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Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law

Thomas W. Merrill
Columbia Law School, tmerri@law.columbia.edu

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ARTICLE

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*Thomas W. Merrill**

ABSTRACT

American administrative law is grounded in a conception of the relationship between reviewing courts and agencies modeled on the relationship between appeals courts and trial courts in civil litigation. This appellate review model was not an inevitable foundation of administrative law, but it has had far-reaching consequences, and its origins are poorly understood. This Article details how the appellate review model emerged after 1906 as an improvised response by the U.S. Supreme Court to a political crisis brought on by aggressive judicial review of decisions of the Interstate Commerce Commission. Once the jerry-built model was in place, Congress signaled its approval, and an academic—John Dickinson—wrote a persuasive book extolling its virtues. As a result, the appellate review model became entrenched by the 1920s and eventually spread to all of administrative law. The early adoption of the appellate review model helps explain why the Supreme Court never seriously grappled with Article III problems created by the widespread use of administrative agencies to adjudicate cases once the New Deal and the expansion of the administrative state arrived. It also helps explain why the judiciary has played such a large role in the development of administrative policy in the United States relative to other legal systems.

* Charles Evans Hughes Professor of Law, Columbia Law School. The Article has benefited from comments by participants in workshops at Chicago, Columbia, Minnesota, and Vanderbilt Law Schools. Special thanks to Charles McCurdy, Jerry Mashaw, and Henry Monaghan for their interest and input. Brad Lipton and Brantley Webb provided valuable research assistance. Some of the material in this Article appears in abbreviated form in Thomas W. Merrill, The Origins of American Style Judicial Review, *in* Comparative Administrative Law 389 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011).

INTRODUCTION

Modern administrative law is built on the appellate review model of the relationship between reviewing courts and agencies. The model was borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation—which in turn were derived from the relationship between judge and jury. The appellate review model, as developed in the civil litigation context, has three salient features[1]: (1) The reviewing court decides the case based exclusively on the evidentiary record generated by the trial court. If the reviewing court determines that additional evidence is critical to a proper decision, it will remand to the trial court for development of a new record but will not take evidence itself. (2) The standard of review applied by the reviewing court varies depending on whether the issue falls within the area of superior competence of the reviewing court or the trial court. (3) The key variable in determining the division of competence is the law-fact distinction. The trial court, which hears the witnesses and makes the record, is assumed to have superior competence to resolve questions of fact; the reviewing court is presumed to have superior competence to resolve questions of law.[2]

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1. See generally Martin B. Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion, 64 N.C. L. Rev. 993 (1986) (describing process of appellate review).

2. See Salve Regina Coll. v. Russell, 499 U.S. 225, 231–33 (1991) (summarizing reasons for law-fact distinction in civil litigation context); Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 234 (1985) [hereinafter Monaghan, Review] (observing that "the categories of law and fact have traditionally served an important regulatory function in distributing authority among various decisionmakers in the legal system"). Of course, the exact line of division between law and fact will often be disputed and will shift over time and from one context to the next. For example, the question whether applications of law to fact (sometimes called questions of ultimate fact or mixed questions of law and fact) are primarily for the initiating or reviewing institution has been answered differently in different contexts. Louis, supra note 1, at 1002–07. See

The body of jurisprudence we know as administrative law is grounded in the same division of institutional authority. Here too, the reviewing court conceives of its role vis-à-vis the administrative agency in terms of the conventions that govern the appeals court-trial court relationship. The decision of the reviewing court (with rare exceptions) is based exclusively on the record generated by the agency. If additional evidence is needed, the reviewing court will remand to the agency for the development of a new record rather than undertake to find the facts itself. The standard of review, again, is based on conventional understandings of relative competence. And those understandings, in turn, are grounded in the law-fact distinction. The agency, which gathers evidence and makes the record, is understood to have superior competence to resolve questions of fact, whether adjudicative facts specific to particular parties or legislative facts of more widespread significance. The reviewing court is characterized as having superior competence to resolve questions about the meaning of the law.

Going further, we can say that the great preponderance of what we today regard as administrative law—the material that is found in administrative law casebooks—consists of an elaboration of the implications of the appellate review model.[3] The many intricacies involving the standards of review that courts apply in resolving challenges to agency action employ the same vocabulary used in civil litigation: "contrary to law," "substantial evidence," "arbitrary and capricious," "clearly erroneous,"

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generally Bert I. Huang, Lightened Scrutiny, 124 Harv. L. Rev. 1109, 1139–40 (2011) (documenting shift in standard of review applied by Second Circuit to mixed questions of law and fact in response to increased caseload); Eric Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts, 1989 Wis. L. Rev. 237 (documenting trend in federal courts after 1968 toward more aggressive appellate review of jury verdicts). Nevertheless, wherever the line is drawn, the result is justified by declaring that the issue is either one "of fact" (for the initiating institution) or "of law" (for the reviewing institution). Id. at 299–301 (suggesting determination of whether issue is of "fact" or "law," and resulting level of deference, may have been responding to desired judicial outcome rather than determinative of it); see also Ronald M. Levin, Identifying Questions of Law in Administrative Law, 74 Geo. L.J. 1, 9–14 (1985) (articulating distinctions between law and fact in administrative context).

3. Commentators continually complain about the emphasis on the court-agency relationship in administrative law. See, e.g., Robert L. Rabin, Administrative Law in Transition: A Discipline in Search of an Organizing Principle, 72 Nw. U. L. Rev. 120, 129 (1977) (noting "administrative law is not really . . . primarily concerned with the administrative system itself; rather, its focus is on a set of principles that courts utilize in determining whether and to what extent agency decisions should be scrutinized"); Edward Rubin, It's Time to Make the Administrative Procedure Act Administrative, 89 Cornell L. Rev. 95, 137–46 (2003) (arguing APA concentrates on a judicial model of governance and judicial review to exclusion of other perspectives); G. Edward White, Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis, 1974 Duke L.J. 195, 196 (describing "conventional wisdom" that "most administrative law issues can be viewed as revolving around the allocation of power between administrative agencies and reviewing courts" (footnote omitted)).

and so forth.[4] Modern administrative law also tracks civil litigation in devoting enormous energy to questions about the availability and timing of review. All of this lore operates in a conceptual universe grounded in an analogy to institutions in civil litigation. Indeed, these issues are largely resolved in terms of concepts—like jurisdiction, sovereign immunity, cause of action, standing, finality, and ripeness—that are directly borrowed from civil litigation.

Although we take it for granted today, the adoption of the appellate review model as a central orienting principle of American administrative law was by no means inevitable. In the nineteenth century, courts engaged in what Jerry Mashaw has characterized as "bipolar" oversight of administrative action[5]: Either courts would review administrators' actions under one of the prerogative writs such as mandamus or habeas corpus, or there was no judicial review at all, with aggrieved claimants relegated either to filing internal complaints with the agency or petitioning Congress for relief.[6] Not until the early decades of the twentieth century did courts embrace the salient features of the appellate review model, which allowed decisional authority to be shared between agencies and courts. Insofar as federal courts are concerned,[7] the appellate review model first emerged in full blown form in the context of judicial review of orders of the Interstate Commerce Commission (ICC) around 1910. The model spread from there to other contexts, including review of orders of the Federal Trade Commission. The appellate review model was fully en-

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4. See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366–67 (1998) ("We must decide whether [the Labor Board's] conclusion is supported by substantial evidence on the record as a whole. Put differently, we must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion." (citations omitted)). See generally Louis, supra note 1 (noting the close parallels in standards of review in civil litigation and administrative law); Robert L. Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harv. L. Rev. 70, 71 (1944) (noting that "the formulas invoked in describing the functions of the reviewing court in the two fields sound very much alike").

5. Jerry L. Mashaw, Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829, 116 Yale L.J. 1636, 1736 (2007) [hereinafter Mashaw, Reluctant Nationalists].

6. See Frederic P. Lee, The Origins of Judicial Control of Federal Executive Action, 36 Geo. L.J. 287, 287 (1948) (discussing development of judicial review of administrative orders); Jerry L. Mashaw, Recovering American Administrative Law: Federalist Foundations, 1787–1801, 115 Yale L.J. 1256, 1334–37 (2006) [hereinafter Mashaw, Federalist Foundations] (discussing judicial review during Federalist era via common law actions). See generally Ann Woolhandler, Judicial Deference to Administrative Action—A Revisionist History, 43 Admin. L. Rev. 197 (1991) (setting forth de novo, res judicata, and error models of judicial review in the nineteenth century).

7. I have not systematically examined state court decisions of the later nineteenth and early twentieth centuries to determine whether the adoption of the appellate review model occurred in state law before federal law. This is a nontrivial possibility, given that many state systems, unlike the federal system, used the writ of certiorari to review agency action. Certiorari entailed calling for the record generated by a subordinate tribunal, and thus would entail a potential precursor to the appellate review model.

trenched before the onset of the New Deal and was later incorporated into the Administrative Procedure Act in 1946. It continues to be the cornerstone of administrative law today.

Indeed, the appellate review model is so thoroughly embedded in contemporary administrative law that modern lawyers take it for granted. Perhaps as a consequence, the story of how American administrative law came to embrace the appellate review model is poorly understood. This gap in collective knowledge about the origins of modern administrative law has had at least two unfortunate consequences.

First, it has distorted the modern debate about the constitutionality of adjudication by federal administrative agencies. Article III confers the "judicial power of the United States" on federal courts with judges who enjoy life tenure and secure compensation.[8] There is no suggestion in Article III that Congress might create federal tribunals that do not enjoy life tenure and secure compensation—like administrative agencies—and confer authority on these tribunals to decide cases and controversies under federal law. How then do we square adjudication on a mass scale by administrative agencies with the text of Article III?

The discussion of this question typically starts with the Supreme Court's 1932 decision in *Crowell v. Benson*, which upheld agency adjudication of workmen's compensation claims against an Article III challenge.[9] *Crowell* reasoned that Article III is satisfied as long as all questions of law and key "jurisdictional" facts are subject to de novo review by an Article III court. Otherwise, ordinary, "nonjurisdictional" facts can be resolved by the agency, subject to deferential review by the Article III court, just as fact issues are resolved by juries or masters in chancery in civil litigation.[10] Modern commentators are divided over whether appellate review of administrative adjudication does in fact solve the Article III problem. They have also been puzzled by the casual, almost offhand way in which the Court in *Crowell* agreed that most fact-finding authority could be given over to non-Article III tribunals.

Recovering the early history of the appellate review model allows us to understand why one of the most significant constitutional questions posed by the rise of the modern administrative state was never seriously deliberated by the Supreme Court. As we shall see, the appellate review model was adopted twenty years before the decision in *Crowell*. Not surprisingly, therefore, all participating Justices in the case regarded the con-

8. Article III also gives Congress discretion as to whether to create any lower federal courts and thus is plausibly read as allowing state courts to adjudicate cases and controversies arising under federal law. U.S. Const. art. III, § 1; see Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1363–64, 1401 (1953) (noting state courts are generally available to enforce federal law even if Congress declines to create, or limits, the jurisdiction of lower federal courts).

9. 285 U.S. 22 (1932).

10. Id. at 51–54.

stitutionality of agency adjudication of fact issues—at least those clearly within the agency's jurisdiction—as settled. This accounts for the cursory discussion of the Article III problem in the decision. We will also see how the concern that arose with *Crowell*—taking away or diluting the authority of Article III courts and giving it over to non-Article III tribunals—was largely invisible in the years when the appellate review model emerged and solidified. Courts in the decades preceding *Crowell* were more concerned with schemes that injected courts into matters that were not properly judicial but were rather "administrative" in nature.[11] The appellate review model—which cast Article III courts in the familiar role of reviewing records made by other tribunals and resolving questions of law—came to be seen as solving this danger of "contamination" of the judicial power by involvement in matters of administration.

A second and even more far-reaching consequence of collective ignorance about the origins of the appellate review model is that it has obscured the possibility of alternative paths for American administrative law—including alternatives that would give reviewing courts much less influence over the formation of policy. Prior to the advent of the appellate review model, when American courts reviewed administrative action, they did so in original actions like mandamus, habeas corpus, or officer suits.[12] Unlike the appellate review model, which confers general authority on reviewing courts to decide all questions of law, review under these actions tended to focus on whether the agency was acting within the scope of its jurisdiction. This, in turn, tended to restrict judicial intervention to executive action lacking any legal authority and discouraged judicial micromanagement of matters clearly falling within the scope of agency jurisdiction. Significantly, English administrative law, and by extension the administrative law in most commonwealth countries, continued to evolve in the twentieth century from the ultra vires model.[13] Only in the United States did administrative law embrace the appellate review model, with the result that U.S. administrative law came to be characterized by much more aggressive intervention by courts—with unpredictable and often chaotic effects—relative to the administrative law of other countries sharing a common legal tradition.

This Article seeks to fill the gap in collective awareness about the origins of the appellate review model as the foundational principle of modern administrative law. Part I describes the nineteenth-century understanding of administrative law, including the all-or-nothing nature of judicial review. Part II describes the controversy over judicial review of railroad rate regulation that resulted in the enactment of the Hepburn

11. See infra text accompanying notes 244–255.

12. See generally Louis L. Jaffe, Judicial Control of Administrative Action 327–38 (1965) (summarizing history).

13. See Kevin M. Stack, The Reviewability of the President's Statutory Powers, 62 Vand. L. Rev. 1169, 1201 (2009) (quoting British judge's observation that ultra vires review remains the "central principle of [English] administrative law" (citation omitted)).

Act of 1906, the Supreme Court's efforts to find a path of retreat in the face of widespread political opposition to its prior practices, and the Court's improvisational development of the appellate review model as a solution to the dilemma it confronted. Part III considers post-Hepburn Act events, including the enactment of the Federal Trade Commission Act of 1914, which solidified the use of the appellate review model as a mode of court-agency relations. Part IV highlights the role of one particular academic figure in rationalizing and legitimizing the appellate review model. John Dickinson's magisterial 1927 book, *Administrative Justice and the Supremacy of Law*, was a sustained panegyric to the appellate review model as the proper conception of the role of courts in the incipient administrative state.[14] Dickinson's vision helped secure judicial acceptance of the appellate review model for use in administrative law.

Building on this historical account, Part V turns to the constitutional puzzle created by the now-widespread practice of using non-Article III federal agencies to adjudicate cases and controversies arising under federal law. The critical point is that the tension perceived by modern commentators between the language of Article III and the use of non-Article III agencies to adjudicate disputes under federal law was largely invisible during the years when the appellate review model was adopted. The separation of powers problem that troubled the Court during that era was whether judicial review of administrative action would draw courts into participating in decisions that were properly regarded as "executive" or "administrative." The fear voiced by modern commentators—dilution of federal judicial power by transferring jurisdiction to Article I agencies—emerged only later, by which time the appellate review model was too thoroughly entrenched to be questioned.

Part VI considers why the appellate review model has been so remarkably successful. Created and nurtured by the courts, it soon won the endorsement of Congress, and has become a fundamental norm of administrative law that everyone takes for granted. Part of the reason for its success is its adaptability. The model has proven sufficiently flexible to permit either passive deference or aggressive substitution of judgment, depending on whether a court agrees with an agency's policy judgment and the court's perception of the agency's political support. It has also proven sufficiently capacious to accommodate significant shifts over time in the conception of the relevant functions of agencies and courts. Thus, as intellectual fashions about agency government have changed, the nature of judicial review has been able to change apace, without modifying the underlying architecture of court-agency relations. For example, when the problem of agency capture became the rage in the 1970s, courts were able to layer "hard look" review onto the existing structure of the appellate review model. And when deregulation became the fashion

14. John Dickinson, Administrative Justice and the Supremacy of Law in the United States (1927).

in the 1980s, courts were able to rally around the *Chevron* doctrine, which in theory eliminated judicial authority to second guess reasonable agency interpretations of regulatory statutes, again without undoing the basic framework of judicial review.[15]

I conclude with some thoughts about whether the appellate review model, although an unqualified success in terms of its capacity to survive, is in fact the best model for accommodating the respective roles of courts and agencies in the administrative state. With the benefit of a century of hindsight, I suggest that a model of review that built on the jurisdictional or ultra vires model—which became the foundation of administrative law in England and many commonwealth countries—might have served as a better foundational principle for American administrative law. The question for courts would have been "Does the agency have authority?," not "Is it the law?" This might have provided a better allocation of institutional roles than the appellate review model has bequeathed to us.

I. NINETEENTH-CENTURY BACKGROUND

In the nineteenth century, government at the federal, state, and local levels unquestionably engaged in functions that today would be characterized as administrative. The federal government enforced embargoes, disposed of massive quantities of public land, awarded invention patents, regulated trade with Indians, and collected tariffs and other forms of taxation.[16] The states subsidized internal improvements and issued corporate charters.[17] Local governments prohibited nuisances and engaged in land use regulation.[18] These administrative functions were subject to judicial review to one degree or another. But there was no distinctive jurisprudence of administrative law. Courts looked to isolated pockets of precedent permitting judicial challenges to certain types of executive action, rather than generalizing across areas in an effort to identify higher order principles.

Scholars have recently begun to focus more closely on this "dark age of administrative law,"[19] and have perceived discernable patterns at work.

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15. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("[I]f the [regulatory] statute is silent or ambiguous . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

16. See generally Mashaw, Federalist Foundations, supra note 6, at 1335 & n.275 (enumerating examples of early federal administrative functions).

17. See Carter Goodrich, Government Promotion of American Canals and Railroads: 1800–1890, at 3–16, 51–120 (1960) ("All but a few of the state governments carried on their own programs of public improvements . . . ."); Oscar Handlin & Mary Flug Handlin, Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts 1774–1861, at 53–56 (1947) (explaining how "beneficent hand of the state . . . reach[ed] out to touch every part of the economy").

18. See William J. Novak, The People's Welfare: Law & Regulation in Nineteenth-Century America 51–82 (1996) (describing active role of nineteenth-century local governments in regulating fire hazards and other public nuisances).

19. Woolhandler, supra note 6, at 198.

Ann Woolhandler, for example, has argued that one can detect three models of court-agency relations in nineteenth-century law: a "de novo" model, a "res judicata" model, and an emergent "error" model.[20] Caleb Nelson has recently claimed that apparently divergent practices fall into place once one understands the nineteenth-century concept of public rights, and how public rights were regarded as entitled to little or no judicial protection as compared with private rights.[21]

In my view, the key to understanding nineteenth-century judicial review starts with the observation that administrative action could be reviewed only through certain forms of action. As then-Assistant Professor Antonin Scalia observed, nineteenth-century judges had "great[ ] reverence for the integrity of the pleadings."[22] Inherited English conventions as modified by American statutes and precedents often dictated the appropriate form of action. The form of action dictated the nature of the "review." With few exceptions, those forms dictated full blown trials, in which the court would develop its own record and apply independent judgment in resolving all issues of law and fact, in effect reviewing the agent's action de novo. Many forms dictated relatively narrow inquiries into whether the agent was acting within the scope of his authority or had violated a nondiscretionary legal duty, in which case the court limited review to whether the agency was acting within its jurisdiction. Still other forms, such as the use of ejectment in public land cases, required that the claimant establish the passage of title in order to bring the action. If this could not be shown, the matter corresponded to what we today would call unreviewable agency action.[23]

Customs, revenue, and prize cases tended to be reviewed by tort actions against the officer responsible for the taking.[24] The officer would defend on the ground that his action was authorized by law. The court would then take evidence and rule on the defense, thereby providing judicial review of the action. Because the officer suit was an original action filed in court, the record was necessarily developed by the court. The

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20. Id. at 200–01.

21. Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 563–64 (2007).

22. Antonin Scalia, Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases, 68 Mich. L. Rev. 867, 885–86 (1970).

23. See id. at 896 n.130 ("[S]o long as the legal title remains in the government all questions of right should be solved by appeal to the land department and not to the courts." (internal quotation marks omitted) (citing Brown v. Hitchcock, 173 U.S. 473, 477 (1899))).

24. See, e.g., Little v. Barreme, 6 U.S. (2 Cranch) 170, 178–79 (1804) (holding commander of American warship "answerable in damages" for seizure of foreign ship without statutory authority). For descriptions of early officer suits and some of the perils they presented, see Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 841–69 (6th ed. 2009) [hereinafter Fallon et al., The Federal Courts]; Mashaw, Federalist Foundations, supra note 6, at 1325–31.

standard of review of both law and fact was one of independent judgment.

Public land disputes were probably the largest class of federal administrative action in the nineteenth century. Direct review of the decisions of the Lands Office was not available either by mandamus or injunction. If the court found that title had not yet passed, the action failed and hence there was no review of the executive action, no matter how unlawful it might be.[25] If title had passed from the government and a dispute arose between two rival claimants, the court would entertain a suit in ejectment to resolve the issue.[26] Even in such an action, however, the court would treat any actions taken by the government prior to the transfer of title as immune from collateral attack.[27] Otherwise, as in the case of the officer suit, this was an original action in court. The record was developed by the court, and so the review—once the passage of title hurdle was cleared—was de novo.

In other circumstances claimants had to assert one of the prerogative writs inherited from English law. Mandamus is the best known. *Marbury v. Madison*, the most famous mandamus case of the nineteenth century, stressed that the writ would issue only when the claimant had a vested right and only when the officer violated a nondiscretionary legal duty.[28] Executive action, in its nature political or otherwise discretionary, could not be challenged by mandamus. Significantly, mandamus was also an original action, and hence if any factfinding was required, the court would find the facts for itself. In *Marbury*, for example, the Supreme Court, presented with an original petition for mandamus, conducted a brief investigation into the factual circumstances behind the withholding of William Marbury's judicial commission before it concluded that it lacked jurisdiction to issue the writ.[29] So mandamus, although it was a very narrow form of review, was also de novo, and the court exercised independent judgment in determining whether a government official had violated a nondiscretionary duty.

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25. See Scalia, supra note 22, at 913–14 (acknowledging that "public-lands cases" constitute an "area[ ] of federal administration in which . . . judicial review is . . . based upon the assumption that a suit against the officer cannot constitute a suit against the sovereign"). For a discussion of the vast amount of nonreviewable public lands adjudication by the Lands Office, see Mashaw, Reluctant Nationalists, supra note 5, at 1717–27.

26. See, e.g., Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 85 (1871) (noting if "legal title has passed from the United States to one party, when . . . it ought to go to another," the court will "compel [the party with the land] to convey the legal title").

27. See Nelson, supra note 21, at 577–79 ("Once private individuals could claim vested rights in the land . . . the executive branch's authority to act conclusively ran out.").

28. 5 U.S. (1 Cranch) 137 (1803). For a brief review of *Marbury*'s role in the development of nineteenth-century mandamus law, see generally Thomas W. Merrill, *Marbury v. Madison* as the First Great Administrative Law Decision, 37 J. Marshall L. Rev. 481 (2004).

29. See *Marbury*, 5 U.S. (1 Cranch) at 142 (ordering witnesses sworn and their testimony taken); id. at 142–46 (summarizing testimony).

Other prerogative writs played a role in nineteenth-century administrative law, including prohibition, quo warranto, habeas corpus, and certiorari.[30] Only certiorari, under which the court was asked to review the action of an inferior judicial tribunal, called for the review of a record generated by an entity other than the court itself. Many states relied upon certiorari to review certain types of administrative action.[31] Originally certiorari was used only to test the jurisdiction of an inferior tribunal. But this broadened during the nineteenth century to include questions of law and eventually the sufficiency of the evidence to support conclusions of law. Interestingly, one of the types of certiorari prescribed by the New York Civil Practice Act made explicit reference to the standard of review that a court would use in reviewing the verdict of a jury;[32] a glimmer of the appellate review model in the midst of what is otherwise a sea of de novo review. But certiorari was never used in the nineteenth century to review federal executive branch actions.[33]

After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action.[34] They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action.[35] These actions were also original actions in which the trial court developed the record. So review here was also de novo, both in terms of the record generated and the exercise of independent judgment by the court.

The traditions surrounding these forms of action exerted a strong gravitational pull on the nineteenth-century judiciary. This is revealed in

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30. As summarized by Hart & Wechsler, "[t]he writ of prohibition is usually directed to an inferior judicial or quasi-judicial body, to bar it from exceeding its jurisdiction"; "[t]he writ of quo warranto is ordinarily limited to testing the right to an office"; "[t]he writ of habeas corpus is available to test the legality of official detention or custody"; and "[t]he writ of certiorari directs a lower tribunal to certify its record to a superior court." Fallon et al., The Federal Courts, supra note 24, at 844 n.10.

31. See Jaffe, supra note 12, at 165–76 (discussing evolution of certiorari in England and United States including use of the writ in states to review administrative decisions).

32. See Ernst Freund, Administrative Powers over Persons and Property 283–84 (1928) [hereinafter Freund, Administrative Powers] (discussing standard of review of New York Civil Practice Act § 1304: "whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination").

33. See Gordon G. Young, Public Rights and the Federal Judicial Power: From *Murray's Lessee* Through *Crowell* to *Schor*, 35 Buff. L. Rev. 765, 802 (1986) (stating first attempt to secure judicial review of federal executive action by certiorari occurred in 1913).

34. See John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 121–30 (1998) (explaining "1875 grant of jurisdiction" was read as authorizing federal equity courts to review administrative action without statutory or common law cause of action).

35. See, e.g., Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110–11 (1902) (holding federal court had power to review determination that material sent by U.S. mail was fraudulent without any specific statutory right of review).

several ways. Consider first some cases involving disputed Mexican land grants in California. Congress enacted legislation providing that such disputes would be heard by a special commission, subject to a right of "appeal" to the federal district court in California.[36] Notwithstanding this characterization of the nature of the relationship between the commission and the court, the Supreme Court said it would not be "misled by a name, but [would] look to the substance and intent of the proceeding."[37] It concluded that the "appeal" would in fact be an original proceeding in which all issues of fact and law could be considered de novo.

Similarly, when the Patent Act[38] was revised to provide that findings by the patent office were to be given "prima facie" effect in subsequent judicial proceedings, this did not give rise to the development of an appellate review or error model in patent cases. Instead, courts tended to treat invention patents like land patents. As in the land office cases, "courts were reluctant to interfere with proceedings that were pending before the agency."[39] Once a patent issued, however, and litigation was brought to enforce a patent, issues going to the validity of the patent were effectively subject to de novo review by the courts.

The creation in 1887 of the first major national regulatory agency, the Interstate Commerce Commission, reflected a similar pattern. The Interstate Commerce Act provided in section 16 that courts were to regard ICC orders as "prima facie evidence of the matters therein stated."[40] While this might suggest that courts should defer to the ICC's findings of fact, the inference ran in the opposite direction. By making ICC findings only prima facie evidence, the Act was read as endorsing the practice of taking additional evidence in court and having the court determine whether the prima facie evidence had been rebutted.[41] The Act also de-

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36. An Act to Ascertain and Settle the Private Land Claims in the State of California, ch. 41, §§ 9–10, 9 Stat. 631, 632–33 (1851).

37. United States v. Ritchie, 58 U.S. (17 How.) 525, 534 (1854); see also Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 375 (1867) (discussing *Ritchie* and quoting same language).

38. Patent Act, ch. 357, 5 Stat. 117 (1836) (current version at scattered sections of 35 U.S.C. (2006)).

39. Woolhandler, supra note 6, at 235 n.193 (citing Comm'r of Patents v. Whitely, 71 U.S. (4 Wall.) 522 (1866)).

40. Act of Feb. 4, 1887, ch. 104, § 16, 24 Stat. 379, 384–85.

41. The principal consequence of the "prima facie evidence" provision was that it prevented outright judicial ratemaking. The Supreme Court instructed that when an order of the ICC was reversed, either for errors of law or because new evidence presented to the circuit court suggested an error of fact, the proper course ordinarily was to remand to the Commission, not for the court to determine for itself whether rates were unreasonable or discriminatory. See E. Tenn., Va. & Ga. Ry. Co. v. ICC, 181 U.S. 1, 26–27 (1901) (holding law attributes prima facie effect to findings of fact by Commission, therefore courts should correct errors of law but not reinvestigate facts); ICC v. Clyde S.S. Co., 181 U.S. 29, 32–33 (1901) (finding it is "duty of the courts . . . not to proceed to an original investigation of the facts which should have been passed upon by the commission, but to correct the error of law . . . and . . . remand the case to the commission"); Louisville & Nashville R.R. Co. v. Behlmer, 175 U.S. 648, 675–76 (1900) (holding evidence cannot be

nied ICC orders any self-enforcing effect. To enforce an order, the Commission had to go to federal court to secure an injunction compelling compliance with its order. Courts were conditioned to think of equity proceedings as original actions. Not surprisingly, the lower federal courts uniformly ruled that in such a proceeding new evidence could be submitted by the carriers.[42] This meant that often the record that determined the validity of the ICC's order was the record made in court, not the one made before the Commission. Review was de novo, at least with respect to the identity of the record on which review was based.

The Supreme Court confirmed this construction of the Act in *ICC v. Alabama Midland Railway Co.*[43] The circuit court had taken new evidence and based on this record had reversed the Commission. The Commission appealed, claiming among other things that the lower courts had no jurisdiction to review the Commission's judgment on questions of fact, and were required to limit their review to questions of law.[44] Speaking through Justice Shiras, the Court rejected the Commission's argument, saying that it was "sufficiently answered" by referring to those provisions of the Act providing for review by an original action in equity.[45] Justice Harlan complained in dissent that the decision, together with others narrowly construing the powers of the ICC, "goes far to make that commission a useless body for all practical purposes."[46]

As this brief survey suggests, the breadth of review of agency action in the nineteenth century varied, but the nature of the review was uniformly what we would now call de novo, certainly as to the development of the record. The understanding that courts would develop the record for review exerted a powerful pull on the standard of review, and so the tenor of review even in statutory review cases was nearly always one of independent judgment. There was little rhetoric of deference, and even less evidence of it in practice.

Academic literature from the era confirms this. Around the turn of the century, a small group of scholars devoted to the study of "administration" began to emerge.[47] Prominent here were Bruce Wyman of Harvard Law School, Frank Goodnow of Columbia (first in political science and

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weighed by Court where Commission "from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising").

42. See ICC v. Ala. Midland Ry. Co., 168 U.S. 144, 175 (1897) ("It has been uniformly held by the several Circuit Courts of Appeals . . . that they are not restricted to the evidence adduced before the Commission . . . but that additional evidence may be put in by either party . . . .").

43. 168 U.S. 144 (1897).

44. Id. at 174.

45. Id.

46. Id. at 176 (Harlan, J., dissenting).

47. See generally William C. Chase, The American Law School and the Rise of Administrative Government 47–71 (1982) (discussing scholarship of Freund, Goodnow, and Wyman).

then at the Law School), and Ernest Freund of the University of Chicago (again starting in political science and migrating over to the Law School). The early work of these scholars was devoted to the constitutional status and internal organization of administrative bodies.[48] They had little to say about judicial review. To the extent they addressed the subject at all, they did so by reviewing the various forms of action in which review was possible in the nineteenth century.[49] None of them discussed the possibility of what I have called the appellate model of review, or any other conception of sharing of decisional authority between agencies and courts.[50] The straightforward explanation is that a body of law based on the model of the judge-jury relationship did not exist at that time and was beyond the imagination of these scholars.

In short, in the nineteenth century, either a court had authority to review administrative action or not, and if it did, it decided the whole case.[51] There was nothing that could be described as a general jurisprudence of administrative law. Judges and lawyers thought primarily in terms of different forms of action that might provide an avenue for challenging particular agency action. The nature of judicial review, if any,

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48. See generally Ernst Freund, The Police Power, Public Policy and Constitutional Rights (1904) [hereinafter Freund, The Police Power] (discussing scope of police power under federal and state law); Frank Johnson Goodnow, The Principles of the Administrative Law of the United States (1905) (detailing powers of various administrative bodies); Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers (1903) (describing administrative law governing relations of public officers).

49. See generally Frank J. Goodnow, The Writ of Certiorari, 6 Pol. Sci. Q. 493 (1891) (discussing history of writ of certiorari and how New York and other state courts had begun to enlarge on it as a device for controlling administrative discretion).

50. Wyman broadly defines administrative action as either final as to all the world or final only within the administration, i.e., as unreviewable or subject to de novo review. Wyman, supra note 48, at 341. This is basically a distillation of the nineteenth-century view. Goodnow has a more complete discussion of forms of action, including officer suits, mandamus, certiorari, and other prerogative writs. The possibility of "special appeals, generally to the lower courts, from the decisions of administrative officers" is briefly mentioned on one page. Goodnow, supra note 48, at 441. Freund's early work is concerned with the scope of the power to regulate and the theory of regulation, and makes very little mention of judicial review. See Freund, The Police Power, supra note 48, at iii (noting treatise is organized by principle "that certain rights yield to the police power, while it respects and accommodates itself to others").

51. Ann Woolhandler has offered a "revisionist history" of nineteenth-century court-agency relationships, which includes the claim that this period featured instances of what I call the appellate review model and she calls the "error" model. See Woolhandler, supra note 6, at 224–29 ("A 'pure' version of the error was not a common method of review of agency action in the nineteenth century, but a closely related method of review by 'appeal' was."). She admits that actual examples of appellate review of administrative action were rare, but argues that this was simply because Congress rarely provided by statute for judicial review of agency action. More tellingly, she admits that in those cases where courts were charged with reviewing agency action under a writ of error or by appeal, "the review was generally de novo." Id. at 229. I am thus not persuaded by her claim that the error or appellate review model had any meaningful presence in nineteenth-century administrative law.

was dictated by the form of action under which review was sought. If the action was in mandamus, the court looked to see if the agent had violated a nondiscretionary legal duty. If the action was an original bill in equity, the court held a hearing and took evidence in a manner similar to what any court of equity would do.

In all cases, at least in the federal courts, the court based its decision on the record produced in court. This might include the record generated by the agency, but it could include supplemental evidence as well. Thus, all nineteenth-century review of agency action was, in effect, de novo. Consistent with the de novo nature of review, courts generally gave no deference to agency determinations, whether on issues of law or fact. Review was often *narrow*, as when the court applying the prerogative writs asked whether the agency was acting within its jurisdiction or whether an officer had violated a nondiscretionary legal duty. But whatever the permitted scope of review, there was no understanding of a sharing of authority or division of functions between court and agency.

II. The Emergence of the Appellate Review Model

The appellate review model first emerged in federal administrative law in decisions of the Supreme Court reviewing ICC rate and service orders in the period 1907–1910. Scholars of an earlier generation, most notably John Dickinson and Frederick Lee, observed an important shift in the Supreme Court's understanding of the appropriate review of ICC decisions at this time.[52] Yet, it is worth examining this critical period in administrative law again, because it has largely been forgotten. One factor that deserves closer attention is the relationship between doctrinal change and an upsurge in public dissatisfaction with aggressive judicial review of decisions of the ICC, culminating in the adoption of the Hepburn Act in 1906.[53] In the course of a very few years immediately following the passage of the Hepburn Act, the Supreme Court jettisoned the nineteenth-century model of judicial review and stumbled onto the appellate review model.

A. *The ICC Crisis*

As the nineteenth century drew to a close, the federal system of regulation of railroads centered on the ICC was widely perceived to be broken, and the U.S. Supreme Court was widely identified as the culprit which had brought it down.[54] As Stephen Skowronek has noted, "[b]y 1896–97, the Court was openly declaring that it was not bound by the

52. See Dickinson, supra note 14, at 160 (noting Court's approach was product of "a gradual process of evolution"); Lee, supra note 6, at 305 (tracing change to "a handful of decisions around the turn of the century").

53. Ch. 3591, 34 Stat. 584.

54. The best account of the political climate prior to the enactment of the Hepburn Act I have uncovered is Stephen Skowronek, Building a New American State: The Expansion of Administrative Capacities 1877–1920, at 121–62, 248–84 (1982). For a more

conclusions of the commission, that it could admit additional evidence, and that it could set aside the commission's findings altogether."[55] The Court's aggressive review threatened to reduce the ICC to the status of "a mere statistics-gathering agency."[56] Yet by insisting that complainants had to begin before the Commission, the Court ensured that controversies were long, drawn-out affairs. The average case coming before the ICC took four years to final judgment, which "mocked the supposed economy and efficiency of the administrative remedy."[57]

When the Supreme Court ruled in 1896 that the ICC lacked authority to prescribe maximum future rates,[58] some type of congressional action was widely thought to be imperative. Numerous proposals to revise the Commission's authority circulated. But a deep conflict of interest between shippers and railroads made reform difficult. The railroads, which were beginning to show signs of deterioration from underinvestment in new plant and equipment, wanted measures to legalize pooling and assure a rate structure that would allow them to raise new funds from investors.[59] They supported the establishment of a new specialized commerce court to expedite review proceedings and inject a larger element of expertise into the review process. The railroads' political champions were the Old Guard Republicans of the industrial North.[60]

Congressional representatives aligned with small shippers, especially in the West and South, viewed the regulatory issue as "a battle between the people and the corporations."[61] They opposed railroad consolidation and rate relief, and "were enraged by any regulatory proposal that allowed the judiciary to check the will of the people's representatives."[62] As Skowronek writes:

> [D]uring the 1890s the judicial branch as a whole had become the archenemy of the forces of populism. The nullification of state regulatory laws in the 1890s and the nullification of the federal income tax law in 1895 identified the judiciary as the opponent of democracy upholding the plutocracy of eastern

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abbreviated account, see Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1212–15 (1986) [hereinafter Rabin, Federal Regulation].

55. Skowronek, supra note 54, at 154–55.

56. Id. at 151.

57. Id. at 155.

58. ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 511 (1897). For the significance of this decision in the development of the understanding of when authority to make legislative rules has been delegated to agencies, see Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 490–91, 581–82 (2002).

59. See Albro Martin, Enterprise Denied: Origins of the Decline of American Railroads, 1897–1917, at 182–93 (1971) (detailing railroads' petitions for rate increases and Congress's legislative response).

60. See Skowronek, supra note 54, at 255 (stating Old Guard Republicans "would shield the railroads from broadside political attacks").

61. Id. at 253.

62. Id.

> capital. The representatives of the South and West were determined to overthrow this judicial imperialism, and one way of doing so was to grant sweeping ratemaking powers to the ICC and radically restrict the scope of judicial review.[63]

Standing between these factions was President Theodore Roosevelt, who had campaigned in 1904 on the need for regulatory reform. Roosevelt shared the progressive faith in administrative expertise, and to this end also sought to reign in judicial review.[64] Consequently, Roosevelt was strongly opposed to one prominent reform proposal—creating a specialized court to review ICC rate orders.

B. *The Hepburn Act*

Congressional consideration of reform began soon after Roosevelt's inauguration. The House quickly passed reform legislation, but it got nowhere in the more conservative Senate. The next year, 1906, Congressman William Hepburn submitted a new reform bill, drafted by the ICC and fully supported by the President.[65] It easily passed the House with no amendments. The Old Guard Republicans in the Senate sought to embarrass the President by refusing to unite behind a committee report, forcing the President to accept "Pitchfork" Ben Tillman, a Southern Democrat, as the floor leader for "his" bill. The matter proceeded to the floor of the Senate, where a four-month debate on the ICC and the proper function of judicial review ensued.[66]

The debate touched on many issues of far-reaching importance, such as the constitutionality of combining legislative, executive, and judicial functions in a single agency, whether Congress could delegate the power to regulate interstate commerce to a subordinate body, and whether the power to regulate commerce includes the power to prescribe rates for the future.[67] As regards the issue of judicial review, the proposed legislation made one significant change in the original Interstate Commerce Act (ICA): Commission orders were to be self-executing thirty days after they became final, unless "suspended or set aside by a court of competent jurisdiction."[68] This change had widespread implications. The original Act had required that the Commission file a bill of equity in circuit court seeking judicial enforcement of its orders, causing the burden of inertia

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63. Id.

64. See Theodore Roosevelt, Theodore Roosevelt: An Autobiography 473–74 (1913) (offering example of Roosevelt's preference for executive rather than judicial action).

65. Skowronek, supra note 54, at 256.

66. Id. at 256–57.

67. Each of these issues was raised in the opening speech of Senator Joseph Foraker, who argued that the Hepburn bill was unconstitutional in each of these regards. 40 Cong. Rec. 3102–20 (1906). His comments elicited responses from many others, but it appears he stood virtually alone in condemning the Act outright on constitutional grounds.

68. Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906) (amending Interstate Commerce Act of 1887, ch. 104, § 15, 24 Stat. 379, 384).

to work in favor of the railroads and against the Commission.[69] Under the proposed legislation, the burden was reversed, and the railroad would have to persuade a court to enter a preliminary injunction against the Commission's order before it took effect.[70] Interestingly, this sea change went largely uncontested, even in the Senate. Nearly everyone acquiesced in the notion that the Commission's orders should be made self-executing. The question of whether giving a regulatory commission authority to issue such orders was consistent with Article III's conferral of the "judicial power" on federal courts was ignored.

Nevertheless, the proposal to make Commission orders self-executing explains why the question of the standard of judicial review was perceived to be of such importance by the "eloquent and circumlocutious lawyers in the Senate."[71] Shifting the burden of going to court to the railroads would not be very consequential if courts would continue to review ICC orders de novo and under a standard of independent judgment. Shifting the burden to the railroads and narrowing the standard of review significantly would represent a fundamental change in the balance of power. Everyone understood there was going to be reform legislation, and, apparently, that the reform would include making the Commission's orders setting future maximum rates self-executing. But the question of the standard of review was the key to just how far-reaching the reform was going to be.[72]

Modern historians such as Gabriel Kolko and Stephen Skowronek have failed to perceive the importance of making ICC orders self-executing, and thus have misunderstood what the debate in the Senate was about. Kolko dismisses the whole debate as a sideshow.[73] Skowronek, for his part, mistakenly focuses on a provision of the Hepburn Act that authorized the Commission to seek a court order imposing sanctions on a carrier for failing to obey an ICC order.[74] This was

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69. Interstate Commerce Act § 16, 24 Stat. at 384–85.

70. Hepburn Act § 5, 34 Stat. at 591; see Carl McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission 1920–1930: A Comparative Study in the Relations of Courts to Administrative Commissions 115 (1933) ("Thus the burden or initiative . . . was shifted from the commission to the carrier.").

71. Gabriel Kolko, Railroads and Regulation 1877–1916, at 133 (1965).

72. See 40 Cong. Rec. 6690 (1906) (statement of Sen. Joseph Weldon Bailey) (noting "for three long months this controversy has been revolving around the question as to the character of a court review"); id. at 6687 (statement of Sen. Chester Long) (stating "this controversy has been as to the difference between a broad and a limited court review").

73. See Kolko, supra note 71, at 135 (suggesting "much of the drama and excitement attributed to the debate over the bill in the Senate . . . has been exaggerated").

74. With respect to such enforcement actions, the Hepburn Act provided that "[i]f, upon such hearing *as the court may determine to be necessary*, it appears that the order was *regularly made and duly served* . . . the court shall enforce obedience to such order." Hepburn Act § 5, 34 Stat. at 591 (emphasis added). Skowronek argues that the Old Guard Republicans and other proponents of vigorous judicial review could point to the clause authorizing the courts to decide what kind of judicial hearing was necessary. Skowronek, supra note 54, at 255–56. This left open the possibility that the courts would continue to

rarely mentioned in the Senate debate, and for good reason. The senators understood that the main battle would take place when the carrier went to court to obtain a preliminary injunction against an ICC order before it went into effect.[75] Once ICC orders became self-executing, what mattered was determining the proper standard of review for preliminary injunctions, not the standard for deciding whether to penalize a railroad for defying a lawful order that had already gone into effect.[76]

The partisans in the Senate fell into two camps with respect to the standard for obtaining an injunction before an order took effect: those favoring "narrow" and those supporting "broad" review. Narrow review would have allowed the courts to engage in only as much review as necessary to save the Act from being declared unconstitutional. Drawing their cues from Supreme Court decisions on the constitutionality of state rate regulation, most notably the *Minnesota Rate Case*,[77] proponents of this view conceded that carriers had to be afforded an opportunity to present evidence and argument to a court that rates were set so low as to be confiscatory. But they would not have allowed any more review than the bare minimum needed to secure Supreme Court validation. The narrow review camp would have achieved this result by acknowledging that carriers could bring an action in federal court to enjoin a rate prescription order before it took effect, but by providing no statutory grounds upon which such a challenge could be based—and ideally by securing an amendment limiting challenges to constitutional claims only.

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insist on de novo review. The progressives and President Roosevelt, he suggests, could point to the clause requiring enforcement of ICC orders provided they were regularly made and duly served as suggesting a highly deferential mode of rule similar to the ultra vires model. Id. at 273. There is no evidence from the Senate debate that the respective factions invested any such significance in these phrases.

75. See, e.g., 40 Cong. Rec. 6675 (1906) (statement of Sen. Augustus Bacon) (noting "grant of interlocutory or preliminary injunctions" is a "very grave and important manner" requiring "all possible safeguards, so that there shall be no hasty, no ill-advised, no improvident grant of an injunction").

76. The Hepburn Act imposed stiff penalties—$5,000 for each offense—for violating an order once it took effect. See Hepburn Act § 5, 34 Stat. at 591. Writing in 1931, Leo Sharfman noted that "[t]he penalties for disobedience of an order, which becomes operative from its effective date, are so severe, that the carriers do not await enforcement proceedings by the Commission, but themselves seek equitable relief, by initiating proceedings to enjoin, suspend, or invalidate the Commission's order." 2 I.L. Sharfman, The Interstate Commerce Commission: A Study in Administrative Law and Procedure 388 (1931).

77. Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890). Minnesota had established a commission to regulate intrastate railroad rates, and the Minnesota Supreme Court held that its decisions were final and not subject to judicial review. The U.S. Supreme Court held that if rates were set so low as to deprive a carrier of the lawful use of its property, the failure to provide for any avenue of judicial review to redress this situation was a violation of the Due Process Clause of the Fourteenth Amendment. Id. at 458. The decision clearly implied that federal legislation authorizing the ICC to set interstate rates without any possibility of judicial review would violate the Fifth Amendment.

The broad review camp, in contrast, wanted to confer general jurisdiction on federal courts to enjoin rate orders before they took effect on any legal basis, including that the rate was set at an "unreasonably" low level. They would have secured this result by including an express provision authorizing review by carriers by a bill in equity, and by providing that carriers could challenge rate orders as being unreasonably low. In effect, they wished to perpetuate the practice of allowing courts to relitigate rate controversies de novo.

President Roosevelt had hoped to finesse the issue. The original Hepburn bill passed by the House contained provisions that presupposed the existence of judicial jurisdiction in equity, but did not expressly convey jurisdiction, or even provide a statutory cause of action to review ICC orders. As the debate heated up, and the contending groups sought amendments that would clarify the ambiguity, Roosevelt sent conflicting signals of support to one side and then the other.[78] Taking note of these machinations, Senator Rayner argued that the difference could not be compromised, and in so doing he succinctly described the crux of dispute:

> The President tells us that these two reviews which he has sent in here are one and the same thing, but, Mr. President, they are as widely different as it is possible for two divergent propositions to be. The one is the review under the Constitution, which you can not eliminate without invalidating your law; the other is the broad statutory review, which permits the courts to try the cases de novo and in the same manner as if no such body as the Interstate Commerce Commission had ever existed upon the face of the earth.[79]

The battle over the standard of judicial review raged in the Senate for nearly four months. In the end, all efforts to adopt clarifying amendments were defeated, including amendments expressly conferring jurisdiction and amendments expressly limiting review to constitutional issues. The exhausted senators voted overwhelmingly to approve a bill that, like Congressman Hepburn's original bill, said nothing about the applicable standard of review.[80]

For present purposes, one thing is particularly striking about the Senate debate. No senator advocated anything like the appellate review model as a basis for calibrating the proper degree of judicial review of ICC orders. Most of those who favored narrow review—populists like Ben Tillman and progressives like Robert LaFollette—probably would have preferred no judicial review at all. But to the extent that the

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78. See 40 Cong. Rec. 6685 (1906) (statement of Sen. Isidor Rayner) (describing Roosevelt's conflicting communications with senators).

79. Id. at 6685–86.

80. See Hepburn Act §4, 34 Stat. at 589 (providing that ICC orders "except orders for the payment of money" take effect in not less than thirty days unless the same shall be "suspended or set aside by a court of competent jurisdiction").

Constitution required some review, they envisioned that such review would be de novo. Courts would take evidence and determine for themselves whether rates had been set so low as to be confiscatory. Likewise, those who favored broad review, such as Nelson Aldrich, assumed that review would be de novo. After all, review would be by a bill of equity, which was understood to be an original action.

From the perspective of the Supreme Court, the message encoded in the Hepburn Act was twofold. First, the public and the politicians were deeply unhappy with the Court's existing practices regarding judicial review of ICC rate orders.[81] Second, Congress and the President had provided no directions regarding what to do about it.[82] The net effect was to delegate authority to the Court to decide on the new standard of review, with the implied threat that if the Court did not back off from its aggressive review practices, more drastic action would be in the offing.

C. *Strategic Retreat*

Shortly after the Hepburn Act was passed, the tenor of Supreme Court decisions in ICC matters changed dramatically.[83] I will not provide a comprehensive review of the decisions, but will only present the highlights in what amounts to a rapid progression toward a new understanding of the judicial role.

Within a year of the signing of the Act, the Court rendered its landmark decision in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*[84] The case did not concern the standard of review in an action to enjoin an ICC rate order. The question, rather, was whether the Interstate

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81. See 40 Cong. Rec. 5722 (1906) (statement of Sen. Robert La Follette) ("[T]he public refuses longer to recognize this subject as one which the railroads alone have the right to pass upon. . . . Because it is a natural monopoly, because it is the creature of government, it becomes the duty of government to see to it that the railway company inflicts no wrong upon the public . . . .").

82. See 40 Cong. Rec. 6778 (1906) (statement of Sen. Jonathan P. Dolliver) ("[N]obody knows exactly what the courts of the United States will do with an order of the Commission . . . . [A]side from providing the venue of the suits and distinctly providing that the orders of the Commission may be set aside or suspended by a court of competent jurisdiction, we said nothing.").

83. All observers who had lived through the change concur in this assessment. See, e.g., Dickinson, supra note 14, at 160 ("It was the Hepburn Act of 1906 which finally turned the scale."); McFarland, supra note 70, at 120 ("[T]he record of relations between the commission and the courts after 1906 is altogether different from that of the previous period."); Lee, supra note 6, at 305 ("[B]y a handful of decisions around the turn of the century arising under long since repealed provisions of the original Interstate Commerce Act, the Supreme Court arrived at the rudiments of the legal principles that still govern in statutory review proceedings the relationship of the courts to administrative action . . . ."). Modern histories concur as well. See, e.g., James W. Ely, Jr., Railroads and American Law 228 (2001) ("During the early decades of the twentieth century, the Supreme Court in the main bolstered the ICC's authority and largely retreated from review of railroad rates."); Rabin, Federal Regulation, supra note 54, at 1234 (discussing Court's adoption of "new approach").

84. 204 U.S. 426 (1907).

Commerce Act preempted lawsuits grounded in the common law duty of common carriers to charge only reasonable rates. Stressing the congressional objectives of assuring uniformity of rates and rooting out discrimination, the Court held that the Act preempted common law actions. The Court emphasized that the Act gave the power to determine the reasonableness of rates in interstate commerce to the Commission, not to the courts.[85] If the power of hearing original complaints rested in both the Commission and the courts, "a conflict would arise which would render the enforcement of the act impossible."[86] The implications of this for the standard of review, although not noted in the opinion, were far-reaching. If courts could not entertain original complaints charging unreasonableness, it would seem to follow that they could not substitute their judgment for that of the Commission on judicial review either. The Court would soon note those implications explicitly.[87]

The occasion was a decision this Article will refer to as *Illinois Central I*.[88] The case arose under the original Interstate Commerce Act, so it did not directly implicate the Hepburn Act. Counsel for the railroad, seeking to overturn an ICC rate order, made an elaborate presentation asking the Court to adopt a series of "rules or principles" indicating circumstances in which railroad rates would be deemed reasonable.[89] Considering each of the proposed rules or principles in turn, the Court, speaking through Justice McKennna, held that each fell "'peculiarly within the province of the Commission,'" not the courts.[90] Distinguishing the various precedents cited by counsel, the Court noted that in each there had been "a single, distinct, and dominant *proposition of law* which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated."[91] In the present case, in contrast:

> The question submitted to the Commission, as we have said, with tiresome repetition perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether the Commission gave too much weight to some parts of it and too

85. Id. at 441, 448.

86. Id. at 441.

87. See Ill. Cent. R.R. Co. v. ICC (*Illinois Central I*), 206 U.S. 441, 464 (1907) (rejecting request to create judicial presumptions about rates and noting redress for unreasonableness must be through ICC (citing *Abilene Cotton Oil Co.*, 204 U.S. 426)).

88. *Illinois Central I*, 206 U.S. 441.

89. Id. at 454.

90. Id. at 456 (quoting Cincinnati, New Orleans & Tex. Pac. Ry. v. ICC, 162 U.S. 184, 194 (1896)).

91. Id. at 457 (emphasis added).

> little weight to other parts of it is a question of fact and not of law.[92]

There was no question that the Court was in retreat, and that it did so by emphasizing the law-fact distinction familiar to judges from the conventions associated with judicial review of jury verdicts. In another case decided at this time, the Court said the Commission should be reversed only because of "clear and unmistakable error,"[93] invoking the language used to review factual determinations of judges sitting without a jury.[94]

Three years later, the Court decided another case by the same name but presenting different issues, which this Article will refer to as *Illinois Central II*.[95] The case involved the impact of the Hepburn Act on the Commission's authority to allocate rail cars in periods of car shortages. The Court pointedly noted that the new Act made ICC orders self-executing, observing that in this and other respects the new law endowed the Commission "with large administrative functions."[96] The Court then described its review power as embracing (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.[97] These review functions, the Court remarked, "are of the essence of judicial authority,"[98] and may not be curtailed by Congress. But the Court immediately said it was "equally plain" that it could not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative order has been wisely exercised."[99] Here we see a clear articulation of a division of functions between court and agency based on relative competencies. *Illinois Central II* quickly became the leading precedent on the standard of review of ICC rate orders.[100]

Two years later, in *ICC v. Union Pacific Railroad Co.*, the Court, in an opinion by Justice Lamar, spelled out in greater detail the standard of review that would apply when a carrier alleged that the Commission's

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92. Id. at 466.

93. Cincinnati Ry. Co. v. ICC, 206 U.S. 142, 154 (1907).

94. See, e.g., Fed. R. Civ. P. 52(a)(6) (findings of fact in case tried without a jury "must not be set aside unless clearly erroneous"); Stern, supra note 4, at 79–80 ("[F]indings [of trial courts] were to be accepted unless clearly erroneous.").

95. ICC v. Ill. Cent. R.R. Co. (*Illinois Central II*), 215 U.S. 452 (1910).

96. Id. at 470.

97. Id.

98. Id.

99. Id.

100. See William Z. Ripley, Railroads: Rates and Regulation 538–45 (1927) (describing *Illinois Central II* as "[t]he leading Supreme Court decision construing the Hepburn law" and collecting follow-on decisions).

application of law to fact was so defective as to amount to reversible error.[101] Such "mixed questions of law and fact," the Court said, are

> subject to review, but when supported by evidence [are] accepted as final. Not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.[102]

Here we witness the birth of the famous "substantial evidence" standard of review of agency findings of fact.[103] The standard was borrowed—without citation of authority—from the established understanding of the standard of review that an appeals court applies in reviewing a jury verdict.[104]

That same year, the Court upheld a version of the appellate review model against a due process claim.[105] The State of Washington adopted by statute virtually the same scheme for review of orders of its railroad commission that the Hepburn Act had adopted for review of ICC orders. The commission's orders were self-executing unless enjoined before they went into effect. Unlike the Hepburn Act, however, the Washington statute specified that judicial review was to be based on the record produced before the commission.[106] The railroad claimed that this denial of any right to make a new record in the reviewing court denied it due process. The Court, speaking again through Justice Lamar, rejected the claim, analogizing the role of the commission to a master in chancery, who makes a record and recommends conclusions of law, which are then reviewed by the chancellor.[107] The Court noted that the Washington law went further than the ICA cases, where in theory the record could be made de novo. But it observed that recent decisions had disapproved of the practice of allowing carriers to supplement the record on review, so Washington had merely "enlarg[ed]" on the practice the Court had approved in federal proceedings.[108]

It would be misleading to suggest that all decisions after the Hepburn Act deferred to the policy judgments of the ICC, just as it would be an exaggeration to say that all review before the Hepburn Act applied pure independent judgment. The Court, perhaps inevitably, engaged in

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101. 222 U.S. 541 (1912).

102. Id. at 546–48.

103. See E. Blythe Stason, "Substantial Evidence" in Administrative Law, 89 U. Pa. L. Rev. 1026, 1040–41 (1941) (identifying *Union Pacific* as first judicial opinion to use "substantial evidence" in administrative law context).

104. See Stern, supra note 4, at 73 (identifying substantial evidence as being "well-established" standard for review of jury verdicts).

105. Washington ex rel. Or. R.R. & Navigation Co. v. Fairchild, 224 U.S. 510 (1912).

106. Id. at 515.

107. Id. at 527.

108. Id.

some backsliding.[109] Yet within a decade, whether rates were discriminatory or unjust and unreasonable were routinely said to be "questions of fact that have been confided by Congress to the judgment and discretion of the Commission."[110] Accordingly, the Commission's resolution of these matters was "not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."[111] Of particular significance, the Court strenuously lectured lower courts that they were to decide injunction proceedings based on the record made before the Commission if at all possible. Although no language in the statute compelled such a practice, the Court expressly invoked the Hepburn Act as making it especially "appropriate" that "all pertinent objections to action proposed by the Commission and the evidence to sustain them shall first be submitted to that body."[112]

As Skowronek has observed, the Supreme Court appears to have "understood the volatile political nature of the question at hand and the growing precariousness of its own political position."[113] The Court accordingly had embarked on a quest "for a new and more secure position before the growing democratic attack on the judiciary got out of hand and caused some real damage to its prerogatives and its prestige."[114] More precisely, what seems to have happened is that the Court, facing a political crisis to its own authority, looked into the doctrinal tool bag for something that would permit it to back off without losing face. The conventions governing appellate review of trial court decisions seemed to fit, at least in the sense that they satisfied the immediate imperative for a strategic retreat.

D. *The Source of the Appellate Review Model*

So far, I have explained the timing of the adoption of the appellate review model and the motivations that led the Supreme Court to embrace that model. What is missing is an explanation of where exactly the model came from. This, I must confess, remains something of a mystery. Two sources can be ruled out. Congress did not direct the courts to adopt the appellate review model in the Hepburn Act. The Act said noth-

109. See, e.g., ICC v. Chi. Great W. Ry. Co., 209 U.S. 108, 123 (1908) (affirming reversal of ICC by circuit court on undue preference claim); Penn Ref. Co. v. W. N.Y. & Pa. R.R. Co., 208 U.S. 208, 221 (1908) (reversing determination of rate discrimination by ICC concurred in by jury empanelled by circuit court).

110. Mfrs. Ry. Co. v. United States, 246 U.S. 457, 481 (1918).

111. Id. The Court had previously held that a post-Hepburn Act ICC order supported by no evidence should be reversed as contrary to law. See Fla. E. Coast Ry. v. United States, 234 U.S. 167, 185 (1914) ("[W]here it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law . . . .").

112. *Mfrs Ry.*, 246 U.S. at 490 (citations omitted).

113. Skowronek, supra note 54, at 260.

114. Id.

ing about the standard of review in injunction proceedings. And it carried forward the language of the original ICA for reparations cases, which had been interpreted as requiring de novo review.[115] Nor did any academic propose the appellate review model during the relevant time frame. The handful of scholars who addressed the law of administration at this time had their thinking tightly locked in the bipolar model of the nineteenth century.[116]

Clearly, the immediate source of the appellate review model was the Court itself. No single Justice played a critical role in developing the appellate review model. Justice White authored the two most important decisions that acknowledged the policymaking role of the ICC—*Abilene Cotton Oil*[117] and *Illinois Central II*.[118] But Justice Lamar's opinions drew most explicitly on the example and the linguistic conventions of civil litigation, analogizing a regulatory commission to a master in chancery and introducing the phrase "substantial evidence" into administrative law.[119] No Justice made an explicit connection between the court-agency relationship and the judge-jury or appeals court-trial court relationships.[120] The conventions developed in the one context were transposed to the other through a collective process of trial and error, albeit over a relatively brief period of time.

The rigidly bipolar nature of judicial review began to break down toward the end of the nineteenth century. Professor Mashaw has noted that exceptions began to be recognized to the "conclusiveness" of decisions by the Lands Office.[121] Similarly, the narrow ultra vires review available under mandamus and habeas corpus began to widen.[122] Professor

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115. See supra Part II.B.

116. See supra text accompanying notes 47–50.

117. Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 430 (1907).

118. ICC v. Ill. Cent. R.R. Co., 215 U.S. 452, 459 (1892).

119. Washington ex rel. Or. R.R. & Navigation Co. v. Fairchild, 224 U.S. 510, 527 (1912) (discussing chancery analogy); ICC v. Union Pac. R.R. Co., 222 U.S. 541, 548 (1912) (introducing "substantial evidence" standard).

120. Dickinson cites two state court decisions that expressly analogized workmen's compensation commissions to juries for purposes of review. See Dickinson, supra note 14, at 154 n.81 (citing In re Savage, 110 N.E. 283 (Mass. 1915) and Papinaw v. Grand Trunk Ry. Co., 155 N.W. 545 (Mich. 1915)). Note, however, that both these decisions came after the Supreme Court had effectively adopted the analogy for purposes of review of ICC orders.

121. Jerry L. Mashaw, Federal Administration and Administrative Law in the Guilded Age, 119 Yale L.J. 1362, 1408–11 (2010) [hereinafter Mashaw, Federal Administration].

122. On habeas corpus, compare Paul Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 478–83 (1963) (arguing that until twentieth century, habeas corpus review was limited to examining whether custodian was acting within his jurisdiction), with James S. Liebman, Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2045, 2055 (1992) (contending courts began to use habeas to review for error in limited class of nationally important claims in nineteenth century). On mandamus, see Mashaw, Federal Administration, supra note 121, at 1405–07 (citing examples of expansion of mandamus review).

Woolhandler has insightfully pointed out that appeals courts began using the deferential "clearly erroneous" standard of review for findings of fact by judges sitting as chancellors in equity, in parallel with the use of this standard in appeals from decisions by judges sitting without juries in cases at law.[123] So, we can surmise that appeals courts (such as the U.S. Supreme Court) would increasingly find it anomalous to engage in de novo review in any case based on equity jurisdiction, including a case reviewing agency action.

But none of these developments entailed the adoption of the appellate review model for calibrating the posture of a reviewing court toward the decisions of an administrative agency.[124] The old order was breaking down, but the new era was not yet born. Nevertheless, the spark did jump between 1907 and 1910, and the appellate review model of administrative law was launched.

III. ENTRENCHMENT OF THE APPELLATE REVIEW MODEL

If the Hepburn Act provided the catalytic event that brought the appellate review model into being, subsequent events quickly reinforced the Court's gravitation toward this conception of judicial review. By 1930, well before Franklin Roosevelt was elected President, the appellate review model was thoroughly entrenched.[125]

A. *The Commerce Court*

One episode that occurred shortly after the adoption of the Hepburn Act undoubtedly helped secure the status of the appellate review model in the context of review of ICC rate orders: the rise and rapid demise of the so-called Commerce Court between 1910 and 1913. The Commerce Court was a specialized Article III tribunal devoted exclusively to review of ICC decisions. Supporters argued that such a court, staffed by judges who devoted their energies exclusively to railroad matters, would "prevent delay incident to the adjudication and prosecution of cases," "overcome the apparent inability of the Federal Judges to adequately meet the technical and conflicting evidence submitted," and end "the dissimilarity and contrariety of opinions issuing from different

123. Woolhandler, supra note 6, at 226–29.

124. In United States v. Duell, 172 U.S. 576, 582 (1899), the Court upheld the use of an "appeal" to review decisions of the Patent Office. See also infra notes 256–259 and accompanying text (discussing *Duell*). But the decision, which was soon forgotten, contained no guidance about how the "appellate" function would be exercised in the context of reviewing an administrative body.

125. A particularly striking decision is Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930), where Justice Brandeis reviewed the ICC cases, found that they conclusively established the appellate review model, and then extended this understanding to define the judicial role in reviewing decisions under the Packers and Stockyards Act. Id. at 443–45.

Federal Courts."[126] The creation of such a court was much discussed during the debate that led to the adoption of the Hepburn Act, and it was omitted from the final bill only because of President Roosevelt's adamant opposition.

The idea of a specialized court did not die, however, and when a further round of reforms strengthening the powers of the ICC was considered in 1910, President Taft threw his support behind the idea of the Commerce Court, leading to its creation in the Mann-Elkins Act adopted in that year.[127] Although the Commerce Court "experiment" was to last only three years, it had several points of significance for the development of the appellate review model.

In adopting the Mann-Elkins Act, Congress arguably ratified—or at least signaled its strong approval of—the Supreme Court's newly deferential stance toward review of decisions of the ICC. In hearings conducted by the Senate Commerce Committee to consider the proposal to create a commerce court, several witnesses warmly praised the Court's recent decisions, especially *Illinois Central II*.[128] One witness—Martin A. Knapp, who was Chairman of the ICC and soon to be named chief judge of the Commerce Court—proposed that Congress adopt an amendment stating that nothing in the new Act would give the Commerce Court "any jurisdiction or authority not now possessed by the circuit courts."[129] This was designed to lock in the post-Hepburn Act conception of judicial authority recently adopted by the Supreme Court. Congress readily agreed, and added a provision to this effect to the legislation.[130] Knowledgeable observers, including Justices of the Supreme Court, could not help but note that Congress was pleased with the new appellate review model.

Shortly after Woodrow Wilson was inaugurated as President in 1913, the Commerce Court was unceremoniously abolished. The court had many failings, including perhaps that Congress concluded it did not want controversial railroad rate matters settled by a tribunal insulated from its control.[131] But among the many sources of dissatisfaction with the court, one, not unexpectedly, was that it engaged in very aggressive review of

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126. J. Newton Baker, The Commerce Court—Its Origin, Its Powers and Its Judges, 20 Yale L.J. 555, 555 (1911).

127. Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539.

128. 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) (statement of Rush C. Butler, representing Chicago Association of Commerce and National Industrial Traffic League); id. at 200–03 (testimony of Martin A. Knapp); id. at 211–12 (testimony of Judson C. Clements).

129. Id. at 201 (testimony of Martin A. Knapp).

130. Mann-Elkins Act, 36 Stat. at 539 ("Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit[ ] courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court.").

131. See George E. Dix, The Death of the Commerce Court: A Study in Institutional Weakness, 8 Am. J. Legal Hist. 238, 253–57 (1964) (advancing this thesis).

ICC decisions. Martin Knapp, after he was named chief judge of the court, took the position that review would be on the record generated by the Commission, but under a standard of independent judgment.[132] Progressives and shipper constituencies were outraged. As one commentator put it, "this body of usurping judges upset the rulings of the commission in practically every important case . . . and this not on questions of law but purely on findings of fact."[133]

The Supreme Court, for its part, seemed to view the upstart tribunal as a rival. It overturned four of the first five Commerce Court decisions that came before it for review,[134] and narrowly interpreted the scope of its jurisdiction. Democrats and progressive Republicans seized on the Supreme Court's sharp language condemning the Commerce Court for overreaching as confirmation of the court's pro-railroad bias. When impeachment proceedings commenced against one of the five judges for using his office to promote his private interests in railroads, the court's fate was sealed.

The sudden collapse of the Commerce Court served to further entrench the appellate review model. The Supreme Court likely saw the fate of the Commerce Court as a vindication of its strategy of accommodation between reviewing courts and agencies. The failure of the specialized court left the appellate review model as the only option on the table for reaching some solution midway between the "bipolar" options of the nineteenth century. Furthermore, complaints about the Commerce Court's aggressive review, and Congress's eagerness to end the experiment, no doubt reinforced the political message that some kind of judicial retreat from de novo review was imperative. The appellate review model offered a way for the Court to retreat with dignity.

B. *Post-Commerce Court Decisions*

By 1918, the Court's post-Commerce Court Act decisions had effectively congealed into the appellate review formula familiar to modern administrative lawyers. All judicial review of ICC orders, including those in which a claim of confiscation was advanced, was based solely on the re-

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132. See Frank H. Dixon, Railroads and Government: Their Relations in the United States, 1910–1921, at 45–51 (1922) ("The Commerce Court assumed jurisdiction, and while its conclusion was identical with that of the Commission, it is evident that it could have reached no conclusion at all without reviewing the facts and substituting its own judgment upon them for that of the Commission.").

133. Dix, supra note 131, at 257 (internal quotation marks omitted) (quoting C. Synder, Justice vs. Technicality, Courts in Reform, Colliers, Feb. 24, 1912, at 28).

134. Skowronek, supra note 54, at 266. For the overall record of the Commerce Court, see Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 165 n.95 (1928) ("94 cases were docketed in the Commerce Court. 43 decisions were rendered, including one rehearing. Appeals were taken in 22 cases, of which 13 were reversed, 2 modified, and 7 affirmed.").

cord before the Commission.[135] Questions of fact, and mixed questions of law and fact, were for the Commission to decide, subject to review under the substantial evidence standard. The Court would decide independently only questions of constitutional right, whether the agency was acting within its jurisdiction, and pure questions of law.

The judicial attitude also changed significantly in reparations cases. With respect to reparations claims, the Hepburn Act eliminated the approach to judicial review under the original ICA—a petition in equity to enforce the Commission's order—and provided instead that if a carrier did not comply with a reparations order, a shipper could file an action in circuit court, where "[s]uch suit shall proceed in all respects like other civil suits for damages."[136] The Act nevertheless carried forward the provision of the original ICA that in such an action "the findings and order of the Commission shall be prima facie evidence of the facts therein stated."[137] Because the Act specifically directed courts to proceed "in all respects" like they were adjudicating a civil suit for damages, it is not surprising that courts exercised more independent judgment in reparations cases than they did in rate prescription cases.[138] Even so, it was clear to contemporary observers that "the courts have given more weight to the findings of the commission, even in reparations cases, than they did shortly after the commission was established."[139]

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135. The dictum in *Manufacturers Railway* was reaffirmed in the context of a confiscation claim in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 53–54 (1936); see supra notes 110–112 and accompanying text (discussing *Manufacturers Railway*).

136. Hepburn Act, ch. 3591, § 5, 36 Stat. 584, 591 (1906).

137. Id.

138. Thus, in Meeker v. Lehigh Valley Railroad Co., 236 U.S. 412 (1915), the Court rejected the contention that the prima facie evidence provision violated due process and deprived the carrier of its right to trial by jury, observing that "[t]his provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of the issues, and takes no question of fact from either court or jury." Id. at 430. Modern proponents of the Article III public rights theory have placed great emphasis on the Hepburn Act's divergent treatment of reparations cases and rate prescription cases, suggesting that Congress perceived an action to require the payment of reparations to be a "private right"—which required a judicial action in which the findings of the Commission were regarded as only prima facie evidence—whereas the prescription of rates for the future was a "public right," and hence something the Commission could direct in a self-enforcing order. See Nelson, supra note 21, at 598 & n.150 (noting "authoritative resolution . . . required an exercise of 'judicial' power, because it implicated property rights that had already vested in the regulated entities"); Young, supra note 33, at 813–19 (providing background on Hepburn amendments to Interstate Commerce Act). As discussed below, the support for this claim is weak. See infra notes 218–235.

139. A.M. Tollefson, Judicial Review of the Decisions of the Interstate Commerce Commission (pt. 2), 11 Minn. L. Rev. 504, 505–06 (1927); accord Gregory Hankin, Conclusiveness of the Federal Trade Commission's Findings as to Facts, 23 Mich. L. Rev. 233, 240 (1924) (reviewing ICC cases and concluding "the findings of fact in the reparation cases had greater weight in the courts than was previously attributed to them").

Particularly important here was the development of the distinction between "evidential" and "ultimate" facts.[140] The Commission's order was given only prima facie effect with respect to ultimate facts such as "whether there has been injury, and if so to what extent."[141] But questions preliminary to these and which are "administrative in character, such as reasonableness of rates, are evidential facts and such findings, with some exceptions . . . chiefly as to questions of law, are conclusive and will not be reviewed by the courts even where such questions arise in reparations cases."[142] Soon, the Court would say that the Commission enjoys

> a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.[143]

Whatever distance remained between judicial review of reparations and rate prescription orders, both were comfortably within the orbit of the appellate review model.

C. *The FTC*

The early history of judicial review of decisions of the Federal Trade Commission (FTC) is also instructive, because it shows how the appellate review model quickly spread beyond the context of ICC review proceedings and how it could easily be adapted for offensive as well as defensive purposes. The Federal Trade Commission Act of 1914 was a patchwork of discordant ideas,[144] and what quickly became the most frequently invoked provision of the Act, section 5, was hastily cobbled together at the last minute with little opportunity for legislative discussion.[145] As enacted, section 5 sweepingly authorized the Commission to bring proceedings to determine whether particular firms were engaged in "[u]nfair methods of competition" in interstate commerce.[146] An affirmative finding would result in a cease and desist order, which could be enforced through an action by the Commission for an injunction in federal court; alternatively, a party against whom the order was directed could bring an action to have the order set aside. In either type of proceeding, the Act

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140. See *Meeker*, 236 U.S. at 427 (defining "ultimate" facts).

141. Tollefson, supra note 139, at 509.

142. Id.

143. Spiller v. Atchison, Topeka & Santa Fe Ry. Co., 253 U.S. 117, 126 (1920).

144. Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58 (2006)).

145. See Thomas K. McCraw, Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn 112–28 (1984) (discussing origins of the Federal Trade Commission).

146. Federal Trade Commission Act § 5, 38 Stat. at 719 (codified at 15 U.S.C. § 45(a)(1)).

provided that "the findings of the Commission as to the facts, if supported by testimony, shall be conclusive."[147] The legislative history indicates this formulation was chosen in order to adopt the deferential standard of review the Supreme Court had developed in its post-Hepburn Act ICC decisions.[148] Nothing was said in the statute about the standard of review of questions of law, or of ultimate facts, i.e., the application of law to facts in making a determination of whether a business practice was an "unfair method of competition."

In its first confrontation with the new Act, *FTC v. Gratz*, the Supreme Court wasted no time making clear that it had sole and final authority to determine what practices could be described as "unfair methods of competition."[149] This, the Court said, was a question of law, and thus for the courts, not the Commission, to determine.[150] The court of appeals had set aside the Commission's order on the ground that the Commission had produced no evidence that the conduct the Commission thought unfair—tying the purchase of cotton bale ties to the purchase of bagging cloth—was the *general* practice of the respondent.[151] Realizing, perhaps, that this was hard to square with the deferential standard of review of facts prescribed by the statute, the Court shifted the ground of decision to the legal definition of "unfair methods of competition." The Court then concluded, as a matter of law, that the respondents' tie-in scheme was not unfair.[152]

Gratz set the pattern for judicial review of FTC cease and desist orders for the next twenty years. The Supreme Court repeatedly reversed the Commission but never on the ground that facts of record failed to support the Commission's conclusion that a method of competition was unfair. Instead, the Court freely indulged in defining the scope of "unfair competition" itself, sometimes with reference to parallel judgments

147. Id. at 720 (codified at 15 U.S.C. § 45(c)). In 1938 the word "testimony" was changed to "evidence." Civil Aeronautics Act of 1938, ch. 601, § 1107, 52 Stat. 973, 1028. There is no indication any change in meaning was intended.

148. As was true when the Mann-Elkins Act was adopted in 1910, the Court's decisions, in this instance *Illinois Central II* and *Union Pacific*, were frequently cited with approval. See Stason, supra note 103, at 1042–44 (discussing legislative history of the Federal Trade Commission Act's judicial review provision). Senator Cummins, who proposed the language eventually adopted, discussed the *Union Pacific* case and said, "This probably is the clearest and most satisfactory expression of the law that can be found, and in my amendment I am endeavoring to make this law applicable to the orders of the proposed trade commission." 51 Cong. Rec. 13,045 (1914). Early decisions of the courts of appeals reviewing factual challenges to FTC orders under this provision likewise generally construed it in accordance with the substantial evidence standard developed in the ICC context. See Hankin, supra note 139, at 245–71 (discussing courts' treatment of finding of facts made by FTC).

149. 253 U.S. 421 (1920), overruled in part by FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

150. Id. at 427.

151. Id. at 424–25.

152. Id. at 428–29.

reached by courts under the antitrust laws,[153] and sometimes based on nothing more than its own intuitions.[154] The meaning and application of unfair competition, the Court intoned, "must be arrived at by what this Court elsewhere has called 'the gradual process of *judicial* inclusion and exclusion.'"[155] The Court also seized on the statutory language authorizing courts to "modify" the Commission's order on review to significantly recast the Commission's remedial orders.[156]

In one case, in a passage that was probably dicta, the Court opined that it had the authority to "examine the whole record" to ascertain whether there were "material facts not reported by the Commission" that might support a different outcome. However, even here it acknowledged that the ordinary course in such a case would be to remand to the Commission, "the primary fact-finding body," to make additional findings.[157] This elicited a rebuke from Chief Justice Taft, who said he hoped the majority did not mean that "the court has discretion to sum up the evidence *pro* and *con* on issues undecided by the Commission and make itself the fact-finding body."[158] He reminded his colleagues that "we should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the Court should in its rulings preserve the Board's character as such."[159]

Chief Justice Taft's lecture was taken to heart. Never again during this formative period did the Court suggest that courts should engage in any meaningful review of the FTC's findings of fact. There was no need to. With an extraordinarily vague statute, and the understanding that the courts had complete authority to interpret that statute as they saw fit, the federal judges could reverse the Commission any time they encountered an outcome they did not like.

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153. See, e.g., FTC v. Beech-Nut Packing Co., 257 U.S. 441, 452–54 (1922) (assessing resale price policy against judicial precedents regarding resale price maintenance under Sherman Act).

154. See, e.g., FTC v. Raladam Co., 283 U.S. 643, 651–53 (1931) (deciding false advertising of preparation as an "obesity cure" is not a method of competition); FTC v. Raymond Bros.-Clark Co., 263 U.S. 565, 574 (1924) (holding wholesaler's refusal to deal with manufacturer who sells to competing wholesaler not unfair); FTC v. Sinclair Ref. Co., 261 U.S. 463, 476 (1923) (holding practice of renting underground tanks to retailers at nominal rents in return for exclusive dealing agreement not unfair); FTC v. Curtis Publ'g Co., 260 U.S. 568, 581–82 (1923) (holding contract prohibiting dealers from selling competitor's publications not unfair); see also FTC v. Klesner, 280 U.S. 19, 27–30 (1929) (refusing to enforce FTC order applicable to squabbling retailers in District of Columbia because it did not implicate "the interest of the public"); cf. FTC v. Winsted Hosiery Co., 258 U.S. 483, 492–94 (1922) (holding practice of selling underwear made of only part wool as "natural merino" or "natural wool" unfair).

155. *Raladam*, 283 U.S. at 648 (emphasis added) (citation omitted).

156. See, e.g., *Curtis Publ'g Co.*, 260 U.S. at 580 ("[T]he statute grants jurisdiction [to the court] to make and enter . . . a decree affirming, modifying, or setting aside an order [from the FTC] . . . .").

157. Id.

158. Id. at 583 (Taft, C.J., doubting).

159. Id.

The FTC was regarded by the courts during this era with something approaching contempt.[160] It suffered from weak appointments, insufficient appropriations from Congress, hostility from the organized bar, and, above all, a legal mandate so vague as to be meaningless.[161] What is clear is that the appellate review model was quickly and readily adapted to the end of supervising an upstart agency. A model that originated in the need for strategic retreat from oversight of the ICC was quickly turned around and used as an instrument of aggression against the poor FTC.

IV. The Apostle of the Appellate Review Model

In administrative law, and perhaps public law more generally, academic writing is rarely the catalyst for fundamental legal change. When the law takes a detour, the impetus tends to come from the courts themselves, and the Supreme Court in particular. Innovation is not always—or perhaps even usually—self-consciously chosen by judges for instrumental reasons. It may simply be a mutation produced by the pressures of litigation, which is then seized upon as something that "works" better than what came before. The *Chevron* doctrine, the hard look doctrine, modern standing doctrine—and, I would claim, the appellate review model—all fit this description.[162] This is not to say that academic writing is irrelevant. Academic commentary is an important source of feedback for the courts. When the courts venture down a new path and academics cheer, this undoubtedly increases the odds that the novelty will be perpetuated. When the courts innovate and the academics jeer, it is more likely that the courts will backtrack or confine the innovation to its facts.

Although no academic served as impresario for the appellate review model, it had a cheerleader—and a very effective one at that. John Dickinson, like the first generation of administrative law scholars, had a background in both political science and law.[163] When he took a position as a lecturer in the Government Department at Harvard in 1925, he set to work on his magnum opus, *Administrative Justice and the Supremacy of Law*.[164] The book was an immediate success upon its publication in 1927,

160. See McCraw, supra note 145, at 125 ("[T]he FTC got off to a rocky start. In no one's eyes did it represent a distinguished regulatory body."); McFarland, supra note 70, at 92 ("[T]he history of judicial review of regulatory orders of the Federal Trade Commission clearly discloses that the judges substitute their own opinions for those of the commissioners or, even when sustaining the commission, hold themselves in readiness to reverse or modify orders with which they do not agree.").

161. See McCraw, supra note 145, at 81, 125–28.

162. See Thomas W. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, *in* Administrative Law Stories 399, 427–28 (Peter Strauss ed., 2006) ("*Chevron* . . . became great not because of inherent importance of the issue presented, but because the opinion happened to be written in such a way that key actors in the legal system later decided to make it a great case.").

163. The biographical details are drawn from George L. Haskins, John Dickinson 1894–1952, 101 U. Pa. L. Rev. 1 (1952).

164. Dickinson, supra note 14.

and is still described by those who encounter it for the first time as "brilliant."[165] The book led in short order to his appointment as a full professor at the University of Pennsylvania Law School. He remained at Penn from 1929 until 1948, even while engaged in significant service in the New Deal, and then with the Law Department of the Pennsylvania Railroad. He gave up his academic position only when his responsibilities as Vice President and General Counsel of the railroad became all-consuming. Nevertheless, throughout his busy but shortened career (he died at age fifty-eight), Dickinson remained a highly productive and respected scholar, who wrote on history, jurisprudence, and political theory as well as administrative law.

Dickinson's 1927 book made a number of contributions that would have a lasting impact on the field of administrative law. First, his was the first treatment that made judicial review the centerpiece of the study of administrative law. For the founding generation of "administration" scholars—Wyman, Goodnow, and Freund—judicial review was a peripheral issue.[166] In sharp contrast, Dickinson's monograph was all about the court-agency relationship. Quite likely, Dickinson had no intention of suggesting that there is nothing else to administrative law besides the issue of judicial review—this was simply what he chose to write about. Nevertheless, it remains true that after Dickinson, the study of administrative law became largely synonymous with the study of judicial review. The field as conceived by the next generation of scholars—Jaffe, Davis, Gellhorn, Schwartz, and Nathanson—bears much more resemblance to the subject of Dickinson's book than to the works of the first generation of scholars.[167]

Second, Dickinson broke new ground in suggesting that judicial review was governed by a unifying set of principles.[168] The idea that judi-

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165. See, e.g., Chase, supra note 47, at 171 ("The book is nothing less than brilliant . . . ."); Young, supra note 33, at 824 (praising Dickinson as "brilliant" and crediting him with "unusual powers of analysis and foresight").

166. See supra note 48 and accompanying text (discussing scholars' treatment of constitutional status and internal organization of administrative bodies).

167. William Chase laments the juriscentric nature of administrative law, which he attributes to the influence of Harvard and the Frankfurter tradition. See Chase, supra note 47, at 106, 116.

168. This is not immediately apparent from the organization of the book. Chapter V, "Practical Limits of the Supremacy of Law," concludes with the observation that the field of administration needs to be broken into subfields for further study. Dickinson, supra note 14, at 155–56. Dickinson followed up with separate chapters on public utility regulation—principally railroads—in Chapter VI, id. at 157–202; the Federal Trade Commission in Chapter VIII, id. at 236–50; general police regulation in Chapter IX, id. at 251–63; and traditional executive functions like the distribution of lands, the post office, and immigration in Chapter X, id. at 264–306. But it would be a mistake to characterize the work as a high level treatise. Dickinson expounds his general thesis in discussing administrative finality in Chapter III, id. at 39–75; the supremacy of law in Chapter V, id. at 105–56; the role of the courts in areas of social controversy in Chapter VII, id. at 203–35; and judicial review of questions of fact in Chapter XI, id. at 307–32. And his discussion of

cial review is a unified phenomenon, rather than a series of discrete forms of intervention governed by different forms of action, was transformative. Here we see the seed planted for the judicial review provisions of the Administrative Procedure Act, and for the modern study of administrative law, which overwhelmingly regards judicial review as a unitary phenomenon.

Third, Dickinson clearly perceived that the new conception of judicial review that had emerged was modeled on the judge-jury relationship in civil law. Consider the following passage from the chapter on judicial review of questions of fact:

> [Courts are recognizing] an essentially new basis of review . . . at once broader in some respects, and narrower in others, than that appropriate to ultra vires. Other analogies have been sought, and the forms of expression most frequently employed are those which are borrowed from review by a court of error of the verdict of a jury. . . . The difficulties which arise on review of administrative orders are for the most part of the same nature as those applying to the review of verdicts.[169]

Fourth, Dickinson supplied something that was missing from the Supreme Court's foundational decisions construing the post-Hepburn Act ICA: a functional justification for the new appellate review model in terms of what we would today call comparative institutional analysis.[170] Although he frequently and explicitly noted the analogy between the judge-jury relationship and the reviewing court-agency relationship, he also recognized that it was only an analogy, and that what was needed to justify the new division of functions was an argument grounded in the strengths and weaknesses of the respective institutions. One point he made with particular effectiveness was that the old de novo review model failed to achieve a differentiation of functions, produced delay, and was duplicative and wasteful.[171]

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judicial review in the subject areas he considers is always oriented to the general principles he outlines in the thematic chapters.

169. Id. at 312.

170. See, e.g., Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 3–4 (1994) (referring to "comparative institutional analysis" as "sophisticated comparison of [institutional choices]"); Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 64–67 (2006) (discussing "institutional choice" and "interpretive-choice analysis").

171. As he wrote, there was no point in allowing courts to substitute their judgment for agencies

> where there is merely some difference of opinion between them as to matters peculiar to the particular case, or some difference in inference from those matters. Such substitution does nothing to clarify a rule because it relates wholly to something which will be dead and done with after the particular case. It is like permitting the court to substitute its conclusion in place of the jury's as to whether the plaintiff in a negligence action did or did not see an approaching vehicle. If the court's "independent" judgment on such a point is to prevail, there would be little use in having a jury. The argument applies with greater force to the finding of a commission, reached in a separate proceeding at much

Fifth, Dickinson seemed intuitively to appreciate that his critical audience was judges, and that what was needed was a unified conception of judicial review that he could sell to this audience. This he sought to do by stressing the critical role of judges in articulating general principles that would govern the regulatory state—principles that judges would impose on agencies in the name of the supremacy of law. The great virtue of courts was the generality of their experience and their knowledge of law in all its manifestations. The law applicable to a given case, he wrote, should be pronounced by a tribunal that knows "the whole of the law," that is, "by an agency whose main business is to know the law, rather than to enforce some part of it."[172]

In effect, by conceding the "fact" part of the regulatory process to the agencies, and reserving the "law" part for courts, judges would be assigning themselves the more exalted and important function. Dickinson was, in this respect, a precursor of Ronald Dworkin, with his model of the judge as Hercules.[173] The court, for Dickinson, "is the forum of principle and, by extension, the forum of reason. It is through the process of judicial review that law founded on policy is subjected to principled, that is, 'rational' scrutiny."[174]

One of Dickinson's great strengths as an expositor of a normative vision was his ability to acknowledge conceptual weaknesses, and then to build on the very conceptual base acknowledged to be flawed. Notable in this regard is his discussion of the law-fact distinction. In what is perhaps

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> trouble and expense to both the public and the parties. The double process only reduplicates the uncertainty of any particular case and brings it out at the end of the administrative stage of the proceedings with nothing settled which is not liable to be overruled. . . . And meanwhile the courts, if left free to revise administrative determinations on no more accurate grounds than their own private opinions as to the facts of particular cases, will inevitably overlook that laborious development of general rules from case to case which is their proper task under a sound division of labour, and one which is essential to the maintenance of the supremacy of law.

Dickinson, supra note 14, at 201–02 (footnote omitted).

172. Id. at 124. Or as Dickinson put it in another passage:

> The technical equipment which the commissions are supposed to possess, and the limited and specialized nature of their work, in a measure operate to unfit them for the task of developing general rules of law. It is of the essence of legal rules that they should be founded on broader considerations than those which spring from the special class of situations to which any particular rule may apply. They must take into account the habits and attitude of mind of the whole community as gleaned from the sum-total of its transactions. . . . [T]hey should be touched off into greater generality by a tribunal which has under its jurisdiction the whole field of legal relations.

Id. at 234 (footnote omitted).

173. See Ronald Dworkin, Taking Rights Seriously 105 (1977) (describing Hercules as "a lawyer of superhuman skill, learning, patience and acumen").

174. Neil Duxbury, Faith in Reason: The Process Tradition in American Jurisprudence, 15 Cardozo L. Rev. 601, 621 (1993).

the most frequently quoted passage from the book, Dickinson gives the law-fact distinction "the usual realist acid bath"[175]:

> [Questions of law and fact] are not two mutually exclusive kinds of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right. It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of "fact"; and when otherwise disposed, they say that it is a question of "law."[176]

What is not generally noted is that after debunking the traditional law-fact conception, Dickinson reconceptualized the distinction in terms of the generality of the principle involved. The more the principle for decision becomes one of widespread generality, the more appropriate it is to call it a question of law.[177] The more it tends toward factors unique to a particular controversy, the more appropriate it is to call it a question of fact. Dickinson then endorsed the reconceptualized distinction as the core principle of judicial review. The law-fact distinction, in Dickinson's hands, meant that courts were to decide the big important questions, and agencies the small inconsequential ones.

Another key to Dickinson's power as a proponent of the appellate review model was his wide-ranging scholarship, which lends his work an aura of definitiveness. Yet, like most exercises in academic cheerleading, the work was important as much for what it left out as for what it included. What was most noticeably downplayed was any anguish over the constitutionality of the appellate review model, and in particular whether it could be squared with the assignment of the judicial power of the United States to Article III judges. To be sure, Dickinson did not ignore separation of powers considerations entirely. This would undermine the credibility of his analysis, which derived in large measure from the sense of its completeness. His main tactic here was to argue that the purposes underlying the structural Constitution could be reduced to a single point—the need to subordinate political discretion to the rule of law—and that this could be assured by providing for judicial review of questions of law.[178] Here we see the origins of a major trope of modern administrative law: Judicial review cures all.

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175. Robert W. Gordon, Willis's American Counterparts: The Legal Realists' Defence of Administration, 55 U. Toronto L.J. 405, 411 (2005).

176. Dickinson, supra note 14, at 55.

177. See id. at 312 ("[A]ny factual state or relation which the courts conclude to regard as sufficiently important to be made decisive for all subsequent cases of similar character becomes thereby a matter of law for formulation by the court.").

178. See id. at 74–75 (noting doctrines such as separation of powers and due process "are but the outworks of an elaborate structure devised to buttress from different sides the

Dickinson's indifference to the Article III implications of delegating the fact-finding mission to administrative agencies both reflected existing precedent and helped shape the Court's response when the issue finally came to the fore in the 1930s. There is unmistakable evidence of Dickinson's influence in both *Crowell v. Benson*[179] and *St. Joseph Stockyards Co. v. United States*[180]—two of the most significant decisions in laying to rest any questions about the constitutionality of the appellate review model. Chief Justice Hughes's majority opinion in *Crowell*, for example, deftly distinguishes between constitutional and jurisdictional facts; a subject treated in such detail by Dickinson, that it is hard to imagine Hughes developing it merely by reading the scattered and contradictory case law.[181] The opinion even uses, as an illustration of jurisdictional facts, a Massachusetts nuisance decision that was prominently discussed by Dickinson.[182] Of Justice Brandeis's dissenting opinion there is little doubt—he cites Dickinson's book twice, and faithfully follows his analysis.[183] Similarly, there can be no doubt of Dickinson's influence in *St. Joseph Stockyards*, the decision that interred the notion that courts must independently develop a factual record in cases involving issues of constitutional fact. Dickinson wrote the brief and argued the case for the government. The brief clearly develops the theme, adopted by the Court, that judicial exercise of independent judgment on questions of constitutional fact is enhanced, not impeded, if "aided by the sifting procedure of an expert legislative agency."[184]

Dickinson has been characterized by modern legal historians as both a legal realist[185] and an opponent of legal realism.[186] In truth, Dickinson was some of both. He used realist or functional arguments to attack formalisms he did not like—separation of powers, de novo review, ultra vires review, a mechanical application of the law-fact distinction. But he did not succumb to the view that all law is politics, as found in the more extreme versions of realism or later critical legal studies writing. Instead, he sought to develop new formal principles that would operate at a higher level of generality and produce a more satisfactory working relationship between courts and agencies than what had gone before.

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central doctrine of the supremacy of law; and the discussion can be simplified by striking down to this essential issue").

179. 285 U.S. 22 (1932).

180. 298 U.S. 38 (1936).

181. See *Crowell*, 285 U.S. at 62–63.

182. Compare id. at 59 n.29 (discussing Miller v. Horton, 126 N.E. 100 (Mass. 1891)), with Dickinson, supra note 14, at 107–08 (discussing *Miller*).

183. *Crowell*, 285 U.S. at 89 n.24, 93 n.30 (Brandeis, J., dissenting).

184. *St. Joseph Stockyards*, 298 U.S. at 53; see also Brief for the United States & the Secretary of Agriculture at 200, *St. Joseph Stockyards*, 298 U.S. 38 (No. 497).

185. See Gordon, supra note 175, at 405 (including Dickinson as one of the American realists).

186. See Duxbury, supra note 174, at 618 (describing Dickinson's work as having "basic anti-realist thrust").

Proving intellectual influence is always difficult. One puzzle is why Dickinson is not better known among public law scholars today. Based on contemporary constitutional and administrative law casebooks and standard historical accounts, one would conclude that Dickinson never existed.[187] A brief bibliographic entry in William Chase's study of the administrative law scholarship is revealing. On the one hand, Chase remarks that "[t]he complexity and ambiguity of the man as suggested by his writings and the outline of his career are more than a little intriguing, but I haven't been able to gather enough satisfactory material on him to be sure, or even have solid hunches about, who he was intellectually."[188] This suggests that Dickinson has suffered by resisting easy categorization as falling into one "camp" or another. On the other hand, Chase also remarks that Dickinson "appears to have been considerably more discerning than his contemporaries, but unable to make the intellectual impact on his times that he desired, due in part at least to the inhibiting power of his institutional loyalties."[189] This suggests that Dickinson suffered by staying at Penn while rebuffing overtures from Harvard and Yale, or because he eventually abandoned academics altogether for private practice.[190] Whatever the reasons for Dickinson's relative obscurity today, it is important to remember that influence and enduring fame are not the same thing.

Ted White has singled out Justice Louis Brandeis as playing an instrumental role in the development of the modern understanding of agency-court relations.[191] But Brandeis did not join the Court until 1920, well after the appellate model had been established. His original contributions to administrative law, as White details, centered on ancillary questions like the scope of the primary jurisdiction doctrine and the law of standing.[192] Justice Brandeis's most extensive discussion of the proper division of authority between courts and agencies—his dissenting opinion in *Crowell v. Benson*—owes an obvious debt to Dickinson. The path of influence here would seem to be from Dickinson to Brandeis, rather than vice versa.

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187. See, e.g., Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases (6th ed. 2006) (containing no reference to Dickinson); Gary Lawson, Federal Administrative Law (4th ed. 2007) (same); Jerry L. Mashaw, Richard A. Merrill & Peter M. Shane, Administrative Law: The American Public Law System (6th ed. 2009) (same); cf. Peter L. Strauss et al., Gellhorn & Byse's Administrative Law: Cases and Comments 250, 976 (10th ed. 2003) (reproducing two passages from Dickinson's writings).

188. Chase, supra note 47, at 171.

189. Id.

190. The biographical sketch of Dickinson written by Haskins reports that Dickinson accepted the offer from Penn while turning down an offer from Yale and an offer of tenured position from Princeton, and that President Conant of Harvard later offered Dickinson a University Chair, which he also declined. Haskins, supra note 163, at 5, 12, 22.

191. White, supra note 3, at 196–97.

192. Id. at 209, 242.

There is also reason to believe that Dickinson bears some responsibility for the rapid eclipse of the jurisdictional fact doctrine propounded in *Crowell*. Dickinson disagreed sharply with the notion that reviewing courts had to make their own record in reviewing jurisdictional or constitutional facts, as his book makes clear.[193] *Crowell*, of course, ruled to the contrary (although, as I have suggested, even the majority opinion is informed by Dickinson's scholarship). Dickinson quickly penned an acidic critique of *Crowell* in the *University of Pennsylvania Law Review*, recapitulating the arguments of his book and bringing them to bear on the analysis of *Crowell*.[194] It would not be too great an exaggeration to say that the specific holding of *Crowell* was never heard from again. Obviously, there are multiple reasons for this. But it is interesting that a narrow majority of the Court went on to do battle against the New Deal for five more years, and yet it did not choose to make its stand on the jurisdictional fact doctrine. Jeering from academics matters, especially when it comes from someone as persuasive as Dickinson.

In short, Dickinson supplied what the Supreme Court's halting, improvisational decisions of the post-Hepburn Act era lacked: a normative theory that explained why the appellate review model was a good thing. That the theory was surrounded by impressive scholarship and set forth in refined prose gave the judiciary all the more confidence that this innovation was worth perpetuating. It is also noteworthy that his influential book contained no discussion of Article III.

V. THE ARTICLE III PUZZLE

Modern constitutional law scholars frequently suggest that the appellate review model of administrative law violates the plain meaning of Article III of the Constitution.[195] They argue that Article III vests the "judicial power of the United States" exclusively in courts composed of

193. Dickinson, supra note 14, at 201.

194. John Dickinson, *Crowell v. Benson*: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact," 80 U. Pa. L. Rev. 1055, 1077–82 (1932).

195. See, e.g., Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 919 (1988) [hereinafter Fallon, Of Legislative Courts] (suggesting literal language of Article III means "the only federal tribunals that can be assigned to resolve justiciable controversies are 'article III courts'"); Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1248 (1994) ("Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as 'judicial' activity."); Monaghan, Review, supra note 2, at 262 ("In terms of the constitutional design, the whole process of substituting administrative for judicial adjudication may be thought to suffer from a serious 'legitimacy deficit.'"); James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 646 (2004) ("[D]espite the importance of [Article III] . . . Congress has often assigned disputes that appear to fall within the scope of the federal judicial power to Article I tribunals whose judges lack salary and tenure protections."); see also Nelson, supra note 21, at 625 & n.257 (collecting additional sources); cf. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 859 (1986) (Brennan, J., dissenting)

judges who enjoy life tenure and secure compensation. The judicial power, it is further assumed, includes the power to find both the facts and the law needed to resolve particular cases and controversies. The appellate review model, however, calls for a sharing of this power with federal tribunals that do not have the independence of Article III courts. The appellate review model, from this perspective, represents a major challenge: Is there a principled justification for what appears to be a violation of the plain requirements of the Constitution?

In attempting to answer this puzzle, constitutional law scholars frequently turn to historical narratives. These narratives, however, generally ignore the period from the enactment of the Hepburn Act through the 1920s. Instead, they tend to leap in one bound from *Murray's Lessee v. Hoboken Land & Improvement Co.*[196] in the mid-nineteenth century to *Crowell v. Benson*[197] on the threshold of the New Deal, as if nothing of significance happened in between (a mere seventy-seven years!). This is a mistake. It is a mistake not because this history reveals the answer to the puzzle, but because it shows that the puzzle that consumes modern scholars was simply not a matter of significant concern to judges and scholars during the critical period when the appellate review model emerged. Today, judges and scholars worry about the dilution of the authority of Article III courts. During the earlier era, the primary concern was that Article III courts would be drawn into matters of "administration" that were not properly judicial. In other words, the concern was not dilution of the judicial power but contamination of that power. The appellate review model succeeded in part because it provided a solution to the contamination problem.

The standard narrative also posits that the critical decision which opened the door to agency adjudication was *Crowell v. Benson*, decided in 1932. *Crowell* is said to be the "first case that broadly approved transfers of trial jurisdiction from courts to agencies,"[198] making it the "fountainhead" for later decisions legitimating the role of the modern administrative agencies,[199] thereby "pav[ing] the way" for administrative agencies to act as adjudicators of a wide array of statutory claims.[200] Once *Crowell* broke through the logjam of the knotty Article III problem, the story goes, the path was open for the massive expansion of the administrative state during the New Deal.

The most immediate problem with this view of history is that, as we have seen, courts abandoned de novo review of agency adjudication more than two decades before *Crowell*. Compounding the difficulty with the

("On its face, Article III, § 1, seems to prohibit the vesting of *any* judicial functions in either the Legislative or the Executive Branch.").

196. 59 U.S. (18 How.) 272 (1855).

197. 285 U.S. 22 (1932).

198. Young, supra note 33, at 779.

199. Fallon, Of Legislative Courts, supra note 195, at 923.

200. Nelson, supra note 21, at 602.

standard narrative, when we attend closely to *Crowell* we discover that none of the Justices had any quarrel with the use of the appellate review model in routine administrative adjudications of controversies involving private rights, such as ICC rate cases. The only point of division among the Justices was whether the appellate review model could be applied to so-called "jurisdictional" facts; in particular, whether the record on which the jurisdictional facts were determined had to be developed by the reviewing court rather than the agency.[201] All of the Justices in *Crowell* took it for granted that the appellate review model was unproblematic insofar as it applied to ordinary, "nonjurisdictional" facts, even in matters concededly involving private rights, both in the sense that the record for review would be the one developed by the agency, and in the sense that the standard of review would be a deferential jury-review type standard.[202] However, the opinions in *Crowell* provide no persuasive justification—at least none that modern commentators find fully persuasive—for the assumption that agency determination of routine facts can be squared with Article III. As Gordon Young puts it, the implausibility of the Court's explanation for how the appellate review model squares with Article III generates a deeper "mystery" as to "how the view advanced in *Crowell* became so clear to such distinguished Justices and scholars by 1932, months before the New Deal and years before Court-packing pressures."[203]

A. *Modern Attempts To Solve the Article III Puzzle*

Contemporary courts and scholars have offered essentially two types of theories in an effort to reconcile Article III with the widespread practice of conferring adjudicatory authority on non-Article III administrative agencies. These can be called the adjunct theory and the public rights theory.

1. *Adjunct Theory.* — The adjunct theory builds on the brief analysis offered by Chief Justice Hughes in *Crowell.* Hughes described administrative agencies like the Longshore and Harbor Workers Compensation Commission as functioning as "adjuncts" to courts, in a manner analogous to the way juries function in trials at law or masters in chancery function in cases at equity.[204] The adjunct decides questions of routine

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201. *Crowell,* 285 U.S. at 66 (Brandeis, J., dissenting) (stating the "primary question" presented was, "Upon what record shall the district court's review of the order of the deputy commissioner be based?").

202. Id. at 58 (majority opinion) (stating "question of the conclusiveness of . . . administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation" but not "where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations" (footnote omitted)).

203. Young, supra note 33, at 774.

204. See *Crowell,* 285 U.S. at 51–54 ("While the reports of masters and commissioners . . . are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law . . . .").

fact, subject to instruction and oversight by the court. The court then reviews the adjunct's findings to assure they have decided within the bounds of reason, meanwhile reserving for itself all questions of constitutionality, jurisdiction, and law. Under this conception, ultimate decisional power remains with the Article III court; the agency merely supplies inputs on one dimension—finding adjudicative facts—where it has certain comparative advantages and enjoys the sanction of historical analogies to the jury and masters in chancery.

The adjunct theory has a number of serious weaknesses. One is that juries and masters in chancery have a direct basis in the constitutional text, whereas adjudication by federal administrative agencies does not. Juries are mentioned both in Article III and in the Bill of Rights; indeed, trial by jury is required by the Constitution not only in criminal cases,[205] but also in civil cases involving more than twenty dollars where a jury would decide the matter at common law.[206] Article III expressly confers authority on federal courts in cases of equity, where masters in chancery had historically been used.[207] Thus, there is an "intratextual" basis for recognizing an exception to Article III for factfinding by juries and masters in chancery.[208] No such textual basis exists, however, for conferring factfinding authority on federal administrative agencies.

Another weakness is that adjudication by federal administrative agencies often carries far more legal significance than factfinding by juries or masters in chancery. Chief Justice Hughes's analogy had some plausibility as a description of the early ICC or the FTC, neither of which had authority to enforce its own orders and had to file a bill in equity seeking enforcement. But it had no plausibility as a description of the most important agency of the era when *Crowell* was decided—the post-Hepburn Act ICC—which could issue a rate prescription order on its own authority which became legally binding unless a carrier could persuade a court to issue an injunction staying it.[209] No jury or master has such power. Similarly, large numbers of agency adjudicators today—including every administrative law judge employed by the Social Security Administration[210]—has the power to issue self-executing orders.

Modern commentators, most prominently Richard Fallon, have sought to rehabilitate the adjunct theory by defining the "judicial power

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205. U.S. Const. art. III, § 2, cl. 3; id. amend. VI.

206. Id. amend. VII.

207. Id. art. III, § 2, cl. 1.

208. See generally Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747 (1999) (developing idea that constitutional provisions can be interpreted by examining other constitutional provisions).

209. See supra text accompanying notes 68–72 (discussing reform legislation by which orders became self-executing).

210. See 42 U.S.C. § 405(h) (2006) (declaring that findings and decision of Commissioner of Social Security after hearing "shall be binding upon all individuals who were parties to such hearing"); § 405(l) (permitting Commissioner to delegate this power to any officer or employee of Social Security Administration).

of the United States" to mean, simply, the power to engage in appellate review of decisions by other tribunals in cases arising under federal law.[211] This is ingenious, and has the advantage of constitutionalizing the appellate review model, since Article III would command nothing more than appellate review. Nevertheless, this revised version of the adjunct theory also suffers from shortcomings.

For one thing, it puts unwarranted emphasis on the resolution of questions of federal law as the dominant objective of Article III. Article III lists not only cases arising under federal law as lying within the judicial power of the United States, but also cases and controversies between two or more states, cases involving ambassadors and other ministers and consuls, cases between citizens of different states, cases between citizens of one state and another state, cases involving admiralty and maritime issues, and cases involving land grants from different states.[212] Many or most of these categories of cases would be (and have been) resolved under state (or international) law. They were included within the scope of the judicial power of the United States presumably because the Framers thought it important to provide an impartial federal tribunal for their resolution, not to assure the supremacy of federal law. So the equation of the "judicial power" with appellate review in cases arising under federal law rests uneasily with the whole text of Article III.

The revised adjunct theory, like Chief Justice Hughes's original version, also fails to account for the fact that agency orders commonly resolve questions of federal law that otherwise could be determined by an Article III court. Insofar as agency orders are self-executing, and judicial review is discretionary at the instance of an aggrieved party, not mandatory, then the whole controversy will often be resolved by a non-Article III tribunal. When this happens, the parties' federal rights are determined in a binding agency order without any input at all from an Article III court. It is also possible, of course, for Congress to make certain matters decided by federal administrative agencies unreviewable by any Article III court, which necessarily means no appellate review by Article III courts of questions of federal law.[213] These exceptions are

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211. See Fallon, Of Legislative Courts, supra note 195, at 943–49; see also Martin H. Redish, Legislative Courts, Administrative Agencies, and the *Northern Pipeline* Decision, 1983 Duke L.J. 197, 226–28 (tentatively endorsing thesis that Article III is satisfied provided appellate review by Article III tribunals on questions of federal law is available). Although he distinguishes his approach from the appellate review idea, I also regard Professor James Pfander's "inferior tribunals" theory as falling into the revised adjunct category, broadly defined. See Pfander, supra note 195, at 671–97 (setting forth inferior tribunals account of Article III).

212. U.S. Const. art III, § 2, cl. 1.

213. See 5 U.S.C. § 701 (2006) (contemplating Congress may by law "preclude judicial review" or may draft statutes such that "agency action is committed to agency discretion by law"). For discussion of a recent enactment which cut off all review, state and federal, of compliance with law in the construction of a border fence between Mexico and the United States, see Thomas W. Merrill, Delegation and Judicial Review, 33 Harv. J.L. &

hard to square with a revised definition of the judicial power as requiring appellate review by Article III tribunals of all questions of federal law decided by non-Article III tribunals.

2. *Public Rights Theory.* — The second principal effort by contemporary scholars to reconcile agency adjudication with Article III draws on the distinction between public and private rights. The distinction is alluded to in *Murray's Lessee*,[214] and gained traction in the wake of the Court's 1982 decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[215] Justice Brennan's plurality opinion in *Northern Pipeline* sought to bring order to Article III jurisprudence by positing that all adjudication by federal tribunals must take place in Article III courts, subject to three historically grounded "narrow situations": adjudication by territorial courts, by military tribunals, and by administrative agencies with respect to matters of "public" rather than "private" rights.[216] As should be clear, the public rights exception is key under this account to reconciling agency adjudication with Article III. Unfortunately, Justice Brennan was less than clear about what makes a right "public" rather than private. He suggested variously that public rights are limited to disputes in which the government is a party, often have a connection to sovereign immunity, often involve tax and revenue collection functions, and often entail statutory functions that could be performed exclusively by the executive or legislative departments.[217]

Scholars have taken up the challenge of developing a more precise conception of public rights, and of explaining how the historical understanding of the public rights exception can square agency adjudication with Article III. Gordon Young and Caleb Nelson have offered the most thorough efforts in pursuit of this objective.[218] I will concentrate here on their accounts of how the public rights exception was applied at the dawn of the modern administrative age, and in particular on how the post-Hepburn Act decisions involving review of ICC rate cases are consistent with a public rights exception.

The Young-Nelson historical argument is based on the differential treatment in the Hepburn Act between the provisions for review of rate prescription orders and reparations orders. As we have seen, the Act provided no standard of review for actions seeking to enjoin a rate prescription order, and the Supreme Court devised the appellate review standard

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Pub. Pol'y 73 (2010) (discussing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

214. See 59 U.S. (18 How.) 272, 284 (1855) ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.").

215. 458 U.S. 50 (1982).

216. Id. at 63–70 (plurality opinion).

217. Id. at 67–70.

218. Nelson, supra note 21; Young, supra note 33.

to fill this gap.[219] With respect to reparations actions, however, the Act instructed courts to treat the action "in all respects like other civil suits for damages," except that orders were to be regarded as "prima facie evidence" of the facts determined therein.[220] From this, Young and Nelson infer that reparations actions—claims for damages based on rates charged in the past—were regarded as implicating private rights and hence as necessitating full judicial determination of all contested issues of law and fact. Rate prescription orders, in contrast, which set maximum reasonable rates that could be charged in the future, were regarded as public rights and hence could be resolved by a tribunal that did not conform to the requirements of Article III.[221]

There is little support for this argument in contemporary sources. Both authors rely on a footnote in Leo Sharfman's multivolume treatise on the ICC.[222] Sharfman, however, does not address the Article III problem, nor does he explicitly invoke the private rights-public rights distinction. He does observe that the "special treatment" for cases involving the payment of money may be explained by the fact that "they are concerned exclusively with past transactions, and that they are designed to afford private redress to particular parties, rather than to further public ends through the process of regulation."[223] Sharfman, in turn, cites a passage from a treatise by Ernst Freund, which Young and Nelson also cite. Freund does mention, without elaboration, that having an administrative agency determine claims for money damages for past transactions is something of an "anomaly," and is in tension with the constitutional right of trial by jury.[224] But he, like Sharfman, makes no mention of Article III, or the public rights-private rights distinction.

Neither Young nor Nelson, nor for that matter Sharfman or Freund, considers the legislative history of the Hepburn Act in connection with the reparations versus rate prescription distinction. There is nothing in that history to suggest that Congress invested great significance in the past-future distinction, or regarded actions for prescription orders as entailing public rights whereas actions for reparations involved private rights. To the contrary, the senators who debated the provisions at great length assumed that the ICC would commonly deal with the past and the future in a single order.[225] The Commission would determine what was a reasonable rate; it would then issue an order prescribing this rate for the

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219. See supra Part II.B–C (noting failure of Congress to add standard of review to Hepburn Act and subsequent creation of appellate review standard by Supreme Court).

220. Hepburn Act, ch. 3591, § 5, 36 Stat. 584, 591 (1906); see also supra text accompanying notes 40–42.

221. See Nelson, supra note 21, at 594–98; Young, supra note 33, at 813–23.

222. 2 Sharfman, supra note 76, at 387 n.64; see also Nelson, supra note 21, at 598 (discussing Young's citation of Sharfman); Young, supra note 33, at 785 (citing Sharfman).

223. 2 Sharfman, supra note 76, at 387 n.64.

224. Freund, Administrative Powers, supra note 32, at 12–13.

225. See 40 Cong. Rec. 3105 (1906) (statement of Sen. Joseph B. Foraker) ("[The Hepburn Bill] makes the order of the Commission condemning a rate effective and

future and awarding reparations to the extent past rates exceeded this level.[226] The critical matter was the Commission's determination of a reasonable rate, not the differential remedial implications of that order for the past and the future.[227]

Nor do post-Hepburn decisions of the Supreme Court contain any suggestion that backward-looking ICC orders implicate private rights whereas forward-looking ICC orders enforce public rights. To the extent the Court offered a conceptual understanding of the distinction, it said that reparations orders were "judicial" in nature whereas prescription orders were "legislative" in nature.[228] But both were regarded as affording "a private administrative remedy" for "the violation of the private right."[229] Moreover, as previously noted,[230] the Supreme Court's cases involving reparations claims quickly gravitated toward the appellate review model in the years after the Hepburn Act. Judicial supplementation of the record, while theoretically available, was discouraged in practice, and courts were instructed to accept the ICC's determination of questions of "evidential" fact as long as they were supported by substantial evidence. Eventually, the standard of review in reparations cases became another variant on the idea of substantial evidence review.[231] All this happened well before the decision in *Crowell*.[232]

Finally, the idea that ICC rate prescription orders are matters of "public right" whereas reparations orders were matters of "private right" has little to commend it. The fact that prescription orders were prospec-

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thereby disposes of that rate, and then authorizes the Commission to name a new rate and put it into operation in place of the condemned rate.").

226. Subsequent practice confirmed this expectation. See, e.g., ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 90 (1913) ("[T]he Commission made a single order in which it found the class rates complained of to be unreasonable, directed the old locals to be restored and a corresponding reduction made in the through rates.").

227. The most plausible explanation for the perpetuation of the original ICA provisions in reparation actions is that Congress assumed the ICC could not enforce an order for the payment of money, but instead needed a court to issue such an order. But there is no discussion of this in the legislative history.

228. See Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 384 (1932) (distinguishing rate prescription orders and rate reparations orders); Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908) ("The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind . . . .").

229. FTC v. Klesner, 280 U.S. 19, 26 (1929).

230. See supra notes 139–143 and accompanying text (describing increasing weight given to agency determinations by courts).

231. See supra note 143 and accompanying text.

232. On the threshold of its decision in *Crowell*, the Supreme Court characterized the function of the ICC in reparations cases as being "judicial in its nature," and noted that Congress had altered the common law by "lodging in the Commission the power theretofore exercised by courts." *Ariz. Grocery*, 284 U.S. at 384, 389. There was no suggestion that this was constitutionally problematic, or that courts had to exercise de novo review over reparation actions in order to preserve Article III. See also Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443–44 & n.4 (1930) (broadly characterizing all ICC cases as following appellate review model).

tive does not distinguish them from matters subject to the "judicial power." Article III pointedly specifies that the judicial power extends to all cases "in Law and Equity,"[233] and courts sitting in equity characteristically issue prospective orders. It is true that a rate prescription order would inure to the benefit of any shipper who wanted to avail itself of the same service covered by the prescription order. In this respect, a rate prescription order has a "public" quality not present in a judicial injunction, which is in personam. In practice, however, nearly all actions brought before the ICC, whether for a prescription order or reparations—or both—pitted a private shipper against a private railroad company, and determined how much money the shipper had to pay the carrier for specific services. These were not "public" actions in the sense that the federal government was a party to these proceedings. Nor were they "public" in the sense that Congress had to waive sovereign immunity to permit the action to proceed, or in the sense that the outcome would have direct implications for the public fisc.[234] To top it off, an ICC order, whether requiring reparations or prescribing a rate for the future, was a direct substitute for a common law action—a substitute which *Abilene Cotton Oil* held to be preemptive of the common law action.[235]

On virtually any plausible theory of what it means to adjudicate private rights, the post-Hepburn Act ICC was involved in adjudicating private rights. So, if agency adjudication presents a problem in terms of usurping Article III's grant of the judicial power to federal courts to resolve matters of private rights, the problem was fully presented in 1906, well before *Crowell* was decided. Whatever its merits as a purely normative theory, the public rights exception cannot explain the emergence and judicial acceptance of the appellate review model.

B. *Article III and Fear of Judicial Contamination*

The ease with which all Justices in *Crowell v. Benson* accepted the idea of administrative agencies deciding issues of fact subject only to deferential review by Article III courts thus remains a mystery under the principal modern theories. The answer to the mystery starts with the nineteenth-century understanding of separation of powers, an understanding which continued to dominate judicial thinking during the period in question and still has a presence today in what is called the "formalist" view.[236]

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233. U.S. Const. art. III, § 2.

234. Cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–70 (1982) (describing bases for public rights doctrine, including sovereign immunity).

235. Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

236. For discussion of formalism in separation of powers see generally John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. (forthcoming 2011) (on file with the *Columbia Law Review*); Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 Sup. Ct. Rev. 225 [hereinafter Merrill, Constitutional Principle]; Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488 (1987).

According to this traditional understanding, separation of powers requires the establishment and maintenance of three separate and nonoverlapping spheres of power: the legislative, executive, and judicial.[237] The "judicial power," as one of the three spheres of power, can neither be reduced nor expanded at the expense of either the "executive" or the "legislative" spheres. This conception of the judicial power would be violated by taking a chunk of the business of the courts—say determining whether A is liable to B for breach of contract—and transferring that authority to an administrative agency. Such a transfer would reduce the sphere of the judicial power. But the traditional conception of separated powers would also be violated if courts had authority to exercise powers which properly belonged to either the executive or the legislative sphere.

This vision of separated powers had considerable hold over the legal mind during the period in which the appellate review model emerged and solidified. To see this, one need go no further than the mid-nineteenth century decision in *Murray's Lessee*, often invoked as a foundational precedent in forging the modern understanding of Article III.[238] At issue in *Murray's Lessee* was the constitutionality of a seizure of property of Samuel Swartwout, a New York collector of customs who had defalcated large sums of money owed to the United States Treasury and fled to England. The United States, using a summary executive process, attached his property first; another creditor claimed this process was invalid and that its later-filed judicial claim should have priority. The disappointed creditor argued that the attachment by the United States was an inherently judicial act which required a proceeding before an Article III court. Further, the creditor pointed out that Congress, by statute, had made the executive seizure subject to judicial review in an Article III court, which the creditor cited as confirmation that the attachment was inherently judicial in nature.[239]

Writing for a unanimous Court, Justice Curtis rejected the Article III claim. He posited that there are some actions that Congress can assign either to the executive or the courts, as it sees fit.[240] Included in this category are attachments of property to satisfy a debt owed to the government. The proceedings in court were fully compatible with the exercise of the judicial power because "every fact upon which the legality of the extrajudicial remedy" turned could be "drawn in question" in the subse-

237. See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law . . . ."); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792) (stating under the Constitution the federal government "is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either").

238. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

239. Id. at 274–76.

240. Id. at 284 ("[T]here are matters, involving public rights . . . which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.").

quent suit against the defending federal officer.[241] In other words, the judicial review was in the form of an officer suit in which all issues would be determined de novo.

Here we see both the influence of the separate spheres understanding, and the way the nineteenth-century judicial mind went about reconciling judicial review with the separate spheres assumption. Authority that can be exercised by either the courts or the executive, as Congress sees fit, does not represent an impermissible mixing of spheres, so long as the executive determination is complete, final, and fully effective on its own terms, and the judicial consideration is by an original proceeding in which the court decides all facts and legal issues de novo.[242] The constitutional underpinnings of the orthodox nineteenth-century conception of judicial review are clearly revealed.

In dicta near the end of the Article III discussion, Justice Curtis made the separate spheres assumption explicit. He said in part:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.[243]

The first part of this dictum is an acknowledgement that reduction of the judicial sphere is not permitted. Such a statement in a Supreme Court opinion is rare prior to *Crowell v. Benson*. The second part, warning that Congress could not bring under the judicial power matters not fit for judicial determination, is a statement that extension of the judicial power into other spheres would also be impermissible. Such statements would loom much larger in the thinking of the Court in the ensuing decades.

Today, those who fret about dilution of judicial power can easily see that the appellate review model is in tension with the proposition that the judicial power may not be reduced. But during the period when the appellate review model came to the fore, the focus of attention was not on the dangers of reducing judicial power, but rather on the risk of impermissible augmentation of the judicial power into areas properly regarded as belonging to a different sphere of authority. The simple explanation for why the danger of dilution went largely unrecognized is that none of the "exceptions" to Article III adjudication that arose in the nineteenth century presented any kind of threat to the dignity and power of the federal courts. The business of the territorial courts, it was assumed, would

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241. Id.

242. Bruce Wyman's treatise, written in 1903, lays all this out. See Wyman, supra note 48, at 321–41 (recounting case law in which "alternative" review occurred). Wyman's term for what we would call judicial review is "alternative" consideration, i.e., consideration first by the executive and then by the judiciary.

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

eventually fall to the Article III courts as the territories became settled and were organized as states. (Who would want to ride circuit in a wild and distant territory in any event?) And the Article III courts had no interest in taking over military courts-martial or getting involved in the distribution of federal public lands. The judicial response to the ICC undoubtedly elicited more complex reactions. But at least around the time of the enactment of the Hepburn Act, the Court was eager to get out of the business of engaging in de novo review of ICC decisions. The emergence of the appellate review model in this context did not raise any immediate concerns about displacement of the authority of Article III courts.

The more immediate problem presented by the appellate review model was the fear of contamination—of drawing federal courts into matters regarded as being the province of the other branches of government. Fear of displacement appeared in the nineteenth century and early twentieth century only rarely, and it was cited as an abstract or theoretical proposition—as in *Murray's Lessee*.[244] Fear of contamination was a much more pronounced theme.

One prominent example of this fear is seen in the judicial response to schemes which placed the federal courts in a position of subordination to an executive official. *Hayburn's Case* is the earliest and best known instance of this.[245] The circuit courts were asked to determine and issue written opinions on whether wounded Revolutionary War veterans were entitled to pensions; these opinions were then sent to the Secretary of War, who could decide not to pay if he suspected fraud or mistake. Various Justices riding circuit refused to take part in the scheme because it subjected judicial judgments to potential executive nullification. This was seen as subordinating the judiciary to the executive, in violation of the separate spheres assumption.[246] The principle was reaffirmed in later cases holding that the Court would not review judgments of the Claims Court subject to payment at the discretion of the Secretary of the Treasury.[247]

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244. See id. ("[W]e do not consider congress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty . . . .").

245. 2 U.S. (2 Dall.) 409 (1792).

246. See Fallon et al., The Federal Courts, supra note 24, at 83–93 (questioning whether prohibition against executive revision of judicial decisions rested on "judicial dignity and a desire to keep face, or on more fundamental concerns about the integrity of the judicial process").

247. See Gordon v. United States, 69 U.S. (2 Wall.) 561, 561 (1864) (finding lack of jurisdiction over appeal from Court of Claims where petitioner sought damages for injury caused by government troops); cf. United States v. Ferreira, 54 U.S. (13 How.) 40, 45–47 (1851) (finding district court's determination of claims arising under Treaty of 1819, subsequently reviewed by Secretary of Treasury, to be "award of a commissioner" and not "judgment of a court of justice").

Fear of contamination also arose where it appeared that the courts were being asked to validate or revise administrative action. I have already alluded to decisions in the public lands area where the Court refused to allow federal courts to hear "appeals" from land commissions.[248] The Court got around the objection in the California Lands Commission cases by insisting that the proceeding in the district court would be de novo.[249] As Justice Matthews later explained, Article III courts have no

> right to control, to reserve, and to dictate the procedure and action of executive officers . . . . Such a function is not judicial; it is administrative, executive and political in nature. The abstract right to interfere in such cases has been uniformly denied by judicial tribunals, as breaking down the distinction so important and well defined in our system between the several, separate, and independent branches of the government.[250]

Similar concerns were reflected in decisions refusing to permit Article III courts to hear appeals from the courts of the District of Columbia reviewing patent and trademark decisions,[251] or appeals from the Court of Customs Appeals.[252] In each case, it was held that an Article III court could not review by appeal a judgment of an Article I or legislative court without impairing the independence of the judicial authority.

A particularly revealing decision from the time approaching the era when the appellate review model emerged was *ICC v. Brimson*.[253] The Commission was conducting an investigation into whether the Illinois Steel Company, through various subsidiaries, was engaged in interstate transportation without complying with the ICA. Pursuant to section 12 of the ICA, the Commission issued subpoenas for documents to officers of the company, but they refused to comply. The Commission then filed an action in circuit court, seeking judicial enforcement of the subpoenas. The circuit court held that section 12 violated Article III of the Constitution. A present-day devotee of Article III jurisprudence might assume that the argument was that the ICC, as an administrative agency, could not issue subpoenas for documents, because this is a judicial function

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248. See supra notes 25–27 and accompanying text (highlighting lack of review of Lands Office decisions except in narrow situations).

249. See Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 375 (1867); United States v. Ritchie, 58 U.S. (17 How.) 525, 533–34 (1854).

250. Craig v. Leitensdorfer, 123 U.S. 189, 211 (1887).

251. See Postum Cereal Co. v. Cal. Fig Nut Co., 272 U.S. 693, 700 (1927) ("[W]hile Congress in its constitutional exercise . . . may clothe the courts of the District . . . with such authority as a State might confer on her courts . . . it may not do so with . . . any federal court established under Article III . . . ." (citation omitted)).

252. See Ex parte Bakelite Corp., 279 U.S. 438, 458–59 (1929) (finding Court of Customs Appeals to be a legislative court whose determinations could be made "with no recourse to judicial proceedings"). Congress later disagreed with this characterization of the Court of Claims, declaring it to be an Article III court. The Supreme Court, in a fractured decision, acquiesced in this view. Glidden Co. v. Zdanok, 370 U.S. 530, 584 (1962) (plurality opinion).

253. 154 U.S. 447 (1893).

reserved for courts. But, in fact, the argument was the exact opposite: The circuit court, as an Article III tribunal, could not allow itself to be drawn into the process of assisting the Commission in gathering information, because this was an "administrative" rather than a judicial function.[254] The Supreme Court found the case to be a close one, and rejected the Article III contamination argument by a vote of five to four. Justice Harlan's majority opinion took great pains to distinguish *Hayburn's Case* and similar controversies where courts were asked to make determinations that were not "properly judicial" because they were subject to override by executive or legislative officials.[255]

C. *The Appellate Review Solution*

The appellate review model, in a roundabout way, eventually came to be seen as the solution to the fear of contamination if Article III courts were drawn into matters of administration. The solution was anticipated in an 1899 decision, *United States v. Duell*, in which the Court upheld the constitutionality of a statute allowing "appeals" from the Patent Office to the Court of Appeals for the District of Columbia.[256] To the objection that the Patent Office was "purely executive," and thus could not be "subjected to the revision of a judicial tribunal," the Court cited *Murray's Lessee* for the proposition that certain matters involving public rights may be assigned by Congress to either the executive or the judiciary for resolution.[257] Of course, *Murray's Lessee* assumed that any judicial determination of such an issue following upon executive action would be de novo. The statute in *Duell*, in contrast, called for review in the nature of an "appeal." The Court nevertheless reasoned that with regard to patents, Congress was steadily moving toward recognizing "the judicial character of the questions involved."[258] Moreover:

> the proceeding in the Court of Appeals on an appeal in an interference controversy presents all the features of a civil case, a plaintiff, a defendant and a judge, and deals with a question judicial in its nature, in respect of which the judgment of the court is final so far as the particular action of the Patent Office is concerned . . . .[259]

Read for all it was worth, *Duell* could have led directly to the conclusion that judicial review of administrative action in the nature of an appeal is consistent with Article III. But the decision was not read for all it was worth; to the contrary, it was limited to the patent context and later distinguished on the ground that courts sitting in the District of

254. Id. at 456–57.

255. Id. at 481.

256. 172 U.S. 576, 581–82 (1899).

257. Id. at 582–83 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855)).

258. Id. at 588.

259. Id.

Columbia are "Article I" courts and hence can be given functions that cannot be assigned to Article III tribunals.[260] Soon, the Court was asserting anew that Article III courts cannot be given power to "revise" administrative action through appeals. The most emphatic statement of this proposition occurred in *Keller v. Potomac Electric Power Co.*[261] Congress had adopted a statute conferring authority on a public utility commission to regulate electricity rates in the District of Columbia, subject to appeal to the courts of the District of Columbia and further review by appeal to the Supreme Court. The provisions for review in the District of Columbia courts were upheld on the ground that these were Article I courts and could be assigned a variety of governmental functions under Congress's plenary authority over the District. But the provision for further review by the Supreme Court was unconstitutional because "legislative or administrative jurisdiction" could not be "conferred on this Court either directly or by appeal."[262] The cases which had adopted appellate-style review of decisions of the ICC and the FTC were distinguished on the ground that they permitted courts to consider "questions of law only," and did not allow Article III courts to revise the policy discretion conferred on the relevant agencies.[263]

A breakthrough of sorts finally occurred in *Old Colony Trust Co. v. Commissioner.*[264] Traditionally, federal taxpayers could obtain plenary judicial review of tax liabilities by paying the tax and suing for a refund in court. Congress in 1926 adopted an alternative remedy in the form of an internal appeal to the Board of Tax Appeals, "an executive or administrative board," followed by an "appeal" to one of the circuit courts of appeal, which were concededly Article III courts.[265] To the predictable objection that this was an unconstitutional mixing of judicial and administrative functions, the Court responded that "[i]t is not important whether such a proceeding was originally begun by an administrative or executive deter-

260. See O'Donoghue v. United States, 289 U.S. 516, 545 (1933) ("In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state."); Ex parte Bakelite Corp., 279 U.S. 438, 450 & n.5 (1929) (noting Article I courts such as those in D.C. "may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III"); Keller v. Potomac Elec. Co., 261 U.S. 428, 443 (1923) ("Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts."). *O'Donoghue* held that District of Columbia courts were both Article I and Article III courts, and thus opined that they could entertain administrative appeals in their Article I capacity. 289 U.S. at 545–46. Today, the District of Columbia has both Article III courts (the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court) and Article I courts that deal with "distinctively local" matters for the District. Palmore v. United States, 411 U.S. 389, 405–10 (1973).

261. 261 U.S. 428.

262. Id. at 444.

263. Id. at 442.

264. 279 U.S. 716 (1929).

265. Id. at 725.

mination, if when it comes to the court . . . it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law."[266] A tax dispute between the government and a taxpayer over the amount of tax due, the Court said, was a case or controversy appropriate for judicial resolution. Indeed, the jurisdiction conferred was "quite like that of Circuit Courts of Appeals in review of orders of the Federal Trade Commission."[267] As in those cases, the Court observed without further elaboration, "[it] is not necessary that the proceeding to be judicial should be one entirely *de novo*."[268]

The Article III contamination problem was finally laid to rest by a pair of cases arising under the judicial review provisions of the Radio Act of 1927. That Act authorized a disappointed party to "appeal" from decisions of the Radio Commission (the forerunner of the Federal Communications Commission) to the Court of Appeals for the District of Columbia, and permitted that court to "alter or revise the decision appealed from and enter such judgment as to it may seem just."[269] In *Federal Radio Commission v. General Electric Co.*, the Court, following the logic of *Keller*, held that it would violate Article III to permit the Supreme Court to hear appeals from such judgments, because this would convert the Court into "a superior and revising agency," and render its decision administrative rather than judicial in nature.[270]

Congress responded to the decision by amending the statute to conform to the precepts the Court had upheld in reviewing ICC and FTC decisions and in sustaining judicial review of the Board of Tax Appeals. The revised statute authorized the court of appeals to review only "questions of law" and provided "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary and capricious."[271] The Court held that it could entertain appeals from such judgments consistent with Article III in *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*[272] The new version of the Act, the Court reasoned, confined the court of appeals to performing "judicial, as distinguished from administrative, review."[273] In what can serve as concise summation of the tenets of the appellative review model, the Court explained:

> Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the

266. Id. at 722.

267. Id. at 723.

268. Id.

269. Radio Act of 1927, ch. 169, § 16, 44 Stat. 1162, 1699, amended by ch. 788, 46 Stat. 844 (1930) (repealed 1934).

270. 281 U.S. 464, 467 (1930).

271. 46 Stat. at 844.

272. 289 U.S. 266 (1933).

273. Id. at 276.

> legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action.[274]

Nelson Bros. thus articulates the critical understanding that served to resolve any doubts about the constitutionality of the appellate review model under Article III—at least insofar as the problem was contamination of judicial authority. As long as the function of a court is truly appellate in nature, that is to say, as long as the court reviews a record and resolves the same kinds of questions it would resolve in reviewing a record generated by a trial court, the reviewing court is acting in a perfectly judicial manner.

In light of the foregoing, we can now see *Crowell v. Benson*, the decision that is generally cited as the decisive turning point in overcoming Article III objections to agency adjudication, in a new light.[275] All the Justices participating in *Crowell*, both in the majority and in dissent, assumed the validity of the appellate model for judicial review of agency action involving private rights. This is because that model had already become entrenched by the time *Crowell* was decided. In *Crowell*, Chief Justice Hughes adopted a modest carve-out from the appellate review model for facts bearing on the jurisdiction of the agency to hear the claim in question. He reasoned that the record supporting these facts should be developed in the reviewing court, rather than before the agency, in order to assure impartiality in policing the scope of the agency's activities.[276] Justice Brandeis penned a lengthy dissent, which cited extensive authority suggesting that the agency could develop the record itself.[277] In any event, *Crowell*'s suggestion that the record for re-

274. Id. at 276–77.

275. 285 U.S. 22 (1932).

276. Id. at 54–65.

277. Id. at 84–93 (Brandeis, J., dissenting).

viewing jurisdictional facts had to be made judicially was soon forgotten.[278]

The true significance of *Crowell*, in terms of the present topic, is that it contains the first intimation of judicial anxiety about the potential displacement of federal courts by administrative agencies. It was just an intimation. The opinion extols the virtues of administrative agencies, and insists that the Court had no desire "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 administrative agency specially assigned to that task."[279] But the Court was concerned that meaningful judicial review of the legal limitations on the agency's authority required a more searching review of the evidence. If Congress could completely vest the authority to make all findings of fact with an agency—including those facts necessary to establish that the agency was acting within the scope of its delegated power—"[t]hat would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system."[280] Here is a quick flash of doubt about what decades later would become an obsession in certain quarters: the possibility of doing away with Article III courts altogether, and replacing them with a compliant bureaucracy willing to do the bidding of its political superiors.

This anxiety became a virtual neurosis with the massive expansion of the power of the federal courts during the Warren and Burger Court eras, and especially with the Court's intrusion into multiple areas of social controversy. The Court was well aware of the potential for backlash.[281] The most threatening form a backlash might take would be to strip Article III courts of jurisdiction, and transfer adjudicatory functions to more pliant Article I courts or agencies. Hence the perceived need to define a "core" of constitutionally-protected authority for Article III courts impervious to congressional removal. Justice Brennan's plurality opinion in *Northern Pipeline* is the ultimate manifestation of this anxiety.[282] This modern obsession with securing a redoubt for judicial power

278. In St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 53–54 (1936), in the context of a confiscation claim, the Court held that constitutional facts could be determined by the court independently based on the record generated by the agency. "After *St. Joseph Stock Yards* the independent record requirement receded into the constitutional shadows." Monaghan, Review, supra note 2, at 256. As previously noted, the government lawyer who successfully argued *St. Joseph Stock Yards* was none other than John Dickinson, then serving as Assistant Attorney General for the Antitrust Division. *St. Joseph Stock Yards*, 298 U.S. at 41.

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

280. Id. at 57.

281. See Fallon et al., The Federal Courts, supra note 24, at 277–78 (listing numerous proposals to eliminate federal court jurisdiction over various issues of controversy).

282. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (plurality opinion) ("As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines and protects the

has led commentators to search for pre-*Crowell* understandings of core Article III authority. But the antecedents do not exist, because the anxiety did not exist.

I am not suggesting that this historical account in any way solves the puzzle of agency adjudication and Article III. The puzzle will remain as long as we persist in reading Article III as conferring a monopoly on the exercise of the judicial power by Article III courts.[283] What the account suggests, however, is the path dependent nature of our constitutional law. Institutions are created, and become entrenched, in response to one set of imperatives. Given the limits of human reason, no one perceives all potential complications or objections presented by these institutions. By the time complications or objections come to the fore, the inertia of institutional change is too great to undo them.

VI. Accommodating Change

Given its inauspicious beginnings in an improvised retreat from intrusive review of ICC decisions, it is truly remarkable how the appellate review model flourished in the century that followed. In the evolutionary struggle for survival among legal doctrines, this one is a clear winner. What accounts for its remarkable staying power?

Part of the explanation has already been hinted at. Judges created the appellate review model—not Congress, the executive branch, or the academics. And the appellate review model, as rationalized by Dickinson, casts judges in the powerful role of "senior partner" in the court-agency relationship. Judges anxious to maximize their influence over policy, and to minimize their need to engage in dreary review of evidentiary records, should naturally be drawn to a conception of judicial review in which agencies find the facts and judges get to declare whether the agency's policy initiatives are consistent with "the law."

Another explanation for the enduring power of the appellate review model is its flexibility at both the micro and macro levels. Dickinson spotted the flexibility at the micro level.[284] Insofar as the reviewing institu-

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independence of the Judicial Branch."). Justice Brennan would continue to voice these concerns in subsequent decisions. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 866 (1986) (Brennan, J., dissenting) (warning "Congress can seriously impair Article III's structural and individual protections without assigning away 'the *entire* business of the Article III courts.' . . . It can do so by *diluting* the judicial power of the federal courts." (citation omitted)); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 599 (1985) (Brennan, J., concurring in judgment) ("At a minimum, Article III must bar Congress from assigning to an Article I decisionmaker the ultimate disposition of challenges to the constitutionality of Government action, either legislative or executive.").

283. Although it is not my purpose here to offer a solution to the puzzle, I have previously argued that the assumption the Constitution confers the "judicial power" exclusively on Article III courts should be reconsidered. See Merrill, Constitutional Principle, supra note 236, at 259–60.

284. See Dickinson, supra note 14, at 49–55, 168–70, 203–05 (noting how courts can redefine questions of fact as questions of law and vice versa).

tion wants to overturn an agency decision on an issue within the sphere of competence of the agency, it can usually find a way to do so that suggests it is exercising its own competence. Thus, for example, the reviewing institution will overturn a fact-based decision by the agency by describing that decision as so lacking in evidence as to be "contrary to law." Alternatively, insofar as a court wants to uphold the decision of an agency, it will frame the issue in terms of the competence of the agency, for instance by positing that whether a carrier's practice is discriminatory is a "question of fact" for the agency to determine in its "sound discretion."

The appellate review model has also proven to be flexible at the macro level. For example, in the late 1940s, control of Congress shifted from the Democrats to the Republicans, and Congress began criticizing prolabor decisions of the NLRB. No clear legislative directive emerged, but Justice Frankfurter was able to announce in *Universal Camera Corp. v. NLRB* that Congress had "expressed a mood" requiring more searching judicial review of the Board's decisions.[285] That "mood" could be vindicated by tinkering with the way courts implemented the appellate review concept. Specifically, courts were directed to consider the weight of the evidence based on the entire record, not merely by looking at select evidence supporting the Board's decision. No reconsideration of the framework of review was required.

Even greater capacity for adaptation was revealed in the 1970s, as Congress encouraged a shift from adjudication to rulemaking as the dominant mode of policymaking. This posed a potentially serious problem for the appellate review model, given that rulemaking as originally conceived did not produce the closed record presupposed by the traditional appellate review model. But courts and agencies were able to adjust to overcome this difficulty, essentially by developing a new conception of the record for purposes of review of rulemaking.[286]

Similarly, when concern about agency capture became fashionable in the late 1960s and early 1970s,[287] courts tinkered with the appellate review model along another dimension. They construed the role of the courts to include much more aggressive review of the agency's explanations for significant new policies. Thus was born hard look review.[288]

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285. 340 U.S. 474, 487 (1951).

286. See William F. Pederson, Jr., Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 39 (1975) (arguing "[r]ulemaking procedures should provide for compiling and organizing an administrative record while rulemaking is in process, with use of a discovery system to ensure no material which properly should be included is left out").

287. See Thomas W. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1059–67 (1997) (describing how "various strands of academic capture theory roiled together into a general pot of discontent, out of which emerged a new popular muckraking literature").

288. See generally James V. DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. Rev. 257, 301–09 (1979) (describing need for more aggressive judicial monitoring of internal agency processes); Merrick B. Garland, Deregulation and

Again, this approach required no fundamental alteration in the appellate review model. Courts simply layered a more aggressive monitoring of the quality of agency reasoning on top of the standard review of the factual record from the original model.

Later, in response to the deregulation movement, the model was sufficiently elastic to permit a further modification in the appropriate division of authority in resolving questions of law, most prominently with the *Chevron* decision in 1984.[289] *Chevron*'s two-step formula for reviewing questions of law can be seen as a reworking of the tried and true appellate review model. Step one entails reviewing for a controlling question of law. Here the court exercises pure independent judgment, using "traditional tools" of legal interpretation to say what the law is.[290] Only if the court finds that the law does not speak to the question does it move on to step two, where the agency's view, like that of a lower court's finding of fact, is reviewed for reasonableness.[291] As Edward Rubin has observed, the formula

> is reminiscent of the standard that an appellate court uses when reviewing a bench trial: the appellate court will review questions of law de novo, but will recognize a zone of discretion for matters that lie within the special expertise of the trial court, and will reverse only if the trial court's decision is "clearly erroneous."[292]

This would have come as no surprise to Dickinson. As he explained in 1927, judicial deference to agency determinations of law is compatible with the model, as long as the issues of law are sufficiently narrow and technical as to fall into the sphere of superior competence of the agency rather than the court.[293] This is consistent with the common sense understanding of *Chevron* shared by most judges, even if the theoretical grounds of that decision authorize a much greater transfer of authority over questions of law to agencies.

These and other transformations in administrative law were made possible only because the appellate review model, as Dickinson perceived,

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Judicial Review, 98 Harv. L. Rev. 505, 525–42 (1985) (examining evolution of hard look doctrine).

289. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

290. Id. at 843 n.9, 845.

291. Id. at 843 n.11, 844–45.

292. Rubin, supra note 3, at 142. I am not sure that this characterization is fully accurate insofar as *Chevron* applies to pure questions of law—when the statute is ambiguous—as well as questions of law application. Cf. Negusie v. Holder, 129 S. Ct. 1159, 1172 (2009) (Stevens, J., concurring in part and dissenting in part) (arguing courts should decide "pure questions of statutory construction" while deferring to reasonable agency interpretations on questions of "applying law to fact").

293. Dickinson, supra note 14, at 286–87 (endorsing idea of courts treating legal interpretations of the Land Office like questions of fact, on the ground that those issues fall within "a body of technical administrative practice").

rests on the general idea of a division of functions.[294] As long as the model is understood at this level of generality, particular understandings of institutional functions and the line of demarcation between institutions can change over time, all the while permitting a basic continuity in the identity of the relevant institutions and the sequence with which they discharge their functions. Thus, the model has permitted the federal courts to respond to a variety of political imperatives and intellectual fashions without surrendering their position of dominance in the development of regulatory policy.

CONCLUSION

The adoption of the appellate review model for ordering the relationship between agencies and courts was one of the most far-reaching developments in the history of American administrative law. The model had two great virtues, one political, the other conceptual. The political virtue was that it allowed the federal courts to back off from engaging in intensive de novo review of the nation's most important regulatory agency, the ICC. By 1906, the Court had gotten itself into hot water over micromanagement of the ICC. The appellate review model allowed the Court to increase the ratio of affirmances to reversals and develop a rhetoric of deference while at the same time purporting to maintain continuity with its past practice. Conceptually, the model permitted a genuine specialization of functions between courts and agencies, which reduced friction, delay, and duplication of effort. Agencies would specialize in the nitty-gritty of their particular regulatory programs: developing records, making findings of fact, crafting dispositional orders, initiating enforcement actions. Courts would review the record to assure that agencies were acting in a reasonable fashion, and they would concentrate on conclusions of law in order to harmonize the agency regulatory program with broader principles of law, including constitutional rights such as the protection against confiscation.

All this seems familiar and uncontroversial. But it is worth asking whether the division of functions generated by the appellate review model is in fact optimal given the characteristics of the institutions involved. As between judge and jury, few would argue that the jury should find the law and the judge should find the facts. But it is not self evident that the same holds true as between court and agency. Finding the law is closer to making policy than finding the facts, at least most of the time. And agencies, for reasons both of expertise and democratic accountability, are today generally regarded as the preferred policymaker. Kenneth Culp Davis made the point with characteristic bluntness in commenting

294. See id. at 233–35 (noting that agency "must seek a practical solution of one case rather than a rule for all cases; and this requires that its determinations . . . must be subject ultimately to the check of an adjudicating body primarily interested in general rules of delimitation between opposing rights").

on Dickinson's conception of the judge as lawgiver: "[W]ho can best determine what the law should be as to the maximum amount of poison spray on fruit—a judge . . . or the appropriate expert of the Department of Agriculture?"[295]

One problem is that the appellate review model emerged during a time when agencies primarily engaged in adjudication and only rarely ventured into rulemaking. Agencies looked like the proverbial Article I court. Today, the pattern is close to the reverse, as many of the characteristic modern agencies, like the EPA, the FCC, and FERC, do most of their business through rulemaking and rarely engage in adjudication. Agencies today look more like a "junior-varsity Congress."[296] In light of this role reversal, one could argue that the independent and impartial Article III judiciary should be assigned the primary task of determining the facts—at least adjudicative facts that pertain to particular parties in enforcement actions—and agencies should be assigned the task of developing legal principles through notice and comment rulemaking. Of course, the *Chevron* doctrine, if taken seriously, gets us at least part way to this result. But *Chevron* is a kind of patchwork solution jiggered on top of the appellate review model, and it seems to be at constant war with the underlying premises of that model. The appellate review model tells courts to decide all questions of law independently, whereas *Chevron* interposes and instructs the court to hold off if there is reason to think that Congress has given the legal issues to the agency to decide.

As a thought experiment, it is at least worth considering whether some other model for judicial review, such as the ultra vires or jurisdictional model, might have offered a superior architecture for allocating authority between agencies and courts. Much nineteenth-century review, especially under the prerogative writs, adopted this premise. Courts would not review an agency decision like a judge supervising a jury, but would ask whether the agency was acting within the scope of its jurisdiction as authorized by law. This reinforced the principle of legislative supremacy, in that the courts enforced the decisions of the legislature about the basic mandate and scope of authority of any agency created by statute. But oversight of individual decisions, including policy choices made within the scope of the agency's authority, was left to internal agency review mechanisms and the legislature. British courts (and many commonwealth courts) continued to develop the ultra vires review model into the twentieth century, with the result that review of agency action in Britain has generally been more deferential to administrative initiatives than is characteristic of American administrative law.[297]

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295. Kenneth Culp Davis, Administrative Law § 8, at 33 n.103 (1st ed. 1951).

296. Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

297. See generally Judicial Review and the Constitution (Christopher Forsyth ed., 2000) (providing variety of perspectives on the role of ultra vires review in British administrative law).

To be sure, as Dickinson also observed, the ultra vires review model, like the appellate review model, can expand and contract to reflect judicial confidence about the need for intervention. Some American courts following this mode of review, for example, held that a decision based on erroneous factual assumptions was beyond an agency's "jurisdiction."[298] And the British courts, in the late twentieth century, superadded review for procedural regularity and so-called *Wednesbury* review for "reasonableness" onto the basic model of ultra vires review, thereby reducing the distance between British and American courts in matters of administrative law.[299] The potential for judicial aggrandizement is inherent in any model.

Different models, however, orient courts in different ways, and they have a broad conditioning effect on the nature and direction of judicial review. An ultra vires model focuses attention of the reviewing court on questions of boundary maintenance. The basic question is always whether the agency has remained within the zone of discretion given to it by the legislature.[300] The appellate review model invites courts to substitute their judgment for that of the agency on any matter that can be characterized as a question of "law." It is certainly plausible that the ultra vires approach would leave more "policy space" for agencies than the appellate review model. As experience with agency government accumulates, powerful arguments can be made that, on the whole, this would have been a good thing.[301] If some senator in 1906 had made an impassioned plea for amending the Interstate Commerce Act to incorporate an ultra vires standard of review, the American administrative state might

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298. See Dickinson, supra note 14, at 44–47, 309–13 (describing cases and their application to administrative law).

299. See, e.g., R v. Hull Univ. Visitor, [1993] A.C. 682 (H.L.) 701 (appeal taken from Eng.) (Lord Brown-Wilkinson) (arguing powers of public decisionmaking bodies "have been conferred on the decision maker on the underlying assumption that powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense . . . reasonably" (citation omitted)).

300. See Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2171–75 (2004) (arguing vital role of judicial review is to enforce limits on zone of discretion given to agency); Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 33–34 (1983) (emphasizing "boundary setting" role of courts in judicial review of agency action).

301. Although the initial reaction to *Chevron* deference by law professors tended to be skeptical, recent books on statutory interpretation that adopt a more systemic, consequentalist perspective are united in their endorsement of strong *Chevron*-style deference to agency interpretations of statutes, albeit for different reasons. See, e.g., Frank B. Cross, The Theory and Practice of Statutory Interpretation 110–12 (2009) (arguing deference to agency interpretation promotes pragmatic interpretation); Einer Elhauge, Statutory Default Rules: How to Interpret Unclear Legislation 9–10 (2008) (arguing deference to agencies is the primary means of assuring statutory interpretation tracks currently "enactable preferences"); Vermeule, supra note 170, at 225–26 (arguing agencies have superior understanding of statutory purposes and empirical realities relative to reviewing courts).

look very different today, and regulatory policy might arguably be a good deal more coherent.

This, of course, is wistful conjecture. The appellate review model is so deeply entrenched in American political culture that it is impossible to imagine wrenching free from its influence. The best that can be expected is that courts, especially the Supreme Court, will continue to whittle away at the scope of judicial authority over questions of policy, leaving courts the function of policing the boundaries of administrative action. The dominating influence of the appellate review model has made it much more difficult to arrive at this position. But having chosen that fork in the road, it is almost certainly impossible to go back and take another.