

Substantial Defects: Deference, Juries, and Agency Fact-Finding

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Introduction

Separation of powers cases often raise interesting questions, but none is more crucial than the first: “Who decides?”¹ This Article considers that issue in relation to questions of fact in cases involving the deprivation of private rights. For centuries, the uncontested answer was the jury—an arm of the judicial branch. But in the modern administrative state, executive branch agencies initiate and adjudicate cases involving private rights and, in the process, make conclusions of law and findings of fact. The agency thus acts as prosecutor, judge, and jury. And when a case finally gets to an independent Article III court, the judge is to ask only whether agency findings are supported by substantial evidence.² No jury ever considers the case.

Substantial-evidence review is appropriate for a reviewing court when it considers the findings made by a jury. But in agency adjudications, the findings are made by some kind of hearing officer—usually, for the private-rights cases we consider here, an administrative law judge (ALJ)—or the agency itself. And, because of agencies’ supposed expertise, courts often defer to agency fact-finding.

However, the Seventh Amendment requires a jury in “suits at common law.”³ We submit that the Amendment means what it says: individuals and organizations facing the deprivation of private rights based on claims analogous to suits at common law are entitled to a jury. Agency fact-finding in these cases creates a serious constitutional tension. Here, after discussing the history and importance of the jury, we will focus on the problems that arise due to the appellate-review model applied to administrative cases—most prominently, the requirement that individuals and entities must establish facts not to a jury of their peers, but to agency personnel.⁴

While the administrative state encompasses a broad array of agencies and bureaus—covering everything from land use to securities regulation to benefits—our focus and conclusion are narrow: we claim that a (waivable) right to a jury is required for government actions that impinge on private rights. Therefore, for instance, when the Securities and Exchange Commission (SEC) alleges fraud and seeks a civil penalty (*i.e.*, legal damages), the defendant must have the right (though not the obligation) to force the SEC to bring that action in an Article III court before an independent (Article III) judge and jury. While important—and mandated by the Constitution—this requirement would have modest practical effect: it would not touch the vast swath of administrative adjudications considering public rights like Social Security hearings, which involve the exercise of adjudicative-like functions but which are exercises of executive—not judicial—power.

1 Nat’l Fed’n of Indep. Business v. OSHA, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring); see *id.* (“This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.”).

2 See 5 U.S.C. § 706(2)(E).

3 U.S. CONST. amend. VII. The value in controversy must be over \$20. *Id.*

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

The Jury

The civil jury—despite its deep roots in British law—hardly has any relevance anymore. Between Civil Rule 12, summary judgment, settlements, and the demise of the Seventh Amendment, virtually no lawyers empanel jurors these days. Civil lawyers of a certain age hardly know what *voir dire* is.⁵

But that could soon change. In May 2022, the Fifth Circuit Court of Appeals held that the Seventh Amendment—which requires civil juries—applies to cases brought by the Securities Exchange Commission seeking civil penalties—even when the SEC brings the case in an administrative tribunal rather than in federal court.⁶ Therefore, the SEC cannot seek monetary fines in an in-house adjudication without a jury—at least not when the Commission sues on a fraud theory under the Securities Exchange Act. Said simply: If the government wants to take hundreds of thousands of dollars of a defendant’s property, it must at least prove its case to a jury in a neutral court.

The reaction to the Fifth Circuit’s decision has been mixed, in both the academy and in popular media.⁷

Current academic legal dogma says that juries stand in the way of technical experts who can run the modern state more efficiently and expertly than regular members of the community—never mind the Seventh Amendment. In this line of thinking, there is no turning back to empaneled jurors. Technical experts can do just fine. Agency fact finders are, as Professor Gary Lawson put it, part of the “*Rise and Rise of the Administrative State*.”⁸

But like all bubbles, the growth of the administrative state is on the verge of bursting. Agencies have enjoyed a century-long bull market, and a correction seems imminent. After all, the Supreme Court has taken on multiple high-stakes administrative law cases recently and appears poised to continue reviewing agency activities.⁹ Among the most obvious places to start is addressing the jury in cases involving private rights and legal remedies.

This is particularly true given the Administrative Procedure Act’s requirement that agency factual findings are reviewed for “substantial evidence.”¹⁰ After all, if administrative agencies are supposed to act as “replacement jurors” for efficiency’s sake, then they can do so only when a jury is not otherwise constitutionally required.¹¹ Substantial-evidence review might well be appropriate in “public rights” cases such as Social Security disputes.¹² But in private-rights cases, it runs headlong into the Seventh Amendment.

5 Let alone how to pronounce it.

6 *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

7 See, e.g., Jonathan H. Adler, *The Good, the Bad, and the Ugly of Jarkesy v. SEC*, *The Volokh Conspiracy* (Aug. 17, 2022), available at <https://reason.com/volokh/2022/08/17/the-good-the-bad-and-the-ugly-of-jarkesy-v-sec/>; see also Transcript, *The Problem with Jon Stewart*, <https://www.theproblem.com/podcast/jarkesy-v-sec-strict-scutiny/> (June 9, 2022) (discussing *Jarkesy*).

8 Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

9 See *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Axon v. FTC*, No. 21-86 (argued Nov. 7, 2022); *Cochran v. SEC*, No. 21-1239 (argued Nov. 7, 2022).

10 5 U.S.C. § 706(2)(E).

11 *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 60 (1989).

12 Or maybe not. We do not commit either way.

Other scholars have argued that substantial-evidence review is unconstitutional in some instances, and we commend that analysis.¹³ But few scholars have connected substantial-evidence review and the jury. We do so here. To the extent that courts may employ substantial-evidence review, they can do so only if the case does not require a jury under constitutional first principles. Current agency practice—allowing political appointees to fully control and oversee decisions made by on-the-ground fact finders like administrative law judges—only underscores the point.

So when courts engage in “substantial-evidence review” of an agency’s decision, we ask: *review of what facts found by whom?* Appellate panels at administrative agencies—often composed of commissioners themselves—have the full power to make factual determinations without ever hearing testimony or reviewing evidence. In such cases, federal courts apply substantial-evidence review to factual findings *never determined* by a first-level fact finder. In these cases, federal courts defer to factual determinations made by political appointees who themselves engaged in appellate review.

That contradicts the purpose and promise of the jury. And it undermines the entire purpose of substantial-evidence review. The better course, then, is to ditch factual deference in private-rights cases that otherwise would require a jury. Doing so would finally live up to our Constitution’s guarantee.

The Central Role of the Jury

No right in our federal Constitution was more important to the Framers than the jury.¹⁴ We think this point uncontestable. The Founders wrote criminal jury requirements into Article III itself as well as the Sixth Amendment.¹⁵ The Fifth Amendment guarantees a grand jury and the due process of law, which we contend *itself* requires a jury.¹⁶ And the Seventh Amendment provides the right to a civil jury.¹⁷ Juries, in other words, were everywhere. Anytime the Framers could write it down, it seems, they stuffed the word “jury” into the founding charter. But why?

Scholarship on this point has long emphasized that jurors served as a bulwark against tyranny. They ensured community oversight of government officials, and they allowed average citizens to participate in democratic governance. Juries further kept eyes on shady judges and prosecutors who might try to pull one over on a defendant.¹⁸

13 Evan Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL’Y 27, 30 (2018) (Deferring to agency fact-finding in core private rights cases “constitutes an abdication of the duty of independent judgment that Article III imposes upon federal judges.”); John Gibbons, *Why Judicial Deference to Administrative Fact-Finding Is Unconstitutional*, 2016 BYU L. REV. 1487 (2017).

14 Although some may have been equally so.

15 U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

16 Gary Lawson, *Take the Fifth ... Please!: The Original Insignificance of the Fifth Amendment*, 2017 BYU L. REV. 611 (2018); Akhil Reed Amar, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1997); Randy E. Barnett & Even D. Bernick, *THE ORIGINAL MEANING OF THE 14TH AMENDMENT* 31 (2021) (“The original meaning of ‘due process of law’ in the Fourteenth Amendment guarantees some judicial process before any person can be deprived of life, liberty, or property. This judicial process includes a jury trial.” This “date[s] back to the Founding.”).

17 U.S. CONST. amend VII.

18 Amar, *supra* note 16.

One cannot understand federal courts and litigation without getting familiar with the jury. And once one knows the jury, one can begin to peel back the problems with substantial-evidence review—and just what it takes from civil litigants.

Jury rights date back to at least the Magna Carta.¹⁹ Longer, really. But in any event, they were well established by the time men took up arms at Lexington and Concord. William Penn wrote a century before the revolution that among the great English rights was “[a]n influence upon, and a real share in, that judicatory power that must apply every such law; which is the ancient, necessary and laudable use of juries.”²⁰ Just over a decade later, Penn doubled down on his point, writing that the “Birthright of Englishmen whines most conspicuously in two things: (1) Parliament” and “(2) juries.”²¹ As Penn saw things, no man could be “adjudged to lose life, member or estate, but upon the verdict of his Peers or Equals his neighbours, and of his own condition.”²² Penn considered taking away the jury a serious problem. “[W]hoever shall design to impair, pervert or undermine” the right, Penn wrote, “do strike at the very Constitution of our Government, and ought to be prosecuted and punished with the utmost zeal and rigour.”²³

Blackstone similarly praised the jury, for “a competent number of sensible and upright jurymen, chosen by lot from among those of middle rank, will be found the best investigators of truth, and the surest guardians of public justice.”²⁴ “[T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another’s right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed until the hour of trial.”²⁵ Thus the jury “preserves in the hands of the people that share which they ought to have in the administrative of public justice, and prevents the encroachments of the more powerful and wealthy citizens.”²⁶

For these reasons, Blackstone questioned *any* proceeding that took juries away from private citizens. “[E]very new tribunal, erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates) is a step toward establishing aristocracy, the most oppressive of absolute governments.”²⁷ In short, the jury was a “uniquely English right” and “its avowedly historical character made Englishmen the envy of less fortunate people.”²⁸

Across the Atlantic, colonists (and later Americans) adhered to Blackstone’s view. At the Founding, “juries functioned differently—as an integral part of government in both England and

19 *United States v. Booker*, 543 U.S. 220, 239 (2005) (The “right to a jury trial had been enshrined since the Magna Carta.”).

20 WILLIAM PENN, *ENGLAND’S PRESENT INTEREST CONSIDERED, WITH HONOUR TO THE PRINCE, AND SAFETY TO THE PEOPLE* (1675), available at <https://quod.lib.umich.edu/e/eebo/A54132.0001.001/1:4.1.3?rgn=div3;view=fulltext>.

21 WILLIAM PENN, *THE EXCELLENT PRIVILEGE OF LIBERTY AND PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND* (1687) (<https://press-pubs.uchicago.edu/founders/documents/v1ch14s5.html#:~:text=This%20original%20happy%20Frame%20of,laws%20than%20from%20our%20parents>).

22 *Id.*

23 PENN *supra* note 20.

24 III Blackstone *Commentaries* at *380.

25 *Id.*

26 *Id.*

27 *Id.*

28 Jack Rakove, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 294 (1996).

the colonies.”²⁹ When, in 1765, Parliament passed the Stamp Act, which “authorized the government to prosecute alleged violators in juryless vice-admiralty courts,” colonists were aghast.³⁰ Americans viewed the Act as “a mere ruse to deprive Englishmen in America of ancient jury trial protections that Englishmen in England took for granted as their constitutional birthright.”³¹ So important was the issue that colonists organized the Stamp Act Congress—a precursor to the Continental Congress—where they unanimously agreed that “Trial by Jury is the inherent and invaluable Right of every British Subject and these Colonies.”³² And when Parliament refused to budge, the colonists left. In the Declaration of Independence, announcing departure from the mother country, Thomas Jefferson excoriated King George III for “depriving us, in many cases, of the benefit of trial by jury.”³³

In crafting their own governments, state after state reaffirmed this deep commitment to trial by jury.³⁴ The Constitution did nothing to change that.³⁵ If anything, our founding charter strengthened the jury’s power. When the Constitution went to state ratifying conventions, the people demanded a civil jury, even when many Federalists thought an explicit guarantee unnecessary. Starting with Massachusetts, ratifying conventions again and again attached proposed amendments that would require civil juries.³⁶ As Hamilton observed, “[t]he objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases.”³⁷ Congress ultimately acceded to those requests and approved the Seventh Amendment, which states ratified. And “without the Seventh Amendment, it is unlikely that there would have been any Constitution at all.”³⁸ As legal titan Professor Akhil Reed Amar put it, “[j]uries stood at the center of the original Bill of Rights.”³⁹

But why? What’s the big deal about juries? Did Americans (and Englishmen) really think that a group of strangers could best judge the facts of a case? In a word, yes. Of all the modern debates about the historical constitutional understanding, at least one is largely uncontested: Jurors played key roles in protecting American liberty and ensuring citizen participation in the new government.

29 Suja A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1197 (2014).

30 Akhil Reed Amar, *THE WORDS THAT MADE US* 53 (2021).

31 *Id.* at 54.

32 *Id.* at 61.

33 DECLARATION OF INDEPENDENCE (1776).

34 Sheldon Whitehouse, *Restoring the Civil Jury’s Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1248–49 (2014) (explaining importance of juries in state constitutions).

35 Although the original Constitution did not contain a provision for the civil jury, that was quickly remedied through the Seventh Amendment in 1791. Luther Marin reflected the views of many when, at the Philadelphia Convention, he railed against the Founders’ failure to provide for a civil jury. III FARRAND’S RECORD at 221–222. Many state ratifying conventions made the same point when voting on the proposed founding document.

36 See PAULINE MAIER, *RATIFICATION, THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2011) at 197 (Massachusetts proposed amendment), 245 (Maryland), 316 (New Hampshire), at 307 (Virginia); *see also* IV ELLIOT’S DEBATES at 243–44 (North Carolina Declaration of Rights) (“[I]n controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.”).

37 THE FEDERALIST No. 83 (Alexander Hamilton).

38 Kenneth Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1015 (1994).

39 Amar, *supra* note 16 at 108–09.

Jurors did so by forming a fence around liberty, guarding against arbitrary rule.⁴⁰ James Madison saw things this way, describing the jury as “one of the best securities to the right of the people.”⁴¹ It was “as essential to secure the liberty of the people as any one of the preexistent rights of nature.”⁴² Jefferson’s Declaration of 1776 still rang true a decade later when he explained: “I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”⁴³ John Adams called the jury “the heart and lungs of liberty” and without it we might be “ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swines and hounds.”⁴⁴ Even today—despite the diminishing role of juries—some federal judges recognize that “juries are essential to our freedom” and “[i]f we fail to purposefully guard and defend the jury, we risk losing one of America’s greatest traditions and protectors of our liberty.”⁴⁵

The themes surrounding the jury have hardly changed from constitutional ratification to today. Start with 1788: An Old Whig summed things up nicely by saying, “Judges, unincumbered by juries, have been ever found much better friends to government than to the people.”⁴⁶ Thus, “[s]uch judges will always be more desirable than juries.”⁴⁷ Today, Senator Whitehouse has similar views: “The principles of separation of powers and government by the people, including the civil jury, are our established guardians against such encroachment. We allow them to wither at our peril.”⁴⁸

Furthermore, the jury gave life to America’s conception of popular sovereignty—We the People held all power. Through juries, the sovereign people could oversee their agents in government.⁴⁹ By allowing the community to supervise their public officials (particularly judges and prosecutors) “civil jury trials ensure[d] that parties [were] not forced to suffer the biases that might develop among judges.”⁵⁰ This particular concern—biased judges ruling in favor of government—served as the foundational purpose of the jury. Jurors “shielded individuals from the injustice that would otherwise issue from feckless judges all too eager to serve their royal masters.”⁵¹ That extended to America where the Constitution put “We the People” in charge. And that meant that “[j]uries need not achieve a better result than judges for popular sovereignty to have value.”⁵² At the time, juries were even *more* important than today, for as juries determined facts, they also decided the law.⁵³

40 Whitehouse, *supra* note 34 at 1244 (“The Founders intended the civil jury to serve as an institutional check on [arbitrary] power by giving ordinary American people direct control over one element of government.”).

41 JAMES MADISON, WRITINGS 1772–1836 444 (The Library of America 1999).

42 I ANNALS OF CONG. 437 (1789) (James Madison).

43 Letter from Thomas Jefferson to Thomas Paine (July 11, 1789).

44 Thomas J. Methvin, *Alabama—The Arbitration State*, 62 ALA. LAW. REV. 48, 49 (2001) (quoting John Adams in 1774).

45 Judge Jenifer Elrod, *Is the Jury Still Out?*, 44 TEXAS TECH L. REV. 303, 325 (2012).

46 VIII Old Whig (Feb. 6, 1788), available at <https://teachingamericanhistory.org/document/old-whig-viii>.

47 *Id.*

48 Whitehouse, *supra* note 34 at 1272.

49 *See, e.g.*, Letter from the Federal Farmer, No. 4 (Oct. 12, 1787) (trial by jury ensures “that common people should have a part and share of influence in the judicial, as well as the legislative department.”).

50 Whitehouse, *supra* note 34 at 1266–67.

51 Rakove, *Original Meanings*, *supra* note XX at 294.

52 Whitehouse, *supra* note 34 at 1268; *see also* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

53 *See* Amar, *Bill of Rights*, *supra* note 16 at 98–104 (explaining idea of “jury review”—as distinct from jury nullification—by which jurors would decide the law); Barnett * Bernick at 31 (the jury “was said to be the trier of law as well as fact.”); Rakove, *Original Meanings*, *supra* note 28 at 300 (in colonial practice, “the competence of the jury extended to matters of law and fact alike, and juries used this authority freely.”).

This additional institutional check on arbitrary power fit snugly with the Founders' vision of (and experience as) jurors.⁵⁴ Framers and citizens alike recognized that the Seventh Amendment places upon "the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty."⁵⁵ On top of that, jurors ensured society *accepted the legitimacy* of court decisions. Judgments announced by juryless courts would "never have a decisive influence over society—they will never come home to the business and bosoms of the citizens—unless they are practically founded on the manners, and characters, and rights of men," which could only be "reported by the verdicts of juries."⁵⁶

All this to say: The jury was no mere afterthought. Jurors sat at the center of the legal world for hundreds of years, monitoring government agents—thereby guarding against arbitrary rule—and giving citizens direct control over the judiciary.

So, what would people think of a world without a jury? We already know that answer. After all, the Stamp Act set off a firestorm. Blackstone, as noted, thought any "new tribunal, erected for the decision of facts without the intervention of a jury ... is a step toward establishing aristocracy, the most oppressive of absolute governments."⁵⁷ James Iredell railed against limiting the civil jury because it "would undoubtedly produce an insurrection ... that would hurl every tyrant to the ground who attempted to destroy that great and just favorite of the English Nation."⁵⁸

And yet today, hordes of "new tribunals" adjudicate and determine private rights. They issue binding judgments ordering money payments. And they do so without a jury. The rise of the juryless administrative state threatens to flatten hundreds of years of Anglo-American jury tradition.

Not only do juryless executive agencies adjudicate rights, but they also allow in-house appellate panels to set aside and determine their own facts—without ever hearing a witness testify or viewing the evidence at trial. Then, once a court reviews the agency's determination, it applies "substantial deference" to the agency's fact-finding. Courts do not guard against the lack of a jury—they acquiesce to it by deferring to those factual findings.

Substantial-evidence review (in the cases we focus on) stamps out the jury. It allows political appointees to make facts as they go. When the facts are not on their side, they can simply make credibility determinations and weigh evidence—without ever seeing it directly—in a way to fit the result they want. And courts defer to it all.

This is precisely what the jury should guard against. Substantial deference to juryless facts is simply incompatible with our Founders' vision, the constitutional text, and the spirit of Anglo-American law.

54 See Whitehouse, *supra* note 34 at 1270 ("[T]he civil jury has political value simply because it helps distribute government power. The American system of government is built on Montesquieu's and Locke's premise that divided and separate powers are most protective of individual liberty.")

55 JOSEPH STORY, II COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 574.

56 James Wilson, Lectures on Law ch. VI, at 1007 (1791) [hereinafter "Wilson Lectures"], reprinted in 2 COLLECTED WORDS OF JAMES WILSON 1007 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2011).

57 III Blackstone, *Commentaries* at *380.

58 James Iredell, Marcus, Answers to Mr. Mason's Objections to the New Constitution (1788), reprinted in THE FOUNDERS' CONSTITUTION, at 357.

Factual Findings and Administrative Adjudication of Private Rights

Having explained why the jury is so important, we now discuss the more technical aspects—When is a jury generally required?—and argue that a jury right should attach in many actions that now proceed without a jury, through administrative adjudications.

The Seventh Amendment

The Seventh Amendment provides the following: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”⁵⁹

“Suits at common law” refers to “suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.”⁶⁰ But while “the thrust of the Amendment was to preserve the right to jury trial as it existed [in England] in 1791,” a jury is also required both for historical common-law claims that have since been codified *and* for new statutory legal claims that provide legal remedies (*i.e.*, rights and remedies analogous to common-law rights and remedies).⁶¹

Accordingly, to determine whether one is entitled to a jury, the Supreme Court now applies the following analysis: “First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”⁶² The second factor of this analysis is more important than the first.⁶³

Private Rights and Public Rights

No one could say—and we do not—that *all* adjudications must be in Article III courts.⁶⁴ Since the Founding, executive officials have adjudicated at least some controversies. So the question is *which* cases ought to include a right to a jury in an Article III court.

59 U.S. CONST. amend. VII.

60 *Parsons v. Bedford*, 3 Pet. 433, 447 (1830). See also *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–48 (1998); *Chauffeurs, Teamsters, and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990); *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (“treating the Seventh Amendment common law ‘Suits’ as a dynamic category extending to all new types of cases provided only that they determine ‘legal rights’”) (Story, J.).

61 *Curtis v. Loether*, 415 U.S. 189, 193 (1974); see *id.* at 193 (The Seventh Amendment “extends beyond the common-law forms of action.”). See also *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989) (The Seventh Amendment “also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century....”).

62 *Granfinanciera*, 492 U.S. at 42 (quoting *Tull v. United States*, 481 U.S. 412, 417–18 (1987)).

63 *Granfinanciera* at 42 (citing *Tull*, 492 U.S. at 421). Professor Suja Thomas argues that the nature of the remedy should be the *only* criterion. See Suja A. Thomas, *A Limitation on Congress: “In Suits at Common Law,”* 71 OHIO ST. L.J. 1072 (2010). Professor Samuel Bray makes similar points. See Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 485 (2022). The Supreme Court’s current Seventh Amendment jurisprudence is likely wrong as an original matter. We leave that issue aside, except with respect to the adjudication of private rights.

64 And indeed, we claim only that the *right* to a jury must attach to private rights. As explained below, a party may well wish to waive that right.

The short answer is that cases involving the potential deprivation of private rights must be adjudicated in courts at law rather than in administrative tribunals.⁶⁵ When the government disburses benefits, like Social Security distributions, or resolves “public rights,” the government may proceed outside of court.⁶⁶ Thus, when the government seeks to deprive private rights in cases involving “[s]uits at common law,”⁶⁷ it must proceed in court, where a jury decides questions of fact.⁶⁸ As Professor William Baude says, “one of the most fundamental requirements of the [Due Process C]lause is one of form and legality—as a limit on the legislature’s ability to dispense with the courts.”⁶⁹

The Supreme Court acknowledges that the distinction between private rights and public rights had not been “definitively explained” in its precedents.⁷⁰ We need not wade into the margins here. We will assume for the purposes of this discussion that public-rights cases—for which no jury is required—refer to adjudications that do not deprive anyone of private rights to life, liberty, or property.⁷¹

In sum, while the deprivation of life, liberty, and property “generally requires judicial process and therefore judicial power,” there is “no constitutional prohibition on an executive official finding facts, or applying law to those facts, so long as he does not authorize the deprivation of life, liberty, or property.”⁷²

65 See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1151, 1541 (2020) (“One longstanding principle of Anglo-American law holds that the government need turn to a court only when it seeks to deprive a person of their private rights to life, liberty, or property.”) (footnote omitted); cf. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL’Y 27, 30 (2018) (arguing that “judicial deference to agency fact-finding is unconstitutional in cases involving deprivations of what I refer to as *core private rights* to life, liberty, and property”).

66 See Baude, *supra* note 65 at 1541 (“If ... the government is simply deciding whether to bestow a benefit or privilege, or if the government is grappling only with the scope of a public right, no court is needed.”) (footnote omitted).

67 U.S. CONST. amend. VII.

68 See *Calcutt v. FDIC*, 37 4th 293, 348 (6th Cir. 2022) (Murphy, J., dissenting) (“[B]oth Article III and the Due Process Clause generally require the government to follow common-law procedure (including, fundamentally, the use of a ‘court’) when seeking to deprive people of their private rights to property or liberty.”) (citing *Stern v. Marshall*, 564 U.S. 462, 482–84 (2011); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 569–70 (2007)); see also *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 450, n.7 (1977) (“In cases which do involve only ‘private rights,’ this Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court....”); cf. also Bernick, 16 GEO. J.L. & PUB. POL’Y at 58–60 (arguing that fact-deference to agency fact-finding is unconstitutional only with respect to “core-private rights” cases, *i.e.*, cases involving the potential deprivation of life and liberty).

69 Baude, *supra* note 65 at 1541; see *id.* (“The predominant principle of executive action is that it cannot deprive people of life, liberty, or property without judicial process.”).

70 *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality).

71 See Baude, *supra* note 65 at 1542 (“While the phrase ‘public rights’ has been much confused in modern case law, in the nineteenth century it generally referred to forms of adjudication that did not deprive any people of their private rights to life, liberty, or property.”) (citing Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 568–69 (2007)).

72 Baude, *supra* note 65 at 1542. Scholars have long recognized that, since the Founding, administrative officials would not have “finality of judgment” in such cases. See, e.g., Leonard White, *The Federalists: A Study in Administrative History*, 1789–1801 at 455 (1948). “No penalty, fine, or forfeiture was collectible except by judgment of a court. Judicial review was therefore an ultimate protection against error, bad judgment, partiality, or venality of the customs officers.” *Id.*

Today’s Adjudication in the Administrative State

Administrative agencies deprive individuals and private entities of private rights through administrative—rather than judicial—processes.⁷³ The Administrative Procedure Act (APA) establishes the default procedures for formal administrative adjudications “required by statute to be determined *on the record* after opportunity for an agency hearing.”⁷⁴

At these administrative hearings, “[t]here shall preside *at the taking of evidence*” one of the following: the agency itself; one or more members of the body that comprises the agency; or an administrative law judge (ALJ).⁷⁵ In practice, ALJs often preside over administrative adjudications involving the potential deprivation of private rights.

Therefore, ALJs—who are usually but not always employed by the agencies bringing the administrative actions—serve as finders of fact in these adjudicative proceedings.⁷⁶ They also serve, of course, as adjudicators and, therefore, as gatekeepers with respect to discovery and evidence.⁷⁷ At these hearings, the ALJ, subject to published rules of the agency and within the agency’s powers, may:

1. administer oaths and affirmations;
2. issue subpoenas authorized by law;
3. rule on offers of proof and receive relevant evidence;
4. take depositions or have depositions taken when the ends of justice would be served;
5. regulate the course of the hearing;
- ...
9. dispose of procedural requests or similar matters;
10. make or recommend decisions in accordance with section 557 of this title; and
11. take other action authorized by agency rule consistent with this subchapter.⁷⁸

After a hearing, the ALJ issues an “initial decision.”⁷⁹ That decision becomes the agency’s decision unless a party appeals or the agency independently decides to review the initial decision.⁸⁰

73 See *infra* (discussing administrative actions by SEC, FTC, CPSC, and HISA).

74 5 U.S.C. § 554(a) (emphasis added). Most proceedings are conducted under agency-specific rules. See Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL’Y 67, 68 (2018) (noting that most administrative proceedings are not subject to the APA’s framework and “are conducted according to procedures tailor-made to suit the specific needs of the adjudicating agency and the relevant program.”); see *id.* at 69–71 (describing the different types of administrative adjudication). These differences need not detain us here.

75 5 U.S.C. § 556(b) (emphasis added). The distinction among the individuals who may serve as an administrative adjudicator does not affect the arguments here. Therefore, unless the context requires that we distinguish among the types of administrative adjudicators, we will use the terms “ALJ” and “ALJs” to broadly refer to administrative adjudicators.

76 See 5 U.S.C. § 3344 (statutory authority for ALJ loan program); 5 C.F.R. § 930.208 (detailing Administrative Law Judge Loan Program).

77 See *infra* (discussing powers of SEC ALJs, who, among other things, take testimony, receive evidence and examine witnesses, administer oaths, and rule on motions and admissibility of evidence).

78 5 U.S.C. § 556(c).

79 5 U.S.C. § 557(b).

80 *Id.*

Notably, during an administrative appeal, the agency “has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”⁸¹ In other words, after an ALJ has heard evidence, including perhaps live witnesses, the agency itself may make *new* findings of fact based solely on the paper record created (by the ALJ) during the initial hearing.

A disappointed party may then seek judicial review.⁸² The reviewing court “shall ... hold unlawful and set aside agency action, findings, and conclusions found to be[] ... unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.”⁸³

As Professor Merrill has noted, this process applies an appellate-review model employed in traditional judicial litigation.⁸⁴ He describes the administrative version of this model:

The body of jurisprudence we know as administrative law is grounded in the same division of institutional authority [as between the trial and appellate courts]. 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.⁸⁵

The standard for reviewing agency fact-finding predates the APA. In *ICC v. Union Pacific Railroad Co.*, the Supreme Court said that “mixed questions of law and fact” are subject to review, but “when supported by evidence [are] accepted as final.”⁸⁶ The Court continued: “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.”⁸⁷ As Professor Merrill noted, this 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.”⁸⁸

81 *Id.*

82 See 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”). Other statutes provide for review of decisions by specific agencies.

83 5 U.S.C. § 706(2)(E).

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

85 *Id.* at 941.

86 222 U.S. 541 (1912).

87 *Id.* Later, but still before the APA was adopted, the Supreme Court held that agency findings must be supported by “substantial evidence,” which is “more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

88 Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 962 (2011) (footnote omitted).

But one notable distinction between reviews of facts found in agency proceedings as opposed to trials, of course, is the lack of the jury in administrative proceedings for claims that would, if brought in court, require a jury. Therefore, when an agency’s “initial decision” becomes final, the reviewing court reviews findings of fact made by an ALJ or by the agency itself or another authorized individual. And when an agency conducts an administrative appeal, the reviewing court reviews the findings of fact of *either* the ALJ *or* the agency itself. As noted above, when the agency (acting in its appellate role) makes new findings of fact, it does so based on an ALJ’s paper record—not through a new hearing where the agency could, among other things, view the witnesses’ testimony.

Thus, while it is true that a reviewing court applies substantially identical tests—whether the findings are supported by substantial evidence—to review factual findings in decisions from both trial courts and from administrative agencies, these findings themselves are not made equally. In an administrative proceeding, factual findings are made by an ALJ or the agency itself, either by conducting a hearing itself or in its appellate capacity through which it may adopt the ALJ’s findings or make new findings. But in a trial in a court of law, factual findings are made by a jury (unless waived).⁸⁹ This raises the question whether reviewing courts ought to apply the same standard of review.

Consider, too, when *judges* make factual determinations in federal court. Judges also find facts where no jury right applies.⁹⁰ And parties with a jury right may always waive that right, and if they do so, then a judge will find facts.⁹¹ In these situations, a federal judge sits in essentially the same situation as an agency ALJ: he or she will rule on admissibility, weigh testimony, and determine the facts—just as an ALJ does. So one might think that factual determinations in the two instances would be afforded the same weight on review. But one would be wrong. Federal appellate courts reviewing factual findings by a district court judge in a bench trial apply a “clearly erroneous” standard of review.⁹² Yet, findings in an agency proceeding—as already explained—get “substantial evidence” review. The two standards are not the same. As the Supreme Court has said, “clearly erroneous” “allow[s] somewhat closer judicial review[] than the APA’s ... standards.”⁹³ Accordingly, federal courts are *more* deferential to agency fact-finding than to findings made by Article III courts.⁹⁴

Another distinction is that the agencies are given broad discretion to consider all types of evidence, including evidence that would not be admissible in federal court under the Federal Rules of Evidence. In *Consolidated Edison Co. v. NLRB*, the Supreme Court noted that the review statute at issue provided that “the rules of evidence prevailing in courts of law and equity shall not be

⁸⁹ Here, again, we are concerned only with cases involving the potential deprivation of private rights.

⁹⁰ Fed. R. Civ. P. 52.

⁹¹ *See, e.g.*, Fed. R. Civ. P. 39(a), 52.

⁹² Fed. R. Civ. P. 52(a)(6).

⁹³ *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999).

⁹⁴ *See* 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (3d ed. 2007) (“If the findings of fact are against the clear weight of the evidence or the appellate court otherwise reaches a definite and firm conviction that a mistake has been made by the trial court, the appellate court will set the findings aside even though there is evidence supporting them that, by itself, would be considered substantial.”); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 88–89 (1944) (“Policy, authority and history all thus show that the ‘clearly erroneous’ rule gives the reviewing court broader powers than the ‘substantial evidence’ formula.”).

controlling.”⁹⁵ The “obvious purpose of this and similar provisions,” the Court said, was “to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order.”⁹⁶

This helps to explain why the APA adopted lax standards for the admission of evidence while still (ostensibly) requiring the agencies to meet traditional standards of proof to establish their claims.⁹⁷ Thus, the APA reads:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. *Any* oral or documentary evidence may be received, *but* the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. *A sanction may not be imposed* or rule or order issued *except on consideration of the whole record* or those parts thereof cited by a party and *supported by and in accordance with the reliable, probative, and substantial evidence. . . .*⁹⁸

And, as noted above, reviewing courts shall “hold unlawful and set aside agency action, findings, and conclusions found to be[] unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.”⁹⁹

In “making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.” Interestingly, courts have held that this review of the agency’s “whole record” requires the consideration of whether a jury would have reached the same determination. For example, in *Allentown Mack Sales & Serv., Inc. v. NLRB*, the Supreme Court said that it “must decide whether [the 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.”¹⁰⁰

Again, however, no jury has found any facts in an administrative proceeding.

Further, because agencies are presumed to be experts in their fields, reviewing courts not only treat agency-found facts as the equivalent of jury-found facts, reviewing courts usually *defer* to agency-found facts. Professor Bernick makes a strong argument that this deference to agency fact-finding (in cases involving private rights) is unconstitutional.¹⁰¹

95 305 U.S. at 229.

96 *Id.*

97 William H. Kuenhle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 846–49 (2004–2005).

98 5 U.S.C. § 556(d) (emphasis added).

99 5 U.S.C. § 706(2)(E).

100 522 U.S. 359, 366–67 (1998) (citations omitted). *See also Kay v. FCC*, 396 F.3d 1184, 1188 (D.C. Cir. 2005) (“Substantial evidence,’ in the sense used in the Administrative Procedure Act, is the amount of evidence constituting enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn is one of fact for the jury.”) (cleaned up), reh’g en banc denied, cert. denied 546 U.S. 871; *See* Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 74 (1944) (The “substantial evidence’ rule applicable to jury verdicts is identical with that which generally governs review of the decisions of federal administrative bodies.”).

101 *See* Evan Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL’Y 27, 30 (2018).

Leaving that (big) question aside, it is worth considering the more practical effects. Agencies can rely entirely on the credibility determinations of an ALJ unless “patently unsupported.”¹⁰² But, again, we note the power that agencies themselves have to adopt their own findings of fact during the agencies’ appellate review of an ALJ’s findings—based on a paper record alone.¹⁰³ And the Supreme Court is “clear that even if an officer’s decision is based on witness testimony, if the agency disagrees with that decision, the substantial evidence review standard applies without modification.”¹⁰⁴ The only restriction is that an agency disagreeing with the ALJ’s findings must “make clear the basis of its disagreement.”¹⁰⁵ And, “in the end[,] it is the [agency] that is entrusted by Congress with the responsibility for making findings under the statute.”¹⁰⁶ The agency “is not precluded from reaching a result contrary to that of the [ALJ] when there is substantial evidence in support of each result.”¹⁰⁷

The reviewing court is “not to reevaluate the weight of the evidence to come to its own conclusion, but to accept the findings if they are supported by substantial evidence in the record as a whole.”¹⁰⁸ Indeed, that “two inconsistent conclusions can be drawn from the same evidence does not cause a rejection of the agency decision. The purpose of this restraint on courts is to avoid having courts simply replicate the agency’s fact-finding role and displace the expertise that agencies bring to the subject.”¹⁰⁹

The very purpose of the jury, however, “is to permit decisions to be made by persons embodying the underlying sense of fairness of the community, rather than by a single man, no matter how expert, who might have arbitrary notions of his own.”¹¹⁰ “Matters are left to administrative determination, for largely opposite reasons, in order to secure the advantage of expertness and specialization.”¹¹¹ But agencies are not “experts” in any meaningful sense in fact-finding.¹¹²

And Administrative Law Judges are not chosen for their expertise.¹¹³ An independent agency—the Office of Personnel Management (OPM)—allows agencies to choose among the “three highest-scoring candidates” who take merits-based tests.¹¹⁴ “To certain agencies’ chagrin, the OPM

102 *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015).

103 5 U.S.C. § 557(b).

104 HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 3d (2018), Post Publication Update (2022) 234 (citations omitted).

105 *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 n.4 (D.C. Cir. 2011).

106 *Id.*

107 *Id.* See also Kuenhle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. at 889 (“If there is a difference between the hearing officer’s findings and those of the agency, the hearing officer’s findings are considered part of the record and given “such probative force as [they] intrinsically command” in determining whether the agency decision is supported by substantial evidence.”) (footnote omitted).

108 Kuenhle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. at 889 (footnote omitted).

109 *Id.*

110 Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 81 (1944) (footnote omitted).

111 *Id.* at 81–82 (citing Rep. Att’y Gen. Comm. Ad. Proc. (1941) 12–16).

112 See Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful*, at 65.

113 See Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023, 1025 (2017).

114 *Id.*

does not consider candidates' subject-matter expertise but instead seeks to hire generalists."¹¹⁵ Said simply, there is no reason to think ALJs have any relevant expertise at all.

Even if agencies do have any relevant expertise, that “might be outweighed by the costs of dependence and partiality, which could systematically distort fact-finding and lead to less-accurate determinations overall.”¹¹⁶ ALJs and agencies themselves have vested interests in finding *particular* facts—that is, ones that favor the agency's position. Juries have no such systemic incentive. As Professor Bernick has pointed out, “[t]rial by jury was considered vital by those who ratified the Constitution primarily because it protected citizens against a disposition on the part of government adjudicators to favor government program and officials, *not because jurors were thought to be experts.*”¹¹⁷

A 1941 report by the Attorney General's Committee on Administrative Procedure makes the somewhat circular argument that the “absence of a jury and the technical subject-matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the ‘common law rules’ of evidence for jury trials. Such a requirement would be inconsistent with the objectives of dispatch, elasticity, and simplicity which the administrative process is designed to promote.”¹¹⁸ Further, an “administrative agency must serve a dual purpose in each case: It must decide the case correctly as between the litigants before it, and it must also decide the case correctly so as to serve the public interest which it is charged with protecting. This second important factor makes it necessary to keep open the channels for the reception of all relevant evidence which will contribute to an informed result.”¹¹⁹ As a result, the report asserts, “it is rarely suggested that the older common law rules of evidence for jury trials should be imposed upon administrative agencies.”¹²⁰

That approach may well work in public-rights cases. And some regulated parties might *want* agency adjudication to avoid federal court (because of, say, expected efficiency or the desire to avoid significant litigation costs over minor infractions). But when a party makes a jury demand in a private-rights case, an agency cannot justify removing that procedural safeguard merely because policymakers want an efficient process. To the contrary, much of our Constitution was designed to do just the opposite. It slowed so-called “efficient” government to protect liberty.¹²¹

Juryless Agencies

To show how the absence of a jury infects the administrative process, we will consider several examples: The Securities Exchange Commission, the Federal Trade Commission, the Consumer Product Safety Commission, and the Horseracing Integrity and Safety Authority.

115 *Id.*

116 See Bernick, *supra* note 101 at 65.

117 *Id.* (emphasis added).

118 Rep. Att'y Gen. Comm. Ad. Proc. (1941) 70.

119 *Id.*

120 *Id.*

121 See, e.g., *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.”).

The Securities and Exchange Commission (SEC)

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 changed both the way SEC enforcers could pursue alleged securities-law violators and the allowable penalties. Previously, SEC enforcement officials sought to revoke registration or suspend companies from trading—not impose legal fines. Through Dodd-Frank, the SEC was given the power to seek civil penalties for securities-fraud violations through in-house proceedings (in addition to the traditional route of bringing a civil action in federal court).¹²²

Thus, when the SEC enforces the securities laws, its first decision is whether to file a lawsuit in federal court or to bring an administrative action in its in-house “court.”¹²³ No one disputes that if the SEC files in court, the Seventh Amendment guarantees a jury right to the defendant.¹²⁴ But when the Commission proceeds in its own court, it proves its case to *itself* since no jury attaches in the administrative proceeding.¹²⁵ Commissioners can themselves preside over the hearing, although the Commission “typically ... delegate[s] that task to an [ALJ].”¹²⁶ These ALJs—like their counterparts in many other agencies—oversee adversarial proceedings and possess “nearly all the tools of federal judges.”¹²⁷

Among other powers, SEC ALJs may:

- take testimony;
- receive evidence and examine witnesses;
- take pre-hearing depositions;
- conduct trials;
- administer oaths;
- rule on motions;
- regulate hearings, including the conduct of parties and counsel;
- rule on admissibility of evidence;
- enforce compliance with discovery orders; and
- issue decisions with factual findings, legal conclusions, and appropriate remedies.¹²⁸

¹²² See Dodd-Frank § 929(P); 15 U.S.C. §§ 77h-1(g)(1), 78u-2, 80a-9(d), 80b-3(i).

¹²³ See *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022) (Through Dodd-Frank § 929P(a), Congress gave *the SEC* the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so.) (citing 15 U.S.C. § 78u-2(a)).

¹²⁴ See *Tull v. United States*, 481 U.S. 412 (1987) (jury required when government seeks civil penalties in federal court).

¹²⁵ Note that this means that the SEC itself can determine whether a defendant has the right to a jury. The Supreme Court in *Atlas Roofing* strangely rejected this simple fact, claiming that it was “incorrect” that Congress can “control the jury-right question by picking the forum” in which a case is heard. *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 461 n.16 (1977). Yet that is precisely what occurs. And as the Court later recognized, “Congress cannot eliminate a party’s Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or specialized court of equity.” *Granfinccia*, 492 U.S. at 60–61.

¹²⁶ *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (citing 17 C.F.R. § 201.110 and 15 U.S.C. § 78d-1(a)).

¹²⁷ *Id.* at 2053.

¹²⁸ *Id.* (explaining role of SEC ALJs under relevant statutes and regulations).

ALJs, then, act as judges and juries during the trial-level administrative hearing. They both rule on admissibility of evidence and assign a particular weight to the credibility of such evidence. This alone might make those who understand the jury's institution role a bit squeamish.¹²⁹ Without a jury, the ALJ is the *only* initial decisionmaker. In a normal civil case the impartial judge may grant a judgment notwithstanding verdict, or judgment as a matter of law.¹³⁰ This, coupled with the jury, ensures no irrational decisions would be made.¹³¹

But the ALJ's dual role of making admissibility decisions *and* weighing the evidence itself conflicts directly with the Founders' ideal of keeping the "distinction between its competency and its credibility."¹³² "The excellency of the trial by jury ... is[] that they are the triers of the credit of the witnesses, as well as the truth of the fact: It is one thing whether a witness is admissible to be heard: whether, when he is heard, he is to be believed is another thing."¹³³ Judges admit evidence, but it "must still be left to the persons who try the causes"—jurors—"to give what credit to it they please."¹³⁴ The law leaves "the force or credibility of evidence ... to the unbiased and unadulterated sentiments and impressions of the jury."¹³⁵ But "the propriety or competency of evidence ... is wisely committed to the information and experience of the judges."¹³⁶ And so "[t]he satisfactory administration of justice ... demands[] that [the best evidence] should be laid before the jury."¹³⁷

In agency proceedings, however, *no evidence* is ever "laid before" *any* jury. Instead, it is just the ALJ. Although we no doubt commend the service rendered by many ALJs—and recognize the APA's "separation of functions" provision¹³⁸—many scholars and practitioners have long realized that ALJs have every reason to rule in favor of the agencies for which they work.¹³⁹ If that is not enough to be skeptical of agency decisions, the next problem surely is: ALJ factual findings are subject to plenary review by Commissioners themselves.

129 See *In re Murchison*, 349 U.S. 133, 136–37 (1955) (explaining that it "would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused of his investigations").

130 Fed. R. Civ. P. 50.

131 It also separates institutional incentives. Juries picked at random from the community have no conflict, bias, or tension when rendering a verdict. A single judge, on the other hands, represents one aspect of the community. He or she is not representative of the populace as a whole and likely has views that could inform his or her view of facts. Jurors benefit from hearing others' views in deliberations.

132 James Wilson, Lectures on Law ch. VII at 1003 (1791) [hereinafter "Wilson Lectures"], reprinted in 2 COLLECTED WORDS OF JAMES WILSON 952, 1003 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2011).

133 *Id.*

134 *Id.*

135 *Id.* at 1004.

136 *Id.*

137 *Id.* at 1005.

138 5 U.S.C. § 554(d).

139 For a good quick summation, see Bernard G. Segal, *The Administrative Law Judge*, 62 A.B.A.J. 1424, 1426 (1976): "One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder." See also Bernick, *supra* note 101 at 48 ("It is difficult to measure the frequency with which external pressures on ALJs are applied or the extent those pressures influence administrative fact-finding. Yet, we do have alarming indications that ALJs are in fact subjected to external pressures.").

Under the APA, a party may seek review of the ALJ's initial decision.¹⁴⁰ When the Agency reviews the ALJ's ruling, it has all the powers it would have in making the initial decision except as it may limit the issues on notice or by rule."¹⁴¹ Said another way: The Agency can toss the ALJ's decision out the window on appeal and start over from scratch.

In the first place, this setup conflicts with basic due process principles, including the right to a fair tribunal.¹⁴² After all, the Commissioners both vote to file the complaint and sit as an appellate panel.¹⁴³ It hardly takes much legal training to see the problem: The ultimate "judges" in the SEC proceeding are judging their own case—something the law has barred for centuries to prevent any risk of bias.¹⁴⁴

Nonetheless, the courts have found no due process problem when agencies proceed this way. But setting aside the problem with potential bias, the Commission's ability to rule for itself undercuts a key restraint that applies to trial-level hearings in federal court—namely, the rule that only the person (or people) who views evidence and hears testimony can determine facts. The law has long reflected the fact that jurors (or judges in a bench trial) are best positioned to make credibility determinations and weigh evidence.

Quite the contrary at the SEC. Although *only* the ALJ hears the evidence, the SEC Commissioners can themselves wipe out all ALJ findings at the flick of a pen. Agencies can overturn ALJ factual findings.¹⁴⁵ At the SEC, that means Commissioners can review those factual determinations *de novo*.¹⁴⁶ As the Commission itself has explained, it "retains plenary authority over the course of its administrative proceedings and the rulings of its law judges—both before and after the issuance of the initial decision and irrespective of whether any party has sought relief."¹⁴⁷

The APA blesses this approach. Under 5 U.S.C. 557(b), an agency on appeal has "all the powers which it would have in making the initial decision."¹⁴⁸ Courts have confirmed that this language gives agencies themselves *de novo* review of an ALJ decision.¹⁴⁹ In short, "The Commission ...

140 5 U.S.C. § 557(b).

141 *Id.*

142 *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

143 See Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53 (1969) ("It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place.").

144 This dates back to at least 17th Century England where Lord Coke explained that "no one ought to be a judge in his own cause." *Dr. Bonham's Case*, 77 Eng. Rep. 646 (C.P. 1610). Since then, the courts and legal commentators have routinely invoked this phrase to protect against partiality in judicial proceedings. See, e.g., 1 Blackstone *Commentaries* at *91 ("it is unreasonable that any man should determine his own quarrel."); THE FEDERALIST NO. 10 (James Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably corrupt his integrity."); *id.*, No. 80 (Alexander Hamilton) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."); Wilson, Lectures ch. XI at 739 (Any act that will "make a man judge in his own cause is void in itself."); *Calder v. Bull*, 3 U.S. at 388 (1798) (no law can "make[] a man a Judge in his own cause.").

145 *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951).

146 17 C.F.R. 201.411(a) ("The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record."); See *Bandimere v. SEC*, 844 F.3d 1168, 1197 (10th Cir. 2016) (dissent) (noting SEC *de novo* review of ALJ decision).

147 *Mendenhall, Exchange Act Release No. 74532*, 2015 WL 1247374, at *1 (Mar. 19, 2015).

148 5 U.S.C. 557(b).

149 *Deere & Co. v. ITC*, 605 F.3d 1350, 1358 (Fed. Cir. 2010); *Vineland Fireworks Co., Inc. v. ATF*, 544 F.3d 509, 514 (3d Cir. 2008); *Vercillo v. CFTC*, 147 F.3d 548, 553 (7th Cir. 1998); *Containerfreight Transp. Co. v. ICC*, 651 F.2d 668, 670 (9th Cir. 1981).

does not have to review its ALJ's opinions with any deference."¹⁵⁰ Not even the "SEC's regulations include [a] ... deferential standard."¹⁵¹

True, of course, as some courts have recognized, SEC Commissioners often give deference to ALJ decisions.¹⁵² But Commissioners do so purely as a matter of grace—not as a matter of law. Then-Judge Kavanaugh explained the problem in a 2017 dissent at the D.C. Circuit.¹⁵³ The majority held that an investment-firm employee was liable for willfully violating securities laws and regulations for following his boss's instruction to send an email—written by the boss and containing, unbeknownst to the employee, false information—to two clients about an investment opportunity.¹⁵⁴ The case came to the D.C. Circuit following an administrative trial before an SEC ALJ and an administrative appeal to the SEC itself.¹⁵⁵ In his dissent, Judge Kavanaugh highlighted the fact that the ALJ's factual findings could not be reconciled with liability, and the SEC Commissioners engaged in "rewriting" those findings.¹⁵⁶ Judge Kavanaugh said that this rewriting "was utterly unreasonable and should not be sustained or countenanced by this court."¹⁵⁷ The ALJ heard from one witness—the defendant himself—and "his credibility was central to the case."¹⁵⁸ Yet, the SEC Commissioners "ran roughshod over the administrative law judge's finding of fact and credibility assessments."¹⁵⁹ And still, the court majority deferred to Commissioners' factual decisions. Judge Kavanaugh thought "the SEC's rewriting of the findings of fact deserves judicial repudiation, not judicial deference or respect."¹⁶⁰

In Judge Kavanaugh's view, the court should look through the SEC's factual findings and ask whether the ALJ findings "suffice to support the conclusion" that the defendant was liable.¹⁶¹ He recognized the fact that administrative adjudication should "*at least* operate with efficiency and with fairness on the parties involved."¹⁶² When "political appointees" like the SEC Commissioners make factual determinations "without hearing from any witnesses" fairness goes out the window.¹⁶³ To top it all off, the agency adjudication came "accompanied by deferential review" from the

150 *Bandimere*, 844 F.3d at 1197 (McKay, J., dissenting).

151 *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018).

152 *Lucia*, 138 S. Ct. at 2054–55 (noting that the "Commission often accords a similar deference to its ALJs, even if not by regulation."); *id.* at 2055 ("when factfinding derives from credibility judgments, as it frequently does, acceptance [of the ALJ's determinations] is near-automatic."); *Bandimere*, 844 F.3d at 1180 (noting that SEC Commissioners often afford ALJ factual findings "considerable weight").

153 *Lorenzo v. SEC*, 872 F.3d 578, 600 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *affirmed* 139 S. Ct. 1094 (U.S. 2019).

154 *Id.*, 872 F.3d at 580–82.

155 *Id.* at 597.

156 *Id.* at 600.

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 602 (emphasis added).

163 *Id.*

judiciary.¹⁶⁴ “That agency-centric process in in some tension with Article III of the Constitution, the Due Process clause of the Fifth Amendment, and the Seventh Amendment right to a jury trial in civil cases.”¹⁶⁵

The Federal Trade Commission (FTC)

The FTC’s procedures are front and center in a case pending before the United States Supreme Court.¹⁶⁶ The dispute arose when the FTC informed Axon Enterprises, Inc. that its acquisition of an ostensible competitor raised antitrust concerns.¹⁶⁷ Axon initially cooperated with the FTC’s investigation.¹⁶⁸ But when the FTC proposed that Axon turn its newly acquired company into a “clone” of Axon using Axon’s intellectual property or, if not, face an administrative proceeding, Axon sued the FTC in federal court.¹⁶⁹ Axon alleged that the FTC was precluded from proceeding because of structural constitutional defects.¹⁷⁰ The FTC brought its administrative action and, there, Axon raised its constitutional challenges in its defense and moved to disqualify the ALJ based on his double for-cause removal protections (which, Axon argued, violated the Take Care Clause of Article II).¹⁷¹

FTC Commissioners predictably denied Axon’s motion, but in doing so they revealed just how much control Commissioners have over the administrative process. Commissioners claimed they were “responsible for *every final decision* in this adjudication.”¹⁷² They could “modify or set aside *any aspect* of the ALJ’s decision with which [they] disagree[.]”¹⁷³ “[A]ll of the ALJ’s findings, ruling, and conclusions are subject to review and modification by the Commission.”¹⁷⁴ Commissioners can do so, they claim, “even when no party requests review” of the ALJ decision.¹⁷⁵ This “comprehensive oversight” includes the ability to “decide[] motions to dismiss filed before the evidentiary hearing, motions for summary decision, and motions to strike portions of the pleadings.”¹⁷⁶ The ALJ might hear the evidence, but the Commission makes the final call.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* As noted above, the Supreme Court affirmed. But neither the Supreme Court’s majority opinion, nor Justice Thomas’s dissenting opinion (joined by Justice Gorsuch) addressed the administrative-findings issues discussed by Judge Kavanaugh.

¹⁶⁶ See *Axon Enter., Inc. v. FTC*, No. 21-86 (oral argument Nov. 7, 2022).

¹⁶⁷ *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1177 (9th Cir. 2021).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Axon alleged that the removal protections enjoyed by the FTC Commissioners and the ALJ violated Article II of the Constitution; Axon also alleged that the FTC’s “clearance process,” through which the FTC and the U.S. Department of Justice decide which agency will bring a proposed enforcement action, violated Axon’s due process rights. See Complaint for Declaratory and Injunctive Relief, *Axon Enter., Inc. v. FTC*, U.S.D.C., D. Ariz. No. 2:20-cv-00014-DMF (Jan. 3, 2020).

¹⁷¹ See *Respondent’s Renewed Motion to Disqualify the Administrative Law Judge*, available at https://www.ftc.gov/system/files/documents/cases/d09389_r_mtn_to_disqualify_the_alj_public598857.pdf.

¹⁷² *In the Matter of Axon Enter. Inc.*, No. 9389, 2020 WL 5406806, at *5 (F.T.C. Sept. 3, 2020) (emphasis added).

¹⁷³ *Id.* at *4 (emphasis added).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *5.

¹⁷⁶ *Id.*

The Consumer Product Safety Commission (CPSC)

Under the Consumer Product Safety Act, the Consumer Product Safety Commission may, after affording the opportunity for a hearing, determine that a consumer product distributed in commerce presents a “substantial product hazard.”¹⁷⁷ This hearing is conducted by a “Presiding Officer.”¹⁷⁸ A Presiding Officer is “a person who conducts any adjudicative proceedings under this part, and may include an administrative law judge qualified under Title 5, United States Code, section 3105, but shall not include a Commissioner.”¹⁷⁹

These Presiding Officers are given significant power. According to the CPSC’s regulations, “broad discretion has been vested in the Presiding Officer who will hear a matter being adjudicated to allow him/her to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved.”¹⁸⁰

Further, a Presiding Officer “shall have the duty to conduct full, fair, and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order,” and he or she “shall have all powers necessary to that end,” including the powers to administer oaths and affirmations; compel discovery; rule upon offers of proof; receive relevant, competent, and probative evidence; and consider procedural and other “appropriate” motions.¹⁸¹ While the Federal Rules of Evidence generally apply to Commission hearings, these rules may “be relaxed by the Presiding Officer if the ends of justice will be better served by so doing.”¹⁸²

Presiding Officers may also, among other things, extend deadlines, allow “appropriate” amendments and supplemental pleadings, decide whether to allow intervening parties, decide whether to certify a class action and issue related orders, consider motions by parties, issue summary decisions and orders, “control” discovery, and issue discovery sanctions.¹⁸³

At the end of a Commission hearing, a Presiding Officer issues an Initial Decision, which includes (1) findings upon the material questions of fact and conclusions upon the material issues of law, along with the reasons therefor; and (2) an order.¹⁸⁴ Any party may appeal an Initial Decision, or the CPSC may unilaterally order review of an Initial Decision.¹⁸⁵ If no party appeals, and if the CPSC does not order review of the Initial Decision, the Initial Decision becomes the Final Decision and Order of the CPSC.¹⁸⁶ The respondents in these proceedings are deprived of their right to a jury trial.

Nonetheless, the consequences can be severe. If the CPSC proves—to its appointed Presiding Officer and, ultimately, to itself—that a product does present a “substantial product hazard,” the

177 15 U.S.C. § 2064(c), (d), (f), (h).

178 16 C.F.R. § 1025.1.

179 *Id.* § 1025.3(i).

180 16 C.F.R. § 1025.1.

181 16 C.F.R. § 1025.42(a)(1)–(3), (a)(6).

182 *Id.* § 1025.43(a).

183 16 C.F.R. § 1025.13, .15(c), .17(d)–(e), .18(d)–(g), .25, .31(i), .37.

184 16 C.F.R. § 1025.51(a)–(c).

185 16 C.F.R. §§ 1025.53(a), 1025.54.

186 16 C.F.R. § 1025.52.

CPSC may, among other things, order the product’s manufacturer, distributor, or retailer to cease distribution of the product; provide notice to third parties who transport, store, distribute, or otherwise handle the product; provide notice to “appropriate” state and local public-health officials; give public notice of the “defect;” bring the product into “conformity with the requirements of the applicable rule, regulation, standard or ban;” “refund” the purchase price; reimburse other manufacturers, distributors, or retailers for their expenses in connection with carrying out the Commission’s order; and submit an action plan, for Commission approval, to comply with the order’s requirements.¹⁸⁷

Finally, the CPSC maintains that it may use its in-house “adjudicative proceedings *for the assessment of civil penalties* under section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)).”¹⁸⁸

The Horseracing Integrity and Safety Authority (HISA, or the Authority)

The newest of the bunch might also be the most interesting.¹⁸⁹ In 2020, Congress passed the Horseracing Integrity and Safety Act (Horse Act), which ostensibly sought to create uniform rules for horseracing across the country. For centuries, thoroughbred racing fell under state jurisdictions, but through the Horse Act, Congress empowered a private nonprofit corporation—the Horseracing Integrity and Safety Authority—to promulgate binding nationwide rules.¹⁹⁰

The Horse Act does much more than allow a private corporation (with little oversight from the FTC) to create rules. In fact, the Act allows the private corporation to set up its own adjudication scheme that HISA itself enforces.

Consider HISA’s powers. It regulates breeders, horses, races, trainers, veterinarians, jockeys, and any person “engaged in the care, training, or racing of covered horses.”¹⁹¹ Among its extensive powers, the Authority may:

- issue legislative rules for laboratory standards, racing surface quality maintenance, racetrack safety standards and protocols, safety, performance and anti-doping and medication control violations, civil sanctions, and procedures for discipline under the Act;¹⁹²
- “exercise independent and *exclusive* national authority over the safety, welfare and integrity” of covered people and horses;¹⁹³

187 15 U.S.C. § 2064(c), (d), (e).

188 16 C.F.R. § 1025.1 (emphasis added). Notably, some courts have held that the CPSC may *not* seek civil penalties through its in-house proceeding, see *Athlone Indus. Inc. v. CPSC*, 707 F.2d 1485 (D.C. Cir. 1983), but the CPSC’s rules of practice still contemplate such fines.

189 Given ongoing litigation regarding HISA as of this writing, it is unclear how long this adjudicatory scheme will last, but the initial regulations show how far agencies have moved away from juries.

190 See 15 U.S.C. § 3051 *et seq.*

191 15 U.S.C. § 3051(6).

192 *Id.* § 3053(a).

193 *Id.* § 3054(a)(2)(A).

- develop rules addressing “access to offices, racetrack facilities, other places of business, books, records, and *personal property* of” individuals subject to the Act;¹⁹⁴
- issue and enforce subpoenas and hold investigatory authority for civil violations;¹⁹⁵
- investigate to the same extent state racing commissions have investigatory power;¹⁹⁶
- require all “covered persons” under the Act to register with the Authority;¹⁹⁷
- issue “guidance” that interprets existing rules or procedures or states the policy or practice with respect to enforcement of any rule;¹⁹⁸
- develop a “list of civil penalties” that applies to covered persons;¹⁹⁹
- file civil lawsuits in federal court to “enjoin” any “acts or practices” that “constitut[e] a violation of this chapter *or any rule* established under this chapter;”²⁰⁰
- file civil lawsuits in federal court “to enforce any civil sanctions imposed under that section and for all other relief to which the Authority may be entitled;”²⁰¹
- establish a “horseracing anti-doping and medication control program” that includes “uniform standards” for the “administration of medication of” horses and a “list of permitted and prohibited medications, substances, and methods;”²⁰²
- establish a “racetrack safety program” for all horses, persons, and races covered by the act, which must include “training and safety standards,” a “racing surface quality maintenance system,” “track safety standards,” a program for “investigations at racetrack and non-racetrack facilities,” “[p]rocedures for investigating, charging, and adjudicating violations,” “enforcement of civil sanctions for violations,” and establishing disciplinary hearings;²⁰³
- issue rules for “safety and performance standards of accreditation for racetracks;”²⁰⁴
- “require covered persons to collect and submit” information to a nationwide database regarding racehorse safety;²⁰⁵
- issue a description of safety and anti-doping rule violations;²⁰⁶
- create the elements of offenses for rule violations;²⁰⁷

194 *Id.* § 3054(a)(2)(A)(i).

195 *Id.* § 3054(c)(1)(a)(ii), (h).

196 *Id.* § 3054(c)(1)(a)(iii).

197 *Id.* § 3054(d)(1).

198 *Id.* § 3054(g).

199 *Id.* § 3054(i).

200 *Id.* § 3054(j)(1)–(2).

201 *Id.* § 3054(j)(1).

202 *Id.* § 3055(a)(1), (c)(1).

203 *Id.* § 3056(a)(1), (b).

204 *Id.* § 3056(c)(2)(A).

205 *Id.* § 3056(c)(3).

206 *Id.* § 3057(a)(1).

207 *Id.* § 3057(a)(2).

- establish the disciplinary process—including hearing procedures, standards for burden of proof, presumptions, evidentiary rules, and appeals—for safety, performance, and anti-doping and medication control rule violations;²⁰⁸ and
- create civil sanctions, including lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to race results.²⁰⁹

HISA has issued regulations outlining an in-house adjudication process to enforce the rules it promulgates. Under the Rule 8000 series, the FTC approved the Authority’s plans to issue violations, sanctions, hearing procedures, and investigatory powers.²¹⁰ A failure to cooperate with the Authority, failure to respond truthfully to the Authority, failure to comply with a ruling of the Authority, failure to register with the Authority, and failure to remit fees to the Authority, among many others, all count as violations subject to penalties.²¹¹ Sanctions for such violations come from Rule 8200. A covered person can be sanctioned for “any violation of, or failure to comply with” the Authority’s regulations.²¹² Sanctions are imposed after a “hearing required to be conducted in accordance” with Authority rules.²¹³ The Authority or Authority-picked adjudicators may impose sanctions “in proportion to the nature, chronicity, and severity of the violation.”²¹⁴ Depending on the rule violation, sanctions include monetary fines of up to \$100,000 and a lifetime ban from the industry.²¹⁵

Consider what occurs when a person is suspected of violating an Authority regulation. He or she first receives a “notice of violation.”²¹⁶ HISA itself may issue the notice, although the so-called Racetrack Safety Committee could also do so.²¹⁷ A covered person may respond, at which point the issuing authority “may initiate disciplinary proceedings.”²¹⁸

When either HISA or the Racetrack Committee begins an enforcement proceeding, it must comply with the Rule 8300 Series, which establishes the adjudication procedures for such violations.²¹⁹ The nature of the adjudication turns on the nature of the violation. For example, violations of Section 2200 Rules (covering accreditation and many other topics) allows “stewards” to adjudicate violations.²²⁰ Under Rule 2133, stewards enforce a range of safety regulations. Stewards work for racetracks and are appointed by State Racing Commissions or are named by racetracks.²²¹

208 *Id.* § 3057(c).

209 *Id.* § 3057(d).

210 *See* 87 Fed. Reg. 44,399 (July 26, 2022).

211 *Id.* at 44,400.

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 87 Fed. Reg. at 44,400 (Rule 8200(d)).

217 *Id.* (Rule 8200(d)(1)).

218 *Id.* at 44,401 (Rule 8200(d)(3)).

219 87 Fed. Reg. 44,401.

220 *See id.*

221 87 Fed. Reg. 449 (Jan. 5, 2022).

In those adjudications, stewards “shall apply the hearing procedures of the state jurisdiction in which the violation is alleged to have occurred.”²²²

Then again, maybe stewards will not adjudicate Rule 2200 violations. The Authority regulations permit the Racetrack Safety Committee to “at its discretion” refer cases to a “national Stewards Panel,” an “independent Arbitral Body,” or “the stewards.”²²³ Or, if it sees fit, the Committee can “[c]onduct a hearing upon the matter itself.”²²⁴

Rule 8100 violations take a similar path. In those instances, the Authority may “at its discretion” refer the case for adjudication to (1) the National Stewards Panel, (2) an independent Arbitral Body, or (3) the stewards, or (4) conduct a hearing itself.²²⁵

Rule 8340 explains hearing mechanics for those in front of the Racetrack Safety Committee or HISA’s Board.²²⁶ Three Board members—appointed by the Chair of the Board—hear the case (the “Board Panel”).²²⁷ Or, an initial hearing could go before the Racetrack Safety Committee.²²⁸ It is unclear when—or why—hearings would go to one body or the other. But if a hearing goes to one of those bodies, the Board Panel or Committee has extensive authority. Either can, among other things, (1) require submission of written briefs, (2) require sworn testimony under oath, (3) “determine, in its sole discretion, the weight and credibility of any evidence or testimony,” (4) admit hearsay evidence, and (5) direct an inferior officer to oversee the hearing.²²⁹

The Board Panel is “not ... bound by the technical rules of evidence.”²³⁰ And indeed, the Board Panel may not even preside over the hearings. Under Rule 8340(i), the Board Panel “may appoint a presiding officer to assist in regulating the orderly conduct of and presentation of evidence at the hearing.”²³¹ And the Board Panel can “in any manner” it “determines is most appropriate” allow the Presiding Officer to:

- rule on motions;
- set the time of a hearing;
- administer oaths;
- summon and examine witnesses;
- direct a party to appear and testify;
- admit or exclude evidence;
- issue orders on argument, briefs, and “similar matters;”

222 87 Fed. Reg. 44,401.

223 *Id.*

224 *Id.*

225 *Id.* (Rule 8300).

226 Hearings by stewards or the arbitral body are governed by different procedures (Rule 7000) that have not yet been finalized by the FTC.

227 *Id.* (Rule 8340(a)).

228 *Id.* (Rule 8340(b)).

229 87 Fed. Reg. 44,401–402. (Rule 8340).

230 *Id.* at 44,402 (Rule 8340(g)).

231 *Id.*

- order parties to appear; and
- perform all acts necessary for the maintenance of order and an efficient hearing.²³²

The Board Panel (or, again, the Racetrack Committee, which also could hear the case) can “direct a presiding officer to issue in writing a hearing report at the conclusion of the hearing.”²³³ Then the Presiding Officer issues his or her report, which includes a recommended disposition and potential sanctions.²³⁴ After that report, parties may file briefs explaining their opposition to the report.²³⁵ At that point, the Board Panel (or Racetrack Committee) can review the record and issue a written decision.²³⁶ The Board Panel may “adopt, modify, or reject any or all of the hearing report” in its discretion.²³⁷

Once the Board Panel (or Racetrack Committee or stewards or National Stewards Panel or an Arbitral Body) issues its written decision, a party may appeal.²³⁸ A party must request an appeal within ten days, which must include a description of objections and a statement of relief sought.²³⁹ Even if no one appeals, the Authority’s Board may review the case on its “own initiative and at its discretion,”²⁴⁰ even though the Board itself may have filed the enforcement,²⁴¹ and a Board Panel made the initial decision.²⁴² The appellate body may not, however, include the three members of the Board Panel.²⁴³

In rendering its appellate decision, the Board “shall uphold the decision unless it is clearly erroneous or not supported by the evidence or applicable law.”²⁴⁴ The Board may accept, reject, or modify the decision in whole or in part, and it can also remand the case to the Board Panel.²⁴⁵ As it can during the initial decision, the Board may appoint a presiding officer to assist at the appellate hearing.²⁴⁶ The Board then issues a final written decision which “shall be the final decision of the Authority.”²⁴⁷

After the Authority renders its final decision, a party may file for review by an administrative law judge.²⁴⁸ The ALJ will conduct a de novo review in a manner consistent with the Administrative

232 *Id.* (Rule 8340(i)).

233 *Id.* (Rule 8340(j)).

234 *Id.*

235 *Id.* (Rule 8340(j)(2)).

236 *Id.* (Rule 8340(k), (l)).

237 *Id.* (Rule 8340(l)).

238 *Id.* at 44,402 (Rule 8350).

239 *Id.* (Rule 8350(d)).

240 *Id.* (Rule 8350(a)).

241 Rule 8200(d)(3).

242 Rule 8340(k), (l).

243 *Id.* (Rule 8350(b)).

244 *Id.* at 44,402 (Rule 8350(f)).

245 *Id.* (Rule 8350(g)).

246 *Id.* (Rule 8350(h)).

247 *Id.* (Rule 8350(j)).

248 15 U.S.C. § 3058(b).

Procedure Act.²⁴⁹ After a hearing, the ALJ can affirm, reverse, modify, set aside, or remand for further proceedings in whole or in part,” the Authority’s determination.²⁵⁰ After the ALJ’s decision, a party may seek review by the Federal Trade Commission, or Commissioners may institute review themselves.²⁵¹ The Commission has discretion to accept a request for review or reject it.²⁵² If the Commission accepts review, its decision becomes final, but if it declines to hear the case, the ALJ’s ruling “shall constitute the decision of the Commission.”²⁵³

Neither the Horse Act nor the HISA’s regulations provide for judicial review of final orders. Presumably, then, a party can appeal to a federal district court under the Administrative Procedure Act.

A recap is in order:

- When the Authority, HISA, suspects someone has violated a regulation it has promulgated, it can file a notice of violation.²⁵⁴
- Then the Authority or Racetrack Committee (or stewards) may begin disciplinary proceedings.²⁵⁵
- Adjudications may be overseen by several potential hearing officers: (1) the National Stewards Panel, (2) an independent Arbitral Body, (3) the stewards, or (4) the Authority.²⁵⁶
- If heard by the Authority, then three Board members make up the Board Panel to hear the initial case.²⁵⁷
- If heard by the Racetrack Committee, the Committee itself hears the case.²⁵⁸
- The Board Panel or Racetrack Committee appoints a presiding officer to oversee the hearing.²⁵⁹
- The Presiding Officer issues an initial report after the hearing.²⁶⁰
- The Board Panel then reviews the record and issues a written decision.²⁶¹
- Then a party may appeal to the full Authority Board.²⁶²

249 5 U.S.C. § 556.

250 15 U.S.C. § 3058(b)(3)(A)(ii).

251 *Id.* § 3058(c)(1), (2).

252 *Id.* § 3058(c).

253 *Id.* § 3058(b)(3)(B).

254 Rule 8200(d).

255 Rule 8200(d)(3).

256 Rule 8330.

257 Rule 8340(a).

258 Rule 8340(b).

259 Rule 8340(j).

260 Rule 8340(j)(2).

261 Rule 8340(k), (l).

262 Rule 8350.

- The Board issues a final written decision.²⁶³
- Then a party may appeal to an administrative law judge.²⁶⁴
- After the ALJ rules, a party may appeal to the Federal Trade Commission.²⁶⁵
- Only after the FTC rules or declines to hear the case may a party (presumably) seek review in federal court.

In short, a party will have to navigate *at least four levels of review* (and really five if you include the Presiding Officer) *before* he or she ever gets to court. During that process, the in-house adjudicators can impose civil penalties of up to \$100,000. At no point, however, will any jury ever review the facts or evidence that the agency puts forward.

Summing Up

The examples discussed demonstrate that the people who may decide every fact de novo (on a paper record) in an agency proceeding determining private rights (1) are the very same people who vote to file the complaint, (2) never hear the evidence or witnesses, (3) are political appointees pursuing a particular policy agenda, and (4) have no expertise in weighing factual disputes. Yet, after those people issue factual findings in an agency proceeding, federal courts defer to those findings under the APA. As others have noted already, “[t]he conclusion in inescapable: section 706(2) (E) cannot constitutionally be applied in core-private-rights cases.”²⁶⁶

More than that, deference turns the jury guarantee on its head. Recall that jury facts often receive “substantial evidence” review—just like agencies.²⁶⁷ But appellate review of jury facts in a court of law amounts to review of facts determined by community members picked at random who actually viewed the evidence and weighed credibility of witnesses. Agency fact-finding sits very far afield indeed. It raises questions about bias.²⁶⁸ It is political. It is done without hearing the testimony. And when the case gets to federal court, the courts often rubber stamp those findings.

In other words, the reason for applying “substantial evidence” review to *jury* findings is completely absent when agencies find facts. Whereas local community members—“chosen by lot from among

²⁶³ Rule 8350(j).

²⁶⁴ 15 U.S.C. § 3058(b).

²⁶⁵ *Id.* § 3058(c).

²⁶⁶ *Bernick, supra* note 101 at 61. Although Bernick reaches this conclusion, he does not analyze the question we raise here—namely whether the jury independently undercuts the substantial evidence standard. Instead, Professor Bernick focuses on due process of law, Article III, and the separation of powers.

²⁶⁷ See Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 74 (1944) (“[T]he ‘substantial evidence’ rule applicable to jury verdicts is identical with that which generally governs review of the decisions of federal administrative bodies.”).

²⁶⁸ See Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. at 53 (“It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place.”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248–49 (1994) (explaining the FTC process as “probably the most jarring way in which the administrative state departs from the Constitution, and it typically does not even raise eyebrows”); John Gibbons, *Why Judicial Deference to Administrative Fact-Finding is Unconstitutional*, 2016 BYU L. REV. 1487, 1487–88 (2017) (“Both the *Wall Street Journal* and the *New York Times* have since concluded that post-Dodd-Frank enforcement actions heard by SEC ALJs are systemically biased against defendants.”) (footnote omitted).

those of middle rank²⁶⁹—would protect individuals from overreaching government,²⁷⁰ political appointees seeking to achieve a policy agenda may have incentives to do just the opposite. And while we can count on jurors to be fair and deliver justice,²⁷¹ partial and motivated agency appointees have opposite incentives.²⁷² Finally, a jury at the very *least* gives life to popular sovereignty—the notion that We the People rule—and democratic participation, which agency fact-finding strips away.²⁷³ As Professor Bernick has put it, “agency officials cannot be assumed to be superior fact finders in cases involving potential regulatory violations, in view of concerns about independence and impartiality.”²⁷⁴ Instead, “[t]rial by jury was considered vital by those who ratified the Constitution primarily because it protected citizens against a disposition on the part of government adjudicators to favor government programs and officials, not because jurors were thought to be experts.”²⁷⁵

There is no other way to say it: The jury *by design* was intended to stop just what occurs in agency proceedings. Substantial deference exacerbates the problem by applying a standard of review meant for the people whom we trust the most (the people themselves) rather than whom we trust the least (an overarching government). Combined, these structures sanction arbitrary power in defiance of constitutional principles.²⁷⁶

Potential Solutions

We have endeavored to show that jury-less administrative proceedings seeking the deprivation of private rights present a fundamental constitutional problem. Yet several fixes are available—each more or less significant than the others, but none requiring a complete overhaul of administrative adjudications. And, of course, neither the critique above nor the proposed remedies here apply to adjudications concerning public rights.

The most sweeping option would be to establish Administrative Law Courts. This idea has been proposed by Professor Michael Greve.²⁷⁷ He argues that the “irregularities and abuses” of agency adjudication “are the natural and, for the most part, fully intended consequences of the ‘appellate

269 III Blackstone, *Commentaries*, at *380.

270 JAMES MADISON, WRITINGS 1772–1836 444 (The Library of America 1999) (juries was “one of the best securities to the right of the people.”); Whitehouse, *supra* note 34 at 1272 (“The principles of separation of powers and government by the people, including the civil jury, are our established guardians against” government “encroachment.”).

271 Whitehouse, *supra* note 34 at 1266–67 (“[C]ivil jury trials ensure[d] that parties [were] not forced to suffer the biases that might develop among judges.”).

272 Joshua D. Wright, Comm’r, FTC, Remarks, Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority at 6 (Feb. 26, 2015) (“[I]n 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge [] found no liability, the Commission reversed. This is a strong sign of an unhealthy and biased institutional process.”) (footnote omitted).

273 Whitehouse, *supra* note 34 at 1268

274 Bernick, *supra* note 34 at 65.

275 *Id.*

276 John Gibbons’s fantastic article recognizes this point. See John Gibbons, *Why Judicial Deference to Administrative Fact-Finding Is Unconstitutional*, 2016 BYU L. REV. 1487 (2017). There, he suggests that “[f]or administrative fact-finding to bind the reviewing court except where the fact-finding is so outrageous as to be ‘unsupported by substantial evidence’ constitutes a wholesale displacement of the civil jury trial right, which required that “a jury would decide every case in which there was any evidence.” *Id.* at 1519.

277 See Michael S. Greve, *Why We Need Federal Administrative Courts*, George Mason University Legal Studies Research Paper Series, LS 20-05, CSAS Working Paper 20-09, available at ssrn.com/abstract=3561135.

review’ model that has been the bedrock of American administrative law for well over a century.”²⁷⁸ This model, he contends, is “beyond incremental reform or repair,” and therefore, the establishment of administrative *courts* is needed.²⁷⁹ These courts—while not full-fledged Article III courts—would, among other things, be truly independent of the Executive Branch.²⁸⁰

A less drastic approach—offered as an alternative to Professor Greve’s proposal—calls for making agencies “true adjuncts” of the district courts.²⁸¹ Like federal magistrate judges, ALJs and agencies could entertain parties’ objections to their findings of fact and conclusions of law, followed by *de novo* review by a district court.²⁸² If parties raise no objections, then the benefits of administrative adjudication (efficiency, etc.) may be captured without—at least as far as the parties are concerned—suffering from the lack of a jury.

Another option follows from our critique—eliminate the “substantial evidence”²⁸³ standard of review and require federal courts to hear the evidence and make independent factual findings in appeals from final agency adjudications (which have deprived private rights). The downside of this option, of course, is that the parties would have to start over and spend the resources to present (and counter) the evidence a second time. Because of those costs, a modified proposal would (again) eliminate the “substantial evidence” standard of review and require the district court to give agency fact-findings zero deference. In this model, district courts could review an agency’s paper record *de novo* and make findings independent of the agency’s factual findings. Some scholars have argued that such a “*de novo* review” standard for factual findings is constitutionally mandated.²⁸⁴

Finally, parties could be given the option of “removing” cases from administrative agencies to district court, where the right to a jury is guaranteed. The option of removing cases from state court to federal court is a well-recognized practice.²⁸⁵ Generally, a defendant sued in state court may remove the case to federal court if the case could have been brought originally in federal court.²⁸⁶ The same rule would apply to agency adjudications—if an administrative action against a private party (involving the potential deprivation of private rights) could have been brought in federal district court, the respondent could remove the case to district court and file a jury

278 Michael S. Greve, *Administrative Law Is Bunk: We Need a Bundesverwaltungsgericht*, Law & Liberty (Nov. 1, 2018), <https://lawliberty.org/forum/administrative-law-is-bunk-we-need-a-bundesverwaltungsgericht/>.

279 *Id.*

280 *Id.*

281 Ilan Wurman, A Formalist Response to Greve’s Functionalist Proposal, Law & Liberty (Nov. 16, 2018), <https://lawliberty.org/forum/adjuncts-a-formalist-response-to-greves-functionalist-proposal/>. Professor Wurman also suggests, as a response to Professor Greve’s proposal, creating full-fledged Article III Administrative Courts. *Id.*

282 *Id.*

283 5 U.S.C. § 706(2)(E).

284 See, e.g., Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL’Y 27, 29–30 (discussing scholarship on deference to agency fact-finding and concluding that “judicial deference to agency fact-finding is unconstitutional in cases involving deprivations of what I refer to as *core private rights* to life, liberty, and property”).

285 See 14C Fed. Prac. & Proc. Juris. § 3721 et seq. (Rev. 4th ed.).

286 28 U.S.C. §§ 1441–1455; see 14C Fed. Prac. & Proc. Juris. § 3721.1 (Rev. 4th ed.).

demand.²⁸⁷ Like the previous option (making agencies true adjuncts of district courts), this proposal would preserve the benefits of agency adjudication. But some parties may prefer a jury—and the costs that go with it—over an administrative proceeding.

Potential Objections

We acknowledge both doctrinal and practical objections to the main argument of this article—that regulated parties have a Seventh Amendment right to a jury when the government attempts to deprive those parties of private rights.

Doctrinally, supporters of the administrative state argue that agency expertise is a critical component of modern government and that this expertise supports judicial deference to agency decisions. Thus, Professor Metzger writes, “Article III may in fact militate in favor of deference to expert elucidation of statutory standards if the questions at issue require specialized expertise or experience that the federal courts lack. In such contexts, preserving the federal courts’ ability to perform their constitutional function and reach accurate, coherent, and consistent determinations may mandate deference to agency determinations.”²⁸⁸ We do not quarrel with the notion that agencies should have a significant *administrative* role on issues that “require specialized expertise or experience.” But adjudication of private rights does not fit so neatly into the proper administrative role. As Professor Barnett has explained, administrative law judges are *not* selected for their substantive expertise.²⁸⁹ And so there is no evidence that an ALJ at, say, the Consumer Product Safety Commission has *any* expertise to identify what a “defect” is any more than a federal judge or jury.

But other contexts *do* call for agency expertise. Thus, agencies properly issue regulations within their particular bailiwicks and otherwise enforce the laws to the extent Congress authorizes. These administrative actions often include adjudicatory-like processes in “public rights” cases (*e.g.*, Social Security and veterans-benefits hearings). But these processes “are exercises of—indeed under our constitutional structure they *must* be exercises of—the ‘executive power.’”²⁹⁰ As Professor Baude explains, “[a]djudication and judicial power are very different things. Adjudication is procedure; it’s just a *method* of making decisions. Power is substance; it’s what gives someone the *authority* to decide.”²⁹¹ Our argument does not affect the exercise of *executive* power by administrative agencies, even when those agencies operate through adjudicatory procedures. Rather, we claim that the right to a jury attaches when administrative agencies (improperly) exercise *judicial* power and thereby threaten the deprivation of private rights.²⁹²

287 See, *e.g.*, H.R.3798 – Due Process Restoration Act of 2015 (proposal to amend the Securities Exchange Act of 1934 “to authorize a person who is a party to an administrative proceeding brought by the Securities and Exchange Commission (SEC) under a securities law, and against whom an order imposing a cease and desist order and a penalty may be issued at the conclusion of the proceeding, to require the SEC to terminate the proceeding”), <https://www.congress.gov/bill/114th-congress/house-bill/3798>.

288 Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 41 (2017) (footnote omitted).

289 See Barnett, *supra* note 114 at 1025.

290 *United States v. Arthrex*, 141 S. Ct. 1970, 1982 (2021) (cleaned up).

291 Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1520 (2020).

292 As noted above, we do not believe that Article III courts should defer to agency decisions involving the deprivation of private rights. In this respect, we disagree with Professor Metzger. But whether courts should defer to agency decisions involving public rights is beyond the scope of this article.

This doctrinal clarification helps show that the practical effects of our argument will be modest. Thus, while critics of our argument might suggest that the sheer number of administrative cases makes it impossible to transfer them to Article III courts, our argument applies to a small fraction of administrative cases heard each year. It is certainly true that the number of administrative cases dwarfs the number of federal cases. As of 2009, ALJs at the federal level “conduct[ed] at least nine times as many trials as federal judges.”²⁹³ But the vast majority of these ALJ “trials” would not be affected by our argument.

For one thing, more than 80 percent of federal ALJs hear non-adversarial adjudications, such as benefits cases involving Social Security claims.²⁹⁴ Nothing in our argument here would touch those cases. For another, the vast majority of APA adjudications occur as “informal” hearings under section 555.²⁹⁵ Section 555 hearings occur during investigations, negotiation, settlement, and other similar matters, and the APA’s formal procedural requirements do not apply.²⁹⁶ Indeed, “[m]ost agency action is adjudication, most adjudication is informal, and informal adjudication is extremely varied.”²⁹⁷ Many of these hearings use “procedures tailored to suit the needs of the particular agency or program.”²⁹⁸ Our argument would likely touch a vanishingly small number of these hearings, which do not involve legal remedies and private rights.

Additionally, several solutions—such as allowing parties to remove to federal court in private rights cases—would simply give a party the *option* to have a jury and federal court hear its case. Parties seeking the benefits of agency adjudication—whether because of efficiency, lower cost, expertise, or informality—could remain within the agency. To the extent parties want those perceived benefits, they will remain within the agency.

Our proposal would not overburden federal courts. In the first place, federal courts can—and likely should—be expanded. The easiest way to make this perceived problem disappear is to hire more judges. And you will hear no opposition from us on that point. Second, most courts are simply not overburdened. According to the most recent government data, “combined filings in the U.S. district courts for civil cases and criminal defendants decreased by 146,264 (down 28 percent) to 380,213” over the last year.²⁹⁹ Civil filings alone were down 33 percent.³⁰⁰ And this decline in caseload spreads nationwide. From March 2021 to March 2022, the overwhelming majority of district

293 Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1479 (2009) (footnote omitted).

294 See Office of Mgmt. & Budget, ALJs by Agency, <https://bit.ly/2I3HumJ> (identifying 1,655 of 1,931 ALJs at Social Security Administration).

295 5 U.S.C. § 555.

296 See Michael Asimow, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019), available at <https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf>.

297 Emily S. Bremmer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 393 (2021).

298 *Id.* at 395.

299 See United States Courts, *Federal Judicial Caseload Statistics 2022*, available at <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022>.

300 *Id.*

courts saw a decline in the number of civil cases.³⁰¹ It would take more than 100,000 additional cases to return courts to their pre-2021 case load. We doubt our ideas would have such a drastic effect.

Whatever solution emerges, each would at least allow a party to make its case to the trusted centuries-old institution that sits at the center of our legal system: the jury. Doing so would protect important constitutional rights and restore a lost heritage. Court judgments would come with added respect and legitimacy to the agencies enforcing the law in neutral courts. And the administrative state may well be better off by proving its case to the people that it regulates. Maybe Blackstone was on to something after all when he warned that “every new tribunal, erected for the decision of facts, without the intervention of a jury (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates), is a step toward establishing aristocracy, the most oppressive of absolute governments.”³⁰² And maybe, it is time to listen.

Conclusion

Administrators have been adjudicating disputes for centuries. That is not going to stop, and we do not take aim at the vast majority of these cases. But many agencies use in-house hearings to deprive individuals of private rights and seek legal remedies. In those cases, a unique concern arises regarding one’s right to a jury trial. This is particularly true given the fact that courts must defer to agency fact-finding. So while the Supreme Court has ruled that agencies need not provide juries,³⁰³ it has not considered that issue with respect to its relationship with substantial-evidence review. The two doctrines are in tension and this is in need of new examination.

301 See Table C U.S. District Courts–Civil Federal Judicial Caseload Statistics (March 31, 2022), available at <https://www.uscourts.gov/statistics/table/c/federal-judicial-caseload-statistics/2022/03/31>. The data show that the total number of civil cases increased in only 12 federal districts while it declined in 82 districts.

302 Whitehouse, *supra* note 34 at 1268.

303 *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977).