly critical of the decision in *Crowell*. He was concerned that the exceptions that the Court had carved out for jurisdictional and constitutional facts were potentially broad enough to enable litigants to “transfer to the courts the task of reaching their own conclusions on issues which would otherwise be determined finally by the findings of [agencies] which heard the evidence” and perhaps even “make the establishment of an effective system of administrative regulation by the Federal government well-nigh impossible.” See John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of “Constitutional Fact,”* 80 U. PA. L. REV. 1055, 1072, 1082 (1932).

55. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–95 (2016) (detailing how this text, understood in the context of the historical background against which it was adopted, incorporated the prevailing independent-judgment rule).

56. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

57. ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 23–35, 40 (2016) (detailing how “the Hughes synthesis laid down in *Crowell* . . . has come undone in almost every crucial element—most notably the development of judicial deference to agencies on matters of law”). For a sympathetic account of Hughes’s efforts to forge a jurisprudence, which would “[g]ive administrators the freedom to perform their mission without allowing them to exceed their mandate or violate constitutional rights,” see DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 28–78 (2014).

58. See generally *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

59. See generally *Auer v. Robbins*, 519 U.S. 452 (1997).

imprisonment—the category of public rights has steadily grown beyond traditional bounds in cases involving *property*.⁶⁰ Among the most striking expansions of the category of public rights took place in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*.⁶¹ Cases involving alleged violations of the Occupational Safety and Health Act of 1970 could expose employers to civil fines of up to \$10,000 per violation. Despite this, the Court in *Atlas Roofing* determined that Congress could assign the “factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.”⁶² The Court treated *Atlas Roofing* as a “public rights” case because the government was “su[ing] in its sovereign capacity,” even though the deprivation of discrete assets through fines and forfeitures obviously deprives people of core private rights to property—a deprivation that would have triggered independent review under the model that prevailed until the early twentieth century.⁶³ In modern administrative law, property is “a poor relation.”⁶⁴

What does agency adjudication look like today? Under the APA, adjudications are of two types: those which are subject to sections 554, 556, and 557 of Title 5 of the APA and those which are subject only to section 555. Sections 554, 556, and 557 detail procedures for what are known as “formal” adjudications—adjudications subject to section 555 are “informal” and the APA does not impose any particular procedural requirements upon them.⁶⁵

Formal adjudications entail notice of the time, place, and nature of the hearing; the legal authority and jurisdiction for the hearing; and the matters of fact and law asserted.⁶⁶ Parties are also entitled to submit facts, arguments, offers of settlement, and proposals for adjustment.⁶⁷ They may present their case by oral or documentary evidence, submit rebuttal evidence, and conduct

60. See U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) (Congress cannot authorize military tribunals to “adjudicat[e] . . . the guilt or innocence of people”); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.24 (1982) (emphasizing that “the public-rights doctrine does not extend to any criminal matters”).

61. See generally *Atlas Roofing Co. v. Occupational Health & Safety Health Review Comm’n*, 430 U.S. 442 (1977).

62. *Id.* at 450.

63. *Id.*

64. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

65. Michael Asimow has argued that the terms “formal” and “informal,” although widely used in practice and in scholarship, do not fully capture the complexities of the universe of administrative adjudication. In particular, while informal adjudication is largely unconstrained by the APA, the hearings in many schemes of informal adjudication often contain the same procedural elements and protections for private parties as formal adjudication—indeed, some informal adjudication schemes are actually more rigorous than formal adjudication schemes. Asimow therefore classifies “formal” adjudication as “Type A” adjudication and “informal” adjudication as “Type B” adjudication. In this Article, I use the more familiar terminology—but it is indeed important to recognize that informal adjudication, despite not being constrained by the APA, is not therefore unconstrained. See MICHAEL ASIMOW, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 4–5 (2016), <https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-draft-report.pdf> [<https://perma.cc/4RM9-XH6J>].

66. 5 U.S.C. § 554(b) (2012).

67. 5 U.S.C. § 554(c) (2012).

cross-examination.⁶⁸ If the parties cannot reach a consent agreement, they must be provided with a hearing.⁶⁹ At the hearing, an administrative law judge (ALJ), an agency's head, or one (or more) member(s) of a board or commission presides.⁷⁰

ALJs perform some of the functions that a presiding Article III judge would perform: they regulate the course of hearings, rule on offers of proof and evidentiary objections, and dispose of procedural requests.⁷¹ ALJs may issue subpoenas, take depositions or have depositions taken, hold settlement conferences, and suggest the use of alternative means of dispute resolution.⁷²

Prior to the ALJ's decision, parties are entitled to submit proposed findings and conclusions as well as supporting reasons for the proposed findings. The ALJ's decision must include findings and conclusions, and the reasons therefore, on all material issues of fact, law, or discretion presented on the record. Ultimately, the ALJ may make or recommend a decision, but—pursuant to section 706(2)(E)—it must be based on the “whole” record and supported by “substantial evidence.”

After the ALJ has made a decision, a losing party may appeal that decision to the agency, at which point the agency heads or one of their deputies reviews the decision. The agency may consider questions of law and fact anew and overturn the ALJ's decision in full.⁷³ Although losing parties can thereafter seek judicial review of the decision, the agency's findings must be accepted “if supported by substantial evidence on the record considered as a whole,” including the record developed by the initial decision maker.⁷⁴

Formal adjudication is not the only kind of adjudication that agencies perform, nor are ALJs the only agency adjudicators. Much adjudication performed by agencies is “informal” adjudication.⁷⁵ Although informal adjudication is used to decide questions in contexts that are often identical to those in which formal adjudication is used—to dispose of questions involving benefits and licenses, to enforce agency penalties, to resolve claims between private parties—informal adjudication is not subject to the APA's strictures and is performed by administrative judges (AJs).⁷⁶ Again, agencies are not required by the APA to follow any particular procedures at all in informal adjudication—they need not

68. 5 U.S.C. § 556(d) (2012).

69. 5 U.S.C. § 554(c) (2012).

70. 5 U.S.C. § 556(b) (2012).

71. 5 U.S.C. § 556(c) (2012).

72. *Id.*

73. *See* 5 U.S.C. § 557(b) (2012).

74. *See* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 484 (1951) (holding that a reviewing court's assessment of whether an agency's finding was supported by substantial evidence must include consideration of the initial decisionmaker's findings).

75. *See generally* RAYMOND LIMON, OFFICE OF ADMIN. L. JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW A DECADE OF CHANGE 1992–2002, app. C (2002). Limon's data appears to be the most recent data available—he reports that more than 550,000 informal adjudications take place annually.

76. Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 (2016).

provide for the confrontation of witnesses or oral presentation of evidence and they may disallow discovery. Indeed, agencies are not required to make findings of fact in informal adjudication.⁷⁷ As the APA only provides for substantial-evidence review in the context of formal adjudication,⁷⁸ courts nominally use the arbitrary and capricious standard set forth in section 706(2)(A) to review any fact-finding conducted in informal adjudication—but some courts have equated the standards and stated that they perform the same function.⁷⁹

Just how deferential is fact deference? Recall that the “substantial evidence” standard appeared in the Supreme Court’s jurisprudence before it was incorporated into the APA. As the Court put it in the 1938 case of *Consolidated Edison Co. v. NLRB*, substantial evidence meant more than a “mere scintilla of evidence.”⁸⁰ In the years preceding the APA’s enactment, the Court compared the standard to the amount of evidence which would justify a refusal to direct a verdict in a jury trial.⁸¹ Today, factual determinations are upheld if a reasonable agency fact-finder *could have* reached them,⁸² just as legislation is often upheld under the default standard of constitutional review—rational-basis review—if rational legislators *could have* believed that the legislation served a constitutionally legitimate end.⁸³

What accounts for the current scope of judicial deference to administrative agencies along the dimensions of both fact and law? Adrian Vermeule has contended that the pragmatic premises on which *Crowell* rested led to the undoing of Hughes’s attempt at a compromise and thus to the status quo. Vermeule argues that “the implicit question [in *Crowell*] is whether judicial review, at the margin, adds net value to the process of institutional decision-

77. See *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654–55 (1990).

78. See 5 U.S.C. § 706(2)(E) (2012) (emphasis added) (providing that reviewing courts shall hold unlawful and set aside findings “unsupported by substantial evidence in a case *subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute*”).

79. See, e.g., *Amusement & Music Operators Ass’n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1151 (7th Cir. 1982); *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984); *Maryland People’s Counsel v. FERC*, 761 F.2d 768, 774 (D.C. Cir. 1985); *Amusement & Music Operators Ass’n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1151 (7th Cir. 1982); *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984); *Maryland People’s Counsel v. FERC*, 761 F.2d 768, 774 (D.C. Cir. 1985); *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996); *Fields v. U.S. Dept. of Labor Admin. Review Bd.*, 173 F.3d 811, 813 (11th Cir. 1999). As a matter of statutory interpretation, this seems highly dubious at best, but my purpose here is to describe the status quo rather than to evaluate it.

80. 305 U.S. 197, 229 (1938).

81. *NLRB v. Columbian Enameling & Stamping Co.*, 306 US 292, 300 (1939).

82. See, e.g., *Bates v. Colvin*, 736 F.3d 1093, 1098 (7th Cir. 2013) (quoting *Skinner v. Astrue*, 478 F.3d 836, 841 (7th Cir. 2007)) (“Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”).

83. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (emphasis added) (upholding a ban on plastic nonreturnable milk judges because the “Minnesota Legislature *could rationally have decided* that its ban . . . might foster greater use of environmentally desirable alternatives”).

making that begins with agency decision-making,”⁸⁴ and that while Hughes believed that courts had a comparative advantage in law-finding, the Court later concluded that “agencies, at least as compared to courts, were better positioned both to make ultimate value choices relevant to regulatory questions . . . and also to determine facts, causation, and the likely consequences of alternative interpretations.”⁸⁵ Once the Court reached this conclusion, Vermeule argues, deference on questions of both law *and* fact followed logically.

Vermeule paints an attractive picture of the development of deference. Yet the history and present state of fact deference in core-private-rights cases should give us pause. Fact deference in such cases marked a break with what had been a consistent understanding of how facts should be determined and has since spread to contexts in which its early advocates would have been appalled to find it.⁸⁶ From the perspective of those who stand to be deprived of what is rightfully theirs, accurate factual determinations are of urgent concern—facts can be determinative of the outcome of litigation. No less than other kinds of deference that have developed more recently and attracted more critical scrutiny of late, fact deference merits careful scrutiny.

II. A CONSTITUTIONAL CRITIQUE OF FACT DEFERENCE

Although the constitutionality of fact deference has not entirely escaped scholarly attention, the literature examining it is sparse.⁸⁷ This may be because fact deference has long since become entrenched in our administrative jurisprudence—it might seem safe to assume that any constitutional questions were squarely confronted and settled some time ago. Yet the Court in constructing fact deference did not inquire into its constitutionality in any great depth. Indeed, Merrill observes that the Court in the formative years of fact deference seemed to be more concerned with the possible “contamination” of the judicial process by “matters of administration” than by executive usurpation of power constitutionally vested in the courts by Article III.⁸⁸

In what follows, I subject fact deference in core-private-rights cases to a thorough constitutional critique, focusing on Article III’s authorization of “[t]he judicial power” and the Fifth Amendment’s guarantee of “due process of law.”

84. VERMEULE, *supra* note 57, at 13.

85. *Id.* at 214.

86. See E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 12–13 (1928) (arguing that cases involving reparations for past wrongs—for example, workman’s compensation cases—should be resolved only through court proceedings because “public benefit attaches . . . only in the remotest sense (in the same sense in which all administration of civil justice is for the public benefit) to an order which attempts to deal with controversies as to amounts due or losses suffered by reason of past transactions, and which gives pecuniary redress to one of the parties to the controversy”).

87. See *supra* note 1.

88. Merrill, *supra* note 18, at 987–92.

A. Article III Problems

1. Vesting

Article III of the Constitution begins with a clause that vests a particular kind of power in a specialized branch of the federal government. As “[a]ll legislative powers” are vested in “a Congress,”⁸⁹ and “[t]he executive power” is vested in “a President,”⁹⁰ so Article III’s vesting clause mandates that the “[t]he judicial power of the United States shall be vested in a Supreme Court, and such inferior courts as Congress may from time to time ordain and establish.”⁹¹ The separation of powers thus achieved is not absolute—Congress exercises the essentially judicial power of impeachment and the Senate shares in the essentially executive appointment and treaty-making powers. But these exceptions prove the rule—as Chief Justice John Marshall put it, it is generally the case that the “the legislature makes, the executive executes, and the judiciary construes the law.”⁹²

Gary Lawson, Guy Seidman, and Robert Natelson have shown that our Constitution’s content and structure is informed by a theory of *fiduciary government*.⁹³ In private law, fiduciary relationships are created when one person (the fiduciary) is entrusted with control or management of the assets or legal interests of another (the beneficiary) in order to promote the beneficiary’s interests.⁹⁴ As James Iredell explained at the North Carolina ratifying convention, our Constitution is “a great power of attorney” through which a group of beneficiaries (“We the People”⁹⁵) authorize government officials to wield tightly circumscribed powers on their behalf, for their benefit.⁹⁶ The Constitution begins with a preamble that states the purposes of the trust being established

89. U.S. CONST. art. I, § 1.

90. *Id.* art. II, § 1.

91. *Id.* art. III, § 1.

92. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

93. *See, e.g.*, Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191, 193 (2001); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 68–70 (2010); Gary Lawson et. al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014); Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care* (B.U. School of Law, Public Law Research Paper No. 16–29, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822330; GARY LAWSON & GUY SEIDMAN, *A GREAT POWER OF ATTORNEY: UNDERSTANDING OUR FIDUCIARY CONSTITUTION* (2017).

94. *See generally* L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69 (1962); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* (1981); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51 (1981); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991); Frank H. Easterbrook & Daniel Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); LEONARD I. ROTMAN, *FIDUCIARY LAW* (2005); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235 (2011).

95. U.S. CONST. pmb1.

96. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148–49 (Jonathan Elliot ed., 2d ed. 1901) (statement of Att’y Gen. Iredell) [hereinafter ELLIOT’S DEBATES].

and then grants power to federal actors and institutions, as if to fiduciaries of “We the People.”⁹⁷ The Constitution refers to “public trust”⁹⁸ and to public offices “of trust”⁹⁹; Congress is empowered to enact measures that are “necessary and proper” for carrying delegated powers into execution, and to “lay and collect taxes, duties, imposts, and excises” in order to “provide for the . . . general welfare” (as distinguished from the particular welfare of any particular subset of We the Beneficiaries)¹⁰⁰; and the President is required to “take care that the laws be *faithfully* executed.”¹⁰¹ This language all sounds in eighteenth-century fiduciary law.¹⁰² Founding Era writings are saturated with references to government actors as fiduciaries, whether servants, agents, guardians, or trustees, and political philosophers from Locke to Blackstone to Montesquieu whose thought shaped that of the Framers expressed the ideal of government-as-fiduciary.¹⁰³ Given this text and political–philosophical context, Natelson concludes that the Constitution was designed to establish a government “whose conduct would mimic that of the private-law fiduciary.”¹⁰⁴

What follows from the principle of fiduciary government? In private fiduciary law, the delegation of power from beneficiary to fiduciary imposes upon the fiduciary the duty to wield that power responsibly—in good faith, with reasonable care, and in the interest of the beneficiary.¹⁰⁵ It also implicitly prohibits the fiduciary from *sub-delegating* that power elsewhere.¹⁰⁶ Beneficiaries often select fiduciaries to receive the benefit of expert knowledge and judgment that they do not possess—for the fiduciary to delegate that power elsewhere is to deny the beneficiary the benefit of that knowledge and judgment.¹⁰⁷

Article III vests “[t]he judicial power” in the courts because the courts were deemed the best place for it. Alexander Hamilton’s seminal essays on the judiciary in the *Federalist Papers* give expression to a conviction that was

97. Lawson et. al, *The Fiduciary Foundations of Federal Equal Protection*, *supra* note 93, at 429.

98. U.S. CONST. art. VI, cl. 3.

99. U.S. CONST. art. I, § 3, cl. 7 (“Office of . . . Trust”); *id.* art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 2 (“Office of Trust”).

100. U.S. CONST. art. I, § 8, cl. 3. See Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003).

101. U.S. CONST. art II., §3.

102. See Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 52, 52–53 (2010).

103. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* § 149 (Peter Laslett, ed. 1965) (legislative power is a “fiduciary power to act for certain ends”); 1 BLACKSTONE’S COMMENTARIES, *supra* note 13, at 15 (referring to “those who are entrusted by their country to maintain, to administer, and to amend [the laws]”); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748), *reprinted in* MONTESQUIEU/ROUSSEAU 31 (Thomas Nugent trans., Encyclopedia Britannica ed. 1952) (citizens “entrusted” with public employment ought “to live, to act, and to think” for the sake of their fellow citizens alone).

104. Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POLITICS 239, 281 (2007).

105. *Id.* at 255–62 (2007).

106. HAMBURGER, *supra* note 1, at 377–403.

107. *Id.* at 386.

widely shared during the Founding Era—neither the legislative nor the executive branches of government could be trusted to act as the sole judge of the limits of their own powers in contexts where individual rights were at stake. This conviction was in part the product of Lockean theory, according to which individuals are “partial to themselves” and therefore cannot be counted upon to respect the rights of others.¹⁰⁸ Locke identifies the absence of a “known and indifferent” judge to “determine all differences according to the established law” as one of the chief reasons for establishing a government.¹⁰⁹ This conviction was also in part the product of Americans’ lived experience—they had endured abuses of power by both a distant monarch and, after the Revolution, by their own state legislators.¹¹⁰ By vesting the judicial power in courts, staffed by judges who serve during good behavior and earn fixed salaries, Article III ensures that, in general, the government may not proceed against particular members of the public except through neutral forums where a “known, indifferent” judge will measure government actions against the “Supreme Law of the Land.”¹¹¹ Judges cannot sub-delegate the judicial power elsewhere without violating their fiduciary obligations—and thus violating Article III, which imposes those obligations.

It has been argued that the “nondelegation doctrine”—according to which constitutional powers vested in particular branches of the federal government cannot be sub-delegated to other branches—has been dead for generations, if it ever truly had life in our law.¹¹² But the premise on which the nondelegation doctrine rests has never been repudiated. Even as the Court has acquiesced in binding adjudication—that is, adjudication that imposes legal obligations on individuals—and the enactment of binding rules by agencies, it has insisted that the judicial power must be vested in Article III courts¹¹³ and that legislative power must be exercised by Congress.¹¹⁴ Exercises of rulemaking and adjudicative power by agencies have been tolerated only on the “official theory” that no divestment of legislative or judicial power *necessarily* takes place when agencies enact binding rules or reach binding judgments.¹¹⁵

108. LOCKE, *supra* note 103, at §125.

109. *Id.*

110. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 409 (2d ed. 1998) (recounting how, because of attacks on individual rights by state legislatures, “from the outset of the Revolution on through the next decade, the legislatures, although presumably embodying the people’s will, were talked of in terms indistinguishable from those formerly used to describe the magistracy”).

111. U.S. CONST. art. VI, cl. 2.

112. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (urging that “courts should finally shake off the cobwebs of the old jurisprudence and acknowledge that the nondelegation doctrine, and its corollaries for statutory interpretation, are dead”).

113. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63 (1982).

114. *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457 (2001).

115. See Adrian Vermeule, ‘No,’ 93 TEX L. R. 1547, 1557 (2015). For a succinct distillation of the official theory, see *City of Arlington*, 133 S. Ct. at 1873 n. 4 (“These activities take ‘legislative’ and

Is this official theory convincing? The original meaning of “[t]he judicial power” is difficult to pin down—uses of the phrase during the Founding Era are infrequent.¹¹⁶ Yet what we do find is nicely captured by James Wilson’s description of “judicial authority,” which he held to “consist[] in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.”¹¹⁷ According to this understanding, to exercise judicial power was to decide cases involving the core private rights of individuals in accordance with the applicable law and to bind the parties to the judgment reached. That power was given *through* Article III to the courts—the binding character of judgments stems from the authority vested by the law in the courts.¹¹⁸ Deciding cases, in turn, entails interpreting the relevant law, ascertaining the relevant facts, and applying the law to the facts.

With the benefit of this understanding of the judicial power, we can see why the “official theory” fails to capture reality. The availability of subsequent review in a federal court does not change the fact that Article III vests the judicial power *only* in courts to decide cases over which it gives them jurisdiction: “all cases, in law and equity, arising under this Constitution [and] the laws of the United States.”¹¹⁹ The determination of facts, no less than the interpretation of law, is part and parcel of the exercise of judicial power. Requiring judges in core-private-rights cases to defer to facts found by administrative agencies effectively divests the courts of a key component of judicial power—and therefore violates Article III.

2. Independent Judgment

Fact deference not only divests Article III courts of the judicial power—it directly interferes with the exercise of Article III judges’ constitutional duties.

In *Law and Judicial Duty*, Hamburger provides an exhaustive study of what we now call judicial review, and he demonstrates that the judicial power authorized by Article III imposes upon Article III judges a duty of *independent judgment*—a duty on the part of judges to resist the distorting influence of *will*,

‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”)

116. See Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 203 (2001) (“‘The judicial Power’ simply was not a term that received serious attention during the founding period.”) (footnote omitted).

117. See generally James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 771 (1998) (canvassing the sparse evidence and defining “[t]he judicial Power” as the “authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually, to decide the whole case and nothing but the case on the basis of legal reasoning, not political expedience.”).

118. See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 543–48 (2008) (detailing the development of an understanding of the authority of court judgments which was derived from “the court’s jurisdiction and record”).

119. U.S. CONST. art. III, § 2, cl. 1.

understood as extralegal desires or beliefs.¹²⁰ Common-law judges had to steel themselves to resist external pressure from the Crown—that is, the executive branch—because the judiciary was not cleanly separated from the Crown.¹²¹ During the Founding Era, the primary sources of external pressure on judges and threats to the liberty of members of the public were state legislatures.¹²² The Framers incorporated *external* protections for judicial independence into Article III—namely, tenure during good behavior and undiminished salaries—in order to protect the *internal* independence of judges.¹²³

When judges applied the law to the facts found by juries, their adjudication could not be presumed to be tainted by will. Jurors, whatever their idiosyncrasies, were not and are not controlled by any branch of the government—it was for this reason that they were regarded as essential bulwarks against government tyranny during the Founding Era.¹²⁴ While it is true that, as Chief Justice Hughes pointed out in *Crowell*, the Framers contemplated that non-Article III personnel would make factual determinations, those fact-finders were insulated from certain kinds of external pressures.¹²⁵

Although the Court has yet to fully grasp all the implications of the concept of independent judgment, it has grasped certain of those implications. The Court has affirmed that Congress may not effectively transform Article III court judgments into advisory opinions by authorizing the executive branch to review those judgments;¹²⁶ that Congress may not command the courts to reopen final judgments;¹²⁷ and, that Congress may not actually *decide* pending cases by

120. HAMBURGER, *supra* note 118, at 148–79.

121. *Id.* at 148–58.

122. *Id.* at 511–36.

123. See THE FEDERALIST NO. 78, at 405 (Alexander Hamilton) (Gideon ed., 2001) (highlighting the “independence of the judges” as “requisite to guard the Constitution and the rights of individuals” and explaining that “[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence”). The lack of independence of the King’s judiciary from the threat of removal and salary pressures was among the grievances listed in the Declaration of Independence. See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (“He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”).

124. See, e.g., Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 267 (Julian P. Boyd ed., 1958) (describing “trial by jury as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it’s [sic] constitution”); *A Democratic Federalist*, PA HERALD (Philadelphia), October 17, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 74 (Bernard Bailyn ed., 1993) (noting that trial by jury is “our safest resource” against unreasonable searches and expressing doubt that victims can expect “satisfaction . . . from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen”); 3 ELLIOT’S DEBATES 324, 544 (speech of Patrick Henry at the Virginia Ratifying Convention) (describing trial by jury as the “best appendage of freedom,” one “which our ancestors secured [with] their lives and property”).

125. *Crowell v. Benson*, 285 U.S. 22, 52 (1932).

126. *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); *Chicago & S. Air Lines, Inc. v. Waterman SS Corp.*, 333 U.S. 103 (1948).

127. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

directing a verdict for one of the parties.¹²⁸ There is but a small step from the recognition that Congress may not command judges to rule for X in Y case to the recognition that Congress may not command judges to defer to X's beliefs about the law or X's version of the facts in all cases that are similar to Y—both commands require departures from truly independent judgment in reasoning one's way to a decision, even if the former command requires a more obvious departure.

The APA does provide ALJs with several external protections to safeguard their independence. The hiring of ALJs is not supervised by the agency that employs them but, rather, by an independent agency, the Office of Personnel Management (OPM), which ranks candidates based on examination scores, experience, and veteran status and prepares a list of the three highest-scoring candidates from which the agency can select its ALJ.¹²⁹ Even when not presiding over hearings, ALJs are forbidden from performing investigative or prosecutorial functions for their agency.¹³⁰ They also cannot communicate *ex parte* with their fellow agency officials about on-going hearings.¹³¹ Further, ALJs can only be removed for “inefficiency, neglect of duty, or malfeasance in office.”¹³²

Yet these protections do not make ALJs comparable to juries or judges in respect of their insulation from external pressure. Juries may bring their own pre-commitments with them to the courtroom, but they are completely insulated from any tenure or salary pressures. Judges may be subjected to various efforts to influence their decision-making. But unlike ALJs, judges are not supervised by the heads of the agencies who appear before them; their decisions cannot be affirmed, altered, or completely overridden by superior agency officials; and, they cannot be removed by agencies at all, let alone be removed for being absent for extended periods, declining to set hearing dates, or having a “high rate of significant adjudicatory errors.”¹³³

It is difficult to measure the frequency with which external pressures on ALJs are applied or the extent those pressures influence administrative fact-finding. Yet, we do have alarming indications that ALJs are in fact subjected to external pressures against which Article III judges are insulated and that ALJs do not in fact exercise independent judgment in a comparable manner. There is credible evidence that various agencies have used the possibility of removal as a tool for coercing decisions that are consistent with the agency's wishes,¹³⁴ and com-

128. *U.S. v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

129. See VANESSA K. BURROWS, CONG. RESEARCH SERV., ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 1–3 (2010), <http://ssaconnect.com/tfiles/ALJ-Overview.pdf> [<https://perma.cc/B5N7-VEM2>].

130. 5 U.S.C. § 554(d)(1)–(2) (2012).

131. *Id.*

132. 5 U.S.C. § 1202 (2012).

133. See Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 806–08 (2013).

134. See generally Victor G. Rosenblum, *Contexts and Contents of ‘For Good Cause’ as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. NEW ENG. L. REV. 593 (1984).

plaints about threats to independence are well-documented across agencies.¹³⁵ There are also patterns suggesting that ALJs are more deferential than Article III judges to agency decision-making. The Securities and Exchange Commission (SEC), for instance, prevailed against 90% of respondents in contested cases heard by ALJs between October 2010 and March 2015. In the same period, the SEC had a 69% rate of success by federal district court judges.¹³⁶

Nor are ALJs the only agency adjudicators about whose independence we must be concerned. We have noted that most agency adjudication is not formal and is not performed by ALJs but rather by administrative judges (AJs). As Kent Barnett has detailed, AJs lack the protections ALJs enjoy from removal or professional discipline;¹³⁷ are directly hired by their agencies rather than by an independent body;¹³⁸ carry out other duties for the agency outside of hearings;¹³⁹ and, are not prohibited from communicating *ex parte* with their fellow agency officials about on-going hearings.¹⁴⁰ Most AJs, unlike ALJs, are subject to performance appraisals within the agency, which can affect their salaries.¹⁴¹ The opportunities for the imposition of external pressure, whether subtle or overt, are multitudinous.

If indeed agency fact-finding in core-private-rights cases *is* systemically distorted by the influence of external will, judges that defer to that fact-finding cannot be said to be exercising independent judgment. Insofar as Article III requires judges to exercise independent judgment, fact deference requires judges to abdicate a constitutional duty.

135. See, e.g., DONNA PRICE COFFER, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING PROCESS 171 (1985) (reporting that in her 1982 nationwide survey of Social Security ALJs, seventy percent of the respondents reported they had received pressure from the Social Security Administration to deny more claims); Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 4 ADMIN. L. REV. 271, 278 (1994) (reporting that in a 1992 survey of ALJs, 15 percent complained of threats to their independence, and 8 percent identified threats as a frequent problem); Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 52, 63–66 (2013) (detailing actions taken against Social Security ALJs during the Carter administration to intimidate them into denying claims); Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J., May 6, 2015, at 6 (quoting former ALJ Lillian McEwen, who “said she thought the system was slanted against defendants at times” and stated that she “came under fire from [the SEC’s chief ALJ] for finding too often in favor of defendants”). Attempts by state agency personnel to pressure state ALJs are also well-documented. See Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 NAT'L ASS'N ADMIN. L. JUDICIARY 322 (2002) (discussing cases in which state ALJs were disciplined for ruling against their agencies and in favor of private parties).

136. Eaglesham, *supra* note 135.

137. Barnett, *supra* note 76, at 1647.

138. *Id.*

139. *Id.*

140. *Id.* at 1662.

141. *Id.* at 1655. See ADMIN. CONF. OF THE U.S., RECOMMENDATION 92-7: THE FEDERAL ADMINISTRATIVE JUDICIARY 2 (1992) (explaining that ALJs are exempt from the Civil Service Reform Act’s performance appraisal requirements).

B. Due Process of Law Problems

1. The Process of the Courts

It is widely held that the Constitution's guarantees of "due process of law" do not require the government to use the courts when it seeks to deprive individuals of life, liberty, or property. This notion is reflected in our current "procedural" due process of law jurisprudence. The Court frequently discusses due process as if it is an abstract guarantee of procedural fairness rather than a guarantee of (among other things) access to a particular forum—namely, a court of law.¹⁴²

This notion is erroneous. The concept of due process of law was forged in England in the context of opposition to royal prerogative courts—courts staffed not by common-law judges with a duty of independent judgment but by royal officials who were far from neutral concerning the exercise of monarchical power.¹⁴³ It is uncontroversial that the phrase "due process of law" can be traced to the Magna Carta, a series of promises extracted at sword-point from King John by aggrieved barons at Runnymede in 1215. Article 39 of the Magna Carta guarantees that "no free man shall be . . . imprisoned or disseised . . . except by the lawful judgment of his peers or by the law of the land."¹⁴⁴ John notoriously attempted to avoid the regular processes of the common-law courts and to rely instead upon prerogative adjudication to bind his subjects to his will. As evinced by letters patent issued a month before the Magna Carta, Article 39 was designed to thwart John's efforts: John assured his opponents that "he would not arrest or disseise them or their men nor would go against them by force of arms except by the law of the land and by judgement of their peers in his court."¹⁴⁵ Examining this evidence, J.C. Holt—arguably the Magna Carta's most distinguished historian—has concluded that Article 39 was "aimed" primarily against "arbitrary disseisin at the will of the king," against "summary process," and against "arrest and imprisonment on an administrative order."¹⁴⁶ Article 39 thus required the king to proceed against individuals through the common-law courts. Judges would independently evaluate the king's actions to determine whether they were consistent with the whole body of English decisional, statutory, and customary law—collectively, the "law of the land."¹⁴⁷

The principle that the king could act against individuals *only* through the courts with their judges would be enacted in two due process statutes during the

142. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 547 (1985); *Zinermon v. Burch*, 494 U.S. 113, 128 (1990).

143. HAMBURGER, *supra* note 1, at 169–74.

144. WILLIAM SHARP MCKECHNIE, *MAGNA CHARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 375 (1914).

145. J.C. HOLT, *MAGNA CARTA* 208 (George Garnett & John Hudson eds. 2014) [hereinafter *MAGNA CARTA*].

146. *Id.* at 276.

147. See 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 45 (1798) (interpreting *per legem terrae* (law of the land) as "by the Common Law, Statute Law, or Custome of England").

reign of King Edward III. To end Edward's practice of summarily questioning and punishing individuals outside the courts, Parliament enacted a statute that linked due process of law to the courts: "No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law."¹⁴⁸ When this statute failed to restrain Edward, Parliament enacted yet another statute, which specifically indicted the King for bringing subjects "before [his] council" and provided that "no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land."¹⁴⁹ This guarantee of due process was understood to prohibit adjudication outside the courts: When a commission established by Edward seized and imprisoned a man and took his goods, the judges held the commission void, saying that it was "against the law" because it authorized the commissioners "to take a man and his goods without indictment, suit of a party, or due process."¹⁵⁰

The phrases "due process of law" and "law of the land" were given arguably their most influential definition by Lord Edward Coke, the seventeenth-century jurist who invoked the Magna Carta in order to refute the absolutist claims of the Stuart kings. For Coke, the terms "law of the land" and "due process of law" were synonymous, and denoted a concept that was incompatible with adjudication outside the courts. Specifically, Coke held that due process of law entailed both the process of the courts *and* the application of valid substantive law—either in the form of customary rules derived from the common law or acts of Parliament—prior to any deprivation of life, liberty, or property.¹⁵¹ Coke's understanding would be enshrined in the Petition of Right in 1628, and preserved for the instruction of generations of law students on both sides of the Atlantic in the second volume of his *Institutes on the Laws of England*, published in 1642.¹⁵²

148. See MAGNA CARTA, *supra* note 145, at 40 ("due process" was "construed to exclude procedure before the councils or by special commissions and to limit intrusions into the sphere of action of the common-law courts").

149. 42 Edw. 3, c. 3 (1368).

150. Commission, 42 Ass. pl. 5 (1368).

151. See 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1642) (affirming that "due process of the common law" entails, among other things, "presentment before Justices," and translating *per legem terrae* (by the law of the land) as "by the Common Law, Statute Law, or Custome of England").

152. See, e.g., 11 THE WRITINGS OF THOMAS JEFFERSON, at iv (Albert Ellery Bergh ed., 1907) (describing a compilation of the first four volumes of Coke's *Institutes* as "the universal law book of students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or in what was called British liberties"); JAMES HAW, JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA 9 (1997) (noting that John Rutledge called the *Institutes* "almost the foundations of our law"); Donald S. Lutz, *The Intellectual Background to the American Founding*, 21 TEX. TECH L. REV. 2327, 2335–36 (1990) (stating that the *Institutes* were the "standard work" on the common law "for more than a century" and finding that "those with legal training in the [American] colonies were familiar with Coke").

Scrutiny of Founding Era court decisions and legal commentaries yields compelling evidence that the Fifth Amendment's Due Process of Law Clause would have been understood by a reasonably well-informed member of the ratifying public in 1791 to forbid binding adjudication outside of the courts. We find numerous affirmations during the Founding Era that state due process of law and law-of-the-land clauses prohibited *legislative* action that enabled the deprivation of core private rights by dispensing with access to the courts and the proceedings associated with the courts at common law.¹⁵³ Courts held that there could be *no* deprivation of property "unless by a trial by a Jury in a court of Justice, according to the known and established rules of decision derived from the common law, and such acts of the Legislature as are consistent with the constitution."¹⁵⁴ Such affirmations rested upon the premise that government officials could only proceed against individuals in a manner consistent with what Hamburger describes as "ideals about the personnel, structure, and mode of proceeding of . . . courts—ideals that could be summed up as the due process of law."¹⁵⁵ Hamburger notes that the text of the Fifth Amendment is written in the passive voice and is not expressly addressed to courts—it provides generally that "[n]o person shall be deprived of life, liberty, or property, without due process of law."¹⁵⁶

Several of the most distinguished Founding Era jurists affirmed the essential connection between the concept of due process of law and the proceedings of the courts. The notes of St. George Tucker, a Virginia judge who taught constitutional law at William and Mary in the 1790s, include the statement that "[d]ue process of law must then be had before a judicial court, or a judicial

153. See, e.g., ALEXANDER HAMILTON, LETTER FROM PHOCION TO THE CONSIDERATE CITIZENS OF NEW YORK, ON THE POLITICS OF THE DAY 4–5 (New York, Samuel Loudon 1784), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 483 (Harold Y. Syett ed., 1979) (arguing that legislation which stripped loyalists of their citizenship was "contrary to the law of the land" and citing and adopting Sir Edward Coke's definition of the law of the land: "due process of law, that is, by indictment or presentment of good and lawful men, and trial and conviction in consequence."); *Trevett v. Weeden* (R.I. 1786), *described in* JAMES M. VARNUM, THE CASE, TREVETT V. WEEDEN: ON INFORMATION AND COMPLAINT, FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER'S MEAT, IN MARKET, AT PAR WITH SPECIE (1787) (finding that a statute making paper money legal tender, required merchants to accept it at face value, and authorized buyers to bring *qui tam* actions violated the law of the land because the law of the land included a right to trial by jury); *Bayard v. Singleton*, 1 N.C. 5, 7 (N.C. Super. 1787) (holding that a statute which required courts to dismiss suits against purchasers of forfeited Tory estates upon the motion or affidavit of the defendant violated the "fundamental law of the land" because it deprived property owners of "a right to a decision of [their] property by a trial by jury.").

154. *Tr. of the Univ. of N.C. v. Foy*, 5 N.C. (1 Hayw.) 58, 88 (1805).

155. HAMBURGER, *supra* note 1, at 157. See also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1722 (2012) (noting that Madison initially proposed that what would become the Fifth Amendment should be inserted into Article I, Section 9, which enumerates limits on congressional power, and that there is no reason to think that it ceased to be applicable to Congress when Madison's organizational plan was rejected and the amendments were listed separately).

156. HAMBURGER, *supra* note 1, at 255.

magistrate.”¹⁵⁷ In his highly regarded and influential *Commentaries on American Law*, Chancellor James Kent of New York defined due process of law as “law in its regular course of administration through the courts of justice.”¹⁵⁸ Finally, Supreme Court Justice Joseph Story in his *Commentaries on the Constitution* wrote that due process of law means “due presentment or indictment, and being brought in to answer thereto by due process of the common law,” and “affirms the right of trial according to the process and proceedings of the common law.”¹⁵⁹

The Fifth Amendment’s Due Process of Law Clause channels adjudication in cases involving federal deprivations of core private rights to life, liberty, or property to Article III courts. Recall that federal judicial power is, subject to express and narrow exceptions, vested only in “one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish.”¹⁶⁰ Binding adjudication always entails the exercise of judicial power. Thus, if due process of law entails access to the courts in such cases—and it does—it entails access to Article III courts, as no other courts are vested with the power to decide them.

The Supreme Court has long since concluded that due process of law *does not* necessarily require adjudication in Article III courts. In *Mathews v. Eldridge*, the Court articulated a three-part balancing test for determining what procedures “must be imposed upon administrative action to assure fairness.”¹⁶¹ The *Mathews* test requires courts reviewing the constitutionality of agency procedures to consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁶² Far from precluding adjudication outside the courts, *Mathews* embraces the reality of such adjudication, even as it insists upon a bare minimum of “fairness.”

The *Mathews* test may well be a constitutionally permissible means of resolving cases like that in which it was initially deployed—a case involving the denial of Social Security benefits, which fall squarely within the category of privileges. But it falls short of what the Constitution requires in core-private-rights cases. As we have seen, examination of the constitutional text, enriched by the publicly available context in which it was enacted, yields the conclusion that “due process of law” entails adjudication in Article III courts when core

157. 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 203 (1803).

158. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (1826).

159. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833).

160. U.S. CONST. art. III, § 2, cl. 1.

161. 424 U.S. 319, 348 (1976).

162. *Id.* at 335.

private rights are at stake. The guarantee of judicial process cannot be balanced away.

2. Impartial Adjudication

The meaning of “due process of law” has been the subject of more intense controversy than that of perhaps any other constitutional text.¹⁶³ Yet the proposition that due process of law entails impartial adjudication is widely accepted. The venerable common-law maxim *nemo iudex in sua causa*—no man should be judge in his own case—has been affirmed throughout Anglo-American jurisprudence as a commitment to impartial adjudication and was associated with the concept of due process of law throughout the Founding Era.¹⁶⁴ Impartial adjudication remains a component of our due process jurisprudence today.¹⁶⁵

163. For a sampling of views, see, for example, CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* ch. 18 (1997); Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 *Geo. J.L. & Pub. Pol’y* 73 (2016); Matthew J. Franck, *What Happened to the Due Process Clause in the Dred Scott Case?: The Continuing Confusion Over Substance Versus Process*, 4 *AM. POL. THOUGHT* 120 (2015); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672 (2012); Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 *HARV. J.L. & PUB. POL’Y* 283 (2012); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408 (2010); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 *EMORY L.J.* 585 (2009); Andrew T. Hyman, *The Little Word “Due,”* 38 *AKRON L. REV.* 1 (2005); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *CONST. COMMENT.* 315 (1999); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 *VA. L. REV.* 493 (1997); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 *WIS. L. REV.* 941; Frank H. Easterbrook, *Substance and Due Process*, 1982 *SUP. CT. REV.* 85; Stephen F. Williams, *“Liberty” in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers’ Intentions*, 53 *U. COLO. L. REV.* 117 (1981); Raoul Berger, *“Law of the Land” Reconsidered*, 74 *NW. U. L. REV.* 1 (1979); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of the Due Process of Law*, 19 *AM. J. LEGAL HIST.* 265 (1975); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 *HARV. L. REV.* 366 (1911).

164. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *YALE L.J.* 455, 479 (1986) (showing that impartial adjudication “was considered a crucial element of procedural justice by the common law, by those that established the law of the colonies, and . . . by the framers of the United States Constitution”). At common law, *nemo iudex in sua causa* was associated with Sir Edward Coke’s opinion in *Dr. Bonham’s Case*. See *Dr. Bonham’s Case* (1610) 77 *Eng. Rep.* 638 (C.P.) 652; 8 *Co. Rep.* 107a, 118a (Coke, C.J.). For a discussion of how the principle was applied at common law, see D.E.C. Yale, *Iudex in Propria Causa: An Historical Excursus*, 33 *CAMBRIDGE L.J.* 80 (1974).

165. See *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905–06 (2016) (holding that due process of law requires disqualification of a judge who, in an earlier role as a prosecutor, had significant involvement in making a critical decision because as a prosecutor he was likely “psychologically wedded” to his earlier position and “unconstitutional potential for bias exists”); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009) (finding that a sufficiently high “probability of actual bias” on the part of the adjudicator deprives litigants of due process of law); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (“The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the deliberative process [and] deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.”); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a

The promise of impartial adjudication is squarely implicated by fact deference. If agency fact finders *cannot* be presumed to be impartial, judges that treat their determinations as presumptively valid effectively tilt the scales of justice in favor of executive power.

The Supreme Court has thus far been unreceptive to challenges to administrative adjudication that rest upon concerns about bias. One example is *Withrow v. Larkin*,¹⁶⁶ which involved a state administrative board that was charged with policing medical misconduct. The board had the power to investigate licensed physicians, bring charges against them, adjudicate the charges after a hearing, and suspend licenses as a sanction. A doctor challenged on due process grounds both the board's ability to preside over a non-adversary, investigatory hearing and its ability to preside over a later adversary, merits hearing. The Court rejected "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication," largely on pragmatic grounds.¹⁶⁷ The Court reasoned that a constitutional rule barring combination of administrative functions "would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity."¹⁶⁸

Yet the Court's inquiry into bias in *Withrow* was narrowly concerned with whether the combination of investigative and adjudicative functions presented a risk of *actual* bias—it did not factor the *appearance* of bias into its analysis.¹⁶⁹ In subsequent cases focusing on judicial bias, the Court has considered how adjudicators' selection and the prospect of their removal might compromise their impartiality and has emphasized that not only a sufficiently high risk of actual bias, but also the appearance of bias can deprive individuals of due process.

Consider the 2009 case of *Caperton v. Massey Coal*.¹⁷⁰ In *Caperton*, the president of A.T. Massey Coal Co., Inc., which was then appealing an unfavorable verdict, had contributed three million dollars to have Justice Brent Benja-

person to an impartial and disinterested tribunal in both civil and criminal cases."); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972) (finding that due process of law means that a defendant is "entitled to a neutral and detached judge in the first instance" even if an impartial adjudicator is available on appeal); *In re Murchison*, 349 U.S. 133, 134 (1955) (referring to "the due process requirement of an impartial tribunal"); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.").

166. *Withrow v. Larkin*, 421 U.S. 35 (1975).

167. *Id.* at 47.

168. *Id.* at 50 (quoting *Richardson v. Perales*, 402 U.S. 389, 410 (1971)). Similar pragmatic reasoning permeates *FTC v. Cement Institute*, 333 U.S. 683, 701 (1948) (holding that a due process challenge, if sustained, "would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act").

169. See *Withrow*, 421 U.S. at 55 ("[N]o specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing.").

170. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

min elected to the West Virginia Supreme Court of Appeals. Hugh Caperton, who had filed suit against Massey for tortious interference, fraudulent misrepresentation, and fraudulent concealment, motioned for Justice Benjamin to recuse himself from consideration of the appeal. Justice Benjamin refused, claiming that he had no actual bias.

In a 5-4 decision, the Supreme Court held that the Due Process of Law Clause of the Fourteenth Amendment required Justice Benjamin's recusal. The Court emphasized that Massey's president knew that the appeal was pending; that the election was decided by fewer than fifty thousand votes; and, that the president's contributions "had a significant and disproportionate influence in placing the judge on the case."¹⁷¹ For these reasons, the Court found "a serious, objective risk of actual bias that required recusal," as it appeared that the defendant "ch[ose] the judge in [its] own cause."¹⁷² Importantly, the Court also highlighted the fact that states, following the American Bar Association's model code of judicial conduct, have reformed their codes of judicial conduct to eliminate "even the appearance of partiality," and the Court stated that such reforms "serve to maintain the integrity of the judiciary and the rule of law."¹⁷³

Seven years later, the Court made plain that *Caperton* was not a one-off. In *Williams v. Pennsylvania*,¹⁷⁴ the Court held that former Pennsylvania Chief Justice Ronald Castille, who as a district attorney had approved a trial prosecutor's request to seek the death penalty for Terrance Williams, was constitutionally required to recuse himself from review of Williams's habeas petition. The Court applied the *Caperton* standard—a "likelihood of bias" that is "too high to be constitutionally tolerable"—and reiterated that "the appearance of neutrality is . . . an essential means of ensuring the reality of a fair adjudication."¹⁷⁵ Interestingly, the Court drew upon *Withrow*, in which it had held that the combination of investigative and adjudicative functions did not *necessarily* create an unconstitutional risk of bias. To borrow from the opinion of the Court in *Withrow*, it may be that the Court has since developed a more "realistic appraisal of psychological tendencies and human weakness."¹⁷⁶

If the indirect impact of a corporate defendant's disproportionate contributions on a judge's election campaign can create an unconstitutional potential for bias, it is hard to see why the fact that the agencies that appear before ALJs can

171. *Id.* at 886.

172. *Id.*

173. *Id.* at 889; see MODEL CODE OF JUDICIAL CONDUCT, Canon 2 (AM. BAR ASS'N 2004) ("A judge shall avoid impropriety and the appearance of impropriety.").

174. *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

175. *Id.*

176. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). See also *United States v. Herrera-Valdez*, 826 F.3d 912, 918 (7th Cir. 2017) (following *Williams* and concluding that a judge's participation in an individual's deportation case as District Counsel for the Immigration and Naturalization Service (INS) "would lead a reasonable, well-informed observer to question his impartiality" in adjudicating that individual's illegal reentry prosecution and sentencing, despite the fact that the INS is a "complex bureaucrac[y]" and the precise nature of the judge's participation "is open to speculation").

initiate removal proceedings against ALJs would not. The potential for bias in the case of AJs is yet stronger because AJs are selected by the agencies that appear before them and can be removed at will. In the case of both ALJs and AJs, the appearance of bias is considerable. As Bernard Segal, distinguished Supreme Court litigator and former President of the American Bar, long ago observed:

One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder.¹⁷⁷

Also significant is the Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,¹⁷⁸ in which the Court held that the use of "tiered" tenure protection (that is, two layers of tenure protection between the President and the officer at issue) for inferior executive officers violated Article II's vesting clause. In holding that scheme unconstitutional, the Court emphasized that the power to remove officials is key to establishing executive control over officers because "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."¹⁷⁹ We have seen that AJs *do* hold their offices at the pleasure of others, and that while ALJs are better protected against external pressure, the extent of that protection is not comparable to that of juries or Article III judges. If indeed AJs or ALJs cannot be depended upon to maintain an attitude of independence against the will of their superiors, defendants in administrative proceedings certainly cannot depend upon impartial fact-finding from them.

Finally, many of the leading cases in which the Court has held that the Constitution's promise of impartial adjudication has been broken involve adjudicators with pecuniary interests in the outcome of their decisions. In *Tumey v. Ohio*,¹⁸⁰ the Court held that an arrangement pursuant to which the mayor of a town adjudicated violations of Ohio's alcohol-prohibition statute and received a portion of fees assessed deprived defendants of due process of law. In *Ward v.*

177. Bernard G. Segal, *The Administrative Law Judge*, 62 A.B.A. J. 1424, 1426 (1976); see also Victor W. Palmer, *The Evolving Role of Administrative Law Judges*, 19 NEW ENG. L. REV. 755, 798 (1984) (arguing that "[t]he fact that agency employers are often named litigants or interested parties in the proceedings [that] ALJs conduct, prevents full public confidence in the impartiality and the fairness of those proceedings").

178. *Free Enter. Fund v. Pub. Account. Oversight Bd.*, 561 U.S. 477 (2010).

179. *Id.* at 493 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935)).

180. *Tumey v. Ohio*, 273 US 510 (1927).

Village of Monroeville,¹⁸¹ the Court held that due process of law required a mayor to recuse himself from certain ordinance- and traffic-violation cases when the assessed fees were a significant portion of the village's revenue—even though they did not augment the mayor's income. Recall that AJs are subject to performance reviews and that those reviews may affect their salaries. While some AJs may be able to “hold the balance nice, clear and true between the State and the accused,”¹⁸² as the Court in *Tumey* put it, “the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.”¹⁸³ It is easy to see how the salary control that a given agency has over the AJ before which it appears as a party could “offer a possible temptation to the average [person] as a judge.”¹⁸⁴

Further, even if ALJs and AJs *can* be presumed to be impartial, the rules governing their proceedings are slanted in favor of agencies.¹⁸⁵ Even in formal adjudications, agencies need not allow discovery to private parties, whereas they can demand testimony and documents from private parties even before bringing charges.¹⁸⁶ Hearsay evidence is admissible—agencies need not, and generally do not, adhere to the Federal Rules of Evidence.¹⁸⁷ Because, as Hamburger notes, binding administrative adjudications “consist almost entirely of cases charging defendants with regulatory violations,” these relaxed standards of evidence produce “a distinctly biased effect” even when those are not overtly slanted towards agencies.¹⁸⁸ The resulting record is infected by that bias—deference to that record carries that bias into subsequent Article III adjudication. This, too, deprives individuals of due process of law.

III. A PATH FORWARD

The constitutional case against fact-deference in core-private-rights cases is strong. Yet to identify this fact deference as unlawful is insufficient—an alternative judicial approach is required. I propose jettisoning the “substantial evidence” standard in core-private-rights cases—and *only* in core-private-rights

181. *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972).

182. *Tumey*, 273 U.S. at 532.

183. *Id.*

184. *Id.*

185. See HAMBURGER, *supra* note 1, at 249 (“Whereas constitutional law has long given defendants evidentiary protections, the administrative tribunals . . . flip[] these around to give the government special advantages.”).

186. *Id.* at 249–50.

187. *Id.* at 249. See *Richardson v. Perales*, 402 U.S. 389, 400 (1971) (upholding an administrative finding of nondisability that relied upon hearsay written reports, reasoning that “strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent”). For a helpful overview of agency approaches to evidence admission, see William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 831–36 (2005).

188. HAMBURGER, *supra* note 1, at 249.

cases. Instead, reviewing courts should perform independent review of agency fact-finding and facts should be finally determined by an independent, impartial fact-finder, without deference to agencies. Below, I explain what would need to happen before my alternative could be adopted.

A. Refining Core Private Rights

The historical distinction between core private rights on the one hand and privileges and public rights on the other has become muddled over the years, with *Atlas Roofing* being perhaps the most vivid illustration of how far it has departed from its original contours. Instead of categorically insisting that binding adjudication of core-private-rights cases takes place only in federal courts, the Court has developed a balancing test that weighs Article III interests (fairness to litigants and preserving the independence of the judiciary) against government interests (utilizing the expertise of administrative agencies and promoting efficient resolution of cases) to determine whether such cases must be adjudicated in Article III courts or be handled within the political branches.¹⁸⁹ But the difference between core private rights and public rights still matters in our jurisprudence.

As noted above, courts continue to apply the independent model of review in cases where core private rights to *life and liberty* are at stake.¹⁹⁰ Further, as a general matter, only Article III courts may exercise any judicial power on behalf of the federal government.¹⁹¹ Outside of the context of the federal territories, the District of Columbia, and the military, Congress cannot authorize any non-Article III tribunal to adjudicate a criminal case without the consent of the defendants.¹⁹²

189. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (stating that “the public rights doctrine reflects simply a pragmatic understanding” of the separation of powers); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (“In determining the extent to which . . . a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules . . . [S]uch rules might . . . unduly constrict Congress’ ability to take needed and innovative action pursuant to its Article I powers.”); *Stern v. Marshall*, 564 U.S. 462, 493, 503 (2011) (noting “varied formulations of the public rights exception” and considering whether any of several public-rights exceptions apply before concluding that a non-Article III bankruptcy court may not enter final judgment on a state law counterclaim “that is not resolved in the process of ruling on a creditor’s proof of claim”).

190. Nelson, *supra* note 12, at 618 (“Few people believe that Congress could validly establish an administrative tribunal to conduct the initial adjudication of . . . federal crimes, with federal courts being obliged to enforce the resulting sentences as long as the agency’s decisions are supported by substantial evidence . . . and are not tainted by errors of law.”).

191. See *Stern*, 564 U.S. at 484 (“Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III.”).

192. See Nelson, *supra* note 12, at 576 (“Whether nineteenth-century jurists were right or wrong to hold that Article III did not extend to military justice, and that Congress could set up court systems for the District of Columbia and federal territories without implicating the judicial power of the country as a whole, these holdings had special textual rationales that did not spill over into other areas.”); U.S. CONST. art. I § 8, cl. 14 (empowering Congress “[t]o make Rules for the Government and Regulation of

Core private rights to *property* are another matter. Agencies can find private businesses guilty of regulatory violations and force them to pay crippling fines—depriving them of property without the exercise of authorized judicial power or the due process of law in the courts. Following *Atlas Roofing*, such deprivations are treated as public-rights cases, even though the deprivation of discrete assets through fines and forfeitures obviously deprives people of core private rights to property. Although judicial review is available at the appellate stage, courts are required to defer to the findings that support the agency’s initial determinations that violations have taken place. For reasons discussed above, this fact deference violates Article III and deprives defendants of due process of law.

Jettisoning fact deference in core-private-rights cases would not entail transforming current doctrine beyond recognition. It *would* entail placing fines and forfeitures in the category of actions that implicate core private rights and cleanly separating public rights from core private rights to life, liberty, *and* property. Only then can the distinction between core private rights and public rights serve as a reliable means of separating those governmental deprivations constitutionally required to take place through the courts from those that need not.

B. Reclaiming Old Property

Administrative law’s treatment of core private rights to property is an outlier in our jurisprudence more generally. Government-created benefits—which Charles Reich famously termed “new property” and which would have been considered “privileges” under the independent model of judicial review—receive less protection than core private rights in numerous constitutional contexts.¹⁹³ The federal government and state governments can distribute subsidies “according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”¹⁹⁴ Statutes repealing and eliminating future benefits do not effectuate compensable Fifth Amendment takings.¹⁹⁵ While statutes depriving identifiable classes of people of benefits are subject to

the land and naval Forces”); U.S. CONST. art. IV, § 3, cl. 2 (empowering Congress to “make all needful Rules and Regulations respecting” federal territories); U.S. CONST. art. I, § 8, cl. 17 (empowering Congress “[t]o exercise exclusive Legislation in all Cases whatsoever” over what became the District of Columbia).

193. See Charles Reich, *The New Property*, 73 YALE L.J. 733, 786–87 (1964) (arguing that “[i]t is time to see that the ‘privilege’ concept . . . as applied to wealth dispensed by government, is not much different from the absolute right of ownership that private capital once invoked to justify arbitrary power over employees and the public” and contending that “only by making . . . benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity”); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 958 (2000) (recounting that “when the courts have been confronted with claims that ‘new property’ interests such as Social Security or welfare benefits are entitled to substantive constitutional protection, those claims have been rejected out of hand”).

194. *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 588 (1998).

195. *Bowen v. Gilliard*, 483 U.S. 587, 597, 608 (1987).

scrutiny under the Bill of Attainder and Ex Post Facto Clauses of Article I, the Court has emphasized that “the mere denial of a noncontractual government benefit” does not impose “the burdens historically associated with punishment.” Thus, denial of a noncontractual government benefit merits less rigorous scrutiny than deprivations of core private rights to property.¹⁹⁶ In the context of administrative law, however, new and old property receive the same level of protection.

This is not solely a theoretical point about the integrity or coherence of our jurisprudence. The fact that courts have long given old property a pride of place in various constitutional contexts reveals that they are *practically capable* of doing so in administrative contexts. Moreover, as they have in constitutional contexts, courts could give pride of place to old property without abandoning benefits entirely to the discretion of the political branches; benefits could continue to receive substantial-evidence review. Reclaiming old property within administrative law would not destabilize our jurisprudential status quo.

C. Restoring the Independent Fact-Finder

Much of the language in the APA was written in deliberately ambiguous terms so that both sides of often heated debates could later claim that the language should be construed in accordance with their interests.¹⁹⁷ Yet “substantial evidence” does not admit of an interpretation that authorizes independent review of agency fact-finding—we have seen that the phrase was borrowed from case law that expressly departed from independent review.¹⁹⁸ The conclusion is inescapable: section 706(2)(E) cannot constitutionally be applied in core-private-rights cases. The question thus arises: Who should determine the facts in such cases?

There is strong evidence that juries are required by both Article III and the Fifth Amendment’s Due Process of Law Clause to serve as fact-finders in core-private-rights cases. English courts and writers generally understood the “law of the land” clause of Magna Carta to forbid the government from imposing sanctions upon individuals except pursuant to a jury verdict or

196. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

197. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 *Nw. U. L. Rev.* 1557, 1665 (1996) (“Ambiguity was essential to reaching agreement [Because] [t]he parties could not reach agreement on specific, clear provisions . . . the parties intentionally included ambiguous provisions that courts would later interpret. Each party then hoped that the courts would resolve the ambiguities in the party’s favor.”). For a valuable elucidation of how such ambiguity is both common and rational, given the incentives legislators face, see VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 29 (2016).

198. Shepherd, *supra* note 197, at 1659–60 (detailing how by 1945 the American Bar Association, which had championed broad judicial review, “no longer sought to permit a reviewing court to reweigh evidence under the ‘preponderance of the evidence’ standard Instead, the bar now contented itself with the . . . ‘substantial evidence’ rule, which [ABA Chairman Carl] McFarland conceded merely confirmed existing case law.”).

standing law,¹⁹⁹ and certain colonial enactments spoke of prohibiting the imposition of sanctions except by a jury verdict or in accordance with a “known” or “sufficiently published” law adopted by the colonial legislative body.²⁰⁰ Outside of the limited context of chancery, maritime and other equitable courts, jury trials were treated as prerequisites to individualized deprivations of life, liberty, or property in the late-eighteenth and early-nineteenth centuries.²⁰¹

Yet even if juries are *not* constitutionally required to serve as fact-finders in core-private-rights cases, we have seen that judges cannot broadly defer to the factual determinations of ALJs and AJs in such cases. The constitutional case advanced here against fact-deference to agencies in core-private-rights cases turns not on the absence of juries in administrative proceedings but upon the absence of independence and impartiality on the part of the fact-finders to whom judges defer. It does not preclude arrangements pursuant to which appellate courts review factual findings made initially by agency officials—but any such findings cannot command judicial deference.

IV. POTENTIAL OBJECTIONS

Fact deference initially emerged in a limited context and eroded the core of the judicial power and due process of law only gradually. By the time fact deference was squarely challenged, it was regarded as entrenched and legitimated through—what, upon careful examination, turns out to be—unconvincing analogies. Its constitutionality has *never* been confronted by the Supreme Court in a manner that does justice to the constitutional concerns canvassed here.

Yet, fact deference is now a settled component of our administrative jurisprudence, and my proposal to scale it back must grapple with pragmatic concerns: among them, that too much of what the administrative state does depends upon it; that attacks upon it are effectively foreclosed by precedent; and, that dislodging it would deny us the benefit of agency expertise.

A. Scaling Back Fact Deference Will Bring Down the Administrative State

The decisions in which the Court has confronted Article III and due process of law problems with agency decision-making rely heavily upon pragmatic reasoning. I have already discussed the reasoning of *Withrow v. Larkin*. As characterized by Vermeule, *Withrow* denied that a tribunal that combined prosecutorial with adjudicative functions necessarily presented due process problems, “essentially, on the ground that the administrative state could not go on other-

199. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 312–13 (2001).

200. See Raoul Berger, “*Law of the Land*” Reconsidered, 74 Nw. U. L. Rev. 1, 8 (1979) (citing Massachusetts and Rhode Island provisions).

201. See Chapman & McConnell, *supra* note 155, at 1711 (finding that during the Founding Era, the right to a jury trial was understood by American judges”).

wise.”²⁰² Such reasoning can be found in numerous cases in our administrative jurisprudence, and pragmatic concerns may influence the ultimate decisions in cases even where those concerns are not explicitly set forth in opinions.

The scope of my proposal is limited. It would not affect judicial review of agency rule-making, or the content of rule-making. Nor would it affect judicial review of adjudications that involve benefits. Because the caseload of ALJs has been increasingly dominated by the adjudication of benefits and because such adjudications neither involve exercises of the judicial power nor deprive individuals of core private rights, much of what ALJs do would be unaffected by a shifting of core-private-rights cases from administrative to judicial proceedings.²⁰³ Nor would this proposal prohibit the imposition of monetary sanctions for regulatory violations.

That being said, given that most major administrative regulatory programs contain some type of monetary sanction and that adopting my proposal would entail shifting all cases involving monetary sanctions to the federal courts, the question arises what kind of expansion of the federal judiciary would have to take place in order to make my proposal a reality. Answering this question in full would entail determining precisely how much agency adjudication involves the imposition of fines or other binding legal obligations that implicate core private rights. It seems doubtful, however, that the direct costs of any necessary expansion would be prohibitive. The SEC employs five ALJs; the Occupational Safety and Health Review Commission employs 12; the Environment Protection Agency employs four.²⁰⁴ These are not overwhelming numbers of ALJs, particularly when one considers the breadth of the regulatory authority wielded by the agencies that employ them. The agency that employs the most ALJs is the Social Security Administration (SSA), which employs more than 1,500, but the dockets of SSA ALJs are dominated by benefits cases, which I do not propose channeling into federal courts.²⁰⁵ If the federal judiciary would have to be expanded to facilitate independent fact-finding in Article III courts in core-private-rights cases, the direct costs would likely be modest.

B. Scaling Back Fact Deference Is Effectively Foreclosed by Precedent

The precedents that stand in the way of scaling back fact deference are not as intimidating upon closer examination as they might at first appear. Precedents rejecting due process challenges grounded in impartiality look vulnerable after *Caperton*, *Williams*, and *Free Enterprise*. The distinction between core private

202. VERMEULE, *supra* note 57, at 63.

203. See Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1, 59-60 (1997) (describing shift in case load from regulation to benefits).

204. For the list of federal agencies utilizing ALJs or Administrative Judges, see *Administrative Law Judges*, OPM.GOV (Mar. 2017), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [<https://perma.cc/LRW3-KQQJ>].

205. *Id.*

rights and public rights still has significance, and refining that distinction to exclude non-Article III adjudication in core-private-rights cases involving property would not entail eliminating that distinction—although it would entail rejecting *Atlas Roofing*'s categorization of cases involving fines assessed for regulatory violations as public-rights cases.

The Court has long affirmed that due process of law need not entail *judicial* process. Yet some of the leading cases in which it has done so did not involve core private rights but, rather, “privileges.” *Mathews*, for instance, concerned social security benefits. This proposal does not exclude the possibility that greater judicial protection than that which was afforded privileges during the heyday of the independent model of judicial review could be afforded in the context of the denial of benefits—it only insists that such increased protection not produce a diminution of protection for core private rights. Courts could continue to apply the *Mathews* test to evaluate agency deprivations of benefits while insisting upon judges, courts, and independent, impartial fact-finders before individuals could be deprived of core private rights.

C. Scaling Back Fact Deference Will Deny Us the Benefit of Agency Expertise

We have seen that fact deference was defended from its earliest days on the grounds that agency officials have an expertise which judges and juries lack. Today, the federal regulatory apparatus is far more extensive and its operations far more complex. We must ask: Does not such complexity call even more urgently for expertise? And, even if agency fact-finders are less than independent or impartial, does not their expertise make it reasonable for judges to defer to them anyway?²⁰⁶

Agency officials are no doubt far more familiar with their agencies' mission and activities, as well as the regulations that authorize them and which they are charged with administering, than are judges or laypeople.²⁰⁷ But agency officials cannot be assumed to be superior fact-finders in cases involving potential regulatory violations, in view of concerns about independence and impartiality. The benefits of agency officials' expertise might be outweighed by the costs of dependence and partiality, which could systematically distort fact-finding and lead to less-accurate determinations overall. Trial by jury was considered vital by those who ratified the Constitution primarily because it protected citizens against a disposition on the part of government adjudicators to favor government programs and officials, not because jurors were thought to be experts in

206. See VERMEULE, *supra* note 57, at 122 (arguing that “the architects of the administrative state, acting with eyes open, severely compromised the *nemo iudex* principle . . . to obtain other overbalancing goods”).

207. Concern about jurors' capacity to grasp complex facts is not new, nor does it only apply to cases involving administrative action. See LEON GREEN, *JUDGE AND JURY* 353 (1930) (“As a scientific method of settling disputes the general verdict rates little higher than the ordeal, compurgation or trial by battle.”).

the subject matter of regulations.²⁰⁸ This justification for the determination of facts by independent, impartial fact-finders is not undermined by agency fact-finders' expertise.

Further, it may be that the benefits (if any) of agency expertise in the context of fact-finding could be harnessed without the costs we have canvassed. If there are reasons to believe that agency officials' views concerning factual questions are good evidence of the right answer to those questions, judges could choose to take them into account, just as they might take into account a law review article written by distinguished scholars concerning the interpretation of a particular constitutional provision.²⁰⁹ What judges could *not* do is defer to those determinations simply because they were made by agency officials, as they do at present.²¹⁰

It is thus possible that in core-private-rights cases, ALJs could preside over proceedings that are similar to those which are used in formal adjudication at present but which *do not bind individuals* prior to binding adjudication by an Article III court. Indeed, in *Executive Benefits Insurance Agency v. Arkison*,²¹¹ the Court affirmed the ability of non-Article III actors to make non-binding preliminary determinations of both law and fact where those determinations were independently reviewed by an Article III court. Factual findings reached by ALJs could be taken into account, but Article III fact-finders would not be obliged to defer to any record. We need not necessarily choose between agency expertise and independent, impartial fact-finding—non-binding agency fact-finding followed by binding Article III adjudication which includes an independent, impartial determination of facts might give us both.

CONCLUSION

Like the purloined letter, the unlawfulness of fact deference in core-private-rights cases has been hidden in plain sight.²¹² It seems to have escaped detection in part because of a judicial assumption that there could not be

208. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 664, 671–72 (1973) (“[T]he general intention of antifederalist agitation for mandatory jury trial was to achieve results . . . that would not be forthcoming from trials conducted by judges alone [Antifederalists believed] that important areas of protection for litigants . . . would be placed in grave danger unless . . . juries [sat] in civil cases.”).

209. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1291 (1997).

210. See *id.* at 1278 (distinguishing between *legal* deference, which “gives weight to the views of another actor simply because of that actor’s status,” and *epistemological* deference, which “gives weight to the views of another actor because there are reasons to believe that that actor’s views are good evidence of the right answer”). The fact deference I have criticized is a form of legal deference. My critique does not apply to epistemological deference.

211. 134 S. Ct. 2165, 2168 (2014). Such arrangements are not implicated by the constitutional critiques advanced here.

212. Edgar Allen Poe, *The Purloined Letter*, (1844), in *SELECTED WRITINGS OF EDGAR ALLEN POE* 208–25 (Edward H. Davidson ed., 1956).

anything amiss with a doctrine that has been with us since the modern administrative state arose. Surely, earlier courts would have noticed!

We have seen that any such assumption is unwarranted. The contradictions between fact deference in core-private-rights cases and the letter of the “Supreme Law of the Land” are profound—and profoundly troubling.²¹³ So too are their consequences. When judges defer to records produced by agency officials, they place people in a condition that is, as Hamburger puts it, “a defining characteristic of the state of nature”—a condition in which no “known, indifferent judge” is there to ensure that the government acts through law when it proceeds against them.²¹⁴ As Hamburger observes, “[i]n Locke’s theory, revolution and judicial redress were alternatives,” and “when the government acted as judge in its own case, it seemed that the people could legitimately turn to revolution.”²¹⁵ The possibility that fact deference may not only be threatening cherished rights but eroding the very legitimacy of our legal order is frightening, but it is one that must be confronted.²¹⁶

Fortunately, judicial redress remains realistic. Accepting the constitutional critique and implementing the proposal set forth above would not destabilize our administrative jurisprudence. No fundamental doctrinal transformation is required in order to jettison fact deference in core-private-rights cases—indeed, jettisoning such deference would render existing doctrine more coherent. The costs of implementing my proposal would be modest; the benefits to our constitutional order, massive. In order that our administrative law may deliver on the promise of “a fair trial in a fair tribunal” in every case in which constitutionally protected rights are at stake, the courts should embrace it.²¹⁷

213. See U.S. CONST. art. VI, cl. 2.

214. HAMBURGER, *supra* note 1, at 338.

215. *Id.* at 339.

216. See Solomon, *supra* note 135, at 124 (“If [agency] decisions are continually considered to be unfair, the reputation of every agency and the entire government may be jeopardized.”).

217. *In re Murchison*, 349 U.S. 133, 136 (1955).