The Administrative State's Jury Problem

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THE ADMINISTRATIVE STATE’S JURY PROBLEM

Richard Lorren Jolly*

Abstract: This Article argues that the administrative state’s most acute constitutional fault is its routine failure to comply with the Seventh Amendment. Properly understood, that Amendment establishes an independent limitation on congressional authority to designate jurisdiction to juryless tribunals, and its dictate as to “Suits at common law” refers to all federal legal rights regardless of forum. Agencies’ use of binding, juryless adjudication fails these requirements and must be reformed. But this does not mean dismantling the administrative state; it is possible (indeed, necessary) to solve the jury problem while maintaining modern government. To that end, this Article advances a structural theory of the Seventh Amendment that situates the civil jury as an institution within the modern administrative state. It contends that the Seventh Amendment’s demands can be met either by providing a jury trial within administrative adjudication in the first instance, or by providing a de novo jury trial in an Article III court afterward. And it unearths and presents historical and judicial support for both approaches. The Article further considers the consequences of incorporating lay participation into the work of expert agencies and shows that the disruptive impact likely would be minimal. It concludes by arguing that reintroducing the jury will increase the procedural legitimacy of the administrative state and, perhaps, its substantive accuracy and effectiveness, too.

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INTRODUCTION

The modern administrative state is incongruent with the United States Constitution’s formal structuring of government powers. While this claim is controversial, it is hardly novel; the administrative state’s constitutional legitimacy has been under broad and sustained attack since its inception. But while twentieth-century judges generally resisted invitations to dismantle agencies for fear of disrupting modern government, this approach among the judiciary appears to be dissipating. A newly minted cohort of federal judges has been increasingly receptive to arguments critical of administrative agencies on structural grounds. These judges have not hesitated to buck decades of precedent in order to deem critical portions of regulatory schemes unconstitutional. Alarm bells abound. There is real worry that such judicial unwinding of the nation’s administrative systems will soon render the United States ungovernable.

The most common critiques lodged against the administrative state concern its supposed violation of the Constitution’s separation of powers among the legislative, executive, and judicial departments. While familiar sledding at this point, the argument goes that administrative rulemaking impermissibly delegates legislative authority to executive agencies in violation of Article I’s demand that “[a]ll legislative Powers... shall be vested in a Congress of the United States.” Similarly, statutory restrictions on presidential removal of certain administrative agents violate Article II’s command that “[t]he executive Power shall be vested

2. See, e.g., Mistretta v. United States, 488 U.S. 361, 372 (1989) (acknowledging the “necessities of government” and concluding that “Congress simply cannot do its job absent an ability to delegate power under broad general directives”); see also Jack M. Beermann, The Never-Ending Assault on the Administrative State, 93 NOTRE DAME L. REV. 1599, 1602 (2018) (noting that despite the considerable efforts of “administrative state skeptics, the courts... have] consistently... maintain[ed] the features of the administrative state by and large intact”).
4. See, e.g., Jarkesy v. SEC, 34 F.4th 446, 473 (5th Cir. 2022) (holding that SEC penalty enforcement violates multiple constitutional provisions, including the Seventh Amendment and the vesting clauses of Article I and Article II).
5. See, e.g., Ellen E. Sward, Legislative Courts, Article III, and the Seventh Amendment, 77 N.C. L. REV. 1037, 1053 (1999) (noting that legislative courts “handle so many cases every year that it would now be impossible to abolish them”); see also Gundy v. United States, 588 U.S. __, 139 S. Ct. 2116, 2130 (2019) (“[U]nder a strict reading of the nondelegation doctrine[,] most of Government is unconstitutional.”).
in a President of the United States of America.”7 And finally, adjudication before agency bureaucrats8 impossibly skirts Article III’s dictate that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”9 The scholarship on these issues is voluminous, hotly debated, and sharply at odds.10 But at least to its harshest critics, the administrative state is unconstitutional turtles all the way down.11

Beyond these familiar critiques of the administrative state, however, is an independent constitutional shortcoming that is routinely overlooked: The administrative state has a jury problem.12 What does that mean? When an agency seeks to impose some sanction, enforcement often occurs via agency adjudication— which for all intents and purposes looks just like a


8. “Bureaucrat” here and throughout refers to both administrative judges and administrative law judges. It is used to distinguish such actors from constitutionally defined Article III “judges,” who enjoy their positions without incumbrance.

9. U.S. CONST. art. III, § 1; see also Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915, 923 (1988) (“[C]onstitutional principles must be derived to circumscribe the role of legislative courts, or else . . . the Article III judiciary could . . . be all but obliterated.”).

10. Compare Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 COLUM. L. REV. 277, 280 (2021) (reviewing the history and concluding that “the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control”), with Ilan Wurman, Feature, Nondelegation at the Founding, 130 YALE L.J. 1493, 1493–94 (2021) (concluding “that Mortenson and Bagley have not come close to demonstrating their claim that there was no nondelegation doctrine at the Founding”).


12. While the administrative state’s jury problem is frequently noted, it has been fully interrogated by only a handful of scholars. See generally Sward, supra note 5; Martin H. Redish & Daniel J. La Fave, Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 WM. & MARY BILL RTS. J. 407 (1995); Mark I. Greenberg, The Right to Jury Trial in Non-Article III Courts and Administrative Agencies After Granfinanciera v Nordberg, 1990 U. CHI. LEGAL F. 479 (1990); Paul K. Sun, Jr., Note, Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial by Jury, 1988 DUKE L.J. 539 (1988); Note, Application of Constitutional Guarantees of Jury Trial to the Administrative Process, 56 HARV. L. REV. 282 (1942) [hereinafter Application of Constitutional Guarantees]. None of these scholars, however, offer a path for solving the jury problem while balancing the need to maintain modern state administration—the task assumed here.
traditional trial—before a bureaucrat lacking constitutional designation.\textsuperscript{13} That bureaucrat alone is responsible for determining both law and fact; there is no administrative jury.\textsuperscript{14} While a party may appeal the bureaucrat’s decision to an Article III court, no jury is made available on appeal either.\textsuperscript{15} Moreover, a bureaucrat’s decision is often immune from any collateral suit, thereby rendering their factual findings essentially final.\textsuperscript{16} In this way, Congress (with the judiciary’s blessing) has developed an extensive system of tribunals that bypass the jury as a constitutional actor. That’s the jury problem. And whereas reasonable minds can debate “[h]ow much [legislative] delegation is too much,”\textsuperscript{17} or how closely agencies must hew to a “unitary executive,”\textsuperscript{18} the Constitution is remarkably clear in prohibiting this type of juryless adjudication. The question isn’t even close: The jury is the constitutional thorn in the administrative state’s side.

The jury is a mandated component of the Constitution’s separation of powers. The Constitution requires that “[t]he Trial of all Crimes, except in Cases of Impeachment; shall be by Jury,”\textsuperscript{19} and the Sixth Amendment adds that this trial must be “by an impartial jury of the State and district wherein the crime shall have been committed.”\textsuperscript{20} The Fifth Amendment ensures in relevant part that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”\textsuperscript{21} And the Seventh Amendment guarantees that

[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

\begin{itemize}
\item[13.] See, e.g., Richard W. Murphy, Judicial Deference, Agency Commitment, and Force of Law, 66 OHIO ST. L.J. 1013, 1053–54 (2005) (describing formal adjudication under the Administrative Procedure Act and concluding that “[f]ormal adjudication functions much like a bench trial before a federal judge”).
\item[14.] See infra Part II.
\item[16.] See infra section II.B.
\item[17.] See Antonin Scalia, A Note on the Benzene Case, 4 REGUL. AM. ENTER. INST. J. ON GOV’T & SOC’Y 25, 27 (1980) (arguing that “the relevant factors are simply too multifarious” for courts to police the nondelegation doctrine).
\item[18.] See, e.g., Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 8 (1994) (“No one denies that in some sense the framers created a unitary executive; the question is in what sense.”).
\item[19.] U.S. CONST. art. III, § 2.
\item[20.] Id. amend. VI.
\item[21.] Id. amend. V.
\end{itemize}
Court of the United States, than according to the rules of the common law. Combined, these provisions vest in juries a structural power within the constitutional framework. But despite the Constitution’s dictates, judges have repeatedly upheld agencies’ authority to bring and resolve controversies without juries. Their approach to dodging the Fifth and Sixth Amendments has been relatively straightforward. By characterizing monetary fines imposed through administrative proceedings as civil rather than criminal in character, courts have concluded that the Constitution’s provisions providing for grand and criminal juries (and related criminal due process protections, for that matter) are inapplicable. In theory, this would be unproblematic as courts would scrutinize each sanction to determine whether its primary purpose is to punish or to compensate. But in practice, courts regularly defer to the legislature. “When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty,” the Second Circuit summarized, “the courts have taken Congress at its word.” Thus, the Constitution’s criminal and grand jury requirements are easily dodged.

The Seventh Amendment, in contrast, has required far greater judicial contortions to evade its dictates as to civil juries—and for that reason is the main focus of this Article. To say that the case law in this area is tangled would be an understatement. It is constitutionally groundless, internally inconsistent, and seems to be primarily motivated by functionalist concerns of expanding the State’s regulatory power. Perhaps the only underlying jurisprudential thread is the Supreme Court’s erroneous conflation of the Seventh Amendment’s requirements with those of Article III. The Court most recently reaffirmed this error in 2018.

22. Id. amend. VII.
25. See id. at 1834.
27. This Article is hardly the first to critique the Court’s Article III and Seventh Amendment jurisprudence. See, e.g., Judith Resnik & Lane Dilg, Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States, 154 U. PA. L. REV. 1575, 1639 n.270 (2006) (noting that the Court’s Article III jurisprudence “verges on the incoherent”); Redish & La Fave, supra note 12, at 408 (calling the public rights exception “indefensible as a matter of Seventh Amendment construction”).
In *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, the Court explained that “[w]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, ‘the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.’” But the Court there did not fully explore the connection between the two provisions, nor has it ever. Instead, it dedicated just a single, six-sentence paragraph to the issue. True, the Court’s perfunctory analysis likely flowed from the fact that “[n]o party challenge[d] or attempt[ed] to distinguish” the Court’s line of Seventh Amendment cases. But it is also indicative of the Court’s broader failure to develop Seventh Amendment doctrine that secures the civil jury within the modern administrative state.

This routine evasion of the Seventh Amendment’s dictates is not a mere academic concern. Administrative agencies have blossomed over the twentieth century by empowering bureaucrats to enforce government action unchecked by lay involvement. As a result, the administrative state has become “the government’s primary mode of controlling Americans.” The numbers are telling: As of March 2017, there were 1,931 administrative law judges employed by the federal government—over three times the number of Article III district court judgeships. Combined, these bureaucrats likely preside annually over more than 750,000 proceedings (roughly double the number of civil and criminal filings in Article III courts). Furthermore, the neutrality of these bureaucrats is necessarily suspect. They “are inherently plagued by cognitively dissonant impulses to vigorously carry out what they perceive to be their regulatory mandate, on the one hand, and remain within restrictive constitutional limits, on the other.” Studies show that private parties lose in agency proceedings at a disproportionate rate compared to

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30. *Id.*
31. *Id.*
32. HAMBURGER, supra note 11, at 1.
Article III proceedings. And the sanctions imposed can be extraordinary.

Solving the jury problem is imperative if the modern administrative state is to comply with the Constitution. To that end, this Article addresses the administrative state’s jury problem on two levels. On the primary level, it is concerned with advancing a theoretical framework for understanding the Seventh Amendment in relation to Article III. It draws upon notions of separation of powers to mark the contours of the jury’s vested constitutional authority, whether exercised within or outside of Article III courts. And it contends that courts’ near complete abdication of jury authority to administrative agencies must be reversed. Yet on the second, and more practical level, this Article is concerned with solving the administrative state’s jury problem. It starts from the position that the administrative state is a necessary component of modern governance. From there, it proposes methods for integrating juries into adjudication of administrative disputes, striving to ensure that agencies can continue to operate without heavy disruption.

The Article is divided chiefly into four parts. Part I articulates the contours of the Seventh Amendment by focusing on its history and text. It recounts that the civil jury was a hard-fought civil liberty at common law and among the most cherished rights at the American founding. It then reviews the Supreme Court’s Seventh Amendment jurisprudence, specifically the contours of the historical test that dictates the scope of the right within Article III courts. Part II articulates the administrative state’s jury problem. Specifically, it critiques the modern “public rights” exception to the Seventh Amendment as lacking foundation in the Constitution’s text or history. And it reviews before rejecting the functionalist chase for adjudicative efficiency motivating courts’ discarding of the jury. Part III endeavors to solve the jury problem by advancing a structural theory of the Seventh Amendment. It disentangles the Seventh Amendment from Article III, contending that while the primary purpose of Article III is realized via the appellate review model of the judicial power, the Seventh Amendment is unique in requiring lay

36. See Barnett, supra note 34, at 1645 (noting that the SEC prevails in in-house proceedings “frequently—sometimes 100% of the time in a given year”).

37. See, e.g., Lucia v. SEC, 585 U.S. __, 138 S. Ct. 2044, 2066 (2018) (involving a $300,000 fine and a lifetime bar on participating in the securities industry).

38. See infra section I.A.

39. See infra section I.B.

40. See infra section II.A.

41. See infra section II.B.
input prior to final disposition of a dispute implicating legal rights.\textsuperscript{42} It then offers two solutions for integrating the jury into the modern administrative state: The first is to provide jury trials within the administrative tribunal at the outset,\textsuperscript{43} and the second, alternatively, is to secure de novo jury review in an Article III court afterward. Part IV addresses the skeptics. It contends that the proposed approaches would not significantly disrupt the administrative state because the majority of agency adjudication already occurs through informal and consensual proceedings.\textsuperscript{44} What is more, not only would these proposals not destroy the administrative state, but their implementation would actually strengthen its democratic legitimacy by bringing the public back into state administration.\textsuperscript{45}

I. JURYLESS TRIBUNALS AND THE CONSTITUTION

Governments have long sought to evade juries by redirecting disputes to alternative, juryless tribunals. In the eighteenth century, the Crown’s expansive use of juryless vice admiralty courts was a chief motivator of the American Revolution. And soon after, the importance of securing jury trials was at the center of the Constitution’s ratification debates. While the Seventh Amendment is not self-defining, this history must inform how we read its text and understand its scope. Accordingly, to understand fully the administrative state’s jury problem, we must situate our discussion within (a) the broader history and use of juryless tribunals, particularly at the founding, and (b) the Seventh Amendment’s intended scope.

A. Juryless Tribunals at the Founding

Emerging just over a century ago, the United States’ juryless administrative state is relatively new.\textsuperscript{46} By comparison, the jury is an ancient institution. Its common law beginnings stretch back to the Norman Conquest.\textsuperscript{47} And its use became more widespread after 1215 when trial by ordeal and trial by combat were no longer granted religious sanction by

\textsuperscript{42} See infra section III.A.

\textsuperscript{43} See infra section III.B.

\textsuperscript{44} See infra section IV.A.

\textsuperscript{45} See infra section IV.B.

\textsuperscript{46} Most scholars tag the Interstate Commerce Act in 1887 as the first modern regulatory agency. See, e.g., \textsc{Lawrence M. Friedman, A History of American Law} 439 (2d ed. 1985) (noting that the creation of the Interstate Commerce Commission “has been taken to be a kind of genesis” of federal administrative law).

Rome, and the Magna Carta was signed guaranteeing that “no freeman shall be . . . in any way molested . . . unless by the lawful judgment of his peers.” But this early jury was not a fact-finding body, as the jury is today; it was instead a fact-knowing body. Laypeople were compelled by royal authority not because they were neutral actors, but because they possessed personal knowledge of the particular dispute. Jurors were essentially witnesses.

While a full accounting of the last 800 years of the jury’s development is beyond this paper’s scope, it must be stressed that even in this early form the jury was already serving as both an administrative institution and as a buffer against government action. The jury allowed the Crown to carry out government business cheaply, as jurors were not paid, while also ensuring a local voice in the justice system. This integration of community members into government administration necessarily transformed the relationship between subject and sovereign. So while it took some three hundred more years for the jury to morph from a collection of fact-knowing witnesses into a body of fact-finding adjudicators, the jury’s political roots were already taking hold. Because of this, the story of the jury as an institution—and so too that of the Seventh Amendment—is as much about expanding its political power as it is about cabining that power.

Perhaps the most common way of controlling the jury throughout history has been not by eradicating it, but by redirecting disputes so as to

48. See id. at 584.

49. E.g., Edward Keynes, Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process 10–11 (1996) (quoting William Sharp McKeehin, Magna Carta: A Commentary on the Great Charter of King John 436 (1905)). True, the notion that “the modern institution of trial by jury derives from the Magna Carta is one of the most revered of legal fables”—the result “of the inevitable habit of reading later ideas into earlier institutions.” See Felix Frankfurter & Thomas G. Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 922–23 (1926) (quoting Charles Howard McIlwain, The High Court of Parliament and Its Supremacy 57 (1910)). But there has long been political power in this fable, which helped to usher in the jury as a political institution. See The Declaration of Independence para. 20 (U.S. 1776).


51. See id. at 91 (“The jurors were to be selected for their knowledge of the underlying events; if they were ignorant, the solution was not to present evidence, but to select more jurors until one found those who knew.”).

52. See Landsman, supra note 47, at 583–84.

53. This was not their intention. As Stephen Yeazell reminds, “[m]edieval kings intended the jury to enable a thinly stretched bureaucracy to administer an unruly nation; they got instead an institutionalized means of civil disobedience.” See Yeazell, supra note 50, at 88.

evade it. England’s sixteenth-century use of juryless prerogative tribunals is particularly illustrative of this practice, with the Star Chamber being the most infamous example. The Star Chamber featured neither grand nor petit juries; instead, Crown-controlled privy counselors determined issues of both law and fact. And though it emerged to deal with administrative matters—such as “[u]rban planning, monopolies, the standards for clothing, the prices for food and labor, and other economic regulations”—controversies were often strategically characterized to fit within its particular jurisdiction. That is, not unlike the way administrative tribunals in the United States today evade criminal juries by relabeling punitive fines as civil sanctions, the Star Chamber was wont to “punish[] under the rubric of ‘misdemeanors’ what actually were felonies at common law.” This meant that procedural protections (including the jury) could fall aside.

The Star Chamber’s juryless proceedings were at first justified as necessary to achieve government efficiency, security, and order. And controlling and evading juries—which were frequently accused of subornation—came to be part of the Chamber’s core public appeal. But over time the Chamber’s jurisdiction expanded to include, in effect, any civil or criminal case in which offenses against the state were alleged or state officers were involved. Because of this expansion, by the seventeenth century the public increasingly viewed the Chamber as an arbitrary and oppressive tribunal. This was in no small part due to its lack of juries. Though the Act abolishing the Star Chamber in 1641 listed many grievances, the first made explicit reference to the Magna Carta’s promise that no freeman shall be harassed by the King “but by lawful [sic] Judgement of his Peers.” It was not merely the want of due process,
but the want of public participation in that process that drove dismantling of the Chamber.

Parliament’s emphasis on the lack of jury protections in abolishing the Star Chamber is not surprising. By the 1600s, the right to trial by jury was celebrated as a broad, fundamental liberty of the English.64 William Blackstone, among the institution’s most vocal champion, later captured this sentiment in his Commentaries on the Laws of England, praising the jury as the “the glory of the English law” and “the most transcendent privilege which any subject can enjoy.”65 Blackstone emphasized that the jury was a “strong and twofold barrier . . . between the liberties of the people, and the prerogative of the crown,”66 because “the truth of every accusation . . . should be confirmed by the unanimous suffrage of twelve of [a defendant’s] equals and neighbours, indifferently chosen, and superior to all suspicion.”67 Such reverence was not because of jurors’ superior fact finding skills over judges. Instead, it was because the jury as an institution, which had long been an implicitly political body, had become explicitly so. Seventeenth-century jurors were increasingly flexing their independent power to acquit defendants in the face of religious and political persecution.68 And legal developments restricting the power of judges to punish jurors for issuing such false verdicts freed jurors to reach outcomes against the direction of law,69 unleashing the institution as a conspicuously political tool.70

That tool was particularly attractive to North American colonists, who turned to jury obstinance as a means of asserting opposition to the increasingly unpopular Crown. The seditious libel case of John Peter

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64. John Fortescue, Commenation of the Laws of England 44–45 (Francis Grigor trans., 1917) (1537) (discussing the role of peremptory challenges and the criminal jury before famously stating, “one would much rather that twenty guilty persons should escape the punishment of death, then that one innocent person should be condemned, and suffer capitally”).
66. 4 id. at *349.
67. 4 id. at *349–50.
69. See Bushell’s Case, 124 Eng. Rep. 1006, 1012 (C.P. 1670) (“[A judge] can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence.”). For a discussion on the foundation and importance of Bushell’s Case, see generally Simon Stern, Note, Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case, 111 Yale L.J. 1815 (2002).
Zenger in 1735 is perhaps the most famous example.  

The jury there refused to convict Zenger for printing allegations of corruption against New York Governor William Cosby, despite great pressure to convict from the presiding judge. The case was celebrated at the time throughout the colonies and is recognized today as an important spark of proto-rebellion. Often forgotten, however, is that the allegation of corruption printed by Zenger included the Governor’s efforts to create a new court of equity operating without a jury, from which the Governor expected to receive a favorable verdict in a suit against one of his debtors. Again we hear the historical refrain of powerful actors attempting to evade jury authority—not by eradicating the institution, but by creating or expanding alternative tribunals.

Jury revolt in America became increasingly common in the decades preceding the Revolution. This occurred both offensively and defensively. That is, colonial jurors would often refuse to enforce British laws, regularly acquitting smugglers accused of avoiding tariffs, while also awarding damages to those smugglers whose ships had been searched by royal officials. Such acts of jury disobedience were so common that one colonial governor complained, “a trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.” Another added: “A Custom house officer has no chance with a jury, let his cause be what it will. And it will depend upon the vigorous measures that shall be taken at home for the defense of the officers, whether there be any Custom house here at all.”

Parliament responded with a now familiar strategy—legislatively directing disputes to juryless tribunals. Most significant was the

72. See id. at 787–88.
73. Id.
74. See generally ALEXANDER, supra note 71.
75. For an infamous example, consider Erving v. Cradock, in which a Massachusetts shipowner successfully brought a common law writ of trespass against a royal revenue officer who had seized his ship for trade in contraband. Erving v. Cradock, 1 QUINCY 553 (Mass. 1761), in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1773, at 553 (Samuel M. Quincy ed., 1865); cf. Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 GEO. WASH. L. REV. 723, 751 (1993) (“The value of a jury buffer in civil cases was demonstrated by the English experience, where juries had awarded substantial damages against officials who had committed unreasonable searches and seizures.”).
77. Erving, in QUINCY, supra note 75, at 557 n.4.
Stamp Act\textsuperscript{78} in 1765, which was meant to raise revenue to pay for the French and Indian War.\textsuperscript{79} Concerned that the measure might be rendered ineffectual by colonial jurors, Parliament placed enforcement in vice-admiralty courts.\textsuperscript{80} Traditionally, vice-admiralty courts were bodies established to resolve disputes that arose on the high seas; they were essentially specialized maritime courts, which did not employ juries.\textsuperscript{81} Moreover, a decision by the vice-admiralty court precluded a right of recovery of damages in a subsequent common-law action because of the court’s prior decree of condemnation.\textsuperscript{82} The accused were thus deprived of a jury at every stage.

This expansion of juryless tribunals prompted a fierce response among the colonists. It motivated the Stamp Act Congress in 1765, the first congregation of American colonists, which declared: “[T]rial by jury is the inherent and invaluable right of every British subject in these colonies,”\textsuperscript{83} and that “[t]he Stamp Act, and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.”\textsuperscript{84} That should sound familiar. The point was echoed in the Declaration of Independence just twelve years later, which justified independence in part because the Crown had “depriv[ed] [the Colonists] in many cases, of the benefits of Trial by Jury.”\textsuperscript{85} Without question, the English use of juryless tribunals helped prompt the American Revolution.

Despite this significant role in driving independence, the nascent American government did not secure civil and criminal jury trials under the Articles of Confederation.\textsuperscript{86} And nearly a decade later in the summer

\textsuperscript{78} Stamp Act, 5 Geo. 3 c. 12.
\textsuperscript{79} See id.
\textsuperscript{80} See Carl Ubbelohde, The Vice-Admiralty Courts and the American Revolution 24–25 (1960). It should be noted that if these trials had been in England, they would have likely occurred in admiralty without a jury—a fact conveniently ignored by patriots. Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 MINN. L. REV. 639, 654 n.47 (1973).
\textsuperscript{81} Instructions Adopted by the Braintree Town Meeting (September 24, 1765), reprinted in 1 PAPERS OF JOHN ADAMS 138 (Robert J. Taylor, Mary-Jo Kline & Gregg L. Lint eds., 1977). As later-President John Adams complained: “In these Courts one Judge presides alone, No Juries have any Concern there. . . .” Id.
\textsuperscript{82} Wolfram, supra note 80, at 654 n.47.
\textsuperscript{84} Resolutions of the Stamp Act Congress, res. 8 (Oct. 19, 1765), reprinted in SOURCES OF OUR LIBERTIES, supra note 83, at 271.
\textsuperscript{85} THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).
\textsuperscript{86} This does not mean juries were completely overlooked. Although the Articles of Confederation did not secure either civil or criminal juries, that is likely because it did not provide for a robust
of 1787, the Framers secured only the criminal jury in the proposed Constitution; a provision providing for the civil jury was notably absent.\textsuperscript{87} This was not because the civil jury as an institution was no longer widely celebrated among Americans.\textsuperscript{88} Instead, its absence resulted from the difficulty in drafting a provision that would account for the varied jury practices throughout the several states.\textsuperscript{89} States differed dramatically as to which civil cases were entitled to jury trials and as to the particular procedures of those trials.\textsuperscript{90} Any attempt to draft constitutional language would have failed to cover this range of practices.\textsuperscript{91} Early Americans were not sympathetic to the Framers’ drafting difficulty. The lack of civil jury protections was quickly perceived as the Constitution’s greatest weakness.\textsuperscript{92} Anti-Federalists argued that giving the Supreme Court appellate jurisdiction as to “law and fact” effectively eradicated the jury right, and they wrote passionately of the parade of centralized judicial system. See Wolfram, supra note 80, at 655–56. The only national court was the Court of Appeals in Cases of Capture, which dealt with prize cases. See ARTICLES OF CONFEDERATION of 1781, art. IX. And as to prize cases, Congress directed that such matters be decided by jury in state courts, though they ordinarily would have implicated admiralty jurisdiction. See Deirdre Mask & Paul MacMahon, The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction, 63 BUFF. L. REV. 477, 490 (2015). Moreover, in the loose government established as part of the Northwest Ordinance, civil and criminal jury trials were secured. See AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO, ch. VIII, 1 Stat. 50, 52 n.a (1787) (establishing that “[t]he inhabitants of the said territory shall always be entitled to the benefits of . . . the trial by jury”).

\textsuperscript{87} See U.S. CONST., art. III.

\textsuperscript{88} See THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.”).

\textsuperscript{89} See id. at 503.

\textsuperscript{90} Id.

\textsuperscript{91} As James Wilson explained in 1787:

The want of uniformity would have rendered any reference to the practice of the states idle and useless: and it could not, with any propriety, be said, that “the trial by jury shall be as heretofore:” since there has never existed any [] federal system of jurisprudence, to which the declaration could relate.

James Wilson, Address to a Meeting of the Citizens of Philadelphia on October 6, 1787, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, app. A, at 101 (Max Farrand ed., 1911). This is the formal reason why civil juries were not included, but it must also be acknowledged that everyone at the Constitutional Convention was tired and wanted to go home. That summer in Philadelphia was one of the hottest in memory, and the contentious issue as to civil juries was raised a mere five days before the Convention was set to adjourn—which was already running over schedule. Wolfram, supra note 80, at 657–661; id. at 661 (“[The delegates] stay [in Philadelphia] had been uncomfortable physically because of intolerably hot weather and inadequate accommodations.”).

\textsuperscript{92} See THE FEDERALIST NO. 83, supra note 88, at 495 (outlining the political success of this Anti-Federalists’ argument).
horrors that would result in the absence of civil juries.93 Elbridge Gerry, one such Anti-Federalist, is noted to have made explicit reference to that infamous English tribunal at the end of the Constitutional Convention: “[T]he rights of the Citizens [a]re . . . rendered insecure . . . by the general power of the Legislature . . . to establish a tribunal without juries, which will be a Star-chamber as to Civil cases.”94 Federalists retorted that while Congress possessed the authority to establish juryless tribunals, members would not dare deprive citizens of this cherished liberty for fear of reprisal.95 Of course, such an amendment was necessary precisely because the states were unwilling to trust Congress to mark the bounds of the jury’s role.96 History had shown how easily the civil jury could be evaded if it were not concretely secured.

Readers likely know how this story ends. Of the nine states that submitted amendment proposals, eight offered specific language for securing the civil jury.97 Massachusetts explicitly conditioned its ratification on the addition of a civil jury clause.98 James Madison then drafted the text of what would become the Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.99

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93. See, e.g., Essay of a Democratic Federalist (Oct. 17, 1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981) (listing potential state abuses and claiming “in such cases a trial by jury would be our safest resource, heavy damage would at once punish the offender, and deter others from committing the same”).


95. See James Iredell in the North Carolina Ratifying Convention (July 28, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (Jonathan Elliot ed., 2d ed. 1891) (predicting that, should legislative restrictions be made on the civil jury, “[Congress’s] authority would be instantly resisted,” drawing upon them “the resentment and detestation of the people” such that “[t]hey and their families, . . . would be held in eternal infamy”).

96. See, e.g., Sward, supra note 5, at 1102 (reviewing the history and concluding that it “suggests that the Seventh Amendment was born of an unwillingness to trust Congress to do the right thing with respect to the right to a civil jury and is therefore an independent check on Congress’s power to determine the mode of adjudication”).


99. U.S. CONST. amend. VII.
It was ratified on December 15, 1791.\textsuperscript{100}

\textbf{B. Unpacking the Seventh Amendment}

Although it is clear that the civil jury was meant primarily to serve a political role, little is known about the specific intended scope of the Seventh Amendment.\textsuperscript{101} As one student summarized: “Antifederalist rhetoric does not offer definitions, but attitudes—suspicion toward judicial power, fear that the government will serve the few against the many, and respect for the civil jury as the last bulwark against oligarchy and the last redoubt of self-government.”\textsuperscript{102} Or, put more critically by another scholar, the Anti-Federalist’s argument “dealt with nothing more specific than the general proposition that civil juries were a good thing.”\textsuperscript{103} The Amendment’s text provides little guidance. It features the Constitution’s only express reference to “common law,” and it seems, by the use of the word “preserve,” to ossify the jury right at some historical point.\textsuperscript{104} With little guiding them, early courts fashioned a historical test that continues to govern the civil jury trial right within Article III courts today, though with slight updates.

There was never a question that the Seventh Amendment does not extend to all civil proceedings. By its terms, the jury right applies only to those “Suits at common law” meeting the twenty-dollar threshold.\textsuperscript{105} As such, since early in the nation’s history, courts have marked the Amendment’s common law bounds in contradistinction to those juryless proceedings in equity and admiralty. In 1830, Justice Story planted the flag at the federal level in \textit{Parsons v. Bedford}\textsuperscript{106}:

\begin{quote}
By common law, [the framers of the Seventh Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction
\end{quote}

\textsuperscript{100}. Although originally proposed by Congress on September 25, 1789, the Seventh Amendment did not become effective (along with nine other amendments that would later come to be known collectively as the Bill of Rights) until Virginia’s ratification on December 15, 1791. See \textit{The Constitution of the United States of America: Analysis and Interpretation} 25 n.2 (Johnny H. Killian, George A. Costello & Kenneth R. Thomas eds., 2004).

\textsuperscript{101}. See Henderson, \textit{supra} note 98, at 299 (concluding from the history that while “a general guarantee of the civil jury as an institution was widely desired, . . . there was no consensus on the precise extent of its power”).


\textsuperscript{103}. See Henderson, \textit{supra} note 98, at 292.

\textsuperscript{104}. U.S. \textit{Const.} amend. VII.

\textsuperscript{105}. \textit{Id.}

\textsuperscript{106}. 28 U.S. (3 Pet.) 433 (1830).
to those where equitable rights alone were recognized, and equitable remedies were administered... In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, to those where equitable rights alone were recognized, and equitable remedies were administered... In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, to those where equitable rights alone were recognized, and equitable remedies were administered... In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, to those where equitable rights alone were recognized, and equitable remedies were administered... In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

This is likely correct. At the founding, the division between courts of law and courts of equity and admiralty was stark, with a key distinction being the availability of a jury only in courts of law. What is more, the Judiciary Act of 1789—passed by Congress the same week as the Seventh Amendment—secured jury trials only in courts of law, not in courts of equity or admiralty. Given the history, this distinction between traditional forums is likely what the Framers had in mind.

But defining “common law” in contradistinction to equity and admiralty does not answer the question of whose common law the Seventh Amendment references. Recall that this was the chief difficulty in drafting the text of the civil jury right during the ratification debates, as each state had different practices as to when juries were required. Without engaging in the particulars of this debate, Justice Story proclaimed: “Beyond all question, the common law here alluded to [in the Seventh Amendment] is not the common law of any individual state, ... but it is the common law of England, the grand reservoir of all our jurisprudence.”

Despite the lack of analytical support, the notion

107. Id. at 447 (emphasis omitted).
108. Id. at 446 (“It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene...”).
109. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (“The trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.”).
110. Thomas Jefferson made a similar proposal for the civil jury right in a letter sent to James Madison on August 28, 1789. See Jefferson to Mr. Madison (Aug. 28, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 198 (1905). Jefferson wrote: [All] facts put in issue before any judicature shall be tried by jury except in cases of admiralty jurisdiction wherein a foreigner shall be interested, in cases cognisible before a court martial concerning only the regular officers [and] soldiers of the U.S. or members of the militia in actual service in time of war or insurrection, [and] in impeachments allowed by the constitution.

111. See supra notes 87–90 and accompanying text.
113. Note that the Supreme Court soon took a very different approach in interpreting Article III’s admiralty jurisdiction. The Court explained in Waring v. Clarke: “The grant of admiralty power to the courts of the United States was not intended to be limited or to be interpreted by what were cases of admiralty jurisdiction in England when the constitution was adopted.” 46 U.S. (5 How.) 441, 459 (1847). And, overlooking the Seventh Amendment, proclaimed: “We think we may very safely say, such interpretations of any grant in the constitution, or limitations upon those grants, according to any English legislation or judicial rule, cannot be permitted.” Id. at 458–59.
persisted that “Suits at common law” references English practice. By the end of the nineteenth century, the Court confirmed that specifically what the Amendment “preserved” was the common law of England at the time of the Amendment’s ratification in 1791.

Tying the Seventh Amendment to eighteenth-century English practice should immediately strike readers as problematic for the reasons discussed in the preceding section. The common law is not—and never has been—a defined monolith. As Justice William Brennan would much later note: “[T]he line between law and equity (and therefore between jury and non-jury trial) was not a fixed and static one.” It was instead, Brennan explained, “a continual process of borrowing by one jurisdiction from the other.” As such, reading the Amendment’s guarantee as defined by English practice is, in some sense, a contradiction of terms. The jury right was not secure from encroachment in England; and as a result, the civil jury has been easily, and repeatedly, discarded by Parliament and English judges. The founders no doubt knew this. At the time of the founding, “the English judicial system was a veritable patchwork of diverse tribunals that had accumulated over the years to serve particular constituencies or to apply particular kinds of law.” If the Seventh Amendment was meant to reflect strictly the English practice as to civil juries, it would have been a dead letter the moment the ink dried.

Implicitly recognizing this shortcoming, over the course of the twentieth century the Supreme Court began to mold the strict historical

114. See Wolfram, supra note 80, at 641 (“No federal case decided after Wonson seems to have challenged this sweeping proclamation . . . .”). But see Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89 (1998) (arguing that the Seventh Amendment was meant to tie the civil jury right to state court practices).

115. See Thompson v. Utah, 170 U.S. 343, 350 (1898) (“[T]he word ‘jury’ and the words ‘trial by jury’ were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption . . . .”).


117. Id. (quoting James, supra note 116, at 658).

118. See supra section I.A. To be sure, over the last two hundred years Parliament has repeatedly exercised its power to reduce the scope of the civil jury’s authority in England. See Chancery Amendment Act 1858, 21 & 22 Vict. c. XXVII, reprinted in A COLLECTION OF THE PUBLIC GENERAL STATUTES, PASSED IN THE TWENTY-FIRST AND TWENTY-SECOND YEARS OF THE REIGN OF HER MAJESTY QUEEN VICTORIA, 1858 (expanding the jurisdiction of courts of equity); Administration of Justice (Miscellaneous Provisions) Act 1933, 23 & 24 Geo. 5 c. 36 (limiting the right of trial by civil jury to only a subset of causes of action). For a discussion on the collapse of the English civil jury, see generally Sally Lloyd-Bostock & Cheryl Thomas, Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales, 62 LAW & CONTEMP. PROBS. 7 (1999).

test into something more workable. This was especially necessary following the merger of law and equity at the federal level in 1938, which allowed both legal and equitable issues to arise in the same action and gave rise to deep tension about the remaining province of the civil jury. In addressing this tension, the Court would come to explain in *Ross v. Bernhard* that the jury right under the Seventh Amendment extends to *any* legal question, even in actions that were historically only cognizable in equity. The Court then advanced a three-part test for determining application of the Seventh Amendment, explaining: “[T]he ‘legal’ nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries.” The Court would later refine this test by dropping the third factor—the balancing of the jury’s practical abilities (at least with respect to Article III courts)—and come to place primary emphasis on the right at issue and the remedy sought.

Under this now-established approach, the jury right extends to all legal disputes, even those developed after the Seventh Amendment’s ratification in 1791. Stressing this point in *Pernell v. Southall Realty*, the Court echoed Justice Story in noting that the Amendment “embrace[s] all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights” and therefore extends beyond the common law forms of action recognized at ratification. The Court explained that “[w]hether or not a close equivalent to [the statutory action] existed in England in 1791 is irrelevant for Seventh Amendment purposes.” A jury trial is required “provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty.” Under this now-established test, it is not strict history but rather loose historical analogizing to the rights at issue and relief sought that marks the Seventh Amendment’s scope.

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120. O.L. McCaskill, *Jury Demands in the New Federal Procedure*, 88 U. PA. L. REV. 315, 329 (1940) (outlining the confusion over the role of the jury following merged courts of law and equity, and warning that “[t]he wishes of the parties, or the guesses of the trial judges, rather than the Constitution, will determine [the extent of the jury right].”)


122. See id. at 543; see also *Dairy Queen*, Inc. v. Wood, 369 U.S. 469, 470 (1962) (confirming that the jury right extends to legal issues incidental to equitable rights).

123. *Ross*, 396 U.S. at 538 n.10.

124. See infra section II.B.


126. Id. at 375 (emphasis added) (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830)).

127. Id. (emphasis added).

128. Id.
The Court’s modified historical test protects the civil jury right within Article III. But it should be stressed that this approach largely fails to take into consideration the original political motivations behind constitutionalizing the civil jury, which was for it to serve as a check on the State and its actors. The Court instead treats the civil jury not as a pivotal institution within the constitutional structure, but rather as an individual right. This is in stark contrast to the Court’s recognition of the criminal jury’s institutional role, which the Court has championed as a “guard against a spirit of oppression and tyranny on the part of rulers” and referred to as a “circuitbreaker in the State’s machinery of justice.” It is perhaps this failure to appreciate the civil jury’s institutional import that has allowed the Court to make repeated concessions to congressional manipulation of the civil jury right. Such concessions are perhaps most apparent in the context of the administrative state.

II. THE JURYLESS ADMINISTRATIVE STATE

While the Supreme Court’s historical test has its shortcomings, at least it is tied to the text of the Seventh Amendment. The same cannot be said for the Supreme Court’s treatment of the civil jury in the administrative context, where the Court has jettisoned the jurisprudence described above and largely abandoned the jury right altogether. It has done so by recognizing a public rights exception consisting of two inquires: (a) whether the dispute at issue concerns some public interest committed by Congress for resolution by a juryless tribunal; and (b) whether functionalist considerations counsel toward discarding the jury. Neither of these inquiries has foundation in the text or history of the

129. See, e.g., Sward, supra note 5, at 1102 (noting the Seventh Amendment’s original purposes).
130. Admittedly, some judges have emphasized the political importance of the civil jury, but this position is by far the minority and almost always presented in dissent. See, e.g., Green v. United States, 356 U.S. 165, 209 (1958) (Black, J. dissenting) (“A great concern for protecting individual liberty from even the possibility of irresponsible official action was one of the momentous forces which led to the Bill of Rights. And the . . . Seventh . . . Amendment[] was directly and purposefully designed to confine the power of courts and judges . . . .”); Edmonson v. Leesville Concrete Co., 895 F.2d 218, 236 (5th Cir. 1990) (Rubin, J., dissenting) (“The Seventh Amendment preserves the right of trial by jury . . . . thus, interposing the civil jury as an important constraint on the power of government.”); Frank Irey, Jr., Inc. v. Occupational Safety & Health Rev. Comm’n, 519 F.2d 1200, 1208 (3d Cir. 1975) (noting that the Seventh Amendment was adopted because the founders were “fearful of the aggrandizement of power in the national government”).
Constitution. The Supreme Court’s Seventh Amendment jurisprudence in the context of the administrative state is built on sand.

A. The Unrestrained Public Rights Carveout

The main way that the Supreme Court has ushered in the juryless administrative state is by recognizing what it has termed “public rights” as a class of disputes not constitutionally requiring a civil jury. What are “public rights”? No one knows anymore. The Court has never given the term a fixed meaning. And it is so manipulatable as a concept that, as one scholar put it, it is essentially “meaningless.” This critique has not been quietly made. In 1982, the Supreme Court itself acknowledged that “[t]he distinction between public rights and private rights has not been definitively explained in our precedents.” And not much had changed by 2011 when the Court understated that the public rights exception “has been the subject of some debate” and expressed skepticism over recognizing “amorphous ‘public right[s].’” Or as Justice Scalia put it, “something is seriously amiss with our jurisprudence in this area.”

The modern public rights exception can be traced back to the Supreme Court’s 1856 decision in Murray’s Lessee v. Hoboken Land & Improvement Co. There, Samuel Swartwout, a United States customs agent, embezzled more than a million dollars and used the money to purchase land in New Jersey. To recover the funds, the Treasury Department issued a distress warrant against Swartwout, which voided the purchase of the land and allowed the government to seize the purportedly

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133. See, e.g., Kenneth S. Klein, The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment, 21 HASTINGS CONST. L.Q. 1013, 1038–39 (1994) ("[The public rights exception] has come into existence without any reference to the Seventh Amendment."); Redish & La Fave, supra note 12, at 450 (noting with respect to the functionalist-abdication, "[e]xcept in limited circumstances, the provisions of the Bill of Rights are not abandoned merely because their use would give rise to political or social inconvenience" (footnote omitted)).

134. See, e.g., Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n, 430 U.S. 442, 450 (1977) ("When Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’").


138. Id. at 495.

139. Id. at 504 (Scalia, J., concurring).

140. 59 U.S. (18 How.) 272 (1856).
embezzled funds without resorting to the courts.\textsuperscript{142} Swartwout sued, claiming a violation of the Fifth Amendment since the government had taken the property “without due process of law.”\textsuperscript{143} At its core, the question was not whether the Seventh Amendment applied, but rather whether some judicial involvement was required before the United States could take Swartwout’s property.\textsuperscript{144}

The Court answered in the negative, concluding that distress warrants were a form of “summary extra-judicial remed[y]” that had long been authorized by law.\textsuperscript{145} The Court was explicit that it was not considering whether Congress can “withdraw from judicial cognizance any matter which . . . is the subject of a suit at the common law, or in equity, or admiralty.”\textsuperscript{146} Likewise, Congress cannot “bring under the judicial power a matter which, from its nature, is not subject for judicial determination.”\textsuperscript{147} But the Court added: “[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination.”\textsuperscript{148} Simply put, the government had not abandoned its right to employ self-help measures to reclaim its wrongfully taken property from one of its officers.\textsuperscript{149} That is, the “public right” referenced concerned rights belonging to the government itself.

If \textit{Murray’s Lessee} does not appear to be on point as to congressional authority to direct regulatory disputes to juryless tribunals—that is because it is not.\textsuperscript{150} It is merely a statement about the procedural vehicle of distress warrants and sovereign immunity. As prominent critic of the

\begin{footnotes}
\footnote{142}{See id. at 274.}
\footnote{143}{Id. at 275.}
\footnote{144}{See id. at 275–76.}
\footnote{145}{Id. at 283.}
\footnote{146}{Id. at 284.}
\footnote{147}{Id.}
\footnote{148}{Id. at 284 (emphasis added).}
\footnote{149}{The Court drew heavily on an analogy to common law nuisance, explaining: Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals . . . [But] a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. Id. at 283. And as such, “[h]e cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.” Id.}
\footnote{150}{See Gordon G. Young, \textit{Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor}, 35 \textit{BUFF. L. REV.} 765, 794 (1986) ("It is only by strong implication that \textit{Murray’s Lessee} might be seen, as it was seen later, to bear on the constitutionality of federal bodies designed by Congress in the image of courts, but avowedly set up outside of article III and its protections.").}
\end{footnotes}
administrative state Philip Hamburger explains, “although [Murray’s Lessee] is often said to have held that administrative process generally can satisfy due process, the Court’s opinion reached the rather different conclusion that distress was merely a traditional exception from the due process of the courts.”\textsuperscript{151} As such, although Swartwout was not entitled to judicial determination prior to the taking, Swartwout remained free to sue the government to recover the property that had been taken by distress, so long as the government consented to be sued.\textsuperscript{152} Accordingly, the case tells us little about the constitutional permissibility of administrative adjudication—it is instead merely a comment on sovereign immunity in the context of revenue raising.\textsuperscript{153}

Perhaps because of its narrow application, the concept of public rights largely laid dormant for nearly eighty years before the Supreme Court revisited it in \textit{Crowell v. Benson}.\textsuperscript{154} There, Letus Crowell, the Deputy Commissioner of the United States Employees’ Compensation Commission, awarded damages in favor of Joe Knudsen, who had been injured while working on a boat owned by Charles Benson.\textsuperscript{155} Benson appealed to the Southern District of Alabama, which enjoined the Commissioner’s order.\textsuperscript{156} The district court judge concluded that the Constitution required a de novo trial of both fact and law, adding that he “[c]ould not] conceive that Congress ever meant to deprive [Benson] of the right to a fair judicial hearing.”\textsuperscript{157} Because the dispute concerned acts on navigable waters, the judge transferred the case to the court’s admiralty docket.\textsuperscript{158} After conducting a bench trial (remember, no jury trials in admiralty), the judge concluded that Knudson was not Benson’s employee at the time of the injury and so Benson was not financially responsible.\textsuperscript{159} Crowell, on behalf of the agency, appealed and lost before bringing his claim to the Supreme Court.\textsuperscript{160}

\textsuperscript{151}. HAMBURGER, supra note 11, at 217 n.o.
\textsuperscript{152}. \textit{Id}. at 219 (“The taxpayers could pay under protest and then go to court to recover any amounts they did not owe, but the distress itself was not a judicial act . . . .”).
\textsuperscript{153}. As the Supreme Court would later explain, “[t]he point of Murray’s Lessee was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.” Stern v. Marshall, 564 U.S. 462, 489 (2011).
\textsuperscript{154}. 285 U.S. 22, 50 (1932).
\textsuperscript{155}. \textit{Id}. at 36–37.
\textsuperscript{156}. Benson v. Crowell, 33 F.2d 137, 142 (S.D. Ala. 1929).
\textsuperscript{157}. \textit{Id}.
\textsuperscript{158}. \textit{Id}.
\textsuperscript{159}. Crowell, 285 U.S. at 37.
\textsuperscript{160}. \textit{Id}.
In a dicta-laden opinion, the Supreme Court affirmed. Discussing *Murray’s Lessee*, the Court stressed the distinction between “cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”

“[I]n exercising the powers confided to it,” the Court explained, “[Congress] may establish ‘legislative’ courts . . . to examine and determine various matters, arising between the government and others, which . . . do not require judicial determination and yet are susceptible of it.” The Court then gave examples of agencies that had been “created for the determination of such matters,” including “interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.”

Thus, as to matters falling “completely within congressional control,” Congress reserved the power to set the mode of determination.

But the dispute between Crowell and Benson did not concern public rights; it was “one of private right, that is, of the liability of one individual to another under the law as defined.” Nevertheless, the Court concluded that primary adjudication before the juryless Employees’ Compensation Commission was constitutional. Make no mistake, this decision had absolutely nothing to do with the Seventh Amendment and everything to do with the fact that the dispute sounded in admiralty. Indeed, the Court made short work of the Seventh Amendment challenge, noting that the argument was unavailing because “the claims which are subject to the provision of the act . . . are within the admiralty jurisdiction.” And because it was within the admiralty jurisdiction, “Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the act.” If the proceedings had involved a common law claim, the Court acknowledged, “the aid of juries is not only deemed appropriate but is required by the Constitution itself.”

161. *Id.* at 95.
162. *Id.* at 50 (footnote omitted).
163. *Id.*
164. *Id.* at 51.
165. *Id.* at 50. Though the initial determination could be made by the executive, this does not mean that the final determination could be so made. See infra section III.B.
167. *Id.* at 45.
168. *Id.*
169. *Id.* at 49.
170. *Id.* at 51.
Perhaps because *Crowell* (not unlike *Murray’s Lessee*) provides no support for the proposition that Congress can direct common law disputes to juryless tribunals, the public rights exception again saw little action in the years that followed. Consider *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,

171 where the Supreme Court held in 1937 that the NLRB’s authority to decide whether an employer had committed an unfair labor practice and to order reinstatement and backpay was constitutional because “[t]he proceeding [was] one unknown to the common law[:]; It [was] a statutory proceeding.”

172 This suggested that the inapplicability of the Seventh Amendment turned not on the public or private nature of the right, but the forum to which the dispute was submitted. However, the Court also highlighted that the relief of backpay (a common law claim entitled to a jury determination) was merely incidental to the primary relief of reinstatement (a form of equitable relief); and at the time, equity courts were thought to be permitted to resolve incidental legal issues.

173 The Court thus left open the question of whether it was the nature of the administrative tribunal or the nature of the relief sought that exempted this particular dispute from the Seventh Amendment. It had nothing to do with “public rights.”


175 petitioner asked the Supreme Court to resolve a Seventh Amendment challenge to the Occupational Safety and Health Act (OSHA) of 1970.

176 Under OSHA, federal administrators were authorized to inspect private workplaces and impose civil penalties for violations of health and safety standards.

177 Importantly, “[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, [were] conclusive.”

178 This scheme was unusual at the time. The agency was not seeking to enjoin the employer’s future acts—which, as a remedy sounding in equity, would not require a jury. Instead, the agency was seeking to impose financial liability for the employer’s past acts—

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171. 301 U.S. 1 (1937).
172. *Id.* at 48.
173. *Id.* This is because equity courts at the time were permitted to resolve incidental legal issues. *See* A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 321 (1951).
174. The Court, would later retcon this by explaining: “*Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings . . . .” *Curtis v. Loether*, 415 U.S. 189, 194 (1974).
176. *Id.*
177. *Id.* at 445–46.
which, as a remedy sounding in law, ordinarily would require a jury. As the Administrative Conference of the United States noted: “Under most money penalty statutes, the penalty cannot be imposed until the agency has succeeded in a de novo adjudication in federal district court, whether or not an administrative proceeding has been held previously.”

Petitioner argued that they were entitled under the Seventh Amendment to such a de novo trial.

The Supreme Court disagreed. Reviving (or rather, reinventing) the public rights exception, the Court held: “[I]n cases in which ‘public rights’ are being litigated . . . the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.”

The Court defined such public rights litigation as “cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact.” This conception was entirely new. Public rights prior to Atlas Roofing had been understood only to apply to those rights which belonged to the sovereign (as in Murray’s Lessee) and those matters which could be exclusively determined in the first instance by the legislative or executive branch (as in Crowell).

Inexplicably, the Court in Atlas Roofing frankenstein these two conceptions together and concluded that even if the government was suing on its own behalf, it could choose how to resolve the controversy, including doing so without a jury.

It is difficult to overstate the groundlessness of Atlas Roofing. Not a single case cited by the Supreme Court supported the proposition that the Seventh Amendment did not apply when the government sued on its own behalf. Even the Supreme Court recognized that support for this proposition was lacking. It admitted that “the Seventh Amendment was not expressly put in issue” in the cases it cited but concluded that the cases were “clear enough that in the context involved, there was no requirement

181. See Atlas Roofing, 430 U.S. at 448.
182. Id. at 450.
183. Id.
186. See, e.g., Greenberg, supra note 12, at 492 (explaining that “[n]o precedent cited by the Court . . . held explicitly that the Seventh Amendment did not apply to cases involving public rights”); see also Redish & La Fave, supra note 12, at 422 (noting Atlas Roofing’s “total lack of prior grounding in Seventh Amendment jurisprudence”).
the courts be involved at all in the factfinding process in the first instance.\footnote{187} Hardly. The cited cases dealt with issues uniquely within the province of the executive branch, including tax administration and immigration.\footnote{188} None of these cases recognized a carveout to the use of the civil jury at common law.\footnote{189} And in no case had the Court held that administrative process could be used when the government sought to exact money.\footnote{190}

Moreover, it is hard to imagine a decision that is more out of line with an original understanding of the Seventh Amendment than \textit{Atlas Roofing}. One of the animating purposes of the jury trial right was to secure the people against the government.\footnote{191} As Old Whig, the pseudonym of a prominent Anti-Federalist, observed in 1787:

\begin{quote}
In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution[,] yet these are all of them civil causes. . . . These modes of harassing the subject have perhaps been more effectual than direct criminal prosecutions.\footnote{192}
\end{quote}

\textit{Atlas Roofing}’s disregard for history and perversion of precedent effectuated a near-comprehensive judicial repeal of the Seventh Amendment in the context of administrative adjudication.

Given \textit{Atlas Roofing}’s lack of constitutional support, perhaps it is unsurprising that the Court soon lost the thread altogether. In \textit{Thomas v. Union Carbide Agricultural Products Co.},\footnote{193} the Court was called upon to determine whether Congress could submit a dispute between two private companies concerning the Federal Insecticide, Fungicide, and Rodenticide Act.\footnote{194} Under the \textit{Atlas Roofing}-notion of public rights, the Supreme Court saw no problem. It explained: “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate
for agency resolution with limited involvement by the Article III judiciary.\textsuperscript{195} The Court concluded that this reflected the “pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively determined by the Executive and Legislative Branches,’ the danger of encroaching on the judicial powers is reduced.”\textsuperscript{196} This means that under the Court’s current approach to public rights the government is no longer even required to be a party to the dispute; it needs only to be involved in the creation of the relationship in order to lawfully strip private parties of their jury trial right.

Accordingly, under the current public rights exception, whenever Congress devises a regulatory scheme falling within its Article I power and assigns adjudication to a non-Article III tribunal, the Seventh Amendment generally does not apply. Administrative law expert Paul Bator captures the Court’s tautology: “[A]rticle I courts are valid if they adjudicate public rights cases; public rights cases are cases that need not be adjudicated in an article III forum.”\textsuperscript{197} But the problem is not just that this jurisprudence is tangled. The problem with the \textit{Atlas Roofing} line of cases is that they provide Congress with an escape hatch from the Seventh Amendment. And the only meager limitation is whether a jury would operate to undercut the efficient administration of the regulatory scheme. Our conversation turns next to that functionalist component.

\textbf{B. The Naked Functionalism of Efficiency}

Under the Court’s test, juryless adjudication is permissible outside of Article III when “Congress ‘creat[e][s] a new cause of action . . . unknown to the common law,’ because traditional rights and remedies were inadequate to cope with a manifest public problem,”\textsuperscript{198} and jury trials would “go far to dismantle the statutory scheme”\textsuperscript{199} or “impede swift resolution” of those claims.\textsuperscript{200} In the pursuit of expert and efficient regulatory administration, the argument goes, Congress need not be hamstrung by lay jurors.\textsuperscript{201} That might be sound policy, but such functionalism is entirely without constitutional foundation.\textsuperscript{202}

\begin{footnotesize}

\textsuperscript{195} Id. at 593–94.
\textsuperscript{196} Id. at 589.
\textsuperscript{197} Bator, supra note 135, at 249.
\textsuperscript{199} Id. at 61 (quoting \textit{Atlas Roofing}, 430 U.S. at 454 n.11).
\textsuperscript{200} Id. at 63.
\textsuperscript{201} See \textit{Atlas Roofing}, 430 U.S. at 455.
\textsuperscript{202} Redish & La Fave, supra note 12, at 408 (calling this judicial attitude “indefensible as a matter of Seventh Amendment construction”).
\end{footnotesize}
This kind of functionalist approach to the Seventh Amendment was not always unique to the administrative context. The Supreme Court has at times flirted with the notion of a complexity exception in Article III courts, too. Recall that in *Ross v. Bernhard*’s three-part test, discussed above, the Court instructed judges to consider “the practical abilities and limitations of juries” in determining whether a civil jury was required within an Article III court. The rationale is that certain matters are too legally or factually complex to be decided by laypeople. Although this argument was advanced by the Supreme Court, the Court itself has never explicitly applied the complexity exception in deciding whether the jury trial right applied. Yet this did not slow inferior courts from doing so. For instance, the Third Circuit concluded that “due process precludes trial by jury when a jury is unable to [render a verdict] with a reasonable understanding of the evidence and the legal rules.”

But there was no complexity exception to the use of civil juries in 1791. That is for a simple reason: At the founding, common law procedures ensured that disputes were presented as distinct causes of action. By requiring parties to shape their disputes according to pleading requirements (“pleading down to issues”), complex actions were either precluded altogether or directed to courts sitting in equity or admiralty. Twentieth-century developments, such as the liberalization of civil procedure and the ability to bring to bring complex cases in law rather than equity, cannot change that. Because there was no complexity exception at common law these modern developments have zero effect whatsoever on the Seventh Amendment’s application even in purportedly legally and factually complex cases.

Perhaps recognizing the lack of support, the Supreme Court would eventually retire (or at least deemphasize) the complexity exception in

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204. *Id.*
205. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084 (3d Cir. 1980) ("[T]he law presumes that a jury will decide rationally; it will resolve each disputed issue on the basis of a fair and reasonable application of relevant legal rules.").
206. *See, e.g.*, Douglas King, *Comment, Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. Chi. L. Rev. 581, 584 (1984) ("[T]he common law recognized no complex case exception because the procedural limits within which the jury functioned insured that no complex cases would ever reach the jury.").
208. *See supra* notes 203–206 and accompanying text.
Article III adjudication. Yet in the same move, it advanced an equally unfounded idea that the complexity exception could live on in the context of agency adjudication. In Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, the Court explained:

We recently noted that . . . consideration [of the jury’s practical limitations] is relevant only to the determination [of] “whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme.”

As such, if a court concludes that a jury trial would “go far to dismantle the statutory scheme” or “impede swift resolution” of the claims created by Congress and assigned to dispute resolution outside of Article III, the Seventh Amendment is dispensable.

This dual-track approach to the Seventh Amendment is constitutionally baffling. There is zero textual basis for reading the Seventh Amendment as operating one way in the context of Article III and another in the context of agency adjudication. To see this problem, consider Tull v. United States. In 1987, the Court was called upon to determine whether petitioner had a Seventh Amendment right to a jury trial for civil penalties imposed under the Clean Water Act, which Congress had committed to Article III courts. The Court concluded that the civil sanctions at issue constituted a suit at common law under the Seventh Amendment and, therefore, the jury trial right applied to government actions brought to enforce the statute. The Court, however, was careful to acknowledge that this analysis did not apply to civil penalties enforced outside of Article III. Because Congress chose to submit enforcement of the

209. See In re U.S. Fin. Sec. Litig., 609 F.2d 411, 425 (9th Cir. 1979) (“While the Supreme Court has never specifically repudiated the third factor in the Ross footnote, it has never met with general acceptance by the courts.”).


212. Id. at 565 n.4 (plurality opinion) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 n.4 (1989)).


214. Id. at 63.

215. Id. at 49.


217. Id. at 414.

218. Id. at 428.

219. Id. at 418 n.4.
Clean Water Act to the courts, a jury was required; but if Congress had chosen instead to submit enforcement to an agency (as it had done with the OSHA penalties at issue in Atlas Roofing), a jury would not be required. Readers will search in vain for an answer explaining this distinction other than judicial abdication to the administrative state.

What is more, while courts are required to determine whether a jury would functionally undercut an administrative scheme as part of determining whether it may be congressionally submitted to a juryless tribunal, the Supreme Court has advanced no firm approach for making that determination. Instead, present throughout the case law are three main lines of reasoning informing the Court’s functionalist inquiry: (1) the administrative proceedings would be “incompatible” with a jury trial;\(^\text{220}\) (2) a jury trial would “substantially interfere” or “frustrate Congress’s purposes in enacting a particular scheme”;\(^\text{221}\) or (3) a jury trial would “impede the swift resolution” of the matter.\(^\text{222}\) None of these considerations is constitutionally sound.

First, as to the jury’s “incompatibility” with agency adjudication, the Court has never articulated a standard for this factor. And in those rare instances in which a court has recognized a Seventh Amendment deficiency because the jury would be compatible with an administrative scheme, that conclusion was reached by relying on Congress’s determination, not that of the court. For instance, in Jarkesy v. Securities & Exchange Commission,\(^\text{223}\) the Fifth Circuit effectively dodged the compatibility inquiry by noting that under the statute, Congress had given the SEC the choice as to whether to bring a fraud claim in an agency tribunal (where no jury trial right would apply) or to bring it in an Article III court (where the right would apply).\(^\text{224}\) The court concluded that by giving this choice, Congress had suggested that a jury would not so disrupt the administrative scheme as to render the Seventh Amendment inapplicable.\(^\text{225}\) The Supreme Court made a similar rhetorical move in Granfinanciera, S.A. v. Nordberg:\(^\text{226}\) “[O]ne cannot easily say that ‘the jury would be incompatible’ with bankruptcy proceedings, in view of Congress’ express provision for jury trials in certain actions arising out of

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\(^\text{221}\) Id.; see also Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558, 574–75 (1990) (Brennan, J., concurring in part and concurring in the judgment).
\(^\text{223}\) 34 F.4th 446 (5th Cir. 2022).
\(^\text{224}\) Id. at 454–55.
\(^\text{225}\) Id.
bankruptcy litigation.”227 But this vapid rationale amounts to little more than judicial abdication. The Seventh Amendment is a restriction on legislative authority, and thus Congress’s insights as to jury incompatibility are entirely inapposite.

Regarding the second functionalist rationale as to whether the jury would “substantially interfere” or “frustrate” Congress’s purposes in enacting a particular scheme, it is unclear what animates this judicial concern. Perhaps the Court means that the jury is likely to render different results in similar cases. For instance, in a case concerning the Interstate Commerce Commission (ICC), the Supreme Court held that a de novo jury trial was not required after an agency reached a determination as to a shipping rate’s reasonableness.228 The Court explained that if courts and juries were required, “it would follow that unless all courts reached an identical conclusion[,] a uniform standard of rates in the future would be impossible.”229 But this supposed problem is not unique to the administrative state; the lack of uniformity is always at issue whenever a court or a jury acts. And in requiring that each case be treated on its own terms, the common law rejects uniformity as a supreme goal.

Alternatively, with this factor the Court may be concerned that the jury is not incapable, but instead unwilling to enforce an agency’s rules—something akin to jury nullification.230 Yet such pressure on the power of the state is precisely why the Seventh Amendment was ratified. The jury is empowered to push against the government, a role anticipated by the founders.231 Moreover, perhaps this political role is of even greater significance in the context of administrative rules, which have often been propounded not by regularly accountable legislators, but by unelected bureaucrats. To be sure, “the fact that enforcement of a constitutional right would severely disrupt a congressional scheme must be deemed irrelevant, lest our essential constitutional structure be turned on its head.”232

The Court’s third and final functionalist argument concerns the desire not to “impede the swift” administration of regulatory schemes. This point is so without foundation in the Constitution that it is almost undeserving

227. Id. at 61–62 (quoting S. Elizabeth Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 MINN. L. REV. 967, 1024 (1988)).
229. Id.
231. See THOMAS, supra note 23, at 62–66 (reviewing the jury’s anticipated role as a check on the executive, legislative, and judicial branches of government).
232. See Redish & La Fave, supra note 12, at 450.
of a response. Yet the Court has only once acknowledged the substantial harm to the constitutional structure in privileging efficiency over procedural protections outside of Article III. In *Granfinanciera, S.A. v. Nordberg*, Justice Brennan noted that “[t]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” This claim is hardly controversial, and yet, the Court has since repeatedly ignored it in its approval of Congress’s race to the procedural bottom. Just three years after *Granfinanciera*, the Supreme Court returned to naked functionalism in *Union Carbide*, noting that to require full Article III adjudication “would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures.”

Accordingly, the public rights exception to the Seventh Amendment and its functionalist component are constitutionally vacuous. There is nothing in the text or history of the Constitution that suggests the extent of the Seventh Amendment’s protections turn on the public or private nature of the disputed right, or on the practicable capabilities of laypeople. The Supreme Court’s approach here is thus exposed bare. It is a groundless effort to increase government regulatory authority by discarding a disfavored constitutional provision at the whims of the political branches. This must be remedied lest our democratic judiciary succumb to bureaucratic governance.

III. SOLVING THE JURY PROBLEM

The most effective way to solve the administrative state’s jury problem is to develop a theory of the Seventh Amendment that positions the jury as an institution within the system of agency adjudication as it is currently constituted. This requires: (a) disentangling Article III and the

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235. This is not the only solution. Perhaps the easiest approach would be to eliminate agency adjudication by directing all administrative disputes to Article III courts (with juries as required). Another approach would be to transform bureaucrats into Article III judges and limit their jurisdiction to those matters within their expertise (again with juries as required). One problem is that these approaches would undercut the flexibility that is central to agency adjudication. See Robert M. Cooper, *The Proposed United States Administrative Court* (pt. 2), 35 MICH. L. REV. 565, 569 (1937). They are also likely politically untenable. See A.H. Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 YALE L.J. 647, 648 n.8 (1938) (reviewing the Logan Bill’s failure, which would have created a system of Article III administrative courts); Maryellen Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOK. L. REV. 207, 218 (1983) (reviewing the debate over and failure to give bankruptcy judges Article III status).
Seventh Amendment by recognizing that the two provisions are not coterminous in their demands; and (b) once this distinction is appreciated, two main solutions to the administrative state’s jury problem emerge: (1) if agency adjudication is to be deemed factually final and subject only to Article III appellate review, a jury trial must be made available within the agency tribunal; or (2) if the facts as developed in the agency are not determined by a jury, then a de novo jury trial either upon appeal or a collateral claim must be made available in an Article III court. While these approaches might seem novel, close inspection reveals examples of such practices at both the federal and state level throughout American history.

A. Disentangling Article III and the Seventh Amendment

Disentangling the Court’s Article III and Seventh Amendment jurisprudence is necessary to solve the jury problem without collapsing the administrative state. Quick critics will remind that the Supreme Court seemingly rejected this approach by asserting, “when Congress properly assigns a matter to adjudication in a non-Article III tribunal, ‘the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.’” 236 Yet the Court’s practice is far more muddled than this simple pronouncement suggests. In practice, the Court has largely embraced the appellate review model of Article III, which recognizes that the judicial power demands only some amount of judicial review of an administrative decision prior to final disposition. But in the Court’s haste to justify its own position within the modern administrative state, it has left no room for the jury.

The argument conflating the Seventh Amendment and Article III is easy: If a dispute does not implicate Article III’s “judicial power,” then it is not a “Suit[ ] at common law” under the Seventh Amendment. 237 Article III vests the entirety of the United States’ “judicial power . . . in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” 238 The judges that fill those courts “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” 239 Similarly, the Seventh Amendment applies only to “Suits at common law” meeting the constitutionally-set monetary threshold, a category of cases that

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237. U.S. CONST. amend. VII.
238. Id. art. III, § 1.
239. Id.
historically would necessarily implicate common law courts.\textsuperscript{240} Thus, if there is no judicial power exercised by a tribunal, then there is no Article III problem; and if there is no Article III problem, then there is no Seventh Amendment problem.\textsuperscript{241}

Often this Article III-Seventh Amendment syllogism causes no difficulty. Much of the work of the regulatory state does not implicate the judicial power or the jury power. If the legislative or the executive branch is capable of resolving a matter without the involvement of the judiciary, then by definition it does not implicate the judicial power. This is why disputes involving “public rights,” as that term was used pre-\textit{Atlas Roofing}, do not require adjudication before an Article III judge (or before juries, for that matter).\textsuperscript{242} For example, when the executive branch wants to determine to whom a patent should be awarded (or if a monopoly should persist), it need not rely on Article III courts or juries.\textsuperscript{243} Likewise, if Congress decides to sell public land, no judicial power is implicated in that initial determination.\textsuperscript{244} Sure, a dispute implicating the judicial power (and jury power) might emerge after that initial legislative or executive determination, but not in the first instance.\textsuperscript{245}

But this reverberation between Article III and the Seventh Amendment does not mean that the requirements of the two are coterminous—a point made most clear by reviewing the Court’s actual practices as to Article III’s Vesting Clause, which it has never treated as absolute. Indeed, from the earliest days of the Republic the Court has permitted exercises of the judicial power to take place outside of Article III. In 1828, for instance, Chief Justice Marshall confirmed that territorial courts were “legislative courts” and so were not invested with “that judicial power

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\textsuperscript{240} \textit{Id.} amend. VII.
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\textsuperscript{241} William Baude summarized the courts’ general approach: “The Article III analysis should be conducted first, . . . and if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored.” William Baude, \textit{Adjudication Outside Article III}, 133 HARV. L. REV. 1511, 1570 (2020); see also Ilan Wurman, \textit{The Untold Story of Lucia v. SEC: The Constitutionality of Agency Adjudications}, YALE J. ON REG.: NOTICE & COMMENT (Apr. 6, 2018) [hereinafter Wurman, Untold Story of Lucia], https://www.yalejreg.com/nc/the-untold-story-of-lucia-v-sec-the-constitutionality-of-agency-adjudications-by-ilan-wurman/ [https://perma.cc/R3RZ-GQW3] (noting that “it’s not clear that the Seventh Amendment does any independent work”).
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\textsuperscript{242} \textit{See supra} section II.A.
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\textsuperscript{244} \textit{See} Fallon, \textit{supra} note 9, at 965 (“Within the logic of public rights doctrine, it is true, no ‘case’ would have existed at common law until the actions of administrative decisionmakers were challenged in a proceeding . . . .”).
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\textsuperscript{245} \textit{See id. at} 962 (“[A] constitutional ‘case’ will arise at the moment of the violation, and the full protections of article III will thereafter attach.”); \textit{see also infra} section III.B.2.
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which is defined in the 3d article of the Constitution."\textsuperscript{246} The Supreme Court would later clarify that what the Chief Justice meant “is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article.”\textsuperscript{247} The Court took a similar approach with respect to courts in the District of Columbia, holding that such courts need not comply with Article III requirements.\textsuperscript{248} Thus, while the courts at issue in those cases were non-Article III tribunals, they could nevertheless exercise the judicial power of the United States.\textsuperscript{249}

This failure to comply with the plain terms of Article III does not just apply in the somewhat unique circumstances of the territories and District of Columbia. The Court has frequently recognized that judicial adjuncts (non-Article III actors) can adjudicate equity and admiralty disputes. Consider again Crowell v. Benson, where the Court explained that “[i]n cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners or assessors, to pass upon certain classes of questions.”\textsuperscript{250} The Court has similarly allowed proceedings before adjuncts in bankruptcy courts, defining these tribunals as “specialized court[s] of equity.”\textsuperscript{251} These exceptions persist even though Article III requires that “the judicial Power shall extend to all Cases, in Law and Equity.”\textsuperscript{252}

The Court has also permitted non-Article III actors to adjudicate core legal rights. It has primarily done so by concluding that parties may consent to such non-Article III adjudication. That is, just as a party may waive its rights to most other constitutional protections, so too may a party waive its right to Article III adjudication.\textsuperscript{253} But consent is not always required. Specifically, the Court has permitted the adjudication of so-called “petty offenses”—typically those offenses for which the criminal penalty does not exceed six months’ imprisonment—to take place before

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\textsuperscript{247}. See Glidden Co. v. Zdanok, 370 U.S. 530, 545 (1962) (plurality opinion) (footnote omitted).
\textsuperscript{249}. The Court later explained this decision’s functionalist foundation: “The entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon the National Government.” See Glidden, 370 U.S. at 545 (elaborating the basis for Chief Justice Marshall’s earlier comments concerning territorial courts operating without Article III designation).
\textsuperscript{250}. 285 U.S. 22, 51 (1932).
\textsuperscript{252}. U.S. CONST., art. III, § 2, cl. 1.
\textsuperscript{253}. See, e.g., F. Andrew Hessick, Consenting to Adjudication Outside the Article III Courts, 71 VAND. L. REV. 715, 717–18 (2018) (reviewing case law as to waiver of the right to Article III adjudication and noting that “the consent exception confers vast power on Article I tribunals”).
magistrates without the defendant’s consent.254 This is despite Article III’s requirement that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”255 This practice has been upheld as constitutionally permissible because “‘petty offenses’ . . . do not rise to the degree of crimes” within the original meaning of those provisions.256 But while that rationale unconvincingly257 addresses why petty offenses do not require jury trials, it says nothing of why they do not implicate Article III’s judicial power.258

Strictly read, the Constitution forbids each of these delegations of the judicial power. As constitutional scholar Richard Fallon contends: “By nearly universal consensus, the most plausible construction of [Article III’s text] would hold that if Congress creates any adjudicative bodies at all, it must grant them the protections of judicial independence that are contemplated by article III.”259 Yet no court has ever embraced such absolutism.260 There is necessarily some blurring of responsibilities among the departments. At times, that blurring is intentionally exaggerated to advance certain governmental interests.261 And while we can debate how much coloring outside the lines is permissible, it appears beyond contention that at least some of what could be reasonably considered “the judicial power of the United States” can be exercised

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254. See Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (explaining that “[a]lthough . . . an offense carrying a maximum prison term of six months or less [does not] automatically qualify[y] as a ‘petty’ offense . . . we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as ‘petty’”); see also Andrea Roth, The Lost Right to Jury Trial in “All” Criminal Prosecutions, 72 Duke L.J. 599, 604 (2022) (noting that “[s]ince 1970, when the Supreme Court drew the petty/nonpetty line at offenses carrying over a six-month statutory maximum sentence, defendants in both state and federal courts have routinely been denied a jury for all offenses carrying a potential sentence of six months or less” (footnotes omitted)).

255. See U.S. Const. art. III, § 2, cl. 3 (emphasis added).


257. See Roth, supra note 254, at 605 (critiquing this exception as “untenable”).

258. For a proposed resolution to this tangle, see generally Stephen I. Vladeck, Petty Offenses and Article III, 19 Green Bag 2d 67 (2015) (providing a constitutional justification for the petty offense jurisdiction of non-Article III magistrates by tying the practice to the related Sixth Amendment exception).

259. Fallon, supra note 9, at 916.

260. See generally Baude, supra note 241, at 1514–19 (reviewing the history of adjudication outside of Article III).

outside of an Article III-compliant tribunal. But recognizing this only begs the question as to what the heart of the judicial power encompasses; that is, what is the irreducible core of Article III?

The theoretical approach that comes closest to capturing courts’ actual treatment of the judicial power is the appellate review model. The appellate review model emerged in the late twentieth century as an academic attempt to make sense of the Supreme Court’s tangled Article III jurisprudence. It quickly became “the dominant paradigm” and “a central orienting principle of American administrative law.”

Under this model, Article III’s judicial power is understood as merely requiring that the ultimate decision as to legal interpretation remain with an Article III court. That is, preliminary adjudication can take place in any tribunal so long as an Article III judge has final say. As federal courts expert Paul Bator explains: “[Article III’s] ‘judicial power’ is neither a self-defining nor empirical classification, but a purposive institutional concept;” so long as “there is sufficient participation in [the judicial power’s] exercise by those courts whether as a matter of original or appellate jurisdiction,” its requirements are met.

The appellate review model is implicit throughout the Court’s Article III jurisprudence. Perhaps the most explicit pronouncement came in Old Colony Trust Co. v. Commissioner, which concerned a legislative scheme allowing the tax commissioner or the taxpayer to petition for review of deficiencies in a Board of Tax decision, which would then be reviewed in a circuit court of appeals. In deciding that it had jurisdiction, the Court analogized the case to suits “lodged in the Circuit Courts of Appeals upon petition or finding of an executive or administrative tribunal,” and concluded: “It is not important whether such proceeding was originally begun by an administrative or executive

262. See, e.g., Baude, supra note 241 (reviewing comprehensively examples of such exercises of the judicial power).


265. See Merrill, supra note 263, at 942.

266. See id. (articulating the foundations of the appellate review model); Fallon, supra note 9, at 943 (describing “judicial power” as simply the power to engage in appellate review); Martin H. Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197, 226 (endorsing this thesis).


269. Id. at 722.
determination, if, when it comes to the court . . . it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law.” Other cases are similar. Consider again Crowell v. Benson, in which the Court recognized Congress’s power to create separate fact-finding tribunals for enforcing maritime law and “to limit the effect of an appeal to a review of the law as applicable to facts finally determined below.” So long as a court retains power to review the administrative decision, Article III’s requirements are met.

The appellate review model is built on recognition of Congress’s near-complete control over Article III. Remember, Article III demands very little. It requires only that a Supreme Court be created to decide a small subset of disputes and be staffed with jurists of certain job securities. The inferior courts of the United States could be totally discarded without upsetting the constitutional structure. The Constitution, then, “is indifferent whether adjudication occurs, at least in the first instance, in a federal court where the judges enjoy life tenure or in a state court where the judges enjoy no such protection.” “And if the lower federal courts have no constitutionally necessary function,” Professor Richard Fallon writes, “no powerful separation-of-powers interest compels having cases adjudicated in an article III court rather than in a legislative court or administrative agency.” Congress is free to choose either forum.

The constitutional problem with the appellate review model is not Article III, but instead that it leaves no room for the jury as an institution. Congress has directed, and the judiciary has acquiesced to, the delegation of the jury’s factfinding authority to administrative agents. Indeed, this is the Faustian bargain upon which the modern administrative state is built. In an effort to secure Article III judges’ positions as the ultimate adjudicators of legal questions and in the face of congressional pressure, courts abdicated judicial fact-finding to agency bureaucrats. As administrative law expert Thomas Merrill recounts, the Supreme Court’s institutional anxiety that Congress might strip the judiciary of authority

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270. Id.
273. See Fallon, supra note 9, at 938.
274. Id. at 938.
275. Id. at 938–39; see also Bator, supra note 135, at 266 (“It was . . . not the purpose of article III to give litigants a constitutional guarantee or right to original access to courts constituted in accordance with article III.”); Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1372–73 (1953) (“It’s hard, for me at least, to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court (outside the original jurisdiction of the Supreme Court.”).
276. See Merrill, supra note 263, at 977, 996.
was elevated to “virtual neurosis with the massive expansion of the power of the federal courts during the Warren and Burger court eras.” To avoid this, the implicit bargain was an increased “partnership between courts and agencies,” with the key distinction being a specialization of institutional capabilities—the agencies would be experts in the adjudication of facts, and courts experts in the law. This relationship “between the Court and agencies ... resemble[s] the relationship between appellate and trial courts.” The factfinding of administrative bureaucrats takes the place of the abandoned jury.

Given de facto acceptance of the appellate review model, the Seventh Amendment cannot be coterminous with Article III. While Congress has Article I authority to manipulate almost every aspect of Article III, it has zero authority over the Seventh Amendment. It is precisely because Congress could not be trusted to set the bounds of the civil jury right that the institution was constitutionally secured. Just as the judiciary may not abdicate its exclusive power to “say what the law is,” neither may it cede the jury’s exclusive power to “say what the facts are.” And because of this limitation, the jury remains a necessary part of the administrative state—the Court’s muddled jurisprudence notwithstanding.

277. Id. at 996.
278. See Mashaw, Creating the Administrative Constitution, supra note 264, at 303; see also id. at 304 (“[At the core] is the law versus fact distinction that characterizes its allocation of institutional competence.”).
280. John Dickinson, Administrative Justice and the Supremacy of the Law in the United States 155 n.81 (1927) (noting that “the administrative finding is treated like the verdict of a jury” (citation omitted)).
281. See Suja A. Thomas, A Limitation on Congress: “In Suits at Common Law,” 71 OHIO ST. L.J. 1071, 1104 (2010) (arguing that it is the Seventh Amendment’s more exacting requirements rather than Article III that prohibits Congress from giving “certain matters with damages to non-jury adjudicative bodies”). Compare U.S. CONST. art. III, with id. amend. VII.
282. See Henderson, supra note 98, at 299.
283. See Marbury v. Madison, 5 U.S. 137, 177 (1803).
284. Cf. Pa. Thresherman & Farmers’ Mut. Cas. Ins. Co. v. Crapet, 199 F.2d 850, 853 (5th Cir. 1952) (upholding the jury instruction, “[A]ny mistake I make in telling you what the law is ... can be corrected . . . , but you alone can say what the facts are and nobody can correct that anywhere”).
B. Bringing the Jury Back In

Disentangling the Seventh Amendment from Article III allows us to articulate a role for the jury within the modern administrative state without compromising the benefits of agency adjudication. Bringing the jury back in can be realized in two ways: (1) requiring a civil jury within the initial administrative proceeding; or (2) requiring a civil jury in a subsequent Article III proceeding. Though both approaches depart from current practice, the historical support for them is strong. Neither is particularly novel.

1. Jury Trials Within Administrative Tribunals

The first way the Seventh Amendment’s dictates can be met is by integrating the jury directly into administrative adjudication. There is nothing in the text or history of the Seventh Amendment that limits the jury’s province to Article III courts. Properly understood, the jury right extends to all proceedings—regardless of their form or forum—in which legal rights are determined by the federal government. The Supreme Court has recognized many examples in which the jury right extends beyond the strict corners of Article III, and the practice of employing administrative juries was not uncommon at the founding. If a tribunal is given authority to adjudicate and enter a final judgment in a legal dispute, a jury is necessary.

There is nothing in the text of the Seventh Amendment that confines its protections to Article III courts. The amendment “makes no reference to ‘proceedings’[,] rather, it refers merely to ‘Suits.’” Some scholars have suggested that Congress, in ratifying that language, was unlikely to be considering something other than the common law courts they had almost simultaneously established, especially since the Framers “could not have anticipated the vast growth of the administrative state.”

286. See, e.g., Cap. Traction Co. v. Hof, 174 U.S. 1, 17 (1899) (“Whenever a trial by jury of any kind was allowed at any stage of an action begun before a justice of the peace, it was done in one of two ways; either by providing for an appeal from the judgment of the justice of the peace to a court of record . . . or by providing for a trial by a jury of six before the justice of the peace.”).

287. See, e.g., Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 434 (1830) (“[I]n a just sense, [the amendment may] be well construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.”).

288. Redish & La Fave, supra note 12, at 418.


that’s right. But the Framers certainly anticipated juryless tribunals. As the Supreme Court has noted, “[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers.” So while the size of the modern administrative state may shock the Framers, its widespread use of juryless adjudication would be painfully familiar. “The constitutional right to a jury developed largely in answer to extralegal proceedings,” Professor Phillip Hamburger notes before adding, “the Constitution therefore does not confine its jury requirements to the courts.”

Others agree that there is no textual basis for limiting the Seventh Amendment to Article III courts. As federal courts expert David Shapiro testified to Congress, “[T]he guarantee of the Seventh Amendment does not . . . require that a jury trial, if one is to be had, take place in an Article III court presided over by an Article III judge.” “[T]he essence of the Seventh Amendment” Shapiro reminds, “is the preservation of the right to a jury, not an Article III judge.” And administrative law experts William Luneburg and Mark Nordenberg argued similarly that “the legislative court cases support the proposition that the right to jury trial is not dependent on the status of a tribunal as an article III forum.” Or, as inquisitively put by leading administrative scholar Louis Jaffe during the tender years of the administrative state—“Perhaps the right of jury trial does not require that the court to which the jury is an adjunct be an ‘Article III’ court.” Even the Supreme Court, though it has long flirted with the idea, has never explicitly held that the Seventh Amendment has no application outside of Article III—to the contrary, it has been clear “the legitimacy of . . . nonjury mode of trial

291. Cf. Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 793–94 (1999) (“A great play may contain a richness of meaning beyond what was clearly in the playwright’s mind when the muse came; ordinary language contains depths of association that not even our best poets fully understand, even as they intuit . . . . So too with the Constitution.”).

292. See supra section I.A.

293. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995); see also The Federalist No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961) (“There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers.” (quoting Montesquieu)).

294. Hamburger, supra note 11, at 246.


296. Id. (emphasis in original).


does not depend upon the supposed ‘legislative’ character of the court.”

Again, there is no textual basis to limit the Seventh Amendment to Article III courts.

What is more, extending constitutional principles and protections ordinarily limited to Article III beyond that context is neither prohibited nor unusual. For instance, the Supreme Court has determined that state sovereign immunity extends to administrative proceedings. In *Federal Maritime Commission v. South Carolina State Ports Authority*, the Court recognized that

> if the Framers thought it an impermissible affront to a State’s dignity to be required to answer the complaints of private parties in federal courts, we cannot image that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency.

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“[I]t would be,” the Court noted, “quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply.”

The Court concluded that while the administrative agency did not exercise “the judicial power of the United States” as defined in Article III and the Eleventh Amendment, the proceedings were nevertheless inappropriate because “the preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”

Likewise, the Court in *Butz v. Economou* held that “the role of the modern federal hearing examiner or administrative law judge . . . is ‘functionally comparable’ to that of a judge.”

The Court went further and spelled out the similarities between Article III adjudication and agency adjudication, highlighting that “the proceedings are adversary in nature” and “conducted before a trier of fact insulated from political influence,” and that parties are “entitled to present [their] case by oral or documentary evidence,” and “are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the

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301. Id. at 760.

302. Id. at 761 (citation omitted).

303. Id. at 754.

304. Id. at 760.


306. Id. at 513.
record.” On this basis, the court concluded that administrative law judges were entitled to absolute immunity from damages liability for their quasi-judicial acts.

Of course, the matters at issue in those two examples implicate interests distinct from those of securing the promise of the Seventh Amendment. But the fact that the agencies at issue in those contexts did not exercise “the judicial power of the United States” did not halt the application of other constitutional protections to the administrative state that were ordinarily thought only to apply in the context of Article III. The same type of reasoning applies to the Seventh Amendment. “[I]t would be,” to use the Court’s words, “quite strange to prohibit Congress from exercising its Article I powers to abrogate [the Seventh Amendment’s protections] in Article III judicial proceedings, but permit the use of those same Article I powers to create court-like administrative tribunals where [the jury right] does not apply.”

Beyond the lack of textual support, history also counsels against confining the jury to Article III. Review of early practices, particularly at the state level, reveals that jurors were often integrated into administrative decision making outside of traditional courts of record. For instance, in 1801, New York enacted a law that, among other things, delegated to executive actors the authority to regulate the construction of new buildings, streets, wharfs, and slips. Critical for our purposes, if a person were dissatisfied with the surveyor’s assessment, a jury was required to resolve the dispute. The jury would “appear before the mayor’s court”—a non-judicial tribunal—and would “inquire into and assess the damages in question . . . and recompense as they shall . . . judge fit to be awarded to the owner or owners . . . for their respective loss.” This was no mere advisory body. The statute made clear that “the verdict of such jury . . . shall be conclusive and binding.”

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307. Id. (citations omitted).
308. Id. at 512–14.
310. In construing the Seventh Amendment, “the judicial decisions and the settled practice in the several states are entitled to great weight.” Cap. Traction Co. v. Hof, 174 U.S. 1, 23 (1899).
312. Cf. id. § I, 1801 N.Y. Laws at 308–09.
313. Id. § I, 1801 N.Y. Laws at 308.
314. Id. § I, 1801 N.Y. Laws at 308–09.
“building[s] which they may deem hazardous and likely to take fire.”  

With no appeal available to a court of record, the jury operated as final arbiter of facts in the executive tribunal.

The administrative jury’s early role was not limited to simple takings disputes; juries were also instrumental in administering complex schemes implicating issues of serious economic concern. For instance, in 1845 the New York State Legislature passed An Act to Establish and Regulate Ferries Between the City of New-York and Long Island, which allowed the Governor to appoint three people who would issue licenses for “establishing and keeping so many ferries, and at such places as, in their opinion, the public convenience may require.”  

If the parties were unable to agree as to distribution of ferry rights, the grantee could apply in writing “to the vice-chancellor of the second circuit,” who directed the sheriff “to summon and return a jury of twelve men . . . to inquire and assess the damage and recompense which ought to be paid.”  

While adjudication occurred in a court of record under this statute, the point remains that the jury administered the economic scheme in the first instance.

More common was the use of juries to regulate economic behavior before specialized courts staffed, not by judges, but by magistrates or justices of the peace. In 1823, Florida employed juries to address the serious economic issues associated with frequent shipwrecks off the Gulf Coast.  

The legislative council of the Florida territory “created salvage courts to be administered by local officials,” which were territorial executive agents “inferior to the congressionally created superior court judges” that staffed the territory’s judiciary.  

The statute provided that when wrecked property was brought into the territory, the responsible party was required to report the incident, “[t]he justice or notary would then summon a five-person jury, which would determine the disposition of the salvaged property.”  

So again, we see the jury playing a central role in adjudicating facts of economic and regulatory concern in the first instance outside of courts of record.

Support for integrating juries into non-Article III tribunals does not exist solely in eighteenth- and nineteenth-century state courts. As recently

317. Id. § 4, 1845 N.Y. Laws at 423.
319. Id. at 888.
320. Id. at 889 (footnote omitted).
as 1989, the Supreme Court recognized civil jury integration as a salve for a non-Article III tribunal’s Seventh Amendment shortcomings.\footnote{See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 (1989).} 
Granfinanciera, S.A. v. Nordberg concerned whether a bankruptcy court sitting without a jury could adjudicate a suit to recover a fraudulent transfer—a tort actionable at law and involving a purely private interest.\footnote{See id. at 36, 43.} The Court explained that Congress could not eradicate the jury right by designating such a claim as a “core proceeding[\footnote{Id. at 50.}][\footnote{Id. at 52.}][\footnote{Id. at 64.}]” subject to adjudication by bankruptcy judges; indeed, “to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment’s guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears.”\footnote{Douglas G. Baird, The Seventh Amendment and Jury Trials in Bankruptcy, 1989 S. CT. REV. 261, 280–81 (“[T]he Court did not rule that conducting a jury trial is itself an exercise of the judicial power.”).}

Admittedly, the Court took no position on “whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges.”\footnote{Granfinanciera, 492 U.S. at 62–63.} However, the Court strongly suggested that presiding over a jury trial is not alone an exercise of the judicial power.\footnote{See 28 U.S.C. § 157(e).} The Court emphasized the constitutional importance of integrating juries into non-Article III tribunals, critiquing the argument that “juries may serve usefully as checks only on the decisions of judges who enjoy life tenure,” as “overlook[ing] the extent to which judges who are appointed for fixed terms may be beholden to Congress or Executive officials, and thus ignor[ing] the potential for juries to exercise beneficial restraint on their decisions.”\footnote{Commodity Futures Trading Commission v.} Just as Article III judges (with all of the Constitution’s various securities ensuring their independence) cannot be trusted to act without the democratic oversight of the jury, neither can bureaucratic appointees. Congress responded to Granfinanciera by granting bankruptcy judges statutory authority to conduct jury trials.

Outside the context of bankruptcy courts, the Supreme Court has also recognized the authority of administrative bureaucrats to adjudicate purely private disputes. In Commodity Futures Trading Commission v.
Schor, the Court concluded that Article III did not prohibit the Commission from exercising jurisdiction over state-law counterclaims. Factors in the Court’s determination included “the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts.” The Court also listed other factors, including: “[T]he origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.” True, the Court has not recognized bureaucrats’ authority to adjudicate private disputes with a jury. But the idea that it is Article III’s commands as to the judicial power that is halting this practice is untenable given the above authority.

Critics will stress that in both Granfinanciera and Schor the Court’s reasoning turned in part on the consent of the parties. Neither the bankruptcy judge nor the Commission bureaucrat could force a litigant to adjudicate their common law claims in that forum, with or without a jury. The Supreme Court explained in Wellness International Network, Ltd. v. Sharif: “[A] personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights”—such as the right to a jury—“that dictate the procedures by which civil and criminal matters must be tried.” Yet the fact that this has been the established practice makes it no less baffling. So established is the principle that parties cannot confer jurisdiction where none exists that, one scholar notes, “a halo of constitutionality surrounds it.” And if the power to hold jury trials were exclusively an Article III function, no amount of party consent could vest that power in a tribunal incapable of receiving it—regardless of the

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330. Id. at 857.
331. Id. at 851.
332. Id.
333. The Court has since reframed Schor as a unique exception because the common-law counterclaim and the administrative claim involved a “single dispute” in a “narrow class of common law claims” in a “particularized area of law” governed by a “specific and limited federal regulatory scheme” in which the agency has “obvious expertise,” and whose orders could only be enforceable by a district court. See Wurman, Untold Story of Lucia, supra note 241 (quoting Stern v. Marshall, 564 U.S. 462, 491 (2011)).
336. Id. at 675.
parties’ or Congress’s insistence otherwise. Even the Court in Schor recognized that Congress could not create an entire “phalanx of non-Article III tribunals,” the parties’ consent notwithstanding. Consent is not the constitutional limitation critics are looking for.

Other critics might counter that an “administrative jury” like that proposed here, and as practiced historically, does not constitute a “jury” for Seventh Amendment purposes, and thus any such verdict would be open to re-examination on appeal. There is weak support for this argument. The Supreme Court in Capital Traction Co. v. Hof considered Congress’s grant of jurisdiction to justices of peace in the District of Columbia to conduct jury trials consisting of six people. The Court concluded that the “jury” verdict there did not satisfy the Constitution, stating in dicta that “[a] justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge, or his tribunal a court,” and as such “[t]he proceedings before him were not according to the course of the common law.” Because of this limitation, the Court concluded that the verdict of these six individuals as subject to appeal could be committed to a subsequent jury in a court of record.

But while Hof is seemingly on point, it is not particularly persuasive. First, over the course of the twentieth century, the Court has abandoned its commitment to the type of jury formalism reflected there. But perhaps more importantly, the Court in Hof appeared chiefly concerned with the lack of procedures available to justices of peace in controlling and instructing the jurors. That is, the decision turned on the procedural due process of the proceedings before a justice of peace, not that the jury was advised outside of a court of record. To be clear, this Article does

338. See, e.g., In re Adams, Browning & Bates, Ltd., 70 B.R. 490, 497–98 (Bankr. E.D.N.Y. 1987) (“Despite the suggestion in Marathon that the ability to conduct jury trials is one of the indicia of an Article III court, jury trials have not been considered the exclusive province of Article III courts.”).
341. See id. at 4, 17.
342. Id. at 38.
343. Id. at 45.
344. See Colgrove v. Battin, 413 U.S. 149, 164 (1973) (upholding a jury verdict by fewer than twelve people); see also Dimick v. Schiedt, 293 U.S. 474, 490 (1935) (Stone, J., dissenting) (“[T]he Seventh Amendment was intended to endure for unnumbered generations, [and] is concerned with substance and not with form.”).
345. See Hof, 174 U.S. at 39 (“A body of men, so free from judicial control, was not a common law jury.”).
346. A similar concern has been raised as to whether adjuncts and bankruptcy judges may preside over jury trials. See, e.g., Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d
not suggest that the Seventh Amendment creates a free-floating institution that can be maccyvered into place to save an otherwise unconstitutional scheme by calling a group of laypeople to decide the matter. The administrative proceedings still must be empowered to provide and comply with notions of due process.  

Under the proposal here, and in compliance with the text of the Seventh Amendment, jury verdicts reached in administrative tribunals would not be subject to re-examination on appeal. This means that not much would change from the perspective of an Article III judge reviewing an administrative decision. Recall that the current practice is that judges sitting in review give exceptional deference to agency fact-finding, overturning a decision if an agency’s conclusions are found to be “unsupported by substantial evidence.” This is the same standard used to review jury verdicts issued in traditional courts. Under the administrative jury proposal, the only difference is that the judge would review an actual jury verdict rather than a bureaucrat’s decision. If, however, the administrative proceeding did not provide a civil jury trial in accordance with the Seventh Amendment, then one must be provided on appeal or subsequent challenge—which is discussed next.

2. Jury Review of Administrative Fact Finding

There is another solution to the administrative state’s jury problem. Where Congress has not statutorily granted the non-Article III tribunal the authority to hold a jury trial, then the Seventh Amendment demands that such agency decisions as to legal rights be subject to de novo review in an Article III court by a jury either on appeal or through collateral attack. While this solution departs from the current approach, it is reflective of

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537, 544 (1984) (en banc) (explaining that magistrate judges may adjudicate civil cases by consent because the Federal Magistrates Act “invests the Article III judiciary with extensive administrative control over the management, composition, and operation of the magistrate system”); Gibson, supra note 227, at 1037–38 (“[Bankruptcy judges] possess the legal training and ability to instruct jurors on the law, advise them concerning the facts, and set aside inappropriate verdicts.”).

347. See U.S. CONST. amend. V.


349. See FED. R. CIV. P. 50 (“If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve the issue against the party . . . and grant a motion for judgment as a matter of law.”); see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 77 (1982) (“[T]his Court has accepted factfinding by an administrative agency, . . . as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master.” (quoting Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n, 430 U.S. 442, 450 n.7 (1977))).
the general historical practice up until the early twentieth century.\textsuperscript{350} All
the Seventh Amendment requires is that a jury be made available at some
point prior to final disposition of a legal dispute. As Professor Louis Jaffe
suggested over a half-century ago: “The jury trial problem is eliminated
where either party may seek a trial de novo by court and jury.”\textsuperscript{351}

If this approach seems odd, it is only because the Supreme Court has
largely abandoned its responsibility to secure the civil jury as an
institution within the administrative state. \textit{Cox v. United States}\textsuperscript{352} marks
perhaps the clearest misstep. That case concerned the Selective Service’s
classification of three Jehovah’s Witnesses as conscientious objectors
rather than ministers of religion, meaning that they were not entirely
exempt from military service.\textsuperscript{353} After exhausting their appeals within the
selective service process, the individuals initially reported to military
service before subsequently deserting and were arrested for being absent
without leave.\textsuperscript{354} At the criminal trial, they argued that they were entitled
to a de novo determination as to their classification, but the district court
disagreed, instructing the jury that they were not “to concern themselves
with the validity of the classification orders.”\textsuperscript{355} The Jehovah’s Witnesses
were convicted, appealed, and the Supreme Court granted certiorari.\textsuperscript{356}

The Supreme Court affirmed.\textsuperscript{357} Bowing to Congress, the Court
reasoned that “[t]he provision making the decisions of the local boards
‘final’ means to us that Congress chose not to give administrative action
under this Act the customary scope of judicial review which obtains under
other statutes,” and added, “courts are not to weigh the evidence to
determine whether the classification made by the local boards was
justified.”\textsuperscript{358} The Court then gave cursory review of the facts, concluding
that the board had adequate basis to deny the petitioners’ requested
classification.\textsuperscript{359} And in sweeping dicta, the Court explained why no jury
was required: “The concept of a jury passing independently on an issue
previously determined by an administrative body or reviewing the action

\textsuperscript{350} See Jerry L. Mashaw, \textit{Administration and “The Democracy”: Administrative Law from
courts would review agency decisions over private rights de novo, with “prior administrative
determinations . . . given no deference”).

\textsuperscript{351} \textsc{Jaffe, supra} note 298, at 99.

\textsuperscript{352} \textit{332 U.S.} 442 (1947).

\textsuperscript{353} \textit{Id.} at 443.

\textsuperscript{354} \textit{Id.}

\textsuperscript{355} \textit{Id.}

\textsuperscript{356} \textit{Id.} at 443–44.

\textsuperscript{357} \textit{Id.} at 455.

\textsuperscript{358} \textit{Id.} at 448 (quoting \textit{Estep v. United States}, \textit{327 U.S.} 114, 122–23 (1946)).

\textsuperscript{359} \textit{Id.} at 451.
of an administrative body is contrary to settled federal administrative practice,” and as such, “the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order.”

This claim was without foundation. Indeed, the only case the Court could muster for this proposition concerned courts of equity under the Emergency Price Control Act of 1942, which by its equitable nature would not have employed a jury anyway.

Despite its shaky foundations, Cox’s approach to the Seventh Amendment’s application came to dominate administrative law. In fact, today, the principle that a jury is unnecessary to pass independently upon an administrative decision is so well established that the most prominent treatises in the field do not even mention Cox. But what is so striking is that until comparatively recently, providing de novo review either on direct appeal or upon collateral attack was the dominant approach for reviewing administrative decisions. From the earliest days of the Republic, the availability of a jury at some point following an executive decision was believed necessary to comply with the jury trial guarantee. It was inconceivable that the Seventh Amendment could be read in a way that accommodated Cox’s broad approach.

Consider an early example. In the nineteenth century, the federal government had a problem: It wanted to sell all the land it had acquired by various means—but how? Congress delegated the task to bureaucratic commissioners. No judge or jury was required in that initial sale decision because, as constitutional law expert William Baude notes, “the commissioners did not do anything that necessitated a court because they did not deprive any person of life, liberty, or property. Rather, all the commissioners could do was grant or confirm the award of public property to putative claimants.” But if there was a dispute between a third party who claimed ownership of the land the government had just sold, those claims would be fought out in court, and, if brought

360. See id. at 453 (citing Yakus v. United States, 321 U.S. 414 (1944)).
362. See Yakus, 321 U.S. at 423, 440.
363. See Duffy, supra note 285, at 281.
364. See Merrill, supra note 263, at 951 (“[T]he breadth of review of agency action in the nineteenth century varied, but the nature of the review was uniformly what we would now call de novo.”).
365. See Baude, supra note 241, at 1543.
366. Id.
367. Id. (emphasis in original).
under common law, be presented in a jury trial.\textsuperscript{368} The availability of subsequent proceedings was fully in line with the Seventh Amendment even as to decisions of fact reached by the executive branch.\textsuperscript{369}

Consider another early example. In interpreting the same Act as was at issue in \textit{Murray’s Lessee}\textemdash the progenitor of the “public rights” exception\textemdash Chief Justice John Marshall emphasized the need for judicial and jury review of executively determined facts. “It would excite some surprise,” the Chief explained, “if . . . a ministerial officer might, at his discretion, issue this powerful process, and levy on the person, lands and chattels of the debtor, any sum he might believe to be due, leaving to that debtor . . . no appeal to the laws of his country.”\textsuperscript{370}

And so, the Chief explained, in cases of indebtedness by a public officer for public money received by him, “the proceedings by distress warrant may be resorted to, and if the party submits to it, there is an end of the matter.”\textsuperscript{371} However, if the debtor applies to the district court, the court may restrain the proceedings:

\begin{quote}
Afterwards the United States may sue for the debt claimed by them in the usual form, and as if the distress warrant had not issued. By this construction of the law, both the United States, and the defendant in the suit, have secured the right of a trial by a jury; while, by a different version of the law, this right is entirely taken away.\textsuperscript{372}
\end{quote}

As originally understood, the Seventh Amendment does not require jury involvement in the first instance; instead, all that is required is that a jury be made available at some point.\textsuperscript{373}

In the state courts, too, jury review of administrative decisions through collateral attacks was common in the eighteenth century. Consider the Massachusetts Supreme Court case of \textit{Miller v. Horton}.\textsuperscript{374} That was an action brought for the killing of the plaintiff’s horse by the defendants in accordance with an order of the board of health, which had declared the

\begin{flushright}
368. See Duffy, \textit{supra} note 285, at 304 ("In an action at law\textemdash such as a trespass or ejectment action\textemdash the underlying validity of title to the land is an issue that could and would be given to the jury under the common law."). The Court abandoned this approach in the late nineteenth century on functionalist grounds. See Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881).

369. See Merrill, \textit{supra} note 263, at 951.


371. \textit{Id.} at 11.

372. \textit{Id.}


374. 26 N.E. 100 (Mass. 1891).
horse sick with a contagion. Justice Oliver Wendell Holmes, writing for the majority, explained that the board’s finding was not determinative: “Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand.” But, Holmes added, “it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand he may be heard afterwards.” Miller is no aberration; it was favorably cited by the Supreme Court and has “gained a significant degree of fame in the standard canon of administrative law.” Similar cases can be found in states around the country. Public nuisances may be addressed summarily without jury involvement, but such determinations necessarily remain open to collateral attack.

Beyond collateral attacks, the opportunity for a jury trial upon direct appeal of an executive decision was also a well-established mode of preserving the jury right. For instance, less than a decade after the Seventh Amendment’s ratification, Congress took this approach with respect to the newly created bankruptcy courts. Under the Bankruptcy Act of 1800, the United States district judge for each district appointed a commissioner who had the authority, among other things, to issue warrants, allow creditors to prove debts, and order distribution of estates. Critically, a commissioner’s decision was subject to review in the district court, where either the alleged bankrupt or any creditor who disagreed with the commissioner on any fact issue could petition for a jury trial. Granting “original jurisdiction to bankruptcy commissioners and not to Article III judges suggests that early Congresses did not consider such original bankruptcy jurisdiction to fall within the ‘judicial power.’” Of course, it also suggests that early Congresses recognized the Seventh Amendment need for jury review of non-Article III findings.

375. Id. at 100.
376. Id. at 101.
377. Id.
379. See, e.g., Hutton v. City of Camden, 39 N.J.L. 122, 129–30 (1876) (concluding that whether an act is a “nuisance” can only be determined in judicial proceedings with a “jury under the guidance of a court” and without respect to a prior administrative determination reached after a hearing).
380. But see Blake Emerson, Vindicating Public Rights, 26 U. PA. J. CONST. L. (forthcoming 2024) (arguing that public nuisances are the foundation of public rights, to which no jury right attaches).
382. Id. §§ 6, 15, 29.
383. Id.
This kind of jury review of agency decisions played a particularly important role in the runup to the Civil War. Under the Fugitive Slave Act of 1850,\(^\text{385}\) Congress allowed non-Article III bureaucratic commissioners to determine whether an individual was free or enslaved.\(^\text{386}\) These infamous proceedings were mockeries, perhaps best demonstrated by the fact that the presiding non-Article III commissioners were paid five dollars for each person found to be free and ten dollars for each person found to be enslaved.\(^\text{387}\) Abolitionists challenged these proceedings as violating multiple provisions of the Constitution, including both the Seventh Amendment and Article III.\(^\text{388}\) A number of states passed personal liberty laws that (no doubt inadequately) provided for jury review of a commissioner’s decision; some courts even determined that the state and federal constitutions demanded such subsequent jury proceedings to comply with the Seventh Amendment.\(^\text{389}\) And some in the

\[\text{385. Fugitive Slave Act of 1850, Pub. L. No. 31-60, § 4, 9 Stat. 462, 462 (repealed 1864).}\]

\[\text{386. Id.}\]

\[\text{387. See Allen Johnson, The Constitutionality of the Fugitive Slave Acts, 31 YALE L.J. 161, 172–73 (1921) (noting this disparity, as well as its legislative opposition and support).}\]

\[\text{388. Ill-fated Massachusetts Senator Charles Sumner’s passionate critique of the Fugitive Slave Act’s constitutional shortcomings is deserving of being reproduced at length:}\]

This is the Fugitive Slave Bill—a bill which despoils the party claimed as a slave—whether he be in reality a slave or a freeman—of the sacred right of Trial by Jury, and commits the question of Human Freedom—the highest question known by law—to the unaided judgment of a single magistrate, on ex parte evidence it may be, by affidavits, without the sanction of cross-examination. Under this detestable, heaven-defying bill, not the slave only, but the colored freeman of the North, may be swept into relentless captivity . . . . In denying the Trial by Jury, it is three times unconstitutional; first as the Constitution declares, “The right of the people to be secure in their persons against unreasonable seizures;” secondly, as it further declares, that “No person shall be deprived of life, liberty, or property without due process of law;” and thirdly, because it expressly declares that “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” By this triple cord did the framers of the Constitution secure the Trial by Jury in every question of Human Freedom.

Charles Sumner, Speech on Our Present Anti-Slavery Duties, at the Free Soil State Convention in Boston (Oct. 3, 1850), in 2 CHARLES SUMNER, ORATIONS AND SPEECHES 396, 400–01 (1850) (emphasis in original). And Sumner added:

These officers are appointed, not by the President with the advice of the Senate, but by the Courts of Law; they hold their places not during good behavior, but at the will of the Court; and they receive for their services, not a regular salary, but fees in each individual case. And yet in these officers,—thus appointed and compensated, and holding their places by the most uncertain tenure—is vested a portion of that “judicial power,” which according to the express words of the Constitution, can be in “Judges” only, who hold their office “during good behavior,” who “at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office,” and, it would seem also, who are appointed by the President and confirmed by the Senate. And, adding meanness to the violation of the Constitution, Commissioner is bribed by a double fee, to pronounce against Freedom.

\[\text{Id. at 402.}\]

\[\text{389. Consider the Wisconsin Supreme Court’s approach, which held that the Fugitive Slave Act of 1850 was unconstitutional because, inter alia, it failed to secure jury trial rights:}\]

\[\text{Whether proceedings be commenced by the fugitive to resist the claimant, or by the claimant to enforce, and establish his claim, it would seem that either party would be entitled to a jury. It}\]
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Senate later relied on the availability of such state proceedings to justify the Fugitive Slave Act’s constitutionality.390 The persistence of these subsequent state proceedings despite federal efforts to halt them contributed to the onslaught of the Civil War.391 To be sure, just as disputes over the civil jury right helped spark the First American Founding, so too did they help spark the Second American Founding.392

Perhaps unsurprisingly, debate over the civil jury remained at the birth of the modern administrative state in the late nineteenth century. Consider

is no answer to this position to say that neither the states nor the general government have provided means for such a mode of trial. The constitutional right of the party remains the same. In re Booth, 3 Wis. 13, 39–40 (1854).

390. Mississippi Senator and later President of the Confederate States of America Jefferson Davis argued: “The right of jury trial, if there be any question as to the condition of a person of color in regard to freedom or slavery, already exists in every slave-holding State.” CONG. GLOBE, 39th Cong., 1st Sess. 1588 (1850).

391. For a discussion on the role of personal liberty laws and federal efforts to curtail them in the run-up to the Civil War, see THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861 (1974). Consider also the infamous case of Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). There, Wisconsin abolitionist Sherman M. Booth gave an inciting speech to a crowd before leading a mob to rescue an escaped and recaptured enslaved man named Joshua Glover. Booth was subsequently arrested by a United States Marshal and charged with violation of the Fugitive Slave Act. Booth sought, and was granted, a writ of habeas corpus in Wisconsin state court. The Marshal unsuccessfully appealed first to the Wisconsin Supreme Court, before turning to the federal courts. In a unanimous decision, the United States Supreme Court held, inter alia, that the Supremacy Clause of the Constitution precluded Wisconsin’s review of the federal proceedings. The Court’s decision was met with outrage, helping to radicalize abolitionists and drive the nation to war. For a review of the facts and importance of Ableman v. Booth, see generally Jeffrey Schmitt, Note, Rethinking Ableman v. Booth and States’ Rights in Wisconsin, 93 VA. L. REV. 1315 (2007).

392. The dispute over the need for jury trials within non-Article III tribunals persisted after the Civil War, too. In 1865, Congress created the Freedmen’s Bureau, which, among other things, established a network of courts administered by the War Department to handle certain disputes. See An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, § 1, 13 Stat. 507, 507–08 (1866). These military courts, which operated throughout the ex-confederate states, varied considerably in their procedures—though they universally did not rely on juries. See GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN’S BUREAU 154 (1955). This was an issue of great complaint. See Hon. Bernice B. Donald & Pablo J. Davis, “To This Tribunal the Freedmen Has Turned”: The Freedmen’s Bureau’s Judicial Powers and the Origins of the Fourteenth Amendment, 79 LA. L. REV. 1, 4 (2018) (“Of the Bureau’s many fields of action, however, none stirred up as much hostility as its judicial functions.”). Indeed, President Andrew Johnson eventually vetoed a measure to reauthorize the Freedmen’s Bureau, noting, among other reasons, that the authorizing statute created courts “without the intervention of a jury.” See Veto Message of Andrew Johnson over the Second Freedmen’s Bureau Bill (Feb. 19, 1866). Of course, this rationale was likely pretextual; Johnson’s well-known white supremacy and general disinterest in reconstruction was likely of greater significance in motivating the veto than the lack of juries in these tribunals (which, as military courts, would ordinarily not have featured a jury anyway). See CONG. GLOBE, 39th Cong., 1st Sess. 938 (1866) (statement of Sen. Lyman Trumbull) (responding to Johnson’s veto); id. (“Do not all military tribunals take place in that way? Did anybody ever hear of the presentment of a grand jury in a case where a court-martial sat for the trial of a military offense . . . ?”). But the point remains that the debate over application of the Seventh Amendment to non-Article III tribunals, and without an opportunity to appeal, continued to be a point of controversy even into the late nineteenth century.
the approach taken with regard to the Interstate Commerce Commission, which is broadly recognized as the first modern agency.\textsuperscript{393} Established in 1887, the Commission was charged with ensuring that common carriers set reasonable shipping rates.\textsuperscript{394} All carriers were required to make their rates public and send copies to the Commission.\textsuperscript{395} It also empowered the Commission to investigate a carrier based on an aggrieved party’s complaint of an unreasonable rate.\textsuperscript{396} The Commission would investigate, make a findings report, and send a copy to the carrier along with a cease and desist letter and, as necessary, would make a recommendation as to reparations for injuries suffered by a private party.\textsuperscript{397} If a common carrier did not voluntarily obey the order, the Commission or the harmed party could appeal to the circuit court sitting in equity for an injunction.\textsuperscript{398}

But there was a problem. The circuit court sitting in equity could not enforce the Commission’s reparations recommendation precisely because it would not comply with the Seventh Amendment.\textsuperscript{399} The Commission’s 1887 Report was explicit as to this issue:

\begin{quote}
The Commission . . . has not discovered in the statute a purpose to confer upon it the general power to award damages in the cases of which it may take cognizance. The failure to provide in terms for a judgment and execution is strong negative testimony against such a purpose; but what is perhaps more conclusive is that the act must be so construed as to harmonize with the seventh amendment to the Federal Constitution, which preserves the right of trial by jury in common-law suits.\textsuperscript{400}
\end{quote}

The Report continues: “It is believed to be unquestionable that parties can not be deprived of [the jury] right through conferring authority to award reparation upon a tribunal that sits without a jury as assistant.”\textsuperscript{401} For this reason, “any determination that reparation should be made, in a case in which a suit at law might have been maintained, can not be made absolutely binding and enforceable against the defendant in the form of

\begin{itemize}
\item \textsuperscript{393} See FRIEDMAN, supra note 46, at 439.
\item \textsuperscript{394} Interstate Commerce Act of 1887, ch. 104, § 3, 24 Stat. 379, 380 (1887) (repealed 1995).
\item \textsuperscript{395} Id. §§ 6, 12.
\item \textsuperscript{396} See id. § 13.
\item \textsuperscript{397} See id. §§ 14, 15.
\item \textsuperscript{398} See id. §§ 14, 16.
\item \textsuperscript{399} 1887 INTERSTATE COM. COMM’N ANN. REP. 27.
\item \textsuperscript{400} Id.
\item \textsuperscript{401} Id.
\end{itemize}
a judgment. Because their recommendation would be unenforceable in equity, the Commission often refused altogether to hear such claims. This was inefficient. So in 1889, Congress amended the Act to make the Commissioner’s findings enforceable in law rather than equity. The Commission was thus free to adjudicate and recommend damage awards, which could be enforced in a court with the Commission’s report serving as prima facie evidence. Critically, the Act required that on appeal, “if either party shall demand a jury or shall omit to waive a jury the court shall . . . summon a jury to try the cause.” Non-reparations proceedings, of course, could be addressed without the need of a de novo trial, as in such proceedings the Commission’s findings concerned enjoining future behavior rather than addressing past wrongs. In 1915, the Supreme Court reviewed this prima facie procedure and concluded that preliminary agency adjudication did not violate the Seventh Amendment because the “provision only establish[ed] a rebuttable presumption.” “It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury,” and therefore, the Court noted, “[a]t most, . . . it is merely a rule of evidence.” So long as

402. Id.

403. See, e.g., Councill, 1 Interstate Com. Comm’n Reps. 339, 345 (1887) (explaining that because the claim was “in its nature, an action of trespass, . . . the Commission, because it could not give [a jury trial], declined to go into that question”); Heck, 1 Interstate Com. Comm’n Reps. 495, 502 (1888) (“The claim for pecuniary damages made by complainants was not entertained on the hearing, because it presents a case at common law in which the defendants are entitled to a jury trial.”); Riddle, Dean & Co., 1 Interstate Com. Comm’n Reps. 594, 607 (1888) (“The Commission has repeatedly held that it can make no award of damages in a case like the present, for the reason that the defendants are entitled to have the amount assessed by a jury.”).

404. See WILLIAM Z. RIPLEY, RAILROADS: RATES AND REGULATION 461 (1920) (noting that the average duration of cases appealed was for four years or more).


407. Id.

408. Hence, when Congress passed the Hepburn Act and made Commission’s findings self-executing “[i]f . . . regularly made and duly served,” it made no changes to the handling of reparations cases. Hepburn Act, Pub. L. No. 59-337, § 16, 34 Stat. 584, 591 (1906). As administrative law scholar Ernst Freund noted, reparations cases concerned “[n]ot public administration, but remedial justice.” See ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 12–13 (1928) (“[P]ublic benefit attaches, however, only in the remotest sense . . . to an order which attempts to deal with controversies as to amounts due or losses suffered by reason of past transactions, and which gives pecuniary redress to one of the parties to the controversy.”).


410. Id.
the jury was made available at some point prior to final disposition, the Seventh Amendment’s jury right was secure.\textsuperscript{411}

Even as the administrative state grew through the early twentieth century, Congress continued to recognize administrative labor that sought to address past harms as merely preliminary.\textsuperscript{412} For instance, the Federal Communications Act of 1934 drew a sharp distinction between administrative orders concerning monetary payments and all other administrative orders. Monetary sanctions “could be enforced only through suits in district court that proceeded ‘like other civil suits for damages’ and in which the Commission’s underlying findings were simply ‘prima facie evidence’”; whereas with all other administrative orders, “the Commission’s underlying findings, ‘if supported by substantial evidence,’ were to be ‘conclusive unless it shall clearly appear that [they] are arbitrary or capricious.’”\textsuperscript{413} A student writing in 1942 captured how common this approach was to administrative schemes generally:

Legislatures have resorted to two provisions to avoid possible constitutional difficulties in the administrative field: (1) an appeal from the administrative ruling to a court where a jury will try the factual questions de novo; [and] (2) an appeal to a court and a jury, with the administrative finding operating as prima facie evidence of the facts contained therein.\textsuperscript{414}

Regardless of the evidentiary weight of administrative findings, the Constitution necessitated jury input before final disposition.

States also employed juries in reviewing administrative decisions through the twentieth century. Texas provides a key example. In 1890, the State amended its constitution to create a Railroad Commission with rate regulatory authority.\textsuperscript{415} In reviewing decisions of the agency, the Texas legislature provided for de novo review—requiring that they “shall be tried and determined as other civil causes.”\textsuperscript{416} This was inefficient, and

\textsuperscript{411} Interstate Commerce Commission awards were at times relied upon in assessing the reasonableness of a subsequent jury verdict. See Clark Bros. Coal Mining Co. v. Pa. R. Co., 88 A. 754, 760 (1913) (“The verdict can hardly be said to be excessive, in view of the fact that the [ICC] awarded the same plaintiff [a similar sum].”).

\textsuperscript{412} See Nelson, supra note 188, at 598 (noting that “Congress shied away from giving the agencies authority to resolve backward-looking claims for monetary relief,” because “authoritative resolution of such claims required an exercise of ‘judicial’ power”).

\textsuperscript{413} Id. at 601 (quoting Communications Act of 1934, ch. 652, §§ 401–402, 407, 48 Stat. 1064, 1092–96).

\textsuperscript{414} Application of Constitutional Guarantees, supra note 12, at 282.


\textsuperscript{416} Act of April 3, 1891, 1891 Tex. Gen. Laws 55, 58.
courts responded by adopting a standard of “substantial evidence de novo.” Under this standard of review, “the jury would decide whether a reasonable person, presented with the evidence presented to the jury, could rationally have reached the decision that the agency had in fact made.” This approach to reviewing administrative decisions largely persisted until the 1970s. Yet even today, there are pockets of Texas administrative law that still receive jury review under “substantial evidence de novo.” As the Texas Supreme Court noted in 1995, in upholding jury review of administrative decisions as to workers’ compensation claims, “[a]ccess to a jury need not be provided at the initial adjudication, so long as ‘the right to appeal and the jury trial on appeal are secured.’

There is recent federal support, too, for jury review of administrative decisions. In 1995, the Supreme Court seemed to bless this approach in Shalala v. Whitecotton. There, the Court addressed the National Childhood Vaccine Injury Act (NCVIA) of 1986, which allowed those injured by a vaccine to present their complaint to special masters in the Court of Federal Claims, where the dispute would be “adjudicate[d] informally,” “within strict time limits,” and “subject to similarly expeditious review.” Such claims would ordinarily amount to a private tort, and would thus be entitled to a jury trial. While not at issue in the case, the Court noted that under the Act “[a] claimant alleging that more than $1,000 in damages . . . must exhaust the Act’s procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.” Inferior courts grabbed this emphasis
in rejecting Seventh Amendment challenges to the NCVIA. The availability of a subsequent trial preserves the jury right.

Requiring preliminary, nonbinding adjudication to take place prior to Article III adjudication likely complies with the Seventh Amendment. As discussed above, the Supreme Court specifically blessed such proceedings in 1899 in Hof, and it elaborated in Ex parte Peterson that “the requirement of a preliminary hearing [does not] infringe the constitutional right, either because it involves delay in reaching the jury trial or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury.” The Court even suggested that such preliminary proceedings were “essential to the preservation of the right” to jury trial. Moreover, allowing such preliminary proceedings is not unique to the civil jury right. Courts have recognized that it is also consistent with the Sixth Amendment’s criminal jury trial right to conduct preliminary proceedings before a magistrate or the like, so long as a jury is made available on appeal. Accordingly, bringing the jury back into the administrative state by providing de novo review of agency decisions that affect legal rights either on appeal or on collateral attack can bring the modern administrative state into compliance with the Seventh Amendment. As Louis Jaffe explained: “[W]hen a person is the object of an administrative order which will be enforced by a writ levying upon his property or


427. True, the Supreme Court would later conclude that the NCVIA preempts all design-defect claims against vaccine manufacturers—basing that decision in part on congressional wisdom as to jurors’ capabilities. See Bruesewitz v. Wyeth LLC, 562 U.S. 223 (2011) (“It . . . reflects a sensible choice to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries.”). But it is difficult to reconcile that opinion with case law. If Congress could preempt any common law tort and replace it with binding jury-less adjudication whenever it thought necessary, Article III and the Seventh Amendment would become “mere wishful thinking.” See Stern v. Marshall, 564 U.S. 462, 488, 495 (2011).


429. 253 U.S. 300 (1920).

430. Id. at 310 (“[I]t is not an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor.”).

431. Id.

432. See Colten v. Kentucky, 407 U.S. 104, 113 (1972) (“If [the defendant] seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. . . . [S]uch that [p]rosecution and defense begin anew.”). But see Callan v. Wilson, 127 U.S. 540, 557 (1888) (“[T]he guarantee of an impartial jury to the accused . . . secures to him the right to enjoy that mode of trial from the first moment.”).
person, he is at some point entitled to a judicial test of legality.”\footnote{Jaffe, supra note 298, at 388 (emphasis added).} That this judicial test be conducted de novo is required, lest the power of the jury be diluted to the executive’s prerogative. And, again, Professor Jaffe contended: “A system of trial de novo . . . though seeming at first sight wasteful and almost contradictory, may have value; it may be possible thus to dispose of the great mass of cases with relative informality if, as is likely, trials de novo are seldom sought.”\footnote{See id. at 99.} Our attention turns next to addressing the practicable issues that might arise by reintroducing the jury to the administrative state, and the value that nevertheless persists.

IV. THE JURY IN A MODERN ADMINISTRATIVE STATE

Skeptics of the above proposals for meeting the Seventh Amendment’s dictates will likely claim that the modern administrative state cannot function if required to incorporate laypeople, whether directly or indirectly. The work is too complicated and too precise to be bogged down by inexperienced jurors.\footnote{See, e.g., Daniel A. Crane, The Institutional Structure of Antitrust Enforcement 113 (2011) (“Few institutions could be further from the technocratic model of expert administration than a randomly selected group of lay fact finders.”).} Although this argument lacks constitutional foundation, it cannot go ignored. Administrative agencies play an indispensable role in the modern state.\footnote{Mistretta v. United States, 488 U.S. 361, 372 (1989).} Fortunately, the integration of juries is likely to have limited impact on administrative work because: (a) given the realities of informal dispute resolution, few administrative disputes are likely to be submitted to juries; and (b) in those rare instances in which juries are involved, the benefits of democratic involvement easily outweigh the potential detriments.

A. Expert Adjudication with Lay Participation

Reintroducing juries into agency adjudication will no doubt be subject to criticism. The most commonly given reason for discarding the jury in the administrative context is based in functionalist concerns over efficient government administration.\footnote{The motivating rationale behind the emergence of the modern administrative state was to create a type of scientific application of facts and law beyond the capabilities of everyday people. See, e.g., Reuel E. Schiller, The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law, 106 Mich. L. Rev. 399, 413 (2007) (“Progressive reformers of the [early twentieth century] proffered expertise as the solution to a host of problems. . . . They believed that the scientific method could be applied to these problems. Technocratic experts, having arrived as a solution to a given problem, should be allowed to implement it.”).} From the administrative state’s earliest
days, courts and scholars have warned that lay involvement would undercut regulatory schemes and endanger the public.\(^{438}\) None of these commenters, however, have considered the role the jury would actually play within the practices of the twenty-first-century administrative state, in which the vast majority of regulatory disputes are resolved consensually or informally.\(^{439}\) Bringing the jury back in to government administration is unlikely to change that reality.

The Administrative Procedure Act (APA) governs these matters. Passed in 1946 as a means of both controlling and providing legitimacy to the federal administrative state, the Act established, *inter alia*, a formal process of administrative adjudication before an administrative law judge (ALJ).\(^{440}\) These formal proceedings resemble trials before district courts, entitling the parties to oral arguments, rebuttal, cross-examination of witnesses, and the presentation of other evidence.\(^{441}\) And while ALJs lack Article III designation, they do have some limited protections that help to secure their impartiality and independence. They preside over formal proceedings as the functional equivalent to a trial judge in a bench trial.\(^{442}\) The ALJ’s decision must provide findings of fact and conclusions of law, which are then reviewed de novo by agency heads who issue a final decision subject only to judicial review.\(^{443}\)

However, the APA also recognizes informal adjudication, a residual concept capturing all adjudicative proceedings not falling within the APA’s formal procedures.\(^{444}\) Informal adjudication takes place not before an ALJ, but instead before an administrative judge (AJ), who lacks not only Article III designation, but also the security from removal,
professional discipline, and performance reviews that ALJs enjoy. These informal proceedings vary dramatically among regulatory agencies in the amount of procedures secured—some borrow substantially from formal adjudication (such as providing evidentiary hearings), while others are far more perfunctory. Decisions reached via informal adjudication can be appealed and reviewed by agency heads, who issue a final decision. The importance of ultimate agency head review is central to the concept of agency adjudication as a means of implementing administrative policy.

Although the APA recognized informal adjudication as merely a residual means of resolving disputes, the process quickly emerged and has remained the dominant approach to agency adjudication since the 1940s. Eager to increase efficiency even beyond those meager protections provided by the APA’s formal adjudication process, agencies shifted the majority of their work to AJs. Supreme Court decisions helped accelerate this shift. So uncommon is formal agency adjudication today, that some have called it the “lost world” of administrative law. Some scholars celebrate this shift, arguing that this has allowed agencies to conduct their work more efficiently and nimbly, resulting in cost savings and better expertise; others dispute those points. Regardless, it is clear that the perceived benefits of informal adjudication are privileged by both the government and the parties.

As a result, administrative adjudication today looks far more like modern civil litigation than the formal procedures established by the APA. That is, most disputes are resolved through “flexible, consensual mechanisms for regulation, emphasizing less rigid, cooperative approaches over prolonged adversarial disputes.” This is unsurprising; private bargaining is readily apparent in all forms of dispute resolution

446. See Walker & Wasserman, supra note 439, at 153–54.
447. Id. at 152.
448. Id. at 144 (calling agency head review the “touchstone of agency adjudication”).
450. See, e.g., Barnett, supra note 34, at 1666–70 (reviewing the benefits for agencies through the use of AJs).
453. See, e.g., Barnett, supra note 34, at 1693–708 (providing an overview of these debates).
where it is permitted. When free to do so, parties will bargain toward agreements that minimize costs, mitigate risks, and maximize value. Agency adjudication is no different. The administrative state has recognized these interests and bent to the will of the parties. Examples include the extensive use of settlements, court-enforced consent decrees, and negotiated regulations over adjudicated outcomes. True, administrative settlements can impose “large costs on private parties that may have little bargaining power” and “stifle development of the law,” but this is no different than what is seen in civil settlements. Most parties prefer cheap and efficient resolution of their disputes.

Reintroducing the jury into administrative adjudication is unlikely to change this preference for efficiency over process. Although the availability of a jury trial could increase costs and uncertainty, the parties will simply shift their bargains to account for those changes. Justice Brennan in his Schor dissent made a similar point: “If [the administrative proceeding is] so much more convenient and efficient than litigation in federal district court that abrogation of Article III’s commands is warranted, it seems to me that complainants would rarely, if ever, choose to go to district court in the first instance.”

Exactly. Most parties will have little interest in employing juries or Article III judges to resolve their disputes when an agency tribunal offers substantial cost savings.

However, if the reintroduction of the jury did shift incentives to produce burdensome costs, Congress and agencies would not be without remedy. Sensitive to the need for regulatory compliance, Congress or an agency could simply increase the civil sanctions for certain violations to coerce compliance. Note that this is precisely the approach Congress has taken in the criminal context. Faced with the costs of complying with criminal due process protections—what Justice Scalia called the “the exorbitant gold standard of American justice”—Congress responded by


456. See Rossi, supra note 454, at 1016 (“[T]he prospect of settlement is a traditional component of any strategy to influence agency decisionmaking.”).


458. See id. at 1376.

459. See Owen M. Fiss, Comment, Against Settlement, 93 YALE L.J. 1073, 1085 (1984) (outlining some of these same deterrents in the context of private settlements).


dramatically increasing criminal penalties to encourage negotiation and settlement between prosecutors and criminal defendants.\textsuperscript{462} As then-Professor Stephanos Bibas colorfully explained, our criminal justice system is akin to a car dealership where most consumers get the going rate (negotiated outcomes) and “only a few suckers pay full sticker price” (non-negotiated outcomes).\textsuperscript{463} The result, as recognized by the Supreme Court, is that ours “is for the most part a system of pleas, not a system of trials.”\textsuperscript{464} The administrative state could adopt a similar approach.

A fair retort to this is that coerced administrative settlements, while perhaps constitutional, would be no truer to the Seventh Amendment than the plea-bargaining system is to the Sixth Amendment. Increasing penalties on defendants for exercising their constitutional right to a jury is deeply problematic. With respect to criminal defendants, criminal justice expert Albert Alschuler explains that such bargains “place a price in dollars . . . on things that we should be reluctant to sell: human liberty, the legitimate objectives of the criminal sanction, and the right to a hearing.”\textsuperscript{465} And while reasonable minds could draw distinctions between personal liberty and civil sanction, similar concerns would plague efforts to coerce regulated actors into easy settlements. What is more, the courts’ contrived approach of treating regulatory fines as civil rather than criminal in nature would be difficult to maintain in the face of ever-increasing civil penalties, suggesting that at some point it may become necessary to comply with the Constitution’s full due process protections afforded in criminal proceedings.\textsuperscript{466} Such costs are certainly worth bearing from a constitutional perspective, but they are costs, nonetheless.

Congress would have other tools beyond increasing sanctions. For instance, agencies might choose to shift their regulatory efforts away from adjudication and toward rulemaking—which would implicate no Seventh Amendment difficulties.\textsuperscript{467} Agency adjudication is but one means

\textsuperscript{462} See Lucian E. Dervan, \textit{Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization}, 7 J.L. ECON. & POL’Y 645, 650 (2011) (“To cope with the strain on the courts, the symbiotic relationship between overcriminalization and plea bargaining was born . . ..”); Larry E. Ribstein, \textit{Agents Prosecuting Agents}, 7 J.L. ECON. & POL’Y 617, 628 (2011) (“Prosecutors can avoid having to test their theories at trial by using significant leverage to virtually force even innocent, or at least unquestionably guilty, defendants to plead guilty.”).


\textsuperscript{464} \textit{Lafler}, 566 U.S. at 170.


\textsuperscript{466} See \textsuperscript{462} supra notes 22–24 and accompanying text.

\textsuperscript{467} See, e.g., M. Elizabeth Magill, \textit{Agency Choice of Policymaking Form}, 71 U. CHI. L. REV. 1383, 1396 (2004) (explaining the power of agencies to choose how to implement policy).
of implementing administrative policy,\textsuperscript{468} and agencies can choose whether to make policy through rulemaking or adjudication.\textsuperscript{469} If introduction of the jury undercuts the value of regulating through adjudication, agencies could simply increase rulemaking. This strategy would even benefit agency legitimacy, as administrative rulemaking often carries with it the requirement of notice-and-comment, in which the agency must “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”\textsuperscript{470} While the rulemaking process is more susceptible to agency capture—in which powerful parties co-opt agencies to advance special interests—than is adjudication,\textsuperscript{471} it remains the main process by which agencies are popularly checked.\textsuperscript{472} If integrating the jury drove agencies toward rulemaking rather than adjudication, it should be considered a feature, not a bug.

But suppose all of this is wrong; that is, suppose that increased penalties or rulemaking are insufficient to ensure regulatory compliance. It would hardly be the doomsday critics suggest.\textsuperscript{473} Recall that jurors within Article III trial courts are already regularly called upon to determine complex issues, including in such technical areas as antitrust, medical malpractice, product liability, and until 2018, patent disputes. True, critics

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\textsuperscript{468} See Fallon, supra note 9, at 923; see also Walker & Wasserman, supra note 439, at 153 (calling agency head review “the touchstone of agency adjudication”).
\textsuperscript{469} See Magill, supra note 467, at 1396.
\textsuperscript{470} 5 U.S.C. § 553(c).
\textsuperscript{473} Defenders of the juryless administrative state often note that to increase procedural protections would be to burden the state’s capacity to reach all sorts of mundane and routine executive decisions, such as those concerning postal shipping rates, national park permits, and social security or Medicare benefits. Cf. HAMBERGER, supra note 11, at 202 (documenting the position of such defenders of the administrative state status quo). The argument here does no such thing. The Seventh Amendment says nothing about the executive reaching an initial decision as to these types of matters. And it says nothing about claims for equitable relief (to which the jury trial right does not apply) or—given predominant sovereign immunity doctrine—about claims against the government, which would cover most routine government benefits claims. See Lehman v. Nakshian, 453 U.S. 156, 162 n.9 (1981) (“Since there is no generally applicable jury trial right that attaches when the United States consents to suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action.”). But see Weinberger v. Salfi, 422 U.S. 749, 785 (1975) (Douglas, J., dissenting) (“The present law was designed to bar payment of certain Social Security benefits when the purpose of the marriage was to obtain such benefits. Whether this was the aim of a particular marriage is a question of fact, to be decided by the jury in an appropriate case.”).
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lament the use of juries in these areas as well. But the response is not to discard lay involvement, but instead to alter strategies. Agencies and attorneys appearing before jurors would need to restructure their presentations to conform with the expectations of laypeople as opposed to agency bureaucrats. And while some might suggest that increasing procedural protections will not increase the accuracy of administrative decisions, the obvious retort is that the Constitution establishes procedural control, not quality control. The jury must have its say.

B. Democratic Legitimacy and the Administrative State

Not only would integrating jurors into the administrative state likely fail to render the United States’ regulatory agencies impotent, it would also carry substantial benefits in the form of increasing the democratic legitimacy of agencies. The vast majority of federal law is enforced in proceedings in which the public has been divested of any adjudicative role. This is precisely what the founders feared and what motivated ratification of the Seventh Amendment. Reintroducing the jury into administrative regulations therefore rectifies the central constitutional shortcoming of the administrative state and helps rebalance the government’s structure toward its animating democratic principles.

When the modern administrative state first began to emerge in the United States, it was celebrated as a type of “scientific administration” of government, floating above the political fray. President Woodrow Wilson waxed that “civil-service reform[]” “is clearing the moral atmosphere of official life by establishing the sanctity of public office as a public trust, and, by making the service unpartisan, it is opening the way for making it businesslike.” Similarly, Charles W. Needham, counsel for the Interstate Commerce Commission, defended agency adjudication as “combin[ing] the spirit of the jury system with the intelligent action of

474. See, e.g., LEON GREEN, JUDGE AND JURY 353 (1930) (“As a scientific method of settling disputes the general verdict rates little higher than the ordeal, compurgation or trial by battle.”).

475. Cf. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION, supra note 264, at 185–90 (suggesting that the availability of judicial review of agency decisions did little or nothing to improve the quality or accuracy of decision making, while imposing heavy costs).


478. See supra notes 85–92 and accompanying text.


480. Woodrow Wilson, THE STUDY OF ADMINISTRATION, 2 POL. SCI. Q. 197, 210 (1887).
compete with competent judges.” 481 Or consider the words of Harvard Dean James Landis, who in 1938 called “[t]he administrative process...our generation’s answer to the inadequacy of the judicial and the legislative processes.” 482 Those who built the intellectual architecture for the modern administrative state earnestly believed that government administration was capable of both democratic and expert legitimacy.

Today, it is easy to see these types of expressions as naïve. The realities of agency capture and self-interested bureaucrats quickly shatters any illusions that administrative agencies exist separately from the political branches. 483 This should not have been surprising. Precisely because civil servants are agents of the government, they must be viewed with deep suspicion, and their actions, when they impact legal rights, must be subject to lay judicial review at some point prior to a dispute’s final disposition. The “spirit of the jury system” 484 that Needham celebrates is realized only through jurors’ direct involvement; expert adjudicators sitting alone are fundamentally incompatible with the Constitution. To discard the civil jury in the administrative context is to undercut the foundational bargain between the people, the states, and the federal government.

Reintroducing the jury to the administrative state therefore carries the benefits of providing procedural legitimacy currently lacking in administrative adjudication. While agencies are staffed through a political winnowing process that ensures that those employed will be sympathetic to the agency’s goals, the jury suffers not from such deficits. Juries are democratic. Juries are anonymous. Juries are temporary. 485 “The jury is,” as jury scholar Stephan Landsman has put it, “the most neutral and passive decisionmaker available.” 486 Because of this essential character, its decisions carry a level of procedural legitimacy necessarily lacking from those decisions issued by government agents. 487 By ensuring that acts of government impacting legal interests are not brought to bear without first

481. Charles W. Needham, Judicial Determinations by Administrative Commissions, 10 AM. POL. SCI. REV. 235, 239 (1916).
482. JAMES LANDIS, THE ADMINISTRATIVE PROCESS 46 (1938).
484. Needham, supra note 481, at 239.
485. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 57–63 (1978) (arguing that because the jury is “decentralized,” “representative,” “discontinuous,” and “aresponsible,” it possesses an authority that other government agents cannot).
486. Landsman, supra note 47, at 288.
487. See id.
passing through a body of local laypeople, the system achieves greater legitimacy. Under the proposal offered here, the government could still bring disputes in specialized tribunals, but it would be required to test its theories against the crucible of the people.

Beyond this procedural legitimacy, a diverse group of lay jurors can often be better decision-makers than an individual judge, thereby providing increased substantive legitimacy, too. Through deliberating, jurors compare, contrast, and test different evaluations and interpretations of evidence through their diverse backgrounds and experiences. Perhaps for this reason, diverse juries are often perceived as more legitimate. In the alternative, judges (and particularly the bureaucrats presiding over agency proceedings) represent a privileged and not disinterested class. And, as repeat players, they have a natural tendency to review cases in a routinized fashion and fulfill their decision-making role in isolation. This is not a unique point. As Aristotle explained:

> Now no doubt any one of them individually is inferior compared with the best man, but a state consists of a number of individuals, and just as a banquet to which many contribute dishes is finer than a single plain dinner, for this reason in many cases a crowd judges better than any single person.

Reintegration of the jury into government administration could, counterintuitively, result in better and more accurate decision making, even in technically complex cases.

Perhaps more importantly, increasing the role of the jury can have substantial socio-political benefits. At its core, the jury is a political institution representing a radical commitment to self-governance. French scholar Alexis de Tocqueville championed this role, writing: “[Juries] make all men feel that they have duties toward society and that they take a share in its government. By making men pay attention to things

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other than their own affairs, they combat that individual selfishness which is like rust in society.” Empirical studies support Tocqueville’s observations. Those who serve on juries and issue a final verdict tend to view their service as a positive form of civic engagement. Similarly, studies also show that civil jurors who were required to reach a unanimous decision are significantly more likely to vote in elections after jury service than they were before serving. As Plato recognized over two millennia ago, “[I]n private suits . . . as far as is possible, all should have a share; for he who has no share in the administration of justice, is apt to imagine that he has no share in the state at all.”

Accordingly, the potential detriments of reintroducing the jury into the administrative state must be considered alongside the certain benefits. It is unlikely that lay involvement would so disrupt the administrative state so as to dismantle the efficiency and expertise that is its cornerstone. But if there are costs at the edges, in the form of elongated proceedings or increased uncertainty in enforcement, those costs are easily outweighed by the democratic benefits of integrating the people into the administration of the state. Democracy is not the shackle preventing efficient government administration, but rather the key to its realization.

CONCLUSION

William Blackstone warned over two and a half centuries ago of the modern administrative state’s central flaw. In discussing the importance of the jury, Blackstone wrote:

Every new tribunal erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissions of the revenue, judges of a court of conscience, or any other standing magistrates) is a step towards establishing . . . the most oppressive of absolute governments.

To bring the administrative state into constitutional compliance, power must be given back to the jury—as the Seventh Amendment demands. Yet this must be done in a way that ensures that the economic, social, and

498. 3 BLACKSTONE, supra note 65, at *380.
public health benefits of the modern administrative state continue to be realized. Two solutions are proposed here: The first is to integrate juries directly into administrative adjudication, and the second is to provide a de novo jury trial in an Article III court. Neither approach is reflective of unbound jury maximalism.499 Instead, these are modest solutions, grounded in established constitutional principles and practices, that would place the administrative state in line with the plain text and history of the Seventh Amendment. Failure to take these steps will allow the federal government to continue to sidestep the jury in state administration, depriving parties of their liberties and the people of their rightful voice in our democratic judiciary.

499. See Bray, supra note 207, at 507 (defining a “jury maximalist” as one who supports the use of juries beyond the Constitution’s dictates, for instance, “that juries should be used as much as possible regardless of the Seventh Amendment”).