

THE LOST WORLD OF JURISDICTIONAL AND CONSTITUTIONAL FACTS

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According to the standard historical account, courts have deferred to agencies on questions of fact since the early twentieth century. But that account is incomplete. In the world before the APA, courts generally deferred to agencies only with respect to “ordinary” facts. With respect to two particularly important types of facts—jurisdictional facts (facts on which an agency’s jurisdiction over a dispute depended) and constitutional facts (facts on which an individual litigant’s constitutional rights depended)—courts applied independent judgment in a similar manner as they did to questions of law. There is strong evidence to suggest that the APA was intended to incorporate this distinction between ordinary, jurisdictional, and constitutional facts. This Article recovers the origins of the distinction and its status at the dawn of the APA; considers its merits; and traces its evolution and diminishment in the eight decades since then.

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INTRODUCTION

A century ago, the terms “jurisdictional facts” and “constitutional facts,” and the doctrines accompanying each term, were among the most important in administrative law. The two interconnected doctrines made up a large portion of the law governing judicial review of agency action. And because judicial review of agency action lay at the center of a national debate over the role of the burgeoning administrative state, the jurisdictional and constitutional fact doctrines were the issues over which many jurists and politicians of the day chose to express their positions in that debate.

Today, the terms jurisdictional facts and constitutional facts have all but disappeared from court opinions, casebooks, and the academic literature of administrative law. Their shrinking role in each edition of Gellhorn and Byse’s *Administrative Law: Cases and Comments*, one of the field’s most established casebooks, provides good evidence of their shrinking role in the law itself. In that casebook’s first edition, the discussion of jurisdictional and constitutional facts took up fifty-one pages—more than half the chapter on judicial review of agency action. By the casebook’s eleventh edition, they were not mentioned at all.

Edition	Year	Pages
First	1940	51
Second	1947	56
Third	1954	40
Fourth	1960	20
Fifth	1970	18
Sixth	1974	20
Seventh	1979	19
Eighth	1987	8
Ninth	1995	6
Tenth	2003	6
Eleventh	2011	0
Twelfth	2017	0
Thirteenth	2023	0

Number of Pages in Gellhorn & Byse’s *Administrative Law: Cases and Comments* Devoted to Jurisdictional and Constitutional Facts¹

1. See WALTER GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (1st ed. 1940); WALTER GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (2d ed. 1947); WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (3d ed. 1954); WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS*

What were the jurisdictional and constitutional fact doctrines? Why do they appear to have disappeared from administrative law? And what can they teach us about the field today? This Article answers those questions. Although it draws on excellent discussions of the two doctrines in a variety of sources, this Article is, to my knowledge, the first piece of scholarship in fifty years to focus squarely on them.²

Part I recovers the doctrines as they existed in 1946 at the dawn of the Administrative Procedure Act (APA). By that time, judicial review of agency adjudicative orders had coalesced into a framework relatively similar to today's. Thomas Merrill describes it as the "appellate review model."³ Like appeals courts reviewing trial court decisions, courts reviewing agency orders exercised *de novo* review of the agency's determinations of law but deferred to the agency's determinations of fact using the "substantial evidence" test.⁴

(4th ed. 1960); WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (5th ed. 1970); WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (6th ed. 1974); WALTER GELLHORN, CLARK BYSE & PETER L. STRAUSS, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (7th ed. 1979); WALTER GELLHORN, CLARK BYSE, PETER L. STRAUSS, TODD RAKOFF & ROY A. SCHOTLAND, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (8th ed. 1987); PETER L. STRAUSS, TODD RAKOFF, ROY A. SCHOTLAND & CYNTHIA R. FARINA, *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* (9th ed. 1995); PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* (10th ed. 2003); PETER L. STRAUSS, TODD D. RAKOFF, CYNTHIA R. FARINA & GILLIAN E. METZGER, *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* (11th ed. 2011); PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON & ANNE JOSEPH O'CONNELL, *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* (12th ed. 2017); TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON, ANNE JOSEPH O'CONNELL & ELOISE PASACHOFF, *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* (13th ed. 2023). Gellhorn and Byse were not alone. In Louis Jaffe's seminal 1965 treatise on administrative law, the discussion of jurisdictional and constitutional facts took up thirty pages. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF AGENCY ACTION* (1965).

2. The most recent comprehensive treatment of which I am aware is Morris D. Forkosch, *Judicial De Novo Review of Administrative Quasi-Judicial Fact Determinations*, 25 HASTINGS L.J. 963 (1974). The constitutional fact doctrine has been the subject of outstanding recent work, including especially Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289 (2017), but that work has not covered its twin, the jurisdictional fact doctrine. As the rest of this Article will illustrate, it is useful to discuss the two doctrines together because of their interconnected pedigrees.

3. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011).

4. *Id.* at 962. The "substantial evidence" test provides that agency determinations of fact should be upheld if they are supported by "such relevant evidence as a reasonable mind might

The APA was largely intended to codify that existing model rather than establish a new one.⁵

But reviewing courts did not defer to *all* agency determinations of fact. Instead, they exercised independent judgment or *de novo* review when reviewing agency determinations of two particularly important types of facts: (a) jurisdictional facts, which were facts upon which the agency's jurisdiction over the dispute depended, and (b) constitutional facts, which were facts upon which a litigant's constitutional rights depended.⁶ The jurisdictional fact doctrine and constitutional fact doctrine were the names given to the bodies of law that instructed courts to provide these types of facts different treatment.

The jurisdictional fact doctrine was inherited from the English common law at the Founding.⁷ The constitutional fact doctrine was developed by the Supreme Court around the turn of the twentieth century.⁸ As the Court looked for ways to restrain burgeoning administrative agencies in the 1920s and 30s, it breathed new life into both doctrines.⁹ They achieved their most dramatic expression in *Crowell v. Benson*,¹⁰ the 1932 case that is often credited as the “fountainhead” of the administrative state.¹¹ In *Crowell*, the Court held that the appellate review model was constitutionally permissible because it confined agencies to the role of “adjuncts” to the courts—so long as courts exercised independent judgment or conducted new evidentiary hearings when reviewing agency determinations of jurisdictional and constitutional facts.¹²

accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

5. See *infra* Section III.A.

6. As Part I, *infra*, will make clear, the two terms and doctrines are often confused with each other. These definitions are my own. They are substantially similar to the definitions offered by Evan Bernick in Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 37 n.51 (2018).

7. See *infra* notes 38–52 and accompanying text.

8. See *infra* notes 72–89 and accompanying text.

9. See *infra* notes 90–105 and accompanying text.

10. 285 U.S. 22 (1932).

11. Richard H. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 HARV. L. REV. 916, 923 (1988); see also Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 251 (1990) (describing *Crowell* as “the greatest of the cases validating administrative adjudication”); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 602 (2007) (observing that *Crowell* “paved the way” for agency adjudication).

12. *Crowell*, 285 U.S. at 50–54. Today, *Crowell* is generally remembered for upholding agency adjudication on the “adjunct” theory. See, e.g., Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in FEDERAL COURTS STORIES 359, 387 n.91 (Vicki C. Jackson & Judith Resnik eds., 2010) (describing this aspect of *Crowell* as “more robust” than the other).

Part II pauses the chronology to consider the merits of the doctrines. Although the Court never quite articulated a satisfying legal basis for them, they can be understood as expressions of either due process or Article III's reservation of "the judicial power" to federal courts.¹³ Normatively, they assured that particularly significant questions of fact would receive a "hard look" by an independent adjudicator.¹⁴ That assurance protected the rights and interests of regulated parties, for whom, in many circumstances, "who finds the facts is far more important than who applies the law."¹⁵ But it was never entirely clear how to draw a principled distinction between jurisdictional and nonjurisdictional facts (or, in some contexts, constitutional and nonconstitutional facts).¹⁶ As a result, the doctrines had the potential to make almost any issue of fact re-litigable in court, rendering agency tribunals impotent. The doctrines also raised challenging questions of comparative institutional competence: Are agencies more competent than courts to make factual determinations in the area of their expertise? If so, does that competence extend to

At the time, however, almost all commentary about the case focused on its holding about jurisdictional and constitutional facts. See, e.g., JAFFE, *supra* note 1, at 382 (describing jurisdictional and constitutional facts as "the doctrine for which the case is ordinarily cited"); cf. Tushnet, *supra*, at 360 ("[I]n the decision's immediate aftermath, critics emphasized its backward-looking features and failed to emphasize enough its forward-looking ones."). That change is interesting in part because it carried with it a change in political valence. *Crowell* as an emblem of the "adjunct" theory was a decision that legitimized the administrative state. See Fallon, *supra* note 11, at 923. *Crowell* as an emblem of the jurisdictional and constitutional fact doctrines was "the Supreme Court's most serious attack on the . . . administrative state." Linda R. Hirshman, *The Ghost of Crowell v. Benson and the Residual Role of Judges and Agencies Under Federal Law*, 8 J. NAT'L ASS'N ADMIN. L. JUDGES 48, 49 (1988).

13. See *infra* notes 146–157 and accompanying text.

14. "Hard look" review is associated with judicial review of agency policy decisions, not agency factual findings. See, e.g., *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 52 (1983). But I use the phrase "hard look" here in the sense of its plain meaning. The jurisdictional and constitutional fact doctrines assured that courts would take a close or serious look at certain factual findings.

15. Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 255 n.141 (1985).

16. This discussion evokes the sometimes-tenuous distinction between fact and law, over which much ink has been spilled. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (acknowledging "the vexing nature of the distinction between questions of fact and questions of law"); JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 55 (1927) ("[T]here is no fixed distinction. They are not two mutually exclusive kinds of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law."). Rather than wade into that debate, this Article presupposes that fact and law are distinguishable and focuses instead on distinctions within the category of fact.

factual determinations related to the scope of their own authority? In the 1930s and 40s, the doctrines were widely debated on these grounds.¹⁷

Part III picks back up in 1946, at the dawn of the APA, and traces what has happened to the two doctrines since then. There is strong evidence that the APA itself, which was intended to “restate[] the present law as to the scope of judicial review” at the time of its enactment, incorporated the jurisdictional and constitutional fact doctrines.¹⁸ But they were already being cited less often at the time of the APA’s enactment than a decade earlier, and, as the analysis of Gellhorn and Byse’s evolving casebook reveals, that trend continued apace.¹⁹ Substantial evidence review overwhelmed them.

Nevertheless, remnants of the jurisdictional and constitutional fact doctrines continue to exist throughout administrative law. Congress has incorporated a version of the constitutional fact doctrine into several statutes by providing for de novo review of agency determinations of fact related to invidious discrimination.²⁰ Federal courts often exercise independent judgment on the question of a plaintiff’s citizenship status—both a jurisdictional and a constitutional fact—in cases challenging deportation orders and military

17. See generally A.L.S., Note, *Finality of Administrative Findings of Fact Since Crowell v. Benson*, 24 VA. L. REV. 653 (1938); Leigh Athearn, *The Longshoremen’s Act and the Court*, 23 CALIF. L. REV. 129 (1935); Forrest Revere Black, *Jurisdictional Fact Theory and Administrative Finality*, 22 CORNELL L. REV. 349 (1937); William G. Daniels, *Judicial Review of the Fact Findings of the Federal Trade Commission*, 14 WASH. L. REV. 37 (1939); DICKINSON, *supra* note 16; John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of “Constitutional Fact,”* 80 U. PA. L. REV. 1055 (1932); Louis L. Jaffe, *Contributions of Mr. Justice Brandeis to Administrative Law*, 18 IOWA L. REV. 213 (1933); Joseph Kuttan, Note, *Conflict of Jurisdiction Between Federal District Courts and the National Labor Relations Board*, 23 WASH. U. L. Q. 425 (1938); James M. Landis, *Administrative Policies and the Courts*, 47 YALE L.J. 519 (1938); Arthur Larson, *The Doctrine of “Constitutional Fact,”* 15 TEMP. U. L. Q. 185 (1941); Note, *Crowell v. Benson: Inquiries and Conjectures*, 46 HARV. L. REV. 478 (1933) [hereinafter “1933 HARV. L. REV. Note”]; Note, *Judicial Review of Administrative Findings—Crowell v. Benson*, 41 YALE L.J. 1037 (1932) [hereinafter “1932 YALE L.J. Note”]; Note, *Judicial Review of Ratemaking: The “Constitutional Fact” Doctrine Refurbished*, 57 YALE L.J. 639 (1948); Lincoln Rode, Note, *Judicial Review of Administrative Findings of Fact*, 25 CALIF. L. REV. 315 (1937); Marvin B. Rosenberry, *Power of the Courts to Set Aside Administrative Rules and Orders*, 24 A.B.A.J. 279 (1938); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944); Joseph C. Swidler, *Remarks*, 15 TENN. L. REV. 532 (1939); Felix S. Wahrhaftig, *Judicial Review of Administrative Findings on “Fundamental” or “Jurisdictional” Facts*, 21 CALIF. L. REV. 266 (1933).

18. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024) (quoting ATTORNEY GENERAL, MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947)).

19. See *infra* notes 153–165 and accompanying text; *supra* chart accompanying note 1.

20. See *infra* notes 253–256 and accompanying text; see also, e.g., *Age Discrimination in Employment Act*, 29 U.S.C. § 626(c)(2) (providing for de novo judicial review of all claims despite initial agency proceedings).

detention orders.²¹ And when a litigant brings a constitutional challenge to an agency adjudication or an adjudicative order, their claim is often scrutinized more closely than if they had brought a different type of challenge.²²

The constitutional fact doctrine has also made its mark outside administrative law. It has migrated to the standards governing appellate review of trial court records, where appellate courts regularly apply independent judgment to factual issues involving the First Amendment and constitutional criminal procedural rights.²³ The Supreme Court has also drawn on the constitutional fact doctrine in asserting the importance of applying independent judgment to *congressional* factfinding.²⁴ Although the doctrine raises different normative issues in these contexts than it does in the administrative law context in which it was born, its “wandering” across the law suggests the seriousness of the principles it embodies.²⁵

Part IV considers what to make of this history. The Article’s central historical claim is that the jurisdictional and constitutional fact doctrines were one of the earliest manifestations of concern over the accountability of executive officials. Tracing that concern across the centuries lends legitimacy to those who express it today, and it also reveals that the scope of judicial review of agency action was one of the first battlefields in the war between proponents and critics of the administrative state. But in the pre-APA era, concern over agency accountability was most often expressed by debating the scope of judicial review of *factual* determinations, not legal ones. Understanding the terms of that debate reveals how, and why, we ceded robust judicial review of agency factual findings in exchange for robust agency factfinding procedures. It also provides fertile ground from which to identify present and future possibilities in administrative law. Ultimately, this Article is a profile—but not an obituary—of a forgotten part of our law.

21. See *infra* notes 257–261 and accompanying text; see also, e.g., *Agosto v. INS*, 436 U.S. 748, 753 (1978) (“[T]he Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings.”).

22. See *infra* notes 263–272 and accompanying text; see also, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994).

23. See *infra* notes 275–289 and accompanying text; see also, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567 (1995) (“[O]ur review of petitioners’ claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court.”).

24. See *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (“Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”) (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932)).

25. See generally Redish & Gohl, *supra* note 2, for the “wandering” metaphor.

I. RECOVERING THE PRE-APA DOCTRINE

Recovering the doctrine at the dawn of the APA requires recognizing that there were, in fact, two distinct but overlapping doctrines.²⁶ The *jurisdictional fact doctrine* dictated that agency findings of fact on which an agency's jurisdiction depended should be the subject of especially rigorous review by a court.²⁷ This doctrine was inherited from the English common law, and the jurisdictional limits with which it was originally concerned were statutory limits or limits derived from the common law.²⁸ The *constitutional fact doctrine*, by contrast, dictated that agency findings of fact on which an individual litigant's constitutional rights depended should be the subject of especially rigorous review by a court.²⁹ This doctrine was developed by the Supreme Court in the first decade of the twentieth century and grounded in due process.³⁰ *Crowell*, decided in 1932, affirmed both doctrines and applied them to a category of facts that implicated both jurisdictional and constitutional issues: ones on which an agency's *constitutional jurisdiction* depended.³¹ These facts were so important, the Court held, that reviewing courts were required to hold new evidentiary hearings before making determinations about them rather than deferring to the agency or even applying independent judgment to the agency record.³² *Crowell* was grounded in both due process and Article III.³³

Crowell ignited a firestorm of commentary, much of it critical.³⁴ In the decade and a half following the decision, the Court affirmed the jurisdictional and constitutional fact doctrines multiple times, but it declined to apply them in new contexts as it became more solicitous of the administrative state.³⁵ The underlying constitutional law also changed in ways that sharply reduced the number of circumstances in which the doctrines functioned as relevant

26. As I noted in the Introduction, the two terms and doctrines are often confused with each other. *See supra* note 6. They are sometimes considered a single doctrine and grouped under the header "jurisdictional facts," while other times they are considered a single doctrine and grouped under the header "constitutional facts." Some scholarship refers to these types of facts by the case names with which they are associated, such as *Crowell*. Rather than echo that confusion, I offer my own taxonomy in this Article. My definitions are substantially similar to the definitions offered by Evan Bernick in Bernick, *supra* note 6, at 37 n.51.

27. *See infra* Section I.A.

28. *See infra* Section I.A.

29. *See infra* Section I.B.

30. *See infra* Section I.B.

31. *See infra* Section I.C.

32. *See infra* Section I.C.

33. *See infra* Section I.C.

34. *See infra* Section I.D.

35. *See infra* Section I.D.

constraints on agency action.³⁶ By the time of the APA's enactment in 1946, the jurisdictional and constitutional fact doctrines were declining in relevance.³⁷ But every administrative lawyer would have understood that they were good law—so much so that they formed an essential part of the backdrop against which the statute was enacted.

A. *Jurisdictional Facts*

Scholars generally trace the development of the jurisdictional fact doctrine to the mid-seventeenth century.³⁸ In England at that time, justice was often dispensed in summary proceedings by justices of the peace and other local, quasi-judicial officers.³⁹ As the King's Bench evolved, it began to provide an opportunity for review on the limited question of whether the officers had acted within their jurisdiction.⁴⁰

The 1643 case *Commins v. Massam*⁴¹ provides a good articulation of the rule around the time of its origin. In that case, a sewer commissioner assessed a fee on the tenant of a rental property.⁴² On a writ of certiorari to the commissioner, the tenant told the King's Bench that the landlord should pay instead.⁴³ Justice Heath responded that the commissioners were “enabled by the statute to proceed according to their discretions, & therefore if they proceed *secundum aequum & bonum*, we cannot correct them.”⁴⁴ “[B]ut,” he explained, “if they proceed where they have no jurisdiction . . . then they are

36. See *infra* Section I.D.

37. See *infra* Section I.D.

38. See, e.g., JAFFE, *supra* note 1, at 625; George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 20–22 (1992).

39. See JAFFE, *supra* note 1, at 624–33; James R. McVicker, *The Seventeenth Century Justice of Peace in England*, 24 KY. L.J. 387, 406–07 (1936) (observing that justices of the peace adjudicated cases involving “all felonies, poisonings, enchantments, sorceries, magic acts, trespasses, forestallings, regratings, engrossings and extortions; persons who ride armed or lie in wait to maim or kill anyone; the enforcement of the laws as to innkeepers, abuses of weights and measures, or acting wrongfully in the sale of victuals; . . . and all other crimes and offenses of which such justices might or ought lawfully to inquire”).

40. See George A. Bonner, *The History of the Court of King's Bench*, 11 BELL YARD J.L. SOC'Y SCH. L. 3, 6–7 (1933) (describing the evolution of the King's Bench); McVicker, *supra* note 39, at 406 (“[S]ome cases were removed from the justices' courts to the King's courts . . . by the interposition of writs of certiorari issued by the King's Judges at the instance of aggrieved parties.”).

41. March 196, 82 Eng. Rep. 473 (K.B. 1643).

42. *Id.*

43. *Id.*

44. *Id.* The Latin phrase means “[a]ccording to what is just and right.” *Secundum equum et bonum*, BLACK'S LAW DICTIONARY (4th ed. 1968).

to be corrected here”⁴⁵ Because the commissioner had jurisdiction to assess the fee, Justice Heath declined to correct him.⁴⁶

Often, but not always, application of the rule hinged on a question of fact. For example, in the 1668 case *Terry v. Huntington*,⁴⁷ a statute permitted an excise commissioner to levy taxes on “strong wines perfectly made.”⁴⁸ A winemaker sought recovery in the King’s Bench of the value of a tax assessed on his wines, which he asserted were in fact “low wines.”⁴⁹ Chief Justice Hale provided him the opportunity to prove the fact to a jury, holding that the excise commissioner had acted beyond his “stinted, limited jurisdiction” if in fact the winemaker was correct that the taxed wines were “low” rather than “strong.”⁵⁰ As the *Massam* and *Huntington* cases reveal, the doctrine in its earliest formulation did not provide, per se, that jurisdictional facts should be the subject of stricter review than ordinary facts. Rather, it provided that jurisdictional facts were the only kind of facts reviewable at all.⁵¹

The United States imported this kind of limited jurisdictional review of governmental action from the English common law.⁵² As a result, the nineteenth century was, in Jerry Mashaw’s memorable framing, an era of “bipolar” oversight of American administrative action.⁵³ It was bipolar in the sense that “[r]eview was either de novo or nonexistent.”⁵⁴ If a litigant wanted to challenge the substance of an officer’s decision, there was usually no forum in which to bring their claim.⁵⁵ But if they wanted to challenge the officer’s

45. *Commins*, March 196, 82 Eng. Rep. 473.

46. *Id.*

47. Hardres 480, 145 Eng. Rep. 557 (1668).

48. *Id.*

49. *Id.*

50. *Id.* at 559.

51. See JAFFE, *supra* note 1, at 629; see also, e.g., *Warne v. Varley*, 101 Eng. Rep. 639 (K.B. 1795) (approving de novo consideration of the condition of leather where a statute authorized agents to seize only “leather insufficiently dried”).

52. To put a finer point on it, the United States imported the fundamentals of the system used in England to challenge governmental action: prerogative writs and common law actions against government officers. See, e.g., Merrill, *supra* note 3, at 947; Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1321-31 (2006); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1294-1303 (2014). The jurisdictional review model was imported along with that system because it was a part of it. See JAFFE, *supra* note 1, at 633-35; Christie, *supra* note 38, at 23.

53. Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2245 (2011).

54. *Id.*

55. See Black, *supra* note 17, at 351 (quoting Thomas Reed Powell, *Separation of Powers: Administrative Exercise of Legislative and Judicial Power*, 28 POL. SCI. Q. 34, 47 (1913)) (“The courts

jurisdiction to issue the decision, they could secure a full hearing in court, including the opportunity to submit new evidence and have their evidence considered *de novo* by the judge.⁵⁶ Although there was no formal jurisprudence of administrative law in the nineteenth century, this “jurisdictional or ultra vires model” of judicial review was a part of the general law.⁵⁷

While the model was indeed limited to consideration of jurisdiction, that description is slightly misleading because jurisdiction was a more malleable concept in the nineteenth century than it is today.⁵⁸ It included an officer’s legal authority to act, as the *Huntington* case reveals and as we might think of it today. But it could also include an officer’s compliance with procedural requirements⁵⁹ or the presence of important facts related to liability.⁶⁰ In the habeas context, a sentencing court might also be held to lack jurisdiction “if the law under which the defendant was sentenced was unconstitutional” or

have themselves established as a rule of law that in many instances where the power of the administrative to act is lawfully vested, they will assume without examination of the evidence the correctness of the administrative determination.”).

56. Evan Bernick describes this kind of review as “both narrow and deep.” Bernick, *supra* note 6, at 31. “It was narrow in that complaints about governmental activity often did not entitle individuals to judicial review. It was deep in that, if individuals *did* have a complaint that triggered judicial review, that complaint was adjudicated in an especially rigorous way.” *Id.*; see also Merrill, *supra* note 3, at 951–52.

57. Merrill, *supra* note 3, at 946. On the lack of a general jurisprudence of administrative law, see *id.* and Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 197 (1991). For the jurisdictional model’s grounding in the general law, see Tushnet, *supra* note 12, at 360, and Micah S. Quigley, *What is Habeas?*, 173 U. PA. L. REV. 453, 473–74 (2025). The general law was a set of “general principles . . . which are to be found not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state.” *United States v. Burr*, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (opinion of Marshall, C.J., riding circuit). The general law had force in all state and federal tribunals because it did not derive from a particular sovereign. See William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1190 (2024).

58. Cf. D.M. Gordon, *The Relation of Facts to Jurisdiction*, 45 L.Q. REV. 459, 459 (1929) (“[T]he answers to . . . jurisdictional puzzles . . . have now been lost in the mist of obscurity and fallacy that veils the whole concept of jurisdiction.”); *Union Pac. R.R. v. Bhd. of Locomotive Eng’rs*, 558 U.S. 67, 81 (2009) (“[T]he word ‘jurisdiction’ has been used by courts, including this Court, to convey ‘many, too many, meanings.’”).

59. See John R. Rood, *Jurisdictional Facts*, 13 MICH. L. REV. 403, 407 (1915).

60. See JAFFE, *supra* note 1, at 629–30 (“[I]t was held a jurisdictional defect that the child to be supported was not born in the parish; that a daughter whom her father was ordered to support had not been found ‘unable to work’; that a father-in-law had been ordered to maintain his son’s widow without a finding that her own father was unable to support her.”).

“if the sentence violated the rule against double jeopardy.”⁶¹ Because governmental action was only reviewable on the basis of jurisdictional defect, courts might characterize as jurisdictional any defect that seemed to merit court intervention.⁶² In practice, then, the “jurisdictional” model of judicial review offered courts an aggressive tool to superintend governmental action if they chose to use it.

For our purposes, what is important is that, in the nineteenth century, there was a widespread practice in American courts of exercising *de novo* review when litigants made fact-based assertions that agency orders had been issued without jurisdiction. For example, the federal Land Department operated a court-like tribunal in which individuals could acquire a patent over land owned by the United States.⁶³ If the United States did not in fact own the land at the time it issued a patent, then the patent was issued in excess of the Land Department’s jurisdiction.⁶⁴ A claimant making this type of claim could receive “plenary review of law and fact” in court.⁶⁵

*Miller v. Horton*⁶⁶ is another illustrative example. In that case, municipal health commissioners killed Miller’s horse under the authority of a statute that permitted them to kill animals “infected” with the diseases “farcy or glanders.”⁶⁷ Miller argued in court that the killing was in excess of the commissioners’ jurisdiction because his horse was not, in fact, infected with one

61. Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 510 (2022); see also Quigley, *supra* note 57, at 473–79. Siegel’s first category is a reference to *Ex parte Siebold*, which held that a court trying a criminal case under an unconstitutional law “acquire[s] no jurisdiction” because “[a]n unconstitutional law is void, and is as no law.” 100 U.S. 371, 376–77 (1879). Although judicial review on a habeas petition raises different considerations than judicial review on other writs, the bodies of law are historically linked, and the scholarship on each sometimes discusses the other. See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 447 (1963) (citing Louis Jaffe’s discussion of jurisdictional and constitutional facts in administrative law); JAFFE, *supra* note 1, at 637–38 (discussing habeas cases).

62. See JAFFE, *supra* note 1, at 632 (“When there has been an exceptional need for control and no statutory mode of review, the English courts justified their intercession by labeling the issue jurisdictional.”); Woolhandler, *supra* note 57, at 243 (“The [nineteenth century] model distributed lawmaking functions between the courts and agencies by treating some issues as jurisdictional, and hence appropriate for final court interpretation, and other issues as nonjurisdictional, and hence appropriate for final agency decisionmaking.”).

63. Woolhandler, *supra* note 57, at 216–17.

64. *Id.* at 218.

65. *Id.*; see also Mashaw, *supra* note 53, at 2246 (presenting a similar framing of the land patent cases).

66. 152 Mass. 540 (1891).

67. *Id.* at 542.

of the requisite diseases.⁶⁸ Oliver Wendell Holmes, writing as an Associate Justice of the Massachusetts Supreme Court, endorsed Miller's argument and held that "it does not follow that [the commissioners] can throw the loss on the owner without a hearing" in court.⁶⁹

Although this widespread practice was not universal, it had cohered into something sufficiently regular by the early twentieth century that scholars began to call it a doctrine.⁷⁰ As the next Section will discuss, it then gave birth to a parallel doctrine providing for independent judicial review of constitutional, rather than jurisdictional, facts.

B. *Constitutional Facts*

The early twentieth century saw the birth of modern administrative agencies and the appellate model of judicial review. Under the new model, courts made independent determinations of law but generally deferred to agency determinations of fact as long as those determinations were "supported by substantial evidence."⁷¹ Two categories of facts, however, received independent judgment rather than substantial evidence review: jurisdictional facts, discussed in the previous Section, and constitutional facts, a new category composed of facts upon which an individual litigant's constitutional rights depended.

The rise of a new model of judicial review was related to the rise of new types of administrative agencies. The first major federal regulatory agency was the Interstate Commerce Commission (ICC), established in 1887.⁷² The Food and Drug Administration (FDA) followed in 1906⁷³ and the Federal Trade Commission (FTC) in 1914.⁷⁴ These new agencies reflected both the Progressive Era's faith in scientific expertise and the needs of a growing industrial nation.⁷⁵ If they were to be successful, proponents argued, their

68. *Id.*

69. *Id.* at 543–44. Justice Holmes continued to apply the jurisdictional fact doctrine once he was on the Supreme Court. See *ICC v. N. Pac. Ry.*, 216 U.S. 538, 543–44 (1910) (opinion of Holmes, J.) (rejecting the argument that a fact issue "is addressed only to the opinion of the Commission and cannot be reexamined by the courts as a jurisdictional fact").

70. See, e.g., DICKINSON, *supra* note 16, at 309–12 (calling it a doctrine in 1927).

71. E. Blythe Stason, "Substantial Evidence" in *Administrative Law*, 89 U. PA. L. REV. 1026, 1028 (1941).

72. See Tushnet, *supra* note 12, at 367 (describing the ICC as "the first exemplar of the new administrative state").

73. *Id.*

74. *Our History*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/history> [<https://perma.cc/XD4L-YBPH>] (last visited Sept. 9, 2025).

75. Cf. FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 152 (1930) ("[T]he

determinations of fact needed to be accorded finality rather than being subject to searching review by judges with less subject-matter expertise.⁷⁶ Congress expressed this sentiment in the 1906 Hepburn Act.⁷⁷

As Thomas Merrill has documented, the Supreme Court responded to the Hepburn Act and the spirit of the Progressive Era by articulating a new standard of review for ICC orders.⁷⁸ Here is the standard as articulated in the 1910 case *ICC v. Illinois Central Railroad*⁷⁹:

Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made, and (c) . . . whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in . . . an unreasonable manner⁸⁰

Within two years, the Court would come to express category (c) in terms of the now-familiar substantial evidence standard applied to ordinary determinations of fact.⁸¹ Category (b), of course, is an expression of the jurisdictional fact doctrine, which was well established by 1910. But where did category (a) come from?

Although scholars have not addressed the question squarely, I believe the Court's decision to treat "questions of constitutional power or right" separately from ordinary facts is the product of three factors. First, as the previous Section discussed, constitutionality was sometimes thought to be an issue of

staples of contemporary politics—the organization of industry, the control of public utilities, the well-being of agriculture, the mastery of crime and disease—are deeply enmeshed in intricate and technical facts. . . . Such matters require systematic effort to . . . widen the area of accredited knowledge as the basis of action.”).

76. Merrill, *supra* note 3, at 953–65.

77. *Id.* at 955–59.

78. *Id.* at 953–65.

79. 215 U.S. 452 (1910). This case is usually referred to as *Illinois Central II* to contrast it with *Illinois Central Railroad v. ICC*, 206 U.S. 441 (1907), known as *Illinois Central I*.

80. *Illinois Central II*, 215 U.S. at 470.

81. *See ICC v. Union Pac. R.R.*, 222 U.S. 541, 547–48 (1912) (“In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.”).

jurisdiction in the nineteenth century.⁸² A constitutional fact exception might, then, have been considered a subset or extension of the exception for jurisdictional facts. Second, it was the height of the *Lochner* era, and the Court had recently declared that railroads had a substantive due process right to rates set high enough that they could generate a fair return on their investment.⁸³ Placing constitutional facts in their own category provided a way for the Court to emphasize the importance of that right. Third, the new appellate review model involved significantly more deference than courts had historically extended to agency decisions. Articulating an explicit constitutional exception allowed the Court to soften the impact of that change by preserving for the courts a larger role in fact review than they would have from a jurisdictional exception alone.

The third explanation makes particular sense when considered against the backdrop of the fierce debates that accompanied the establishment and growth of administrative agencies. By the Progressive Era, the debate was already expressed in terms familiar to us today. Proponents of the new agencies believed that they should be “qualified by experience, fortified by technical assistance, [and] free from the pulls and pressures of politics.”⁸⁴ Critics were concerned that the agencies would “degenerate into petty tyranny.”⁸⁵ As then-Justice Hughes declared:

The ideal which has been presented in justification of these new agencies, and that which alone holds promise of benefit rather than of hurt to the community, is the ideal of special knowledge, flexibility, disinterestedness, and sound judgment in applying broad legislative principles . . . to the intricate situations created by expanding enterprise. But mere bureaucracy—narrow, partisan, or inexpert—is grossly injurious.⁸⁶

The Court’s approach to judicial review was an “accommodation” of these two competing philosophies about the propriety of the new agencies.⁸⁷ By extending deference to ordinary agency determinations of fact, the Court would permit agencies to apply their “special knowledge” and “sound judgment.” But by preserving robust judicial review of jurisdictional and constitutional questions, the Court would not permit agencies to descend into “mere bureaucracy.” Once again in Justice Hughes’s words:

82. See *supra* notes 58–62 and accompanying text.

83. See *Smyth v. Ames*, 169 U.S. 466 (1898) (declaring a substantive due process right to non-confiscatory railroad rates); Bruce Wyman, *Jurisdictional Limitations upon Commission Action*, 27 HARV. L. REV. 545, 549 (1914) (referencing *Smyth* as a jurisdictional limitation).

84. FRANKFURTER, *supra* note 75, at 122.

85. Tushnet, *supra* note 12, at 368.

86. Charles Evans Hughes, Address Before the New York State Bar Association (Jan. 14, 1916), in ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916, at 336–37 (2d ed. 1916).

87. Tushnet, *supra* note 12, at 368.

It is not the proper function of the courts to fix rates or to make orders as to the facilities which should be supplied, or the safety appliances which should be used. This is the function of the Legislature or of the administrative board which it may create to aid in securing the performance of the duties it has imposed [But] where the Legislature goes beyond its constitutional powers, or where the administrative board exceeds its authority or passes its constitutional limits, the matter falls within the jurisdiction of the courts, who will declare such action null and void and prevent any attempt to enforce the provisions of the obnoxious statute or order.⁸⁸

By World War I, the basic pre-APA framework was in place.⁸⁹ Courts were to conduct judicial review of an agency order on the basis of the agency record. On questions of law, they were to make an independent determination. On questions of fact, they were to broadly defer to the agency using the substantial evidence rule—except for facts upon which the agency’s jurisdiction or the litigant’s constitutional rights were contingent, which were to receive independent judgment.

The constitutional rights exception to the substantial evidence rule coalesced into a doctrine of its own in two decisions in the 1920s: *Ohio Valley Water Co. v. Ben Avon Borough*⁹⁰ and *Ng Fung Ho v. White*.⁹¹ *Ben Avon* was a constitutional challenge to a run-of-the-mill ratemaking.⁹² Recall that, under the constitutional law of 1920, railroads had a right to rates set high enough that they could generate a fair return on their investment.⁹³ Whether a given rate provided a fair return was a question of fact.⁹⁴ In *Ben Avon*, the Court held that railroads must have “a fair opportunity for submitting” that question of fact “to a judicial tribunal for determination upon its own independent judgment . . . otherwise, the order is void because in conflict with the due process clause.”⁹⁵

88. Charles Evans Hughes, Speech at the Banquet of the Utica Chamber of Commerce (Apr. 1, 1907), in ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916, *supra* note 86, at 151–52.

89. See DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, at 43 (2014) (describing this model as coming into place by 1916); Merrill, *supra* note 3, at 967–68 (describing it as coming into place by 1918).

90. 253 U.S. 287 (1920).

91. 259 U.S. 276 (1922).

92. For a detailed discussion of the facts in *Ben Avon*, see Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 400–03 (2007).

93. See *supra* note 83 and accompanying text.

94. *Prentis v. Atl. Coast Line*, 211 U.S. 210, 228 (1908) (“Whether [the railroads’] property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact.”).

95. *Ben Avon*, 253 U.S. at 289. Although *Ben Avon* came to represent the constitutional fact doctrine, James Landis framed it in 1938 as an expression of the *jurisdictional* fact doctrine

The *Ben Avon* decision excited a barrage of commentary.⁹⁶ Although a version of the constitutional fact doctrine had been articulated a decade earlier, *Ben Avon* gave it life and applied it to ratemaking, which was one of the era's most contested exercises of government power. The decision was therefore "a nightmare" for advocates of the administrative state.⁹⁷ "Why have an administrative state at all if courts were going to do all the work over again, but badly? Or was that the point?" they asked.⁹⁸

Despite that commentary, the Court expanded the constitutional fact doctrine two years later in *Ng Fung Ho*. *Ng Fung Ho* was a constitutional challenge to an administrative deportation order.⁹⁹ Although the petitioners argued they were U.S. citizens, the Commissioner of Immigration for the Port of San Francisco determined otherwise and ordered their deportation.¹⁰⁰ On judicial review, the Court held that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus the denial of an essential jurisdictional fact."¹⁰¹ As a result, the Fifth Amendment's Due Process Clause entitled petitioners "to a judicial determination of their claims that they are citizens."¹⁰²

Ng Fung Ho was noteworthy because it involved individual liberties dissimilar to the property rights at issue in *Ben Avon*. And although the decision used the language of jurisdictional facts, its logic rested in large measure on the seriousness of the affected liberty interest.¹⁰³ Justice Brandeis, who

on the argument that unconstitutional exercises of power are in excess of jurisdiction—an example of the overlapping nature of the two doctrines. See Landis, *supra* note 17, at 521–22 ("Rate-making is an appropriate exercise of the legislative power provided that the rates are not confiscatory. Whether or not they are confiscatory depends upon the correctness of the finding as to value. Those facts must thus be independently found by a court in order for a court to conclude that a particular legislative act was within the legislative power; otherwise the legislature would itself be finding the facts upon which the very exercise of legislative power depends.").

96. See GELLHORN, BYSE & STRAUSS (7th ed. 1979), *supra* note 1, at 278 ("Probably no administrative law decision ever gave rise to more instant, voluminous, or steadily critical comment by legal writers.").

97. Schiller, *supra* note 92, at 403.

98. *Id.* (paraphrasing, not quoting, "progressive proponents of the administrative state").

99. *Ng Fung Ho v. White*, 259 U.S. 276, 278 (1922).

100. *Id.* at 281–82. In 1922, Chinese children born to U.S. citizens abroad were themselves U.S. citizens, but Chinese children born to Chinese citizens abroad were not and were forbidden to emigrate to the United States. See Tushnet, *supra* note 12, at 370. The petitioners' claim thus hinged on whether they had been born abroad to U.S. citizens.

101. *Id.* at 284.

102. *Id.* at 284–85.

103. See *id.* ("To deport one who so claims to be a citizen obviously deprives him of

dissented in *Ben Avon* but wrote the Court's opinion in *Ng Fung Ho*, would come, on these grounds, to be both a critic of the jurisdictional fact doctrine and a proponent of the constitutional fact doctrine.¹⁰⁴ By 1930, the Court was referring to a freestanding constitutional fact doctrine unrelated to the issue of an agency's jurisdiction.¹⁰⁵

C. *Crowell v. Benson*

The jurisdictional and constitutional fact doctrines achieved their most dramatic expression in the 1932 case *Crowell v. Benson*.¹⁰⁶ As the previous two Sections demonstrated, both doctrines predated the case. But they were articulated so explicitly in *Crowell*, and prompted so much discussion in the context of that case, that some commentators have described *Crowell* as their origin.¹⁰⁷ Although *Crowell* was not their origin, *Crowell* is indeed the most important case for understanding the two doctrines and the larger "accommodation" they represented between proponents and critics of the growing administrative state.

Crowell was a worker's compensation case that arose in a shipyard near Mobile, Alabama.¹⁰⁸ Joe Knudsen, a shipyard worker, was injured while splicing cable on a river barge owned by Charles Benson.¹⁰⁹ The precise relationship between Knudsen and Benson is unclear. Given the "fluid"

liberty It may result also in loss of both property and life, or of all that makes life worth living.").

104. Commentators also justified Justice Brandeis's opinions on these grounds. See Jaffe, *supra* note 17, at 226–27 ("In the *Ng Fung Ho* case the petitioner was liable to have inflicted upon him the gravest possible injury. To try such an issue our judiciary has built up an elaborate hierarchy of appeals, a system of procedural safeguards. The Immigration Bureau has neither machinery nor tradition comparable to the judicial set-up"). Jaffe later surmised that Justice Brandeis regretted writing *Ng Fung Ho* in "the unmitigated language of jurisdictional fact." JAFFE, *supra* note 1, at 637.

105. See, e.g., *Tagg Bros. & Morehead v. United States*, 280 U.S. 420, 443 (1930) ("The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right"); *Phillips v. Comm'r*, 283 U.S. 589, 600 (1931) ("Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them").

106. 285 U.S. 22 (1932).

107. See, e.g., Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1785 (2003) (referring to "the jurisdictional-fact doctrine announced in *Crowell*"); A.L.S., *supra* note 17, at 660 (referring to "the doctrine of *Crowell v. Benson*").

108. For a detailed discussion of the facts in *Crowell*, see Tushnet, *supra* note 12, at 362–65.

109. *Id.* at 359. The barge was located on the Mobile River. *Id.*

nature of labor arrangements in the shipyard and the complex facts of the case, Knudsen can plausibly be described as either Benson's employee, an independent contractor, or a volunteer.¹¹⁰ Nevertheless, after his injury, he filed a claim under the Longshoremen's and Harbor Workers' Compensation Act, which provided worker's compensation to maritime employees.¹¹¹

Knudsen's claim was adjudicated by the federal Employees' Compensation Commission.¹¹² Letus Crowell, the agency's Deputy Commissioner, conducted an "extremely informal" adjudication in which the primary question was whether Knudsen was in fact Benson's employee, which was a precondition to a compensation award.¹¹³ Crowell determined that he was.¹¹⁴ As a result, Benson was ordered to pay.

Seeking to enjoin enforcement of the compensation award, Benson challenged it in federal court.¹¹⁵ He did so using a provision of the Act that authorized courts to "suspend[] or set aside, in whole or in part" orders of the Commission that were "not in accordance with law."¹¹⁶ The order was not in accordance with law, Benson argued, because Knudsen was not in fact his employee.¹¹⁷ After a hearing that was *de novo* as to both facts and law, the district court came to the opposite conclusion as the Commission, and the court of appeals affirmed.¹¹⁸

When the case reached the Supreme Court, it posed this question: "[u]pon what record shall the district court's review of the order of the deputy commissioner be based?"¹¹⁹ It was settled that determinations of law should be made independently by the reviewing court.¹²⁰ The question in *Crowell*, then, was about determinations of fact.¹²¹ Knudsen's attorneys hoped the Court would use the case to announce that courts should hold *de novo* hearings for most or all fact issues, and that it would invalidate the

110. *Id.* at 362.

111. *See* 33 U.S.C. §§ 901–904.

112. Tushnet, *supra* note 12, at 362.

113. *Id.*; *Crowell v. Benson*, 285 U.S. 22, 65–66 (1932) (Brandeis, J., dissenting) (observing that the evidence before the Commission was "directed largely to that issue, and conflicting").

114. Tushnet, *supra* note 12, at 362.

115. *Benson v. Crowell*, 33 F.2d 137, 138 (S.D. Ala. 1929).

116. *Id.* at 142; Dickinson, *supra* note 17, at 1055–56.

117. *Benson*, 33 F.2d at 142.

118. *Crowell v. Benson*, 45 F.2d 66, 69–70 (5th Cir. 1930); 1932 YALE L.J. Note, *supra* note 17, at 1038–40.

119. *Crowell v. Benson*, 285 U.S. 22, 66 (1932) (Brandeis, J., dissenting).

120. The same year *Crowell* was decided, for example, the Court described as "well established" the principle that courts are "not bound by an administrative construction" of law. *Burnet v. Chi. Portrait Co.*, 285 U.S. 1, 16 (1932).

121. *Crowell*, 285 U.S. at 66 (Brandeis, J., dissenting).

Longshoremen's Act because it did not provide for such hearings.¹²² The agency's attorneys hoped the Court would announce a much more deferential rule.¹²³ The case thus encapsulated the central role of fact review in the era's debates over the administrative state.

The Court, in an opinion by Chief Justice Hughes, answered the question with a grand compromise. In cases "involving public rights," it held, the standard of judicial review "is completely within congressional control."¹²⁴ But in "cases of private right," the Constitution required something like the appellate review model that had developed over the previous three decades.¹²⁵ This model, the Court said, involved separate standards of review for ordinary, constitutional, and jurisdictional facts.¹²⁶

When it came to ordinary facts, "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."¹²⁷ For this proposition, the Court cited the role of juries as fact finders and the history of "masters and commissioners" providing judges with factual advisory reports.¹²⁸ Agencies, like juries and special masters, could make initial determinations about ordinary facts as adjuncts to a court.¹²⁹ Those determinations could be upheld by the reviewing court as long as they were supported by substantial evidence.¹³⁰ In *Crowell*, the ordinary facts were facts about "the circumstances, nature, extent, and consequences of the [employee's] injuries."¹³¹

When it came to constitutional facts, "the judicial power of the United States necessarily extends to the independent determination of all questions."¹³² This holding reaffirmed the *Ben Avon* and *Ng Fung Ho* rule by requiring independent judgment as to constitutional facts but permitting that judgment to be exercised on the basis of the agency record.

When it came to jurisdictional facts, the Court took a new approach. "[W]here the determinations of fact are fundamental or 'jurisdictional' in the sense that their existence is a condition precedent to the operation of the statutory scheme," the Court held, a court should review such a

122. See Tushnet, *supra* note 12, at 365.

123. See *id.*

124. *Crowell*, 285 U.S. at 50.

125. See *id.* at 51–64.

126. See *id.*

127. *Id.* at 51.

128. *Id.* at 51–52.

129. See *id.*

130. See *id.*

131. *Id.* at 54.

132. *Id.* at 60.

determination “upon its own record and the facts elicited before it.”¹³³ In other words, courts should hold their own evidentiary hearings rather than merely applying independent judgment to the agency record. This holding went a step further than the cases of the 1910s and 20s, and there is evidence that it made the lineup of Justices five-to-three rather than seven-to-one.¹³⁴ But, Chief Justice Hughes explained, nothing less than a full evidentiary hearing was compelled by due process and Article III.¹³⁵

In worker’s compensation cases under the Longshoremen’s Act, however, the Court held that the only jurisdictional facts were the ones relating to the agency’s *constitutional*, as opposed to statutory, jurisdiction over the dispute.¹³⁶ That meant (a) the question of whether Knudsen was in fact Benson’s employee,¹³⁷ and (b) the question of whether Knudsen’s injury occurred on navigable waters.¹³⁸ Thus, although it used the language of jurisdictional fact,

133. *Id.* at 54, 64 (footnote omitted).

134. At conference, only Justice Brandeis dissented. Dan Ernst, *Crowell v. Benson: The View from Butler’s Docket Book*, LEGAL HIST. BLOG (May 17, 2012), <https://legalhistoryblog.blogspot.com/2012/05/crowell-v-benson-view-from-butlers.html> [<https://perma.cc/7MR4-TA3Y>]. After Chief Justice Hughes circulated his draft opinion for the Court, Justices Stone and Roberts joined the dissent. *Id.* Daniel Ernst argues that it was the Chief Justice’s conviction about new evidentiary hearings that prompted them to switch. *Id.* As Justice Stone wrote to Justice Brandeis, “[E]ven if the considerations which seem to weigh with the Chief Justice requires limiting the power of the Commission, it does not follow that you should destroy his power as a collector of evidence.” *Id.* Only eight Justices signed the opinions because Justice Holmes retired shortly before they were published. *Id.*

135. See *Crowell*, 285 U.S. at 56–57. The Court’s clarity as to the source of the requirement leaves something to be desired. In the aftermath of *Crowell*, the academic literature expressed “considerable speculation” as to whether the decision was based on due process alone, Article III alone, or a combination of the two. Black, *supra* note 17, at 361; see also Dickinson, *supra* note 17, at 1079–80 (arguing *Crowell* was based on a combination of the two, because any reasoning based on due process alone would also apply to the states); 1932 YALE L.J. Note, *supra* note 17, at 1046 (arguing *Crowell*’s constitutional fact holding was based on due process and its jurisdictional fact holding was based on Article III). See *infra* Section II.A for an analysis of due process and Article III reasoning.

136. See *Crowell*, 285 U.S. at 64.

137. Whether Knudsen was in fact Benson’s employee was a constitutional-jurisdictional fact because, under the constitutional law of 1932, it was a substantive due process violation to impose on an employer strict liability for injuries to independent contractors. See *Crowell*, 285 U.S. at 56–57; *id.* at 77 (Brandeis, J., dissenting); Dickinson, *supra* note 17, at 1057–58; 1932 YALE L.J. Note, *supra* note 17, at 1052.

138. Whether Knudsen’s injury occurred on navigable waters was a constitutional-jurisdictional fact because, under the constitutional law of 1932, Congress lacked power to establish a workers’ compensation scheme for maritime workers injured on land or in nonnavigable

the decision suggested that a new evidentiary hearing would be required only for this kind of *constitutional*-jurisdictional fact.¹³⁹ In doing so, it seemed either to narrow the category of jurisdictional facts to exclude statutory-jurisdictional facts or to create a new, third category that drew on both the jurisdictional and constitutional fact doctrines.¹⁴⁰ Justice Butler, reflecting this move in his docket book from the case conference, wrote the word “jurisdictional” with “fundamental” and “essential” next to it in brackets.¹⁴¹

After all of this—affirming, in private rights cases, the substantial evidence rule for ordinary facts, independent judgment applied to the agency record for constitutional facts, and a new evidentiary hearing for constitutional-jurisdictional facts—the Court leaned on the constitutional avoidance rule to uphold the Longshoremen’s Act.¹⁴² By empowering courts to invalidate agency orders “not in accordance with law,” the Court held, the Act incorporated precisely the model of judicial review announced in *Crowell*.¹⁴³ By setting aside Knudsen’s compensation award based on its own factual determinations after a new evidentiary hearing, the district court had complied with both the statute and the Constitution.¹⁴⁴

Justice Brandeis dissented. “Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to” the requirement of a new evidentiary hearing, he wrote.¹⁴⁵ Although Justice Brandeis had authored the Court’s opinion in *Ng Fung Ho*, he drew a distinction between that case, which involved “fundamental rights,” and this one,

waters. See *Crowell*, 285 U.S. at 39–40; Dickinson, *supra* note 17, at 1057; 1932 YALE L.J. Note, *supra* note 17, at 1052.

139. Confusingly, some commenters describe the type of constitutional-jurisdictional facts at issue in *Crowell* as “constitutional fact[s].” See, e.g., Dickinson, *supra* note 17, at 1059. As notes 6 and 26, *supra*, explained, the literature does not present a coherent taxonomy of fact types. In an attempt to introduce clarity, this Article describes jurisdictional facts as those upon which an agency’s jurisdiction over a dispute depends and constitutional facts as those upon which a litigant’s constitutional rights depend. According to this taxonomy, the facts at issue in *Crowell* were jurisdictional facts, not constitutional facts. But they were a type of jurisdictional fact concerned with constitutional, rather than statutory, jurisdiction.

140. For the argument that *Crowell* narrowed the category of jurisdictional facts, see Dickinson, *supra* note 17, at 1059–60; ERNST, *supra* note 89, at 53; Tushnet, *supra* note 12, at 377. For the argument that *Crowell* created a new category, see *Crowell*, 285 U.S. at 94 n.33 (Brandeis, J., dissenting); Wahrhaftig, *supra* note 17, at 267 n.10.

141. Ernst, *supra* note 134.

142. See *Crowell*, 285 U.S. at 62–65.

143. See *id.* at 62 (quoting the Longshoremen’s and Harbor Worker’s Compensation Act, ch. 509, § 21(b), 44 Stat. 1424, 1436 (1927) (codified as amended at 33 U.S.C. §§ 901–921(b))).

144. *Id.* at 65.

145. *Id.* at 85 (Brandeis, J., dissenting).

which did not.¹⁴⁶ In the dissent's view, the constitutional fact doctrine could be justified as an application of due process, but the jurisdictional fact doctrine could not—at least when it required a new evidentiary hearing.¹⁴⁷

D. Crowell's Aftermath

Immediately after *Crowell*, the case was both celebrated and criticized as a major change in administrative law. But over the decade that followed, the Court quietly retreated from the *Crowell* framework, endorsing deferential substantial evidence review in a wide range of cases. By the dawn of the APA in 1946, *Crowell* remained good law, but the Court rarely applied it.

Crowell excited a lot of commentary—more “than any case since *Ben Avon*.”¹⁴⁸ Some comments on the case are noteworthy for their content, others for their author. Felix Frankfurter, then a law professor at Harvard Law School, wrote to Justice Stone:

I am again in mourning. . . . *Crowell v. Benson* make[s] me wonder whether law is really my beat. . . . The result seems to me the evil offspring of . . . the *Ben Avon* case[]. It is the result of a very jejune, unreal conception of administrative law. To make the issue of employment more jurisdictional than any other fact upon which liability depends is to turn these matters into a game much more sterile than the speculations of the Schoolmen.¹⁴⁹

Judge Learned Hand wrote to Frankfurter that the fact distinctions in *Crowell* “seem[] . . . to me one of the most unnecessary and wanton distinctions that they have got off of late.”¹⁵⁰ Frankfurter agreed, responding sarcastically:

[A]nd so it came to pass that Alexander Hamilton and James Madison and the other Fathers, by conferring the “judicial power” upon the courts, wrote into the Constitution the requirement that whether a longshoreman suffered an injury in connection with

146. *Id.* at 60–61; *see also* notes 99–104 and accompanying text (noting the arc of Justice Brandeis’ arguments from *Ben Avon* through *Ng Fung Ho*).

147. *Crowell*, 285 U.S. at 86 (Brandeis, J., dissenting).

148. *See* GELLHORN, BYSE, STRAUSS, RAKOFF & SCHOTLAND (8th ed. 1987), *supra* note 1, at 534–35. *See generally* Dickinson, *supra* note 17 (1932); 1932 YALE L.J. Note, *supra* note 17 (1932); Wahrhaftig, *supra* note 17 (1933); Jaffe, *supra* note 17 (1933); 1933 HARV. L. REV. Note, *supra* note 17 (1933); Athearn, *supra* note 17 (1935); Black, *supra* note 17 (1937); Rode, *supra* note 17 (1937); Landis, *supra* note 17 (1938); Rosenberry, *supra* note 17 (1938); A.L.S., *supra* note 17 (1938); Kuttan, *supra* note 17 (1938); Daniels, *supra* note 17 (1939); Swidler, *supra* note 17 (1939); Larson, *supra* note 17 (1941).

149. Letter from Felix Frankfurter to Harlan Fisk Stone (Feb. 29, 1932), *in* Schiller, *supra* note 92, at 411–12.

150. Letter from Learned Hand to Felix Frankfurter (Mar. 16, 1932), *in* Aditya Bamzai, *The “Administrative Process” in the 1940s Court*, 10 (2017), https://www.hoover.org/sites/default/files/pages/docs/bamzai_-_admin_in_the_1940s_court_pdf [<https://perma.cc/2WUX-ERSS>].

admiralty matters or was the employee of the boss or sub-boss, must forever, world without end, be tried de novo in federal court and cannot be determined upon the record of a hearing before some other functionary.¹⁵¹

Walter Gellhorn, then a legal secretary to Justice Stone, offered perhaps the most colorful comment in a letter to his classmate Herbert Wechsler:

I think you're dead right on *Crowell v. Benson*. It's a terrible business. Hughes simply created the law of "jurisdictional" facts—they sprang full formed from his penis. It was all, primarily, to avoid the constitutional question. I believe that the Court will be swamped with cases in which counsel will seek to prove that a fact is jurisdictional and should have been tried de novo by a court after the administrative body got through with it. Of course, there will have to be limiting.¹⁵²

There was never an explicit "limiting." In the 1936 case *St. Joseph Stock Yards Co. v. United States*,¹⁵³ the Court did not address *Crowell's* constitutional-jurisdictional facts but reaffirmed the requirement that courts apply independent judgment to agency findings of traditional constitutional facts.¹⁵⁴ To hold otherwise, the Court explained, would be "to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."¹⁵⁵ That same year, in *Baltimore & Ohio Railroad v. United States*,¹⁵⁶ the Court reiterated a muscular version of the constitutional fact doctrine in dicta.¹⁵⁷ In the 1940 case *United States v. Appalachian Electric*

151. Letter from Felix Frankfurter to Learned Hand (Mar. 18, 1932), in Bamzai, *supra* note 150, at 10.

152. Letter from Walter Gellhorn to Herbert Wechsler (Feb. 29, 1932), in Daniel Ernst, *Note: Walter Gellhorn on Crowell v. Benson*, LEGAL HIST. BLOG (Sept. 10, 2015), <https://legalhistoryblog.blogspot.com/2015/09/note-walter-gellhorn-on-crowell-v-benson.html> [<https://perma.cc/D4WE-QJ76>].

153. 298 U.S. 38 (1936).

154. *Id.* at 52–53.

155. *Id.* at 52. *St. Joseph Stock Yards* is sometimes described as limiting *Crowell* because it endorsed the application of independent judgment to an agency record, rather than a new evidentiary hearing. See, e.g., *United States v. Raddatz*, 447 U.S. 667, 683 (1980); Merrill, *supra* note 3, at 977; Redish & Gohl, *supra* note 2, at 300 & n.46. But *St. Joseph Stock Yards* involved a regulated party's substantive due process claim to a higher rate than the one set by an agency. *St. Joseph Stock Yards*, 298 U.S. at 45. That is a classic constitutional fact, not a constitutional-jurisdictional fact. And as the discussion above revealed, *Crowell* endorsed the application of independent judgment to an agency record for constitutional facts, but new evidentiary hearings for constitutional-jurisdictional facts. See *supra* notes 133–141 and accompanying text. *St. Joseph Stock Yards* therefore did not limit *Crowell* unless one reads *Crowell*—erroneously, in my opinion—to have required new evidentiary hearings for constitutional facts.

156. 298 U.S. 349 (1936).

157. *Id.* at 368–69 (“[The railroad] is entitled to a judicial determination of the [rate]. The due process clause assures a full hearing before the court or other tribunal empowered to

Power Co.,¹⁵⁸ the Court upheld an agency factual determination after a de novo review of the record.¹⁵⁹

But at the same time as the Court reaffirmed *Crowell*, it called it into question.¹⁶⁰ In several cases in the 1930s, litigants challenging agency orders argued—as Walter Gellhorn predicted they would—that new evidentiary hearings should be required for jurisdictional facts beyond the two specific facts at issue in *Crowell* (injury location and employment relationship).¹⁶¹ The Court simply ignored their arguments.¹⁶² Then, in the *Rowan & Nichols* cases in 1940 and 1941, lower courts exercised independent judgment on factual issues underlying an oil company’s due process challenge to its daily production limits—and the Court reversed them.¹⁶³ Justice Frankfurter, now on the Court, took the opportunity to cast doubt on *Crowell* and *St. Joseph Stock Yards* without actually mentioning either case. “[I]t would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive” to due process, he wrote for the Court in *Rowan & Nichols I*.¹⁶⁴ “Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the” agency, he added for the Court in *Rowan & Nichols II*.¹⁶⁵

Why was *Crowell* announced with a bang but followed with a whimper? One explanation is the Court’s shifting composition in the 1930s and 40s. President Roosevelt appointed Justice Black in 1937, Justice Reed in 1938, Justices Douglas and Frankfurter in 1939, Justice Murphy in 1940, Chief Justice Stone and Justices Byrnes and Jackson in 1941, and Justice Rutledge in 1943.¹⁶⁶ Many of the Roosevelt appointees were more solicitous of

perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.”)

158. 311 U.S. 377 (1940).

159. *Id.* at 400–01.

160. Linda Hirshman describes this dynamic as the Court declining to “follow[] up” on *Crowell*’s “restrictive implications.” Hirshman, *supra* note 12, at 49.

161. Schiller, *supra* note 92, at 438–39 (citing briefs in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Morgan v. United States*, 304 U.S. 1 (1938); and other cases).

162. *Id.*

163. *See* R.R. Comm’n v. Rowan & Nichols Oil Co. (*Rowan & Nichols I*), 310 U.S. 573 (1940); R.R. Comm’n v. Rowan & Nichols Oil Co. (*Rowan & Nichols II*), 311 U.S. 570 (1941).

164. *Rowan & Nichols I*, 310 U.S. at 581–82.

165. *Rowan & Nichols II*, 311 U.S. at 575.

166. *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/ZG6F-VDCK] (last visited Dec. 10, 2024).

governmental power than their predecessors.¹⁶⁷ Justice Frankfurter, who had extolled the virtues of the administrative state and passionately criticized the jurisdictional and constitutional fact doctrines as a law professor, cabined *Crowell* as soon as he had the opportunity.¹⁶⁸

Another explanation is the changes in constitutional law that occurred shortly after *Crowell*. In the late 1930s and early 1940s, the Court significantly expanded Congress's authority to act under its Article I, Section 8 powers, especially its Commerce Clause powers;¹⁶⁹ permitted Congress to broadly delegate that authority to administrative agencies;¹⁷⁰ and eroded the individual economic liberties that had been grounded in substantive due process.¹⁷¹ By the end of the New Deal era, there were far fewer constitutional limitations on agency action than there were at the beginning. The Court did not need to overrule *Crowell* because the type of constitutional-jurisdictional facts at issue in that case were no longer constitutional at all.

In this sense, there was "a 'doctrinal synergy' between the decline of substantive due process and the rise of judicial deference to administrative action."¹⁷² The grand compromise struck by Chief Justice Hughes in *Crowell*, which was intended to settle the debates about the administrative state that had raged for three decades, did not last because administrative law was overtaken by constitutional law.

By the birth of the APA in 1946, the status of the jurisdictional and constitutional fact doctrines was in transition.¹⁷³ None of the cases establishing the doctrines had been overruled, and they still took up large sections of administrative law casebooks.¹⁷⁴ But as one academic wrote, the "tendency" in the judiciary was "strongly toward" substantial evidence review.¹⁷⁵ In another's words, "constitutional facts are possibly destined to be denied special

167. See Schiller, *supra* note 92, at 429–31.

168. See *supra* note 75 (praise of the administrative state) and notes 149–151 and accompanying text (criticism of the jurisdictional and constitutional fact doctrines).

169. See generally, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

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

171. See generally, e.g., *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

172. Schiller, *supra* note 92, at 432 (quoting Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow Dog Contract*, 1992 SUP. CT. REV. 235).

173. The titles of academic articles in the 1940s help make this point. See generally Robert O. Klausmayer, "Jurisdictional Fact" Theory: What Has Happened to *Crowell v. Benson*?, 25 CORNELL L.Q. 274 (1940); Bernard Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. PA. L. REV. 163 (1949).

174. See GELLHORN (2d ed. 1947), *supra* note 1 (fifty-six pages).

175. James Hart, *Judicial Review of Administrative Action: A Thesis*, 9 GEO. WASH. L. REV. 499, 508–09 (1941).

treatment in the future.”¹⁷⁶ Justice Frankfurter, concurring in a case that year, referenced “the attritions of [*Crowell*] through later decisions” and argued that “the doctrine had earned a deserved repose” because of its “casuistic difficulties.”¹⁷⁷ Of course, Justice Frankfurter might have been indulging in as much advocacy as he was description. It would take time before anyone knew if the doctrines had in fact earned repose.

II. MAKING SENSE OF THE DOCTRINE

This Part pauses the chronology in 1946 to consider the merits. As the Court developed the jurisdictional and constitutional fact doctrines over the first few decades of the twentieth century, it never quite offered a satisfying justification for them.¹⁷⁸ Why should jurisdictional and constitutional facts receive different treatment on judicial review than ordinary facts? In Section II.A, this Article proposes several answers to that question. In Section II.B, it then considers counterarguments and criticisms, drawing especially on the criticisms expressed in the academic literature of the 1930s and 40s.¹⁷⁹ What emerges is a set of doctrines that furthers serious constitutional and normative ends but presents similarly serious practical difficulties.

A. Motivations

First, the jurisdictional and constitutional fact doctrines might be compelled by Article III.¹⁸⁰ On this account, “the judicial [p]ower” vested exclusively in

176. Stason, *supra* note 71, at 1032.

177. *Estep v. United States*, 327 U.S. 114, 142 (1946) (Frankfurter, J., concurring).

178. See Note, *Judicial Review of Ratemaking: The “Constitutional Fact” Doctrine Refurbished*, 57 YALE L.J. 639, 642–43 (1948) (“The court’s summary discussion of guiding constitutional principles is couched wholly in words of conclusion and therefore does not illuminate its rationale.”).

179. Among the doctrines’ fiercest and most influential critics was John Dickinson, a professor at the University of Pennsylvania Law School. See generally DICKINSON, *supra* note 16; Dickinson, *supra* note 17; George L. Haskins, *John Dickinson, 1894–1952*, 101 U. PA. L. REV. 1 (1952). Thomas Merrill surmises that Dickinson’s critiques bear “some responsibility” for the Court’s tepid enforcement of the doctrines in the decade after *Crowell*. Merrill, *supra* note 3, at 977–79.

180. Some scholars argue that *any* deference to agency factfinding, at least in private rights cases, violates Article III. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246–48 (1994) (“Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as ‘judicial’ activity.”); Bernick, *supra* note 6, at 30 (“[J]udicial 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.”); cf. Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1597 (2013) (arguing that the substantial evidence standard in private rights cases

the federal courts contains within it the application of independent judgment to jurisdictional and constitutional fact issues.¹⁸¹ Formally, that might be so because the jurisdictional fact doctrine was part of the common law at the Founding.¹⁸² Functionally, it might be so because one of the Framers' central concerns in designing Article III was ensuring that the political branches would not be "themselves the constitutional judges of their own powers."¹⁸³ Granting an agency finality, or something close to finality, on its determinations of jurisdictional and constitutional facts would thus "be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system."¹⁸⁴

This argument fits uncomfortably into our modern understanding of Article III. The entire appellate model of judicial review depends on the proposition that the judicial power extends more powerfully to findings of law than it does to findings of fact. "It is emphatically the province and duty of the judicial department to say what the law is"¹⁸⁵—not to "say what the facts are." But the appellate model at one time treated jurisdictional and constitutional facts differently from ordinary facts.¹⁸⁶ Given that rich history, our modern understanding of Article III may be missing something.¹⁸⁷

"skew[s] too far in favor of agencies"). For our purposes, however, these arguments are inapposite, although they draw from similar ideas. Justifying the jurisdictional and constitutional fact doctrines requires accepting fact deference for *ordinary facts* but not for *jurisdictional and constitutional facts*.

181. U.S. CONST. art. III, § 1.

182. *See supra* Section I.A.

183. THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* JAFFE, *supra* note 1, at 321 ("[T]here is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures.").

184. *Crowell v. Benson*, 285 U.S. 22, 57 (1932); *see also* Wyman, *supra* note 83, at 556 ("If the legislature has judged it wise to confine the activity of [an agency] within bounds which it has fixed, there is nothing for the courts to do except to insist that the commission takes no action beyond these limits.").

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

186. *See supra* Part I.

187. In its most recent exposition of the judicial power, the Court framed the law-fact distinction with reference to history. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2258 (2024). But, in doing so, it quoted a passage from *St. Joseph Stock Yards* that endorsed the jurisdictional and constitutional fact doctrines:

During [the New Deal], the Court often treated agency determinations of fact as binding on the courts, provided that there was "evidence to support the findings." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51, 56 S. Ct. 720, 80 L. Ed. 1033 (1936). "When the legislature itself acts within the broad field of legislative discretion," the Court reasoned, "its determinations are conclusive." *Ibid.* Congress could therefore

Second, the jurisdictional and constitutional fact doctrines might be compelled by the Fifth Amendment's Due Process Clause.¹⁸⁸ On this account, "a fair trial in a fair tribunal is a basic requirement of due process," and an agency cannot, as a matter of law, be fair when deciding questions related to the scope of its own authority.¹⁸⁹ Permitting an agency to do so "leaves the fox in charge of the henhouse."¹⁹⁰ Chief Justice Hughes framed the issue in these terms in a 1931 address to the American Bar Association:

The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say, "Let me find the facts for the people of my country, and I care little who lays down the general principles."¹⁹¹

Alternatively, the jurisdictional and constitutional fact doctrines might be compelled by due process simply because jurisdictional and constitutional facts are important enough to individual litigants that they should not be finally determined in a tribunal that lacks the procedures of a court. That was the logic on which Justice Brandeis seemed to base the Court's decision in *Ng Fung Ho*.¹⁹²

"appoint[] an agent to act within that sphere of legislative authority" and "endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily." *Ibid.* (emphasis added). But the Court did not extend similar deference to agency resolutions of questions of law.

Loper Bright Enters., 144 S. Ct. at 2258.

188. U.S. CONST. amend. V.

189. *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975); see also *id.* ("Not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness."). Martin Redish and William Gohl offer a version of this argument in Redish & Gohl, *supra* note 2, at 310–16.

190. *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

191. *Legis. Perils Pictured by Hughes*, N.Y. TIMES, Feb. 13, 1931, at 18. Martin Redish and William Gohl are slightly more sympathetic to the administrator than Chief Justice Hughes was by framing the impulse as a manifestation of cognitive dissonance rather than unscrupulousness. See Redish & Gohl, *supra* note 2, at 314 ("While the regulator presumably understands in the abstract her obligation to stay within the bounds of the Constitution, the very existence of the regulator is justified by the need to enforce underlying regulatory policies.").

192. *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922) ("Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law."); see also Tushnet, *supra* note 12, at 361 ("De novo review of administrative determinations of 'jurisdictional facts' in *Crowell's* sense . . . seems entirely defensible, and precisely in the terms Hughes used: fear that people would lose their fundamental rights by being put through the maw of a bureaucracy concerned with its substantive mission but not with fundamental rights.").

It is also the logic underlying historical *de novo* review of habeas applications.¹⁹³

Third, the jurisdictional and constitutional fact doctrines might be an effective method of enforcing limits on Congress's power. Those limits come primarily from Article I, which makes Congress's powers "few and defined,"¹⁹⁴ and from the Bill of Rights, which imposes constraints on Congress's exercise of even its enumerated powers. Although administrative agencies live in the Executive Branch, they execute power conferred on them by Congress. Therefore, applying independent judgment to traditional jurisdictional facts and the type of constitutional-jurisdictional facts at issue in *Crowell* helps enforce the Article I limits, while applying independent judgment to traditional constitutional facts helps enforce the Bill of Rights limits.

Fourth, the jurisdictional and constitutional fact doctrines might be an effective method of constraining the administrative state. On this account, a sprawling administrative state is constitutionally problematic and most any doctrine that limits its power is constitutionally virtuous, as long as that doctrine is itself constitutionally permissible.¹⁹⁵ Although this justification is less precise than the first three, it was the one most frequently advanced by commentators justifying the doctrines in the aftermath of *Crowell*.¹⁹⁶ "[T]he primary concern," wrote one, "is to save us from bureaucracy."¹⁹⁷

Fifth, the jurisdictional and constitutional fact doctrines might be an effective method of dividing authority on the basis of institutional competence. This argument echoes the due process argument but is concerned with accuracy rather than fairness. On this account, courts are better positioned than agencies to determine jurisdictional and constitutional facts—either because agencies are less likely than courts to accurately answer questions related to

193. See Richard H. Fallon & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2069 (2007) ("Modern notions of deference to administrative decisionmakers, developed primarily in other contexts, are in considerable tension with the historic office of the Great Writ."); see also *supra* note 61 and accompanying text.

194. THE FEDERALIST NO. 45 (James Madison); see also *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519, 534–35 (2012) ("The enumeration of powers is . . . a limitation of powers, because the enumeration presupposes something not enumerated. The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government can exercise only the powers granted to it." (citations omitted) (internal quotation marks omitted)).

195. See, e.g., Lawson, *supra* note 180, at 1231 ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to . . . a bloodless constitutional revolution."). See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

196. See, e.g., Black, *supra* note 17, at 353 ("[T]he jurisdictional fact theory . . . is a potential weapon in the judicial armory which can be utilized effectively to check the rising pretensions of administrative agencies.").

197. 1932 YALE L.J. Note, *supra* note 17, at 1053.

the scope of their own authority or because agencies are less likely than courts to accurately answer any very important question.¹⁹⁸ The appellate review model is often explained in terms of comparative institutional competence, with agencies being presumed to have “superior competence to resolve questions of fact” and courts superior competence to resolve questions of law.¹⁹⁹ The jurisdictional and constitutional fact argument goes one level deeper by recognizing that agencies’ superior competence may extend to *most*, but not *all*, questions of fact.

Sixth, irrespective of comparative institutional competence, the jurisdictional and constitutional fact doctrines might simply be valuable because they provide multiple layers of review for determinations that are particularly important. On this account, two decisionmakers is better than one.

Finally, the jurisdictional fact doctrine (although not the constitutional fact doctrine) might be justified because of the unique nature of jurisdictional issues. On this account, jurisdiction is—and should be—treated differently from other legal issues because it is simply more fundamental. This type of “jurisdictional exceptionalism” informs several other doctrines.²⁰⁰ For example, courts of limited jurisdiction are presumed not to have it.²⁰¹ They are generally supposed to address jurisdictional issues before they address merits issues.²⁰² And they have an “independent obligation” to verify their jurisdiction even when the parties have not called it into question²⁰³ and even when verification requires expanding the record on appeal.²⁰⁴ In each of these ways, “jurisdictional questions are exceptional and escape the application of many ordinary principles that would be applicable to the resolution of non-jurisdictional questions.”²⁰⁵ It is, therefore, consistent with the rest of our law

198. *Cf.* Lawson, *supra* note 180, at 1246 (quoting Joshua I. Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815, 1835 (1989)) (“Administrative adjudicators plainly lack the essential attributes that Article III requires of any decisionmaker invested with ‘the judicial Power of the United States.’”).

199. Merrill, *supra* note 3, at 941.

200. *See generally* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829 (2007).

201. *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799) (“[T]he fair presumption is . . . that a cause is without its jurisdiction until the contrary appears.”).

202. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (“Article III jurisdiction is always an antecedent question.”).

203. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (“[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.”).

204. Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1, 7 (2012). Pidot frames jurisdictional exceptionalism as an application of separation of powers principles. *See id.* at 12–36.

205. Collins, *supra* note 200, at 1831.

to prescribe that jurisdictional facts receive more searching treatment upon judicial review than nonjurisdictional ones.

B. Criticisms

First, the jurisdictional fact doctrine relies upon a circular conception of agency authority. If a statute provides an agency with the authority to act in particular circumstances, the statute must, by extension, provide the agency with the authority to determine when those circumstances are present.²⁰⁶ Congress, when vesting the agency with such authority, “always contemplates [liability] flowing from a finding of the facts by [the agency] tribunal, not from the existence of the facts in the absolute.”²⁰⁷ By requiring the existence of the facts in the absolute, the doctrine effectively makes the agency’s jurisdiction turn on the correctness of its findings. This criticism was levied against both the older version of the jurisdictional fact doctrine²⁰⁸ and the bolder, constitutionalized version articulated in *Crowell*.²⁰⁹

Second, even if it is coherent to conceptualize an agency’s authority to act as depending upon the existence of facts in the absolute, it is difficult in practice to determine which facts should count. As Section I.A discussed, jurisdiction is a malleable concept.²¹⁰ On a broad account of the concept, it is possible to argue that almost any fact related to liability is a jurisdictional

206. See *Crowell v. Benson*, 285 U.S. 22, 85 (1932) (Brandeis, J., dissenting) (“[T]he power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence of those circumstances.”).

207. Gordon, *supra* note 58, at 460. Legal realists have taken this criticism one step further by denying the possibility of ever knowing facts in the absolute. Whether a factual finding is made by an agency or a court, “[t]he finding stands for the fact. It is not the fact itself.” JAFFE, *supra* note 1, at 635; see also *id.* (“Its function is to provide an acceptable basis for the exercise of power. It is based upon a reasoned inference from evidence. A court cannot, any more than any other human agency, break down the barrier between appearance and reality.”); Dickinson, *supra* note 17, at 1074.

208. See JAFFE, *supra* note 1, at 630 (“[An agency] cannot lack jurisdiction to make a finding which it is compelled to make. Or, put in another way, its jurisdiction cannot be limited to making correct and only correct findings.”); ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 249 (1928) (“The statute authorized the seizure for subsequent trial; under the circumstances it was absurd to construe the statute literally as subjecting to preliminary seizure only the good of the forbidden description.”). Freund’s criticism was made with reference to *Warne v. Varley*, 101 Eng. Rep. 639 (K.B. 1795). See *supra* note 51.

209. See Dickinson, *supra* note 17, at 1064 (arguing that “there is nothing to prevent” courts seeking to apply *Crowell* from finding that “the administrative agency is itself empowered to decide whether or not the facts exist”).

210. See *supra* notes 58–62 and accompanying text.

fact.²¹¹ *City of Arlington v. FCC*²¹² made much of this challenge, holding—in the context of law, not fact—that the distinction between jurisdictional and nonjurisdictional determinations was “a mirage.”²¹³ Justice Thomas also made much of this challenge in one of the jurisdictional fact doctrine’s rare mentions at the modern Court, writing in 2015 that the doctrine faded over time because courts “struggled to determine the boundary between jurisdictional and nonjurisdictional facts, and thus to determine the appropriate standard of review for administrative decisions.”²¹⁴

A similar criticism was levied against the constitutional fact doctrine in the 1930s, although it relied for its force on the malleable nature of the era’s constitutional law. “[U]nder the broad interpretation now placed on the Fifth and Fourteenth Amendments,” wrote John Dickinson in 1932, “there is practically no issue going to the substantial merits of a controversy which if ‘unreasonably’ decided by an administrative tribunal cannot be made the basis of a claim of constitutional right.”²¹⁵ Today, with substantive due process accorded a much narrower “interpretation,” it is simpler—although not straightforward in every case—to distinguish constitutional from nonconstitutional facts. Of course, the challenge of identifying jurisdictional and constitutional facts is precisely what makes the doctrines such potent tools. They provide a judge reviewing an agency order the freedom, should the judge choose to use it, to exercise independent judgment on a wide range of facts.²¹⁶

Third, as a matter of comparative institutional competence, the argument in favor of the jurisdictional and constitutional fact doctrines might have things upside down. The *raison d’être* of agency adjudication is to permit

211. See Swidler, *supra* note 17, at 536 (“[I]n a sense everything can be made jurisdictional.”). But see David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1023 (2008) (“Difficult cases will arise at the margins, but it will usually be clear which exercises of authority lie at the core of an executive tribunal’s constitutional or statutory authority and which lie beyond the outer bounds of that authority.”).

212. 569 U.S. 290 (2013).

213. *Id.* at 297.

214. *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 170 (2015) (Thomas, J., dissenting).

215. Dickinson, *supra* note 17, at 1077; see also Black, *supra* note 17, at 371 (“If it is difficult to find the line between a reasonable and an unreasonable rate, it will pass the wit of commissions and courts to differentiate ‘unreasonably low but not confiscatory’ from ‘so unreasonably low as to be confiscatory,’ considering that the maximum rate or return conformable to due process has never been fixed.”).

216. *How* wide depends on the rule of constitutional law at issue in a case. The application of bright-line rules “tend[s] to hinge on relatively few facts,” while the application of more flexible standards tends to hinge on “a broader set of facts.” Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 18 (2023).

agency adjudicators to bring their expertise to bear in classes of disputes with which they have significant familiarity.²¹⁷ It is not obvious why that expertise would not apply with the same force to a dispute's jurisdictional and constitutional facts as it would to the dispute's ordinary facts, especially in complex technical cases.²¹⁸ And although agency adjudicators are incentivized to find facts in a manner favorable to the agency, the ability to act on that incentive is cabined by the highly proceduralized nature of formal agency adjudication.²¹⁹ If that is true, then the doctrines are "indefensible from the standpoint of practical judgments as to the appropriate area of administrative activity."²²⁰

Finally, the jurisdictional and constitutional fact doctrines make our system less efficient by permitting relitigation of factual issues already decided. Perhaps the second *raison d'être* of agency adjudication is to handle disputes quickly. When a larger portion of those disputes may be relitigated in court, cases take longer to resolve²²¹ and court dockets swell.²²²

The essence of this criticism, and most of the previous ones, is that the jurisdictional and constitutional fact doctrines sap agency tribunals of their utility.²²³ Because courts already exercise independent judgment when reviewing an agency's legal conclusions, and these doctrines permit courts to exercise independent judgment on many of an agency's factual findings as well, they erode the capacity of agency adjudication to further the ends of either efficiency or expertise. If you are persuaded that independent review

217. See Bernard Schwartz, *The Substantial Evidence Rule and the Administrative Procedure Act*, 25 WASH. L. REV. 135, 135 (1950).

218. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 81 (1936) (Brandeis, J., dissenting) ("[T]here is a limit to the capacity of judges."). But see Tushnet, *supra* note 12, at 385 (questioning whether "expertise" is really necessary to find facts in most NLRB labor disputes).

219. See Landis, *supra* note 17, at 529 ("[The agency tribunal's] composition and its procedure condition its fitness as an instrument for the determination of these issues.").

220. *Id.* at 524.

221. Delay has access to justice implications in addition to efficiency implications. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 94 (1932) (Brandeis, J., dissenting) ("Since the advantage of prolonged litigation lies with the party able to bear heavy expenses, the purpose of the Act will in part be defeated."); Dickinson, *supra* note 17, at 1060–63 (noting that delay causes "undesirable social consequences of a serious kind" in worker's compensation cases).

222. See ERNST, *supra* note 89, at 32–33 ("[P]ublic utility commissions, worker's compensation tribunals, and other administrative agencies [have] enormous caseloads; [non-deferential fact] review of more than a tiny fraction of their decisions would swamp the courts.").

223. See Note, *supra* note 178, at 1055 ("The utility may 'coast' through the commission proceedings, save its evidence, present it for the first time in the court proceedings and compel the administrative action to go for naught."); Fallon, *supra* note 11, at 990 ("A requirement that every conclusion of constitutional or jurisdictional fact must be relitigable de novo in a constitutional court would too severely undermine the utility of non-article III tribunals.").

of factual determinations serves positive constitutional and normative ends, then this loss in utility may well be justifiable. If, however, you are dubious of the affirmative arguments in support of the doctrines, then the loss in utility may not be.²²⁴

III. TRACING THE POST-APA DOCTRINE

Today, it is uncontroversial to state that the jurisdictional and constitutional fact doctrines were “never heard from again” after the 1940s;²²⁵ that they “receded into the constitutional shadows”;²²⁶ or that they are “as strong an example as can be found of being overruled by being ignored.”²²⁷ That is, of course, true if one counts pages taken up by the doctrines in administrative law casebooks²²⁸ or citations to *Crowell* by the Supreme Court.²²⁹ And it is certainly true that *Crowell*’s precise holding, which concerned review of jurisdictional and constitutional facts in private rights cases adjudicated by agency tribunals, has more limited scope in an era in which fewer private rights cases are adjudicated by agencies²³⁰ and there are fewer constitutional limitations on agency jurisdiction.²³¹

224. Compare Black, *supra* note 17, at 353 (writing with admiration that “the courts enjoy a wide and almost unpredictable jural freedom in the exercise of this effective weapon”), with Jaffe, *supra* note 17, at 224–25 (writing with consternation that *Ben Avon* and *Crowell* “threaten to rip wide open every administrative determination of fact”).

225. Merrill, *supra* note 3, at 979.

226. Monaghan, *supra* note 15, at 256.

227. GELLHORN, BYSE, STRAUSS, RAKOFF & SCHOTLAND (8th ed. 1987), *supra* note 1, at 537.

228. See *supra* note 1 and accompanying text.

229. Mark Tushnet observes that the Court cited *Crowell* sixteen times in the 1930s, ten of which were for its holding on de novo fact review; nine times in the 1940s, two of which were for de novo fact review; eight times in the 1950s, one of which was for de novo fact review; five times in the 1960s, one of which was for de novo fact review; and that, today, citations to *Crowell* are “basically throwaways.” Tushnet, *supra* note 12, at 387–88. In 1982, the Court declared that “*Crowell*’s precise holding, with respect to the review of ‘jurisdictional’ and ‘constitutional’ facts that arise within ordinary administrative proceedings, has been undermined by later cases.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 82 n.34 (1982).

230. Agency adjudicative authority over private rights cases was cabined by *Northern Pipeline*, 458 U.S. at 60–71, which held that such authority is presumptively impermissible, and then again by *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024), which categorized most claims with close common law antecedents as private rights claims. The observation that the decline of agency adjudication over private rights threatens *Crowell*’s precise holding about constitutional-jurisdictional facts was also made by Cass Sunstein in Cass R. Sunstein, *Administrative Law’s Grand Narrative*, 77 ADMIN. L. REV. 291, 302–03 (2025).

231. See *supra* notes 169–172 and accompanying text.

But the death of the jurisdictional and constitutional fact doctrines has been overstated. The APA's judicial review provisions may well have been intended to incorporate them. Inside administrative law, they continue to shape judicial review of agency orders in antidiscrimination cases, deportation cases, and military detention cases. And outside administrative law, the doctrines have shaped the standards governing appellate review of trial court decisions on constitutional criminal procedural issues and First Amendment issues.

The overstatement of the doctrines' death is perhaps related to the overidentification of the doctrines with *Crowell*. As Part I revealed, both the doctrines predated *Crowell*—the jurisdictional fact doctrine by almost three hundred years and the constitutional fact doctrine by at least two decades. *Crowell* was simply their apex expression. It is, therefore, a mistake to conclude that the loss in force of *Crowell*'s precise holding necessarily means a loss in force of the doctrines themselves. Although their fortunes are intertwined, the jurisdictional and constitutional fact doctrines continue to exert force throughout the law even though *Crowell*'s holding does not. The real story is the doctrines' mutation—not their death.

A. *The APA*

The adoption of the APA in 1946 serves as this Article's fulcrum—the moment before which Part I recovers the doctrine, and after which Part III traces it—because the APA is the foundation of modern administrative law. It is, in Justice Scalia's words, “a sort of superstatute, or subconstitution.”²³² Although much of contemporary administrative law is administrative common law, even that common law is rooted in, or at least constrained by, the statute's terms.²³³ This Section accordingly asks what those terms say about

232. Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363. Although the APA provides the default procedures for judicial review of agency action, Congress may—and sometimes does—specify different procedures, including de novo fact review, in other statutes. See *infra* Section III.B. However, as Paul Verkuil notes, “Congress usually does not spend much time on scope of review matters, preferring to leave them to the default review provisions of the APA.” Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 690 n.39 (2002).

233. See Bamzai, *supra* note 150, at 17 (“[N]otwithstanding the passage of the [APA], it remains true that much administrative law is ‘common law’ created and elaborated by courts.”). Christopher Walker and Scott MacGuidwin describe the dominant interpretive approach to the APA over the last eight decades as “textually constrained purposivism.” Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1966–67 (2023). But “calls to return to either the APA's statutory text or its original meaning (or both)” have become more frequent in recent years. *Id.* at 1965.

judicial review of jurisdictional and constitutional facts.

I believe the fairest conclusion from the APA's text and legislative history is that the statute does not contain a unique standard of review for jurisdictional and constitutional facts. But the text contains several phrases that might plausibly be construed to suggest that it does, and the legislative history contains strong evidence that would support those constructions—so it is a close call. That makes it all the more remarkable that jurisdictional and constitutional facts are missing from the modern administrative lawyer's toolkit.

The relevant text can be found in APA § 706, which governs the scope of review of agency action. That provision provides that a federal court shall

hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise **not in accordance with law**;

(B) **contrary to constitutional right**, power, privilege, or immunity;

(C) **in excess of statutory jurisdiction**, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) 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; or

(F) **unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.**²³⁴

It also provides that “the court shall review the whole record or those parts of it cited by a party” in considering whether the agency action meets one of the standards above.²³⁵

At least four phrases in § 706 evoke jurisdictional and constitutional facts. First, “not in accordance with law.”²³⁶ That is the precise verbal formulation used in the Longshoremen's and Harbor Workers' Compensation Act. In *that* statute, the Court had, in *Crowell*, interpreted the phrase to encompass a unique standard of review for jurisdictional and constitutional facts.²³⁷ Second and third, “contrary to constitutional right” and “in excess of statutory jurisdiction.”²³⁸ Those phrases, on their face, evoke the constitutional and

234. 5 U.S.C. § 706(2) (emphasis added).

235. *Id.*

236. *Id.* § 706(2)(A).

237. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). In other statutes using the phrase “not in accordance with law,” however, the Court had not arrived at the same interpretation. *Cf. Black, supra* note 17, at 368 (observing, in 1937, that “not in accordance with law” provisions were “common legislative device[s]”).

238. 5 U.S.C. §§ 706(2)(B), (C). Aditya Bamzai argues that the phrase “in excess of statutory jurisdiction” provides a “principled basis” for treating an agency's *legal interpretation* of its

jurisdictional fact doctrines as they were understood in the first half of the twentieth century. Fourth, “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”²³⁹ That phrase suggests that the APA’s drafters intended that at least some facts be subject to de novo review, although it does not clarify which ones.²⁴⁰ All four phrases provide standards *besides* the substantial evidence standard according to which a reviewing court might plausibly “hold unlawful and set aside . . . findings” of fact.²⁴¹

The legislative history contains little evidence that clarifies the meaning of “not in accordance with law,” “contrary to constitutional right,” or “in excess of statutory jurisdiction” beyond the general statement that § 706 was intended to “declare[] the existing law concerning the scope of judicial review” at the time of the statute’s enactment.²⁴² The APA’s drafters relied heavily

own jurisdiction differently from its other legal interpretations. Bamzai, *supra* note 150, at 18. His argument is undercut by *City of Arlington v. FCC*, which held that all an agency’s legal interpretations should be treated the same, regardless of whether they implicate jurisdictional questions. 569 U.S. 290, 307 (2013). But because *City of Arlington* relied on the now-defunct *Chevron* doctrine, Bamzai’s argument is not wholly foreclosed. And, as he suggests, it could straightforwardly be extended from legal interpretations to factual findings. Bamzai, *supra* note 150, at 18–19.

239. 5 U.S.C. § 706(2)(F).

240. Martin Redish and William Gohl describe this phrase as “plausibly broad enough to encompass the constitutional fact doctrine.” Redish & Gohl, *supra* note 2, at 326–27. Joseph Blocher and Brandon Garrett state flatly that it “provides for de novo review for certain constitutional claims.” Blocher & Garrett, *supra* note 216, at 34. Richard Levy and Sidney Shapiro make a similar argument. See Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward A Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 539 (2006) (opining that “the current scope of review doctrine under the Administrative Procedure Act satisfies” the rule of law, in part because it permits constitutional fact review). But the Court, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, interpreted the phrase as applying only when an adjudicatory record is “inadequate” or new issues not present in the adjudication are raised. 401 U.S. 402, 415 (1971). Adjudicatory records are often inadequate in informal adjudications, in which agencies are not required to make formal factual findings. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654–55 (1990).

241. 5 U.S.C. § 706(2).

242. S. REP. NO. 79-752, at 230 (1945); see also Pat McCarran, *Improving “Administrative Justice”*: *Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A.J. 827, 827, 831 (1946) (explaining, in a self-proclaimed “authoritative statement of the legislative intent” of the APA, that courts should review facts using “the tests familiar in traditional Anglo-American judicature”); Conley K. Hurst, *The Scope of Evidentiary Review in Constitutional Challenges to Agency Action*, 88 U. CHI. L. REV. 1511, 1541–42 (2021) (observing that the APA was “not intended to broaden the scope of judicial review of agency action” beyond the review provided by pre-APA case law); Roni Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV’T L. REV. 207, 222 (2015) (same).

for their understanding of “existing law” on a 1941 report prepared by the Attorney General’s Committee on Administrative Procedure.²⁴³ That report included an extended discussion of the jurisdictional and constitutional fact doctrines and framed them as part of “existing law,” but it also noted that “a fundamental change is taking place” and concluded that “in the future, fact issues involving due process, equal protection, and doubtless also other constitutional guarantees will in all probability no longer be subject to court review as a matter of constitutional right.”²⁴⁴ Whether the APA’s drafters intended the statute to incorporate the jurisdictional and constitutional fact doctrines thus depends on the extent to which one considers a prediction about law in “the future” to be part of “existing law.”

The legislative history contains more extended discussion about the meaning of “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.” A Senate committee print from 1945 explains that this provision did “not attempt to state” the circumstances in which facts should be subject to trial de novo “since the . . . subject is one which the courts themselves have not fully settled.”²⁴⁵ But the Attorney General’s Manual, published in 1947, observes that the provision “prescribes a judicial trial de novo only in situations where other statutes *or the courts* have prescribed such review.”²⁴⁶ Since the courts had prescribed trials de novo for constitutional-jurisdictional facts in *Crowell*, the Attorney General’s Manual suggests that § 706 incorporated *Crowell*.

This reasoning involves more conjecture than we might like when answering a question of such magnitude. But, as Aditya Bamzai has observed, the “fact that the APA was enacted against a shifting jurisprudential backdrop in 1946 makes understanding its terms a challenge.”²⁴⁷ One can certainly

243. See Final Report of the Attorney General’s Committee on Administrative Procedure, S. DOC. NO. 77-8 (1941). President Roosevelt commissioned the report to provide Congress with a “thorough and comprehensive study” of “existing practices and procedures, with a view to detecting any existing deficiencies and pointing the way to improvements.” Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 222–25 (1986) (quoting Final Report of the Attorney General’s Committee on Administrative Procedure, *supra*, at 1). It “set the stage” for the APA by providing a critical source of information to the statute’s drafters. *Id.* at 226.

244. Final Report of the Attorney General’s Committee on Administrative Procedure, *supra* note 243, at 87 (discussion of existing law); *id.* at 210 (prediction about the future).

245. S. COMM. ON THE JUDICIARY, 79TH CONG. 39–40 (Comm. Print 1945) (citing, as evidence of the courts not being “fully settled,” the 1941 report of the Attorney General’s Committee on Administrative Procedure).

246. ATTORNEY GENERAL, MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 110 (1947) (emphasis added).

247. Bamzai, *supra* note 150, at 21.

marshal the text and the legislative history into a strong argument that the APA codifies the jurisdictional and constitutional fact doctrines. Or, if those doctrines are truly compelled by the Constitution—as the Court held they were in the 1920s and 30s—then it does not much matter what the APA codified, because they supersede the superstatute.²⁴⁸

Nevertheless, over time, the substantial evidence standard in § 706(2)(E) came to dominate almost all judicial review of agency factual findings under the APA.²⁴⁹ Today’s model of judicial review, in which facts are reviewed deferentially and law is not, is missing the pre-APA model’s two categories of nondeferential fact review. In exchange, today’s model has something the pre-APA model did not: relatively strict procedures governing the way facts are found in formal agency adjudications.²⁵⁰ Whether or not it was intentional, and whether or not the APA sanctioned the exchange, robust judicial review was traded for robust agency procedures as a method of constraining agency factfinding.²⁵¹

B. *Inside Administrative Law*

Although the jurisdictional and constitutional fact doctrines are no longer regularly cited and applied, remnants of the two doctrines continue to shape administrative law. In at least three ways, the doctrines remain “an active constraint on modern administrative adjudication.”²⁵²

248. Cf. Bernick, *supra* note 6, at 30 (arguing that compliance with one of the APA’s judicial review provisions requires judges to violate the Constitution).

249. Even review of factual findings in informal adjudications—to the extent there is a record to rely on—is usually conducted by reading the “substantial evidence” standard into the “arbitrary or capricious” standard in § 706(2)(A). See, e.g., *Ass’n of Data Processing Serv. Orgs. v. Bd. of Govs.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984). As a result, “most factual determinations of the agencies receive deference. Generally a court will apply a substantial evidence or arbitrary and capricious standard to agency-found facts.” Woolhandler, *supra* note 57, at 241. Section III.B, *infra*, discusses circumstances in which courts continue to apply a more rigorous standard than “substantial evidence” when reviewing constitutional facts.

250. See 5 U.S.C. §§ 554, 556, 557 (providing litigants the right to conduct limited discovery, prescribing a burden of persuasion, forbidding ex parte communications by the hearing adjudicator, and mandating other procedures).

251. Daniel Ernst offers a version of this account, noting that although Chief Justices Hughes “remained convinced of the need for after-the-fact judicial review long after others were prepared to abandon it,” he understood that he could accomplish similar objectives by “design[ing] agencies’ structure and procedures so that the affected concerns and their counsel could channel administrative discretion along reasonable lines.” ERNST, *supra* note 89, at 76.

252. Redish & Gohl, *supra* note 2, at 301 (making the argument with reference only to the constitutional fact doctrine).

First, Congress has incorporated a version of the constitutional fact doctrine into several statutes that address invidious discrimination. The relevant statutes include at least Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Fair Housing Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973.²⁵³ Under each of these statutes, litigants may either bring their claims directly in a court for a hearing that is *de novo* in the first instance or may, after submitting to an adjudication in an agency tribunal, secure *de novo* judicial review of the agency order.²⁵⁴ To be clear, Congress did not provide different standards of review in these statutes for the constitutional facts and the ordinary facts within each litigant's claim. But by providing a path to *de novo* review for these litigants' claims, without doing so for litigants bringing claims under many other statutes, Congress effectively created a heightened standard of review for antidiscrimination claims. In doing so, it codified the "common perception that the courts should control both fact and law in cases where the main issues are constitutional."²⁵⁵ To be more precise, it codified the version of the constitutional fact doctrine advanced by Justice Brandeis, according to which the scope of judicial fact review depends upon the significance of the liberty interest at stake.²⁵⁶

Second, federal courts generally conduct *de novo* review on the question of a litigant's citizenship status—both a jurisdictional and a constitutional fact—in cases challenging deportation orders and military detention orders. *De novo* review in deportation cases is required by *Agosto v. INS*.²⁵⁷ Justice

253. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17; Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634; Fair Housing Act, 42 U.S.C. §§ 3601–3619; Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213; Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797.

254. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5, 2000e-16 (providing for initial judicial review of a private citizen's claim and *de novo* judicial review of an agency order concerning a federal employee's claim); Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(2) (providing for *de novo* judicial review of all claims despite initial agency proceedings); Fair Housing Act, 42 U.S.C. § 3612, 28 U.S.C. § 2347 (requiring agency adjudications to pause if a litigant brings their claim in a court in the midst of the proceeding, and permitting litigants to introduce new evidence in court if they wait until the end of the proceeding to challenge the agency order); Americans with Disabilities Act, 42 U.S.C. § 12117(a) (incorporating Title VII's scope of review); Rehabilitation Act of 1973, 29 U.S.C. § 794a(a) (same).

255. Woolhandler, *supra* note 57, at 240–41; see also *id.* (“Thus the general area of ‘civil rights’ at the federal level is pervasively one of court decisionmaking, while in economic regulation Congress has spread decisional authority more between courts and agencies.”).

256. See *supra* notes 99–104 and accompanying text.

257. 436 U.S. 748, 753 (1978) (“[T]he Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation

Marshall, writing for the Court in *Agosto*, traced the requirement directly back to *Ng Fung Ho*.²⁵⁸ And the consensus around de novo review in military detention cases is visible in *Boumediene v. Bush*,²⁵⁹ in which both the majority and the dissenters suggested that de novo review should be available to U.S. citizens via habeas.²⁶⁰ Commentators have generally framed these cases as applications of the constitutional, rather than jurisdictional, fact doctrine.²⁶¹ But as Section I.B explained, *Ng Fung Ho* was written in “the unmitigated language of jurisdictional fact.”²⁶² Because the Constitution constrains the ability of federal authorities to detain and deport U.S. citizens, citizenship status is precisely the type of hybrid constitutional-jurisdictional fact that was at issue in *Crowell*. The litigant’s individual constitutional rights, and the agency’s constitutional jurisdiction over the dispute, both depend on it.

Third, when a litigant brings a constitutional challenge to an agency adjudication or an adjudicative order, their claim is often scrutinized more closely than if they had brought a different type of challenge. When the litigant’s claim is a structural constitutional challenge to the adjudication itself—such as a challenge to the agency head’s removal protections—*Thunder Basin Coal*

proceedings.”); see also *Trump v. J.G.G.*, 145 S. Ct. 1003, 1006 (2025) (reaffirming this requirement in proceedings under the Alien Enemies Act).

258. *Agosto*, 436 U.S. at 753. *Agosto* rested its holding on both the Constitution and the Immigration and Nationality Act. See *id.* But to the extent the requirement stems from the statute, it can be considered an example of Congress, rather than the Court, implementing the jurisdictional and constitutional fact doctrines. When Congress amended the statute in 2005, it implemented them explicitly, forbidding habeas review of a deportation order for a criminal noncitizen except for “constitutional claims,” which may involve factfinding in a district court if there is a “genuine issue of material fact.” 8 U.S.C. §§ 1252(a)–(b).

259. 553 U.S. 723 (2008).

260. *Id.* at 766–71, 786–87 (majority opinion); *id.* at 848–49 (Scalia, J., dissenting); see also Franklin, *supra* note 211, at 1004 (“Military tribunals have no jurisdiction to try non-combatants . . . [so a] detainee’s status as a combatant on the one hand or a civilian on the other is therefore a jurisdictional fact which must be subjected to searching inquiry by an Article III court.”); Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535, 578 (2010) (observing that *Boumediene* “jealously guards the ability of Article III courts to find facts in constitutional cases”).

261. See, e.g., Redish & Gohl, *supra* note 2, at 292 & n.7 (discussing *Boumediene*); Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1450 n.124 (2001) (discussing *Agosto*); Judah Schechter, Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483, 1488 n.28 (1988) (same); cf. Bernick, *supra* note 6, at 37 n.51 (“The category of ‘jurisdictional’ facts seems to have vanished entirely.”).

262. JAFFE, *supra* note 1, at 637.

*Co. v. Reich*²⁶³ and *Axon v. FTC*²⁶⁴ provide that the litigant may bypass the agency tribunal and bring the claim directly in a federal court for de novo consideration, including on the facts.²⁶⁵ And when the litigant's claim is a constitutional challenge to the content of a final agency order—such as a challenge to the agency's determination of a constitutional fact on which the order depends—some lower federal courts permit the litigant to introduce new evidence not contained in the agency record.²⁶⁶ This exception to the APA's "record rule," which otherwise requires judicial review to be conducted on the basis of the agency record, is justified using a variety of rationales.²⁶⁷ According to one explanation, it is appropriate because "[a] direct constitutional challenge is reviewed independent of the APA."²⁶⁸ According to another, it is appropriate because of the "sheer possibility that [an agency] has acted unlawfully."²⁶⁹ According to yet another, it is required by *Webster v. Doe*,²⁷⁰ which authorized discovery on "colorable constitutional claims" in a context in which other claims were precluded.²⁷¹ Of course, it might also be justified by the constitutional fact doctrine, although it rarely is.

Courts are not uniform in permitting a constitutional exception to the record rule. But the exception's existence in a variety of jurisdictions and legal contexts, and its invocation on the basis of a variety of justifications,

263. 510 U.S. 200 (1994).

264. 143 S. Ct. 890 (2023).

265. See *Thunder Basin Coal Co.*, 510 U.S. at 212 (upholding a district court's jurisdiction over claims "wholly 'collateral' to a statute's review provisions and outside the agency's expertise"); *Axon*, 143 S. Ct. at 904–06 (applying *Thunder Basin* in holding that structural constitutional challenges are generally outside agency expertise).

266. See Hurst, *supra* note 242, at 1536–37.

267. The exception has not been expressly approved by the Supreme Court, which has held only that the "record rule" may be discarded in circumstances of bad faith. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573–74 (2019). See Hurst, *supra* note 242, at 1522 for a discussion of criticisms of the bad faith exception, including that it has little basis in the APA's text. As Section III.A observed, an exception to the record rule for constitutional and jurisdictional facts might in fact have a stronger textual basis.

268. *Grill v. Quinn*, No. CIV S-10-0757, 2012 WL 174873, at *2 (E.D. Cal. Feb. 27, 2012).

269. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1918 (2020) (Sotomayor, J., concurring) (arguing that, due to this "sheer possibility," an equal protection claim against agency action "should [have been] determined only after factual development on remand").

270. 486 U.S. 592 (1988).

271. *Id.* at 603–04. For an example of the *Webster* rationale, see P.R. Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev., 59 F. Supp. 2d 310, 328 (D.P.R. 1999) ("The . . . Court has held that a plaintiff who is entitled to judicial review of its constitutional claims under the APA is entitled to discovery in connection with those claims.").

suggest that the constitutional fact doctrine is far more alive than it is usually considered to be, albeit under other names. As Martin Redish and William Gohl observe, “it is very unlikely that the Court today would refuse to recognize an obligation of de novo constitutional fact review if presented with an administrative body’s finding of constitutional facts underlying a fundamental right.”²⁷²

C. Outside Administrative Law

The constitutional fact doctrine, although not the jurisdictional fact doctrine, is similarly alive and well outside administrative law. It has migrated to the standards governing appellate review of trial court records, where appellate courts regularly apply independent judgment to factual issues involving the First Amendment and constitutional criminal procedural rights.²⁷³ The Supreme Court has also drawn on the constitutional fact doctrine in asserting the importance of applying independent judgment to congressional factfinding.²⁷⁴

The first area outside administrative law to which the doctrine “wandered” was constitutional criminal procedure.²⁷⁵ It did so as early as 1935, three years after *Crowell*, when the Court applied independent judgment in *Norris v. Alabama*²⁷⁶ to state court findings of fact underlying an equal protection claim about a racially segregated jury.²⁷⁷ Although the Court did not cite *Ben Avon*, *Ng Fung Ho*, or *Crowell*, those cases constitute *Norris*’s “inarticulated major premise.”²⁷⁸ In the decades that followed, the Court expanded the principle to require independent judgment by appellate courts on factual

272. Redish & Gohl, *supra* note 2, at 300.

273. For useful discussions of the constitutional fact doctrine in the context of appellate review of trial court records, see generally Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TULANE L. REV. 1229 (1996); Hoffman, *supra* note 261; Monaghan, *supra* note 15; Redish & Gohl, *supra* note 2; Amanda Reid, *Fructifying the First Amendment: An Asymmetric Approach to Constitutional Fact Doctrine*, 11 FED. CTS. L. REV. 109 (2019); Schechter, *supra* note 261.

274. See *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (“Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”). For this proposition, the *Gonzales* Court cited *Crowell*. See *id.*

275. See generally Redish & Gohl, *supra* note 2, for the “wandering” metaphor.

276. 294 U.S. 587 (1935).

277. *Id.* at 590.

278. Frank R. Strong, *The Persistent Doctrine of “Constitutional Fact,”* 46 N.C. L. REV. 223, 245 (1968).

issues related to forced confessions²⁷⁹ and double jeopardy determinations.²⁸⁰

After constitutional criminal procedure, the doctrine migrated to First Amendment cases. The Court required independent judgment by appellate courts on the factual questions of whether a statement presents a clear and present danger of a substantial evil,²⁸¹ whether it is expressive,²⁸² whether it is obscene,²⁸³ and whether it was made with actual malice.²⁸⁴ The Court did so in cases in which the fact finder was a jury and in which it was a judge.²⁸⁵ And it did so in the context of both state court decisions and federal trial

279. See *Lisenba v. California*, 314 U.S. 219, 237 (1941) (“Where the claim is that the prisoner’s statement has been procured by [coercive] means, we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a [state] court”); *Payne v. Arkansas*, 356 U.S. 560, 562 (1958) (“[W]here the claim is that the prisoner’s confession is the product of coercion we are bound to make our own examination of the record”); *Miller v. Fenton*, 474 U.S. 104, 115–16 (1985) (holding that the voluntariness of a confession is a legal question meriting de novo consideration, not a factual question meriting deferential review, even though it is fact-bound).

280. See *Ashe v. Swenson*, 397 U.S. 436, 442–43 (1970) (“[I]f collateral estoppel is embodied in [the due process] guarantee, then its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of ‘fundamental fairness,’ but a matter of constitutional fact we must decide through an examination of the entire record.”); *id.* at 445 (holding that collateral estoppel is embodied in the due process guarantee).

281. See *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (“[W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger . . . or whether they are of a character which the principles of the First Amendment . . . protect.”).

282. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567 (1995) (“[O]ur review of petitioners’ claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court.”).

283. See *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (“In ‘obscenity’ cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.”). For this proposition, the Court cited both the original line of cases including *Ng Fung Ho* and *Crowell*, see *id.* at 190 n.6, and the newer criminal procedure cases including *Norris*, see *id.* at 189.

284. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (“We must ‘make an independent examination of the whole record,’ so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.”); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (reaffirming the principle as articulated in *Sullivan*). But see *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989) (reframing the actual malice inquiry as a question of law rather than fact).

285. See *Sullivan*, 376 U.S. 254 (concerning a jury); *Bose*, 466 U.S. 485 (concerning a judge).

court decisions.²⁸⁶ Today, federal appeals courts generally “require plenary review in all cases involving First Amendment issues.”²⁸⁷ They do so despite Federal Rule of Civil Procedure 52(a), which requires that “[f]indings of fact” “not be set aside unless clearly erroneous.”²⁸⁸ Rule 52(a)’s default standard does not apply in the First Amendment context because “the stakes” are simply “too great to entrust them finally to the judgment of the trier of fact.”²⁸⁹

The constitutional fact doctrine as applied to constitutional criminal procedural issues and First Amendment issues is plainly not a doctrine of administrative law. As a result, it presents a different set of legal and normative issues.²⁹⁰ For example, it is challenging to articulate an Article III justification for the doctrine in the context of factual findings by federal district courts. In the context of factual findings made by juries, moreover, it is difficult to square with the Seventh Amendment, which provides that “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.”²⁹¹ In addition to “wandering” beyond the bounds of administrative law, the doctrine also shifted its focus from economic liberties to noneconomic ones.

But it is motivated in these contexts by a similar set of concerns to the ones that prompted the development of both the jurisdictional and constitutional fact doctrines in administrative law. Here, as there, it reflects “the importance of providing substantive protection for certain constitutional rights” and “the need for independent review on appeal where there is reason to believe that the original factfinder is biased or incompetent.”²⁹² And tracing the case law makes clear that it sprang directly out of the administrative law version.

286. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 n.2 (1968) (concerning a state court decision); *Bose*, 466 U.S. 485 (concerning a lower federal court decision).

287. See *Hoffman*, *supra* note 261, at 1455.

288. FED. R. CIV. P. 52(a).

289. *Bose*, 466 U.S. at 501 n.17.

290. For a sympathetic discussion of the doctrine in these contexts, see generally Monaghan, *supra* note 15. For a critical discussion, see generally Redish & Gohl, *supra* note 2.

291. U.S. CONST. amend. VII. *But see Sullivan*, 376 U.S. at 285 n.26 (“[The Seventh Amendment’s] ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts.”).

292. Blocher & Garrett, *supra* note 216, at 27. There is an additional rationale motivating the doctrine in the First Amendment cases that was not articulated in the administrative law debates a century ago, although perhaps could have been. In the First Amendment context, it reflects “the role of appellate courts in law development.” *Id.* That is because “the reaches of the First Amendment,” more so than the reaches of other constitutional provisions, “are ultimately defined by the facts it is held to embrace.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567 (1995).

IV. MAKING SENSE OF THE HISTORY

History is always relevant to law. But history is particularly relevant to administrative law, both because the debates that rage over the administrative state are often cast in historical terms and because the field is dynamic enough that historical models of administration provide fertile ground from which to identify present and future possibilities.²⁹³ As Jerry Mashaw writes, although “there is now too much water over the dam to return to the practices of judicial review” exercised by courts a century or more ago, there is still “much to be learned” from analyzing their approach.²⁹⁴ This Part offers brief reflections on what it is that can be learned from the jurisdictional and constitutional fact doctrines.

The doctrines were one of the earliest manifestations of concern over the accountability of executive officials. In England in the seventeenth century, that concern was directed towards justices of the peace and excise commissioners, who had the opportunity and sometimes the motive to exceed the bounds of their statutory authority when dispensing justice.²⁹⁵ In the United States in the early twentieth century, that concern was directed towards the ICC and the other early federal agencies, who had a similar opportunity and motive to exceed the constitutional limits placed on them when determining rates and issuing adjudicative orders.²⁹⁶

Tracing that concern across the centuries lends legitimacy to those who express it today. When jurists of the twenty-first century express skepticism about the capacity of agencies to self-police, they are not simply (or not always) waging an attack on government regulation. They are advancing a critique that is deeply embedded in our legal tradition. At times, the critique has been advanced by conservative proponents of economic liberties, as it was by Justice McReynolds in *Ben Avon* and Chief Justice Hughes in *Crowell* with respect to the rights of regulated corporations.²⁹⁷ At other times, the critique has been advanced by liberal proponents of noneconomic liberties,

293. Cf. Evelyn Tsisin, *Reflecting on History, Preparing for the Future*, REG. REV. (Mar. 31, 2024) (comments by Sophia Z. Lee), <https://www.theregreview.org/2024/03/31/reflecting-on-history-preparing-for-the-future> [<https://perma.cc/4K6M-X72P>] (“History has always been relevant to administrative law . . . History is only more essential today given the rise of originalism and more historically grounded approaches to interpretation not only of constitutional law, but also of the Administrative Procedure Act. These days, some of the hottest debates in administrative law involve historical questions.”).

294. Mashaw, *supra* note 53, at 2252.

295. See *supra* notes 38–51 and accompanying text.

296. See *supra* notes 72–89 and accompanying text.

297. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920); *Crowell v. Benson*, 285 U.S. 22 (1932).

as it was by Justice Brandeis in *Ng Fung Ho* and the second Justice Marshall in *Agosto* with respect to the rights of immigrants.²⁹⁸ As is always true in administrative law, agency power may be deployed for both liberal and conservative ends.²⁹⁹ It is, therefore, most useful to debate the appropriate scope of that power on the basis of neutral principles, not politics.

Tracing the concern also reveals that the scope of judicial review of agency action was one of the first battlefields in the war between proponents and critics of the administrative state.³⁰⁰ Today, debates over the administrative state are expressed across a range of legal issues: appointment and removal, the nondelegation and major questions doctrines, the assignment of adjudicative authority to agencies, agency procedures and the separation of functions, regulatory planning and review, and so on. But the scope of judicial review was a battlefield before some or most of those issues were battlefields because it is more elemental. While it is unlikely that the English excise commissioner in *Terry v. Huntington* was subject to complex procedural requirements or a regulatory planning process, the legal architecture of the seventeenth century provided at least for judicial review of his orders.³⁰¹ The scope of judicial review may also have been one of the first battlefields because our first and strongest impulse in the Anglo-American legal tradition is to look to courts to secure our liberties—whether or not they can or should provide relief in particular instances.

But in the pre-APA era, concern over agency accountability was most often expressed by debating the scope of judicial review of *factual* determinations, not legal ones. Our debates over judicial review of legal determinations, recently encapsulated by *Chevron* and *Loper Bright*, are a modern phenomenon.³⁰² Their modernity suggests nothing about their importance. In many contexts, a court's deference to an agency's legal determinations is likely to be more consequential than a court's deference to its factual determinations. But facts were the focus of our debates from the seventeenth century until the dawn of the APA because, across that long span of time, agency

298. *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Agosto v. INS*, 436 U.S. 748 (1978).

299. Agency power is more commonly framed as being useful for liberal objectives and antithetical to conservative ones. See, e.g., Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1600 (2018) (“Republicans . . . are generally more receptive to . . . constitutional attacks on the structure of the administrative state.”). While that framing is rooted in truth, it misses one of the lessons of history, which is that regulatory power itself is ideology-neutral.

300. See Tushnet, *supra* note 12, at 360 (cataloguing early debates over the scope of judicial review).

301. See notes 48–51 and accompanying text.

302. See *generally* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (overruling *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

power was expressed most powerfully through case-by-case action.³⁰³ Today, deference to legal determinations captures our attention because it is rulemaking, not adjudication, that most powerfully shapes the interaction between the public and the administrative state.

It remains to be seen whether the scope of judicial review of factual determinations will capture our attention once again in the years to come. In the wake of *Loper Bright*, judicial review of agency action now looks something like it did prior to the enactment of the APA: deferential review of the facts and nondeferential review of the law. But it is missing a critical element of the pre-APA model: nondeferential review of jurisdictional and constitutional facts.³⁰⁴ Attorneys seeking new ways to constrain agency power, or scholars seeking to return the law to its historic foundations, could advocate for the restoration of this element of the pre-APA model. In doing so, they would have a robust history and compelling legal and normative arguments on which to draw. They might demonstrate that there is not, in fact, “too much water over the dam” to breathe new life into old administrative law practices.

Breathing new life into the jurisdictional and constitutional fact doctrines would, however, be challenging. One of the functions of revisiting history is assessing what worked well in the past and what did not. These doctrines did not work particularly well, at least as applied to the early modern administrative state in the 1930s and 40s. It was in part their “casuistic difficulties” that caused their decline and the ensuing replacement of robust judicial review of agency factual findings (an *ex post* constraint) with robust procedures governing agency factfinding (an *ex ante* one).³⁰⁵ Any effort to reinvigorate the jurisdictional and constitutional fact doctrines would need to account for lessons learned. But regardless of whether they offer a partial blueprint for the future, at least they help explain the past and present.

303. See ERNST, *supra* note 89, at 28–29 (“Because the agencies of [Chief Justice Hughes] day typically acted on a case-by-case basis, rather than by promulgating rules, the medium in which the judges worked was a body of legal doctrines governing how courts reviewed agencies’ determination of the facts of a dispute.”).

304. Nine years ago, Adrian Vermeule wrote that *Crowell* “no longer fairly represents the prevailing equilibrium between administration and law,” because “[t]he main elements of the framework have come undone, in ways that have shifted power from courts to agencies.” Adrian Vermeule, *Portrait of an Equilibrium*, NEW RAMBLER REV. (Apr. 24, 2015), <https://newramblerreview.com/images/files/Vermeul-Review-of-Ernst.pdf> [<https://perma.cc/C3YP-MDVW>]. As Section III.C, *supra*, explained, the main elements of that framework were nondeferential review of law, nondeferential review of jurisdictional and constitutional facts, and deferential review of ordinary facts. *Loper Bright* restored one of the elements of the *Crowell* framework.

305. *Estep v. United States*, 327 U.S. 114, 142 (1946) (Frankfurter, J., concurring).

CONCLUSION

This Article began with a simple observation: a set of doctrines that was once central to the way scholars discussed administrative law no longer is. In explaining the reasons for that change, it sought to offer a useful taxonomy of the doctrines as they stood at the dawn of the APA in 1946 and as they have evolved and diminished since then. And in offering a taxonomy, it sought to reveal that the concerns fueling modern debates over the administrative state predate the administrative state itself, although they were once expressed in different forms. In a moment in which much of our law is open for reexamination, it is worth remembering jurisdictional and constitutional facts.