Judicial deference to administrative action—a revisionist history

Deferência judicial à ação administrativa — uma história revisionista[*]

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ABSTRACT

This article discusses the influence of the regulation of railways and the Interstate Commerce Commission on modern administrative law and presents some perceptions of administrative law in the nineteenth and twentieth centuries. Therefore, three models of judicial review are discussed; the assumption that the courts found it difficult to perceive their role in relation to agencies as an "appeal" nature is contested; and other influences on the extent of judicial review of administrative action are explored.

KEYWORDS

Administrative law — statutory law — judicial review — administrative courts — judicial system

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RESUMO

O artigo aborda a influência da regulação das ferrovias e da Comissão Interestadual de Comércio no direito administrativo moderno e apresenta percepções do direito administrativo nos séculos XIX e XX. Para tanto, são discutidos três modelos de revisão judicial; a suposição de que os tribunais tiveram dificuldade em perceber seu papel em relação às agências como natureza de "apelação" é contestada; e outras influências sobre a extensão da revisão judicial da ação administrativa são exploradas.

PALAVRAS-CHAVE

Direito administrativo — direito Estatutário — revisão judicial — tribunais administrativos — sistema judicial

Introduction

The modern regulatory state began with federal regulation of the railroads, and with it began modern administrative law.[1] Congress passed the first Interstate Commerce Act in 1887, and it is only with the Interstate Commerce Commission (ICC) cases that the federal courts began to use the vocabulary of administrative law that has now become familiar through its incorporation into the Administrative Procedure Act.[2] Before that time, there was scarcely a concept of a separate body of federal administrative law.[3]

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1 *See* Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1196 (1986) (focusing on railroad regulation); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1669, 1672 (1975) (traditional model of administrative law developed out of judicial decisions and legislative enactments during the first six decades of this century; coherent set of principles emerged in period 1880-1960); *see also* Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1435 (1988) (generally associating "early period" of administrative law with era of Lochner v. New York, 198 U.S. 45 (1905)); *cf.* Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988) (discussing extensive literature on railroad regulation in the late nineteenth century).

2 *See* 5 U.S.C. §706 (1988); *see also* ICC v. Illinois Central R.R. Co., 215 U.S. 452, 470 (1910); J. Dickinson, Administrative Justice and the Supremacy of Law 67-68 (1927); Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 Geo. L.J. 287, 304-06 (1948); Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 917 & n.228 (1970) (Administrative Procedure Act was considered to be restatement of law embodied in statutes and judicial opinions); Stewart, *supra* note 1, at 1667, 1669; *cf.* W. Nelson, The Roots of American Bureaucracy, 1830-1900, at 119-28 (1982) (describing increasing regularization of governmental process post-Civil War).

3 *See* Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 Buffalo L. Rev. 765, 799-800 & n. 170 (1986).

Nevertheless, federal agencies existed before the establishment of the ICC, as did administrative law, even if not so called. The first century of federal administrative law, however, remains something of a dark age, and "little sustained work"[4] has been done on the era.[5] The work that has been done suggests that administrative law was incoherent and best understood with reference to particular subject matter areas such as "land law" or "customs law" rather than as a unified system of "administrative law."[6] To the extent writers generalize among the different subject-matter areas, the whole first hundred years is lumped together as an age of judicial deference to the agencies.[7]

Scholars traditionally attribute this deference to the federal government's business, which principally consisted of dispensing public "privileges" rather than encroaching on private "rights."[8] This distinction supposedly allowed for a rougher form of justice than we now countenance for modern regulation of private industry. When judicial review of federal agency action was occasionally more searching, scholars attributed it to the federal courts' use of a theory, unpredictable in application, that the agency had somehow exceeded its jurisdiction.[9] According to these writers, courts would focus only on questions of jurisdiction, rather than view their role in a more modern light of "a proceeding in error to correct an adjudication by an inferior tribunal."[10]

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4 S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 24 (1985).

5 The most frequently cited works, both older studies, are J. Dickinson, Administrative Justice and the Supremacy of Law (1927), and Lee, The Origins of Judicial Control of Federal Executive Action, 36 Geo. L.J. 287 (1948). There are of course many studies of particular topics that are part of administrative law in the broad sense, such as sovereign immunity and habeas corpus, which explore nineteenth century case law. See, e.g., Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 Colo. L. Rev. 1 (1972).

6 See J. Dickinson, supra note 2, at 56, 71; Young, supra note 3, at 800; Scalia, supra note 2, at 919 (development of sovereign immunity law should be analyzed with closer reference to the existential categories of cases, *e.g.*, public-lands cases, post-office cases, tax cases).

7 See Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1,16 (1983); Young, supra note 3, at 797. Professor Gordon Young finds some coherency in what he describes as "executive action" cases, in which the courts were deferential to agency decisionmaking. Id. at 816.

8 See Monaghan, supra note 7, at 17; J. Dickinson, supra note 2, at 277; Young, supra note 3, at 797.

9 *See* J. Dickinson, *supra* note 2, at 41-42, 307-08, 310; S. Breyer & R. Stewart, *supra* note 4, at 25-26.

10 J. Dickinson, supra note 2, at 307-08; see also Lee, supra note 2, at 287, 299-300, 305, 309; cf. S. Breyer & R. Stewart, supra note 4, at 25-26 ("The doctrinal effort to draw a sharp division between the responsibilities of administrators and courts ignored the possibility, developed at great length in our own era, of a category of administrative discretion that is subject to limited and partial judicial control and reexamination.").

This article is intended to shed further light on this dark age of administrative law, and to take issue with generalizations that other commentators have made about it. This article uses three models of judicial review, described in part I, to analyze nineteenth-century administrative law and to show coherency in the forms of review that cut across individual subject-matter areas. With the aid of the three models, the article will take issue with the prevailing view of the nineteenth century as a monolithic age of judicial deference to administrative decisionmaking. It will show that in the nineteenth century, as in the twentieth, changing political and economic theory altered the level of judicial review over time.

In addition to showing that early administrative law was at once more coherent and less deferential than is commonly realized, this article disputes the assumption that the courts had difficulty in perceiving their role vis-à-vis the agencies as "appellate" in nature. While it is true that appellate-style review of agency action was a relative rarity in the nineteenth century, this rarity was not necessarily the result, as some have claimed, of a lack of sophistication about administrative law and separation of powers.[11] The relative scarcity of what we would now characterize as appellate-style review resulted less from courts' lack of such sophistication and more from the nature of congressional legislation and the nature of appellate review at that time.

This article also explores other influences on the extent of judicial review of administrative action. It looks at whether the so-called right/privilege distinction, which modern writers use as an explanation for what they see as a deferential style of review in the nineteenth century, has much explanatory force. The article concludes that the right/privilege theory has been overemphasized as a predictor of deferential review. Instead, this article suggests that instrumentalism, or the desire to promote commerce, may have been an equally or more important determinant of the level of judicial review.

The conclusions suggested, while historically based, are of more than antiquarian interest. The commonly held belief that the right/privilege distinction explains nineteenth-century deviations from a presumptively deferential style of judicial review of administrative action lends support to those who today would water down due process protections in cases involving dispensation of government benefits.[12] More importantly, the background assumption that the first hundred years were an age of judicial deference to agencies implicitly

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[11] See Lee, supra note 2, at 287, 299-300; J. Dickinson, supra note 2, at 307-08.
[12] See Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 426 U.S. 341 (1976).

undergirds current claims that the executive agencies can more legitimately exercise delegated lawmaking power than the courts.13 Historically, however, the courts exercised significant lawmaking powers both under the common law and under nineteenth-century administrative law.14 The pre-ICC law tends to demonstrate the long pedigree of inelegant allocations of lawmaking authority between courts and agencies that persisted until the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*[15] transferred significant lawmaking authority from the courts to the agencies.

I. Three models of judicial review

If the courts are to police all branches of government to assure that they act within the bounds of the Constitution, and in addition, police the executive to assure that it acts within statutory authority, there is a limited spectrum of forms for judicial control.[16] Essentially, judicial review may operate between two poles, with the possibilities ranging from what this article refers to as a "de novo" model to a "res judicata" model.

Under a de novo approach, courts accord no finality to administrative determinations of law or fact. Instead, they redetermine all issues of law and fact that executive officers have previously determined. By contrast, under the res judicata model, courts accord finality to the decisions of administrative

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13 *See, e.g.*, Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984); Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. Rev. 1239, 1241-42, 1251 (1989) [hereinafter Pierce, *Agency Theory*]; Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretation of Statutory Provisions*, 41 Vand. L. Rev. 301, 307 (1988) [hereinafter Pierce, *Judicial Review]*; Pierce, *The Role of the Constitutional and Political Theory in Administrative Law*, 64 Tex. L. Rev. 469, 471-72, 508, 520 (1985) [hereinafter Pierce, *Political Theory*]; Starr, *Judicial Review in the Post*-Chevron *Era*, 3 Yale J. on Reg. 283, 308 (1986); Kmiec, *Judicial Deference to Executive Agencies and the Decline of the* Nondelegation Doctrine, *2 Admin. L.J. 269 (1988).* But cf. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 381 (1986) (Supreme Court case law overstates deference due agencies); Sunstein, In Defense of the Hard Look: Judicial Activism and Administrative Law, 7 Harv. J. L. & Pub. Pol'y 51, 57-58 (1984) (questioning political accountability of agencies); see also Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 462 (1987) (rise of presidential control has fundamentally transformed the New Deal agency).

14 Cf. Wood, The Fundamentalists and the Constitution, 35 N.Y. Rev. of Books 33, 40 (Feb. 18, 1988) (historical process is a source of legitimacy for constitutional interpretation); see also Scalia, supra note 2, at 918 (common-law scholar must derive unifying principles from the case law rather than imposing them upon it).

15 467 U.S. 837 (1984).

16 See Monaghan, supra note 7.

officers on issues of both law and fact. Under this latter model, the judiciary treats determinations of the executive branch as it would treat decisions of a court in a separate court system. Judicial review under a res judicata model thus focuses on "jurisdictional" issues; if the original decision maker had jurisdiction to decide the issue, the earlier decision is given conclusive effect and is upheld. Because courts accord increased deference to executive decisions under this res judicata model, more fact finding and lawmaking power rests in the executive than under the de novo model, under which power flows to the juries and judges who sit in review of administrative action.

Between the two poles of the de novo and res judicata models are various possible levels of court deference to agencies. An approximate midpoint between these two models that this article uses as a reference point is an "error" model. As with the res judicata model, the reviewing court analogizes the agency to another court. The analogy, however, is not to a court in a separate court system as under the res judicata model, but to a lower court in the same system as the reviewing court. Thus, under this error model, the reviewing court acts as an ordinary appellate court would act toward a trial court. A court would accord deference to agency fact-findings under the error model, but would conduct de novo review of issues of law.[17]

These models are not intended merely to be modern impositions on an earlier age, but rather are intended to shed light on how the nineteenth-century courts viewed their role in reviewing executive decisions. Over the course of time, one can trace movements from the predominance of a de novo style of review of agency action in the early Republic, with its reliance on the courts as instruments of administration, toward the more deferential and bureaucratic res judicata style. One can also trace the quick slippage of the res judicata model itself into some aspects of the intermediate model that permits review for legal error, but accords deference on issues of fact.

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[17] Professor Judith Resnik describes six general procedural models in her article Tiers, 57 S. Cal. L. Rev. 837 (1984): (1) Single Judge/Finality, (2) Single Judge Plus Same Judge, (3) Single Judge Plus Limited Review, (4) Single Judge Plus Unlimited Review, (5) Single Judge Plus Limited Review Plus Limited Review, (6) Single Judge/Different Forum Plus Unlimited Review. Because Professor Resnik focuses on the expression of values through provision of multiple levels of decisionmaking throughout the procedural system, her models are more complex than those needed to study the interrelationship between the agencies and the courts. If one simplifies the structure of the agencies and the courts by treating the agencies and the courts each as a single decisionmaker, then Resnik's model 1 corresponds roughly to a res judicata model, her model 4 corresponds to a de novo model, and her model 3 to an error model. See id. at 983.

Important qualifications, however, accompany these general trends. The judicially activist de novo model of the early Republic survived in many areas, particularly in the area now associated with constitutional tort litigation. The highly deferential res judicata model of review that succeeded the de novo model in predominance fit poorly with strong common law traditions of court lawmaking power, and quickly took on aspects of the intermediate error model. And despite some predictions that our system of administrative law would evolve towards an appellate-style or error model,[18] it still retains many aspects of the res judicata model of judicial review of administrative action.

II. The De Novo model

A. Allocation of decisional authority among the branches under a De Novo model

1. Government enforcement proceedings as a paradigm of De Novo review of executive action

Under the de novo model, all executive interpretations of law, and executive applications of law to fact, are fully reviewable by the judiciary.[19]

Although the de novo model may operate within several different types of judicial proceedings, the common thread in such proceedings is the lack of finality that the court accords executive determinations of both law and fact.

The paradigm of the de novo model of judicial review of executive action occurs in the government-initiated criminal prosecution. Before initiating prosecution, the executive must interpret the law that it is enforcing to determine if that law has been violated. The executive, however, will not have the final say on the exercise of state power or on the interpretation of law. This interpretive function will be left to the courts, whose task is limited by

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[18] J. Dickinson, supra note 2, at 307-08; Lee, supra note 2, at 309. Professor Ernst Freund described the progress of administrative law as a displacement of common law remedies by a special body of administrative law. E. Freund, The Growth of American Administrative Law 12-13 (1923).

[19] I am using the term "courts" here to include both judges and juries. In criminal prosecutions and in civil actions at law, the jury determines facts and applies judge-given law to the facts. In equity actions, the judges perform both of these functions.

such doctrines as strict construction of criminal statutes,[20] and by the added safeguard that the exercise of state power against the individual cannot be completed without a jury determination. The task of the executive in these contexts, other than to prosecute, is to enforce judgments.[21] The steps required for criminal conviction make the executive decision to prosecute nonfinal, and, in a sense, interlocutory. Final deprivations of liberty or property tend to occur only after full judicial due process.

The prosecutorial paradigm may be extended to the civil context in those cases in which the government must initiate suit before taking action against a party. For example, the government may have to initiate a court action in order to collect money or penalties that the government claims is owed by an official or private citizen.[22] Similar to criminal prosecutions, the court in a government-initiated civil enforcement suit will often accord no finality to the executive's decision to commence the enforcement proceedings, and will determine facts (with the help of a jury in actions at law) and law de novo.

2. Private suits to enforce common law, statutory, and constitutional norms

Besides government-initiated criminal and civil enforcement actions, the de novo model is also visible in civil suits brought by one private citizen against another to enforce statutory, constitutional or common-law norms. When one private party enforces a constitutional or statutory norm against another in a civil action, she may plead an explicit congressionally created cause of action, or a common-law action incorporating statutory or constitutional duties.

For example, one private citizen may sue another for an antitrust violation. A private citizen rather than a government official makes the decision to commence the enforcement action. As in a government-initiated suit, the court determines facts and law de novo. The only involvement of the

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[20] The doctrine of strict construction of criminal statutes is related to the prohibitions against common law crimes and the void for vagueness doctrine. All three doctrines guard against delegating power to make criminal law to bodies other than the legislature. Each doctrine also assists in assuring that there is advance notice of the behavior that will incur criminal sanctions.

[21] See M. Vile, Constitutionalism and Separation of Powers 59 (1967) (describing John Locke's view of role of executive).

[22] See infra note 52.

executive branch is to enforce the judgment, and the court does not review any executive decisionmaking at all. Although this form of action need not involve any element of review of executive decisionmaking, it is useful to include citizen-against-citizen suits in the de novo model. Such suits frequently constitute a form of administration of the law in which courts decide issues of law and fact de novo. We sometimes forget that administration of the law may occur through privately-initiated court actions.

Sometimes suits initiated by private parties involve elements of review of executive decisions. For example, one private party may sue another for patent infringement. The decision by a government agency to issue the patent may be at issue if there is a defense of patent invalidity. In such cases, the court may determine de novo the correctness of the executive decision to issue the patent. As in prosecution and government-initiated suits, in citizen-initiated suits to enforce statutory and common law norms, judicial due process is provided prior to final deprivations of liberty or property.

Executive action may be effectively final in some sense before judicial process is possible. For example, an executive officer might order destruction of property if he concludes that it poses an imminent danger to public health.[23] Other acts preliminary to a final judicial determination may produce harms that are complete, in both a practical and a legal sense.[24] Acts designed to lead to prosecution, such as arrest, inflict harms that are complete and sometimes compensable in an action for false arrest (or today for an unconstitutional arrest).[25] This is true even though the determination of probable cause may be subject to later determination by courts, and the determination of guilt is subject to later determination by a jury. Seizures of property, even if subject to return if a court finds the seizure improper, give rise to harms that may be in themselves compensable under conversion or trespass actions.[26]

For executive action that is in some sense complete before final judicial determination of its legality, the system may require the official to go to court, after the fact, to get final judicial approval of the state's use of power. For

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[23] See, e.g., Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891).

[24] A harm could be said to be complete in a practical sense if there has been some injury in fact. A harm could be said to be complete in a legal sense if the courts are willing to recognize a remedy for it by considering the harm actionable by the person who suffered the harm. Our legal system denies compensation for many interlocutory harms, but awards compensation or injunctions for some. L. Jaffe, Judicial Control of Administrative Action 242, 247-60 (1965).

[25] See, e.g., Beckwith v. Bean, 98 U.S. 266 (1878).

[26] See, e.g., Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818).

example, criminal prosecution may follow arrest, or the government may bring actions for the forfeiture of previously seized property. Sometimes the system awaits a citizen suit against the wrong-doing official before the legality of government action can be tested. For example, persons in custody after arrest might seek their release on habeas corpus; property owners might sue in detinue to recover government-seized property.[27]

Historically, citizen-initiated suits against governmental officials were brought as private law actions. If his invasion of the citizen's interests were not justified by statutory authority, the official was treated as a private person who had committed a tort or other legal wrong.[28] Threatened governmental invasions that might lead to irreparable harms similarly gave rise to actions in equity for injunctions, or at law for mandamus.[29] In such citizen-against-officer actions for injunctive-type relief, as well as in actions for damages, the court treated the officer as a private party if he acted without authority. In citizen-initiated actions for both damages or injunctions, as in government-initiated prosecution and civil enforcement proceedings, the facts and the application of law to facts by the official were generally subject to de novo determination by jury and court.[30]

The de novo model thus manifests itself in criminal prosecutions, government-initiated civil suits preliminary to a final governmental deprivation of liberty or property, citizen-initiated suits to enforce common-law and statutory norms against other citizens, and citizen-initiated suits against officials to contest the legality of completed deprivations or to stop threatened ones. Executive determinations of fact and law (*e.g.*, that a criminal statute has been violated or that a patent should issue) under the de novo model lack finality due to their being channelled (either as a requirement on the executive, or at the election of the citizen after an actual or threatened deprivation) through judicial due process for final determination of their legality. The de novo model therefore comports with an idea that due process generally means judicial process.

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27 See, e.g., Poindexter v. Greenhow, 114 U.S. 270 (1885).

28 *See Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. 396, 414-22 (1987).*

29 See, e.g., Scott v. Donald, 165 U.S. 58 (1897) (action at law); Scott v. Donald, 165 U.S. 107 (1897) (equity action).

30 See infra notes 54-60 and accompanying text.

3. The De Novo model and separation of powers

Separation of powers doctrine dictates that the legislature, or the body with primary law-declaring functions, should ordinarily not execute the law.[31] Thus, law-declaration functions and law-application functions tend to be separate.[32] Of course, law-application itself involves some aspects of law-making, since in applying a general rule to particular facts the law-applier makes a determination of whether those facts are a sufficient predicate for the exercise of state power.[33] Separation of powers doctrine therefore inherently faces the problem that all lawmaking cannot be concentrated in the legislature.[34] Some lawmaking functions must inevitably flow to the branches that apply legislation to particular facts, that is, the executive or the judiciary.[35] The allocation of decisional authority between the executive and the judiciary is also problematic for separation of powers, however, because both branches engage in similar law-application functions.[36] Both the executive and the judiciary will have occasion to apply general rules to particular facts. But while such executive action is verbalized as law-execution or administration, and such judicial action is verbalized as law-judging, interpretation, or discovering, they all nevertheless involve lawmaking functions.[37]

In criminal prosecutions, the paradigm of the de novo model, it is possible to see a coherent tripartite division of government functions. The legislature must enact a specific proscription, the executive prosecutes, and the judiciary tells the jury how to apply a specific law. Both executive and judicial officials have a narrowly circumscribed ability to make law through law-application.

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31 M. Vile, supra note 21, at 23.

32 See Monaghan, Constitutional Fact Review, 85 Colum. L Rev. 229, 234 (1985) (discussing H. Hari & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 374-76 (Tent. Ed. 1958)). By law declaration, I mean laying down rules of general applicability stating the consequences that the state will attach to particular classes of action. By law application, I mean the process of deciding the effect of those more general rules in a particular fact situation. Law application frequently involves elaboration of more general norms. See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 235 (1985).

33 Bohlen, Mixed Questions of Law and Fact, 72 U. Pa. L. Rev. Ill, 114 (1924); see also O. Holmes, The Common Law 126 (1881); L. Jaffe, supra note 24, at 553-54.

34 Cf. M. Vile, supra note 21, at 23 (if law is to deal in generalities, there must be some provision for giving discretion to those who have to apply the law in individual cases).

35 *See Pierce, Political Theory, supra note 13, at 471-72; Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 264 (1990).*

36 See Bator, supra note 35, at 264.

37 See, e.g., H.L.A. Hart, The Concept of Law 132 (1961). But cf. R. Dworkin, Law's Empire (1986).

Executive and judicial officials in criminal cases are faced with effective doctrines against the delegation of legislative power that limit the lawmaking functions of the executive and the judiciary. Although the executive initially may give a broad interpretation to a criminal statute in deciding to initiate prosecution, both the executive's and the judiciary's ultimate ability to create or expand substantive crimes will be reined in by judicially enforced nondelegation doctrines—the proscription against common-law crimes, canons of strict construction, and due process constraints associated with the void-for-vagueness doctrine.

Outside of criminal law, however, the executive and the judiciary customarily have had more room for lawmaking. In the civil area, courts have not created strict nondelegation doctrines like those used in criminal law.[38] Nor is the development of civil as distinguished from criminal common law proscribed, although Erie Railroad Company v. Tompkins[39] reined in federal court creation of a general common law. Because the courts do not require the same legislative specificity in the civil as opposed to the criminal context, and because the legislature frequently fails to supply such specificity voluntarily, Congress often implicitly delegates significant lawmaking authority to the law-applying bodies when it enacts legislation. When this happens, lawmaking power flows to either the executive or the judiciary.[40] As a general matter, under a model of de novo judicial review, outflowing lawmaking authority from the legislature tends to be absorbed by the judiciary rather than the executive.[41] Also, in a common-law system, the frequent absence of any legislation may be filled by judge-made law as a form of regulation.[42]

B. The De Novo Model in the early republic

Before the development of more bureaucratic forms of government in the nineteenth century, the primary impact of government on citizens was through

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38 The Court does use a clear statement doctrine, however, to forbid executive action that treads close to constitutionally protected interests. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958).

39 304 U.S. 64 (1938).

40 See Pierce, Political Theory, supra note 13, at 471-72 (once Congress delegates policymaking power through use of open-ended statutory standards, the executive or the judiciary are the only choices as policy makers).

41 See Resnik, supra note 17, at 850, 854 (de novo review reallocates power from the first to the second decision maker; finality complements authority).

42 See generally M. Horwitz, The Transformation of American Law (1977).

the courts.[43] John Locke saw the main function of the state as essentially judicial,[44] and the court system as the primary tool of administration. The main task of the executive was to enforce judgments between private parties. This administration of government through the court system by way of private law and criminal actions reflects the prevalence of the de novo model.

The role of the courts as regulators through common-law actions between private parties continued throughout the eighteenth and nineteenth centuries in the United States.[45] When the federal government first began to affect the lives of citizens in the late eighteenth century, it used the courts as a principal means of enforcing federal law. The de novo model in its various manifestations, which left the final say to the judiciary rather than the executive, was the predominant form of judicial review of executive action in the early Republic.[46] Chief Justice Marshall encouraged this predominance with his oft-cited view that "It is emphatically the duty of the judicial department to say what the law is."[47] Where the question was one of "law" as distinguished from a restrictively defined area of "discretionary" or "political acts,"[48] the judiciary could have the last word, contrary views of the executive branch notwithstanding.

The early Republic offers many examples of judicial administration.[49] The federal government's control of its own officers was one such area.[50] Most field agents of the federal government were paid by fees, such as a percentage of customs collected, rather than regular salaries.[51] If an officer who collected money on behalf of the government (such as a postal, customs, or internal

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43 See M. Vile, supra note 21, at 28-29 (referring to seventeenth-century England).

44 Id. at 59.

45 See, e.g., Chayes, How Does the Constitution Establish Justice?, 101 Harv. L. Rev. 1026, 1029-30 (1988) (for almost the entire first century after the Constitution was ratified, federal judiciary had lawmaking authority at least as important as Congress; through general common law, federal courts elaborated relatively uniform body of law for large-scale transactions); Rabin, supra note 1, at 1196 (before the Commerce Act, weaker model of government intervention based on common law tort and property principles was prevalent form of regulation, along with sporadic state and local control).

46 Cf. Lee, supra note 2, at 299 (de novo review was earliest form of judicial review of administrative action).

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

48 Id. at 165-70.

49 See L. White, The Federalists 203, 441,443-55 (1948) (noting "eighteenth century reliance on judicial rather than administrative methods of ensuring faithful execution of the law").

50 See Max Weber on Law and Economy in Society xl (M. Rheinstein ed. 1954) (only alternative to bureaucracy is dilettantization).

51 L. White, The Federalists, supra note 49, at 428, 406 (United States attorneys and marshals paid by fees); L. White, The Jacksonians 390 (1954) (law enforcement officials still paid by fees).

revenue official) had a deficiency in his accounts, the government had to initiate a lawsuit against the official to collect the deficiency.[52] The judiciary also oversaw the collection of fines and forfeitures for citizens' violations of the internal revenue and customs laws. Federal officials, for example, had to initiate a court action to collect fines and to enforce bonds.[53] Many of these procedures were directed by statute, therefore showing that Congress itself thought of the courts as a normal instrument of administration.

Besides the government suit against its own officers for defalcations and government suits against private citizens for violations of customs and revenue laws, the citizen suit against the official was a common form of judicial control of administrative action under the Marshall Court. During that era, ship and cargo owners often brought damages actions against customs collectors and ship captains for wrongful seizures arising out of claimed violations of federal trade restrictions that were enacted in response to French and British interference with American commerce.[54] In addition, importers who paid duties under protest often brought assumpsit actions against individual customs collectors to recover those duties.[55] Similarly, persons who had been subjected to military fines for failure to respond to militia call-ups sued the individual collectors of military fines in common-law trespass or replevin actions.[56]

In both the government-initiated enforcement suit and the citizen-initiated suit against officials, the federal courts (with the help of the jury in

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[52] See, e.g., Postmaster-General v. Early, 25 U.S. (12 Wheat.) 136, 144-45 (1827) (debt action on postmaster's bond); L. White, The Federalists, supra note 49, at 180 (Postmaster General personally liable for delinquent accounts); L. White, The Jeffersonians 162-67 (1951) (difficulties in accountings from public officials in part because of reliance on judicial process). Congress authorized summary administrative process against delinquent excise tax collectors by legislation of 1798 and 1813. Id. at 178. In 1820, Congress authorized summary process against all collectors of public money, which process Murray's Lessee approved. Id. at 178. Court suits, however, remained a means for the government to collect against delinquent officials. See Brown v. United States, 50 U.S. (9 How.) 487 (1850) (action on account against former treasurer of post office).

[53] L. White, The Federalists, supra note 49, at 402. But cf. L. White, The Jeffersonians, supra note 52, at 172 (referring to summary process for internal revenue).

[54] See, e.g., Sands v. Knox, 7 U.S. (3 Cranch) 499 (1806); Otis v. Bacon, 11 U.S. (7 Cranch) 589 (1813); Crowell v. McFadon, 12 U.S. (8 Cranch) 94 (1816).

[55] See, e.g., Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836); Bend v. Hoyt, 38 U.S. (13 Pet.) 263 (1839); Hardy v. Hoyt, 38 U.S. (13 Pet.) 292 (1839). See generally E. Freund, Administrative Powers Over Persons and Property, 242-43, 555-60 (1928) (discussing history of customs administration); id. at 242-43 (until 1890, actions in assumpsit, trover, and conversion normally started in state court and were removed to federal court).

[56] See, e.g., Wise v. Wither, 7 U.S. (3 Cranch) 331 (1806); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

legal actions) reviewed the factual and legal basis of the action de novo. Under this de novo model, officers sued by citizens for unauthorized invasions of person or property had no judicially created "good faith" immunity from compensatory damages as they do today.[57] Modern good faith immunities deny compensation even for an illegal invasion so long as the invasion was not grossly illegal, and thus accord finality in citizen-initiated damages actions to erroneous (but good faith) decisions of the executive.[58] By refusing to accord good faith immunity, however, the early nineteenth-century courts effectuated their refusal to give significance in the lawsuit to the initial interpretation of law (or application of law to fact) by the federal executive official. Rather, compensation was due the citizen for seizures that did not comply with the probable cause or other applicable standards for legal seizure as determined by the court.[59]

As a consequence, postdeprivation judicial remedies such as damages actions against the wrongdoing officer were roughly equivalent to predeprivation ones.[60] Where the officer had to sue before depriving the citizen of property, no final deprivation occurred absent a judicial determination that the deprivation was according to law. And where the executive had already completed a deprivation that the legal system recognized as compensable, the citizen was accorded compensation for his damages if the court determined the seizure was illegal even if the official acted in good faith.

Although the de novo model dominated judicial review of executive action in the early Republic, its grip was not universal. Congress often chose the courts as primary tools of administration, but it also delegated substantial

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[57] Compare Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) and Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 95 (1836) with Harlow v. Fitzgerald, 457 U.S. 800, 816-18 (1982).

[58] Harlow, 457 U.S. at 816-18.

[59] See, e.g., Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818); Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806). The 1808 Embargo Act, however, provided for seizures upon an official's opinion that a violation had occurred. See Woolhandler, supra note 28, at 421 & n.123. The Court found no infirmity with Congress' alteration of the standard for a legal seizure in this context.

[60] Of course, the standards applied pre- and postdeprivation contained some differences. Presumably, in a predeprivation hearing as to the legality of a government seizure under a valid law, the Court would disallow the deprivation, even if the government had probable cause, if the Court concluded that in fact no violation had occurred despite reason to believe it had. A postdeprivation remedy might award full compensatory damages only if the officer had no probable cause, even if he were incorrect. A seizure under an unconstitutional law, however, even with probable cause, could give rise to damages. See Woolhandler, supra note 28, at 447 & n.266. In the latter case, a pre- and postdeprivation remedy would be available under identical standards.

authority to the President[61] and set up bureaucratic forms of administration in some areas.[62] Despite then-prevailing doctrine that legislative power could not be delegated,[63] no one seems to have objected to the agencies' promulgation of rules that governed both their internal management and their relations with the people.[64]

III. The res judicata model

The principal alternative to the de novo model in nineteenth-century administrative law was the highly deferential res judicata model. Under this model, the Court explicitly analogized federal agencies and federal officials to courts in a different court system. When reviewing executive decisions under this model (which first rose to prominence under the Taney Court), the Court focused its review on "jurisdictional" questions.[65] If the agency or the executive official had jurisdiction to render the challenged decision, the

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61 On the one hand, legislation was often highly elaborate. In 1790-91, for example, Congress refused to delegate power to the President to designate post roads. See L. White, The Federalists, supra note 49, at 78. On the other hand, Congress often seemed complacent about delegations to the executive. The President was given much discretion by Congress to call out the militia, see, e.g., Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827), in transactions relating to government debt, in raising regiments, and administering the Embargo Acts. L. White, The Federalists, supra note 49, at 450; L. White, The Jeffersonians, supra note 52, at 429-65.

62 See Fallon, On Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915 (1987) (early Congresses assigned treasury officials some responsibilities that might have been assigned to courts, provided nonjudicial resolution of veteran benefits and certain controversies about customs, and provided military tribunals); L. White, The Federalists, supra note 49, at 78, 119, 138, 207 (examples of Congress providing for bureaucratic determinations).

63 See Monaghan, supra note 32, at 247; Monaghan, supra note 7, at 14-20.

64 See L. White, The Federalists, supra note 49, at 177 (referring to 1792 legislation authorizing Postmaster to prescribe regulations for deputy postmasters); id. at 206 (Hamilton gave detailed instructions to subordinates including rules for enforcing 1793 Neutrality Act; also discussing statutory authorizations for boards to make regulations binding on assessors for assessing tax on land, dwellings, and slaves; President promulgated regulations governing trade with Indians); see also L. White, The Jeffersonians, supra note 52, at 462-63 (Congress gave Jefferson authority to make general rules binding on collectors for enforcement of second embargo act); id. at 435 (Galatin issued guidelines for enforcement of embargo laws); United States v. Philbrook, 120 U.S. 52, 59 (1887) (power of Secretary of Navy to establish rules for apportionment of sums set aside in gross by Congress exercised prior to 1835). Preemption legislation of 1830 directed the Commissioner of the General Land Office to promulgate "rules" of what would constitute "proof of settlement or improvement" to be "made to the satisfaction of the register and receiver of the land district" where the land lay. M. Rohrbough, The Land Office Business 205 (1968).

65 Cf. Max Weber on Law and Economy in Society, supra note 50, at xl (in bureaucracies, official business carried on within scope of definite jurisdictions).

decision could be upheld as conclusive without inquiry into error of fact or law.[66] The limitation of review to jurisdictional issues thus accorded finality to many agency determinations of both fact and law, in sharp contrast to the de novo model.[67]

A. The allocation of decisional authority under the res judicata model

When it employed the res judicata model of review, the Supreme Court frequently analogized executive determinations to determinations of a court or special tribunal.[68] It did so even when agency processes were not formal or professionalized.[69] To the extent that agencies were analogized to courts under the res judicata model, judicial review of agency determinations

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[66] See infra notes 103-16 and accompanying text.

[67] In characterizing the Court's deferential style of review of administrative action as based on an analogy to a court system, I differ from Gordon Young's characterization of deferential forms of review as "executive action" cases. Young, supra note 3, at 795 & nn.152, 153, 802 & n.186. Young apparently believed that the courts would have been less deferential if they had seen the executive decision as coming from another court, since he assumes that the courts would then treat the review process as similar to an appeal from a lower court to a higher one in the same court system. He therefore minimizes the extent of the Court's use of the judicial analogy for agencies. Id. at 802 n.186. John Dickinson similarly saw a court analogy as one that would lead to heightened review, and distinguished it from the "ultra vires" theory. J. Dickinson, supra note 2, at 312. The ultra vires theory refers both to the de novo and res judicata models, since both, in different ways, ask whether officials have acted beyond their authority. Analogizing the agencies to courts, however, does not necessarily lead to appellate-style review, so long as the reviewing court sees its mission as one similar to reviewing the res judicata effect of a court in a different court system. I believe that the judicial analogy is essential to understanding the nineteenth-century conception of review of agency action.

[68] See, e.g., Philadelphia and Trenton R.R. Co. v. Stimpson, 39 U.S. (14 Pet.) 448, 458 (1840) (patent office); Bartlett v. Kane, 57 U.S. (16 How.) 263, 272 (1853) (customs appraisal); Smelting Co. v. Kemp, 104 U.S. 636, 640 (1881) (land department officials exercise a "judicial function"); see also J. Dickinson, supra note 2, at 4 n.3 (cases using judicial analogy for agency); Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263, 277 (1937) (immunity for administrative officials was by analogy to judges, even though the processes generally lacked fundamental judicial safeguards).

[69] A lack of traditions of probity can be noted in the Land Department and in customs collection. See generally M. Rohrbough, supra note 64, at 32 (only a rare land officer did not speculate in land). An 1812 statute creating the General Land Office forbade persons employed thereunder from engaging directly or indirectly in the purchase of public land. Id. at 52. Speculation by land officers nevertheless continued. Id. at 197; see also L. White, The Jacksonians, supra note 51, at 421. Merchants accused customs officials, particularly in the port of New York, of bribery, illegal seizures to swell revenues, and embezzlement. See id. at 428; Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856). Professor Nelson has described the growing regularization of administration during the course of the nineteenth century. W. Nelson, supra note 2, at 119-25.

was influenced by the ways in which the reviewing court would view a decision of a court in another court system. Thus, under this model, federal courts reviewed administrative determinations as a lower federal court would have treated a prior state court judgment.

The theoretical basis for a res judicata model is that final decisionmaking authority on certain issues has been allocated to another decision maker. So long as the processes for decisionmaking within the institution provide an adequate opportunity for deciding an issue, the collaterally reviewing court need not enter into the merits of the factual or legal issues decided.[70] When the Court used the res judicata model of administrative review, it frequently stated that its job did not include review of "error" of the administrative agencies.[71] Rather, the natural focus of a res judicata model was upon whether the agency remained within its jurisdiction.[72] Such review of jurisdictional questions is the minimum necessary review in a system that limits arbitrariness by institutional allocation of decisionmaking.[73]

Under this model, the Court tended to give full-blown review only to the question whether the agency had jurisdiction even though as a matter of logic such searching review was not required.[74] In addition to reviewing jurisdictional issues, the collaterally reviewing court could check to see that the alternative court system accorded procedural due process.[75] In contrast to its searching review of jurisdictional issues, however, the nineteenth-century

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[70] See generally Bator, supra note 5, at 441, 454, 455 (in habeas corpus proceedings, substantive errors of fact or law are less important than whether the processes are fairly adapted to determine issues).

[71] Quinby v. Conlan, 104 U.S. 420, 425 (1881) (courts cannot exercise any direct appellate jurisdiction over rulings of Land Department); cf. Bartlett v. Kane, 57 U.S. (16 How.) at 272.

[72] See, e.g., Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881).

[73] Bator, supra note 5, at 460-61 (allowing a judgment from a court without colorable jurisdiction would violate political rules allocating institutional competencies to deal with various matters); see also id. at 468-69.

[74] As a matter of logic, review of the jurisdictional issues could have been weak, since the collateral court may defer to the rendering court's decisions as to its jurisdiction. See Durfee v. Duke, 375 U.S. 106, 111-14 (1963) (full faith and credit due another state's judgments, even on jurisdictional issues, so long as second court's inquiry discloses that those questions have been fully and fairly litigated in court that rendered original judgment). The searching review that the courts made of jurisdictional issues in the nineteenth century may have been in part because the agencies frequently had not made explicit determinations on jurisdictional issues that arose in later court actions. For example, if the land office mistakenly issued a patent for land that no longer belonged to the United States at the time of the patent, the true owner of the land would not necessarily have been a party to the patent proceedings and the issue of the land no longer belonging to the United States to grant would likely not have been litigated in the patent proceedings. Cf. Doolan v. Carr, 125 U.S. 618 (1887).

[75] Bator, supra note 5, at 455 (failure of process as ground for limited habeas review). The court may consider the possibility of raising ad hoc procedural defects within the agency procedure as sufficient to police due process at the retail level. Id.

courts showed little concern for the adequacy of agency process.[76] To the extent the courts examined agency procedures to see if they provided due process, they generally did so only at the wholesale level of asking whether overall the agency process was constitutional.[77] In the early part of the century, the Supreme Court showed little concern that agencies follow prescribed procedures in particular cases. As the century progressed, however, the Court began to show greater concern that agencies do so.[78]

For other "nonjurisdictional" issues, federal courts operating under a res judicata model accorded finality to an agency's decisions, both as to law and fact. The courts deemed decisions on such nonjurisdictional issues to be within the discretion of the agency tribunal. By limiting judicial review largely to jurisdictional issues and recognizing agency discretion on nonjurisdictional issues, the court allowed the executive to exercise greater fact finding and lawmaking power than under the de novo model.

In addition, when courts reviewed actions under the res judicata model, an agency official's error of law or fact was not grounds for a damages award or injunction against the official. Rather, courts generally accorded an immunity to the government officer similar to judicial immunity—that is, freedom from liability absent a gross lack of jurisdiction.[79] According such immunity contrasted sharply with the de novo model under which the officer who acted illegally was cast in the role of a nonimmune private defendant in a citizen-initiated trespass or assumpsit suit, subject to monetary liability.[80] The courts' refusal to accord immunity under the de novo model preserved the de novo nature of review of questions of law and fact that had been initially determined by the officer. By contrast, according immunity under the res judicata model preserved the courts' reluctance under that model to redetermine ordinary questions of law and fact decided by the agency.

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[76] See infra notes 101, 112. John Dickinson notes that the practice seemed to be either not to review an issue at all or to reexamine the whole question. J. Dickinson, supra note 2, at 284 n.100. He attributed this to the collateral nature of the review. Id.

[77] See Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856); United States v. Ritchie, 58 U.S. (17 How.) 525 (1855). In equity proceedings, the inquiry into fraud allowed some examination of the opportunity to fairly litigate at a case-specific level.

[78] This greater concern was particularly evident in customs cases. See infra note 137 and accompanying text.

[79] Compare Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (Secretary of Navy) with Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868) (superior court judge).

[80] Under a de novo model, the courts accorded no immunity on the mere ground of acting as a government officer, or so acting in good faith. The probable cause standard, however, gave room for official error in some circumstances. See Woolhandler, supra note 28, at 413.

Thus citizen-against-officer suits were not generally successful under the res judicata model, because the court would not address mere error in law or fact as it would under a de novo model.

The res judicata model is based on an explicit analogy of the agencies to judicial bodies and thus contrasts with the de novo model, which keeps the executive in a more formally "executive" role by limiting it to prosecution and related functions, or alternatively, casts government officers in the role of private defendants.[81] Under the de novo model, the judicial branch accords no finality to executive action since the legality of government deprivations will be tested either before the fact through government-initiated enforcement actions or after the fact through citizen-initiated tort actions. Since under this model the courts give finality to their own interpretations of law rather than the executive's, the outflow of legislative power that occurs by virtue of legislative delegations comes to rest ultimately in the courts. By contrast, under a res judicata model, since the courts accord decisions of the executive finality on law and fact comparable to that of a court in a different court system, power flows to the executive branch. Thus the executive more than the judiciary becomes the recipient of delegated legislative power.

B. The theoretical basis for finality

1. Characterizing the delegation to agencies as judicial rather than legislative

In modern times, the most coherent justification for judicial deference to agency lawmaking (sometimes called "policymaking" or the "exercise of discretion") is that agencies exercise delegated legislative power.[82] This justification is true whether the delegated lawmaking power is exercised in the context of rulemaking or in the context of adjudication.[83] Nineteenth-century courts, however, could not use this rationale for according deference

[81] The de novo model likens officers to private parties when they commit acts unauthorized by law. By contrast, a res judicata model treats many errors of officials as those of a judge who is entitled to immunity even for erroneous rulings. See Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845); see also Jennings, supra note 68, at 276 (immunity of administrative officials arose by analogy to judges).

[82] See generally Monaghan, supra note 7.

[83] *See id.*

to agencies, because courts did not then explicitly acknowledge that Congress could delegate legislative power to the executive.[84] Nevertheless, the courts were able to solve the dilemma by allowing agencies to exercise "judicial power." By permitting them to do so, the Court effectively allowed them to exercise what we would see as delegated legislative power without having to say so. Of course, one might ask how it was that the courts themselves, whether of the article III or agency variety, could exercise lawmaking power in view of the nineteenth-century unwillingness to acknowledge that any branch other than the legislature could legislate. But courts traditionally exercised significant lawmaking powers under both the common law and the de novo model of judicial review, although such powers were called law "discovering" or "interpretation" rather than lawmaking.[85] By being analogized to courts, the agencies were therefore able to exercise significant lawmaking power.[86]

Had there not been this complacency about agencies being able to exercise judicial power, roadblocks to the development of bureaucracy might have developed. The doctrine that legislative power cannot be delegated, combined with the traditional role of the courts as law "interpreters" and "discoverers," could have resulted in closer adherence to the de novo model with its reliance on the judiciary as the traditional instrument of administration.[87] However, the high Court's willingness to allow for executive exercises of judicial power by treating agencies as alternative courts eroded the judiciary's primacy as a tool of federal administration. Congress and the courts thus were left with some leeway to allocate final decisionmaking powers between the courts and the agencies.[88]

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[84] See Monaghan, supra note 32, at 247; Monaghan, supra note 7, at 14-20.

[85] See supra note 37.

[86] Theoretically the agencies were limited to the exercise of judicial functions in the area of "public" rather than "private" rights. See Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856); J. Dickinson, supra note 2, at 4 & n.3 (courts saw adjudication between private parties as particularly for the courts as distinguished from money claims against government; citing numerous cases using judicial analogy for agencies). Monaghan, supra note 32, at 247 & n.102. As Professor Young notes, however, cases giving deferential review to executive actions did not frequently rely explicitly on Murray's Lessee. Young, supra note 3, at 799.

[87] The idea that certain functions had to be performed by the judicial branch resurfaced when the courts began to review railroad regulation in the late nineteenth century. See Rabin, supra note 1, at 1210-11. This thinking led to de novo review of allegations of confiscatory rates. Id. at 1212-13.

[88] Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); see also Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856); Smelting Co. v. Kemp, 104 U.S. 636, 640 (1981) (Land Department exercised "judicial function" in passing on questions of fact before it).

2. Judicial complacency regarding the flow of judicial business to the agencies

One might wonder why the nineteenth-century Court, while so reluctant to acknowledge a delegation of legislative power to either the courts or the agencies, nevertheless showed such complacency about the flow of "judicial" business to the agencies. The outflow of judicial power to the agencies under the res judicata model seriously compromised the division of functions between the executive and the judiciary provided in the Constitution; by contrast, the de novo model adequately maintained this division by placing the executive primarily in the role of prosecutor of government-enforcement suits.

One reason for the complacency may have been that the division of executive and judicial power into two separate branches in the Constitution was a relative novelty in political theory.[89] While separation of powers theory had early divided legislation and execution, separation of powers doctrine had not clearly separated executive and judicial functions until late .in the eighteenth century.[90] The greater concern was separating the two functions of making general prospective rules (legislating) and applying them (executing).[91] In the nineteenth century the Court frequently seemed to recognize that both the executive and the judiciary engaged in similar functions of law-application.[92]

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[89] This tripartite division was found in Blackstone and Montesquieu. See M. Vile, supra note 21, at 102, 154-55; Powell, How Does the Constitution Structure Government?, in A Workable Government 27 (B. Marshall ed. 1987) (discussing influence of Montesquieu on those with a theoretical approach to the Constitution). Gerhard Casper has recently concluded that while the framers generally agreed that the alternative to separation of powers was tyranny, there was no consensus as to the precise institutional arrangements that would satisfy the requirements of the doctrine. Casper, An Essay on Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 224 (1989). In discussing the establishment of the Treasury Department, Casper refers to Madison's analysis of the office of Comptroller in settling accounts as partaking "of a judiciary quality as well as executive." Id. at 238 (citing 12 The Papers of James Madison 265-66 (C. Hobson and R. Rutland eds. 1979)); see also Werhan, Toward an Eclectic Approach to Separation of Powers: Morrison v. Olson Examined, 16 Hastings Const. L.Q. 393, 428 & n.226 (1989) (discussing the framers' lack of intent as to specific institutional arrangements dictated by separation of powers).

[90] M. Vile, supra note 21, at 28, 37.

[91] Or, stated differently, the relationship between the Crown and Parliament. See id. at 23, 44, 62; see also Chayes, supra note 45, at 1026-27 (Locke devoted little attention to the judicial role; Montesquieu defined judiciary as a separate branch, but his conception of the role of judiciary was as meager as Locke's); Kurland, The Rise and Fall of the "Doctrine" of Separation of Powers, 85 Mich. L. Rev. 592, 595 (1986) (main division of function for Locke, Montesquieu, and James Harrington was between executive and legislative).

[92] See Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 280 (1856); Young, supra note 3, at 788-90; Kurland, supra note 91, at 593-94 (Madison wrote in 37th Federalist of difficulty of strict division of governmental functions; American concept of

Another significant influence on development of the res judicata model was the Court's deference to congressional judgment, which encouraged the Court to assent to almost any administrative scheme that Congress provided.[93] A final factor that encouraged the Court to accord finality to agency decisions of law and fact was the Jeffersonian hostility to judicial review. Unhappy with the Marshall Court, Thomas Jefferson believed that separation of powers was incompatible with the idea that one branch could interfere with another by directly invalidating its acts.[94] Jefferson's idea that each branch was the sole judge of the constitutionality of its acts influenced President Jackson[95] and his appointee to the Court, Chief Justice Taney.[96] Thus, although the heirs of the Jeffersonian tradition were suspicious of executive discretion,[97] they nevertheless were inclined to give less judicial review to the exercise of such discretion than a Federalist such as Marshall. Consequently, the judicially activist de novo method of review was at its height during the Marshall years, whereas the deferential res judicata model of review was at its height during the Taney years and then suffered a decline during and after Reconstruction. This subsequent decline was particularly evident in opinions authored by Justice Field,[98] who shared Marshall's insistence that the judiciary be the final arbiter of questions of law.[99]

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separation of powers is prime example of proposition that experience, not theory, grounds Constitution).

93 See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845), the Court read a statute as displacing the assumpsit remedy against customs collectors. The Court stated, "The organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature." The statutes that provided for bureaucratic dispute resolution typically provided no direct avenue to the courthouse, unlike many modern statutes. See also Thayer, Origins of the American Doctrine of Judicial Review, 7 Harv. L. Rev. 129 (1893).

94 M. Vile, supra note 21, at 158, 165.

95 Id. at 173.

96 L. Jaffe, supra note 24, at 178. Jaffe notes that Taney, as Secretary of State, advised Jackson that the United States Bank was unconstitutional, notwithstanding McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). L. Jaffe, supra note 24, at 179.

97 Cf. L. White, The Jeffersonians, supra note 52, at 29 (while Federalists construed presidential powers broadly, Jeffersonians at the time Jefferson took office feared executive encroachment and sought to limit executive discretion).

98 Field was fond of the judicial analogy for land department decisions but used a less deferential version. He emphasized that the Court would review errors of law on uncontested facts, and would find more actions of the executive branch void (and therefore beyond the agency's jurisdiction) rather than merely erroneous. See, e.g., Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881) (conveyance inoperative where Land Office lacked jurisdiction); Van Reynegan v. Bolton, 95 U.S. 33 (1877) (in ejectment action, defendant could have gained no preemption rights while the plaintiffs had been pursuing claims to the lands under procedures for Mexican grants); Shepley v. Cowan, 91 U.S. 330, 340 (1875) (courts would review error in

C. The res judicata model in action

1. The land office cases

The distribution of federal land was the area of federal administration consistently most important to citizens during the first century of the Republic.[100] And it was in cases arising out of land distribution that the Court early on applied the res judicata model.[101] A number of factors may have resulted in the frequent use of the res judicata model in land cases: prior developments in real property law, such as the limitation on ejectment actions to questions of legal (as opposed to equitable) title; statutes that set up general agency procedures without providing a direct avenue of court review; the need for certainty in land titles; and a sense that government could accord its bounty on the conditions that it chose.[102]

The usual process[103] for acquiring a patent to land in which the United States held title was through detailed agency procedures.[104] The Court

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construction of the applicable law, and fraud, but not error of judgment upon worth of evidence in a contested case before the Land Department); Quinby v. Conlan, 104 U.S. 420, 426 (1881) (same); see also French v. Edwards, 80 U.S. (13 Wall.) 506, 511 (1871) (in ejectment action, Court found void a title derived from tax sale without compliance with California statute that required sale of smallest parcel a purchaser would accept); Moore v. Robbins, 96 U.S. 530, 535-36 (1877) (quoting Justice Field in Shepley). Field, however, was loathe to allow juries to determine issues relating to land patent invalidity in actions at law, so he channeled his more expansive review into actions in equity under the rubric of mistake. See Steel v. Smelting Co., 106 U.S. 447, 453-54 (1882); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 710 (1884) (assessors act judicially).

99 *See McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism 1863-1897, 61 J. Am. Hist. 970 (1975), reprinted in American Law and the Constitutional Order 246, 251, 259, 264 (L. Friedman & H. Scheiber eds. 1978).*

100 See, Scalia, supra note 2, at 882-83.

101 See, e.g., Bagnell v. Broderick, 38 U.S. (13 Pet.) 436 (1839) (United States patent conclusive in action at law); Boardman v. Lessees of Reed and Ford, 31 U.S. (6 Pet.) 328, 342 (1832) (court properly instructed jury in action at law that defects in preliminary steps leading to land patent could not be inquired into); Polk's Lessee v. Wendall, 13 U.S. (9 Cranch) 87(1815) (where prior North Carolina patent was void, it could be attacked in action at law); cf. Sims v. Irvine, 13 U.S. (13 Dall.) 425 (1799) (formal defects should not defeat patent after change in jurisdiction).

102 See infra notes 169-88 and accompanying text.

103 The description in the text does not generally apply to cases in which persons claimed title under a grant by a foreign government. A variety of procedures were used in such cases. In the Northwest territories and the Louisiana purchase, Congress provided for administrative adjudication with confirmation by Congress. See L. White, The Jeffersonians, supra note 52, at 517; M. Rohrbough, supra note 64, at 20, 38, 161. In the Illinois country in the 1790s, the territorial governor and his secretary adjudicated titles of inhabitants who claimed under previous governments. M. Rohrbough, supra note 50, at 20. The courts did not review the validity of congressionally confirmed grants. See infra note 153. In California, Congress subjected commission determinations to review by the courts. See infra text accompanying notes 152-56.

104 See M. Rohrbough, supra note 64, at 75-87, 208.

frequently referred to the Land Department as a "special tribunal" that performed a "judicial function" in passing on matters entrusted to it.[105] This analogy had numerous permutations. While action was pending before the agency, the courts would not disturb the agency proceedings[106] any more than a federal court would disturb the proceedings of another court in a different court system.[107] This reluctance to interfere, however, was more powerful than modern notions of exhaustion of administrative remedies.[108] Even after the agency had decided the question of whether to issue the patent, the applicable legislation provided no explicit statutory mechanism for review of the final agency determination in the courts.

Moreover, once the patent was issued by the agency, an adverse claimant had only a limited number of ways to attack the allegedly wrongful issuance. Although the party challenging the agency decision had no direct statutory avenue for judicial review, he could attempt to bring an action at law (such as ejectment) against the party to whom the patent was issued. Alternatively, the patent-holder herself might sue the adverse claimant as a defendant in an ejectment action. In actions at law, such as ejectment, the Court would not allow an attack on the patent at all, unless the party claiming adversely to the patent could establish one of the very few grounds that would show lack of jurisdiction in the agency.[109]

The primary ground that would establish a lack of agency jurisdiction was that the United States did not own the land at the time it issued the patent.[110]

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[105] See, e.g., Smelting Co. v. Kemp, 104 U.S. 636, 640 (1881); Secretary v. McGarrahan, 76 U.S. (9 Wall.) 298, 311 (1869) ("judicial judgment and discretion").

[106] See, e.g., Marquez v. Frisbie, 101 U.S. 473, 475 (1879); Litchfield v. Register & Receiver, 76 U.S. (9 Wall.) 575 (1869); Gaines v. Thompson, 74 U.S. (7 Wall.) 347 (1868); United States v. Comm'r, 72 U.S. (5 Wall.) 563 (1866).

[107] See, e.g., The Anti-Injunction Act, ch. 22, §5, 1 Stat. 333, 334 (restricting federal court interference with state court proceedings through injunction), current version codified at 28 U.S.C. §2283.

[108] See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

[109] Cases in which the federal government claimed land for its own use did not involve land patents and generally were tried de novo in ejectment actions. United States v. Lee, 106 U.S. 196 (1882) (action to eject United States officers from land). Grisar v. McDowell, 73 U.S. (6 Wall.) 363 (1867) (action to eject military officer); Brown v. Huger, 62 U.S. (21 How.) 305 (1858) (ejectment action against United States officer); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839) (ejectment action against commander of military post); see Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1815). As discussed below, however, somewhat more expansive review was available in equity.

[110] See Doolan v. Carr, 125 U.S. 618, 624-25 (1887) (that land was not government's to grant could be raised to attack patent in action at law by defendant claiming under a confirmed Mexican grant); Smelting Co. v. Kemp, 104 U.S. 636 (1881) (conclusive presumptions attending patent of land apply where department had jurisdiction, i.e., where land belonged to United States and provision had been made for its sale); cf. New Orleans v. United States, 35 U.S. (10 Pet.) 662,

The Court tended to give such issues plenary review of law and fact.[111] On the other hand, the Court deemed errors of judgment by the agency in deciding to issue patents (to land to which the United States did have legal title), and failures to follow procedural formalities for issuance, nonjurisdictional. Thus, most errors of fact and law and most procedural defects were not grounds for attacking a patent.[112]

This use of the res judicata model in the land cases brought at law was in part influenced by the limitation of the traditional ejectment actions to consideration of legal rather than equitable title.[113] A United States land

731 (1836) (equity action in which federal government attempted to enjoin city of New Orleans from selling land that United States claimed; no right passes if thing granted by grantor not possessed); Polk's Lessee v. Wendall, 13 U.S. (9 Cranch) 87, 99 (1815) (in ejectment action involving patent issued by North Carolina, court could determine whether state that issued patent lacked title and whether officer had authority to issue grant). If the United States had issued two conflicting patents, the Court would also reach the merits. See Matthews v. Zane's Lessee, 9 U.S. (5 Cranch) 92 (1809) (ejectment action from Ohio court; where two federal Land Offices issued conflicting certificates, Court construed federal statute to determine which office had authority).

111 In general, the Land Office would not itself have considered this issue. See supra note 74. Also, once the Land Office issued a patent, the department's attempt to withdraw the patent would be void as outside its jurisdiction. United States v. Schurz, 102 U.S. 378, 396 (1880) (mandamus to deliver patent); Moore v. Robbins, 96 U.S. 530, 532-33 (1877) (decision of land office to withdraw issued patent void); see also Noble v. Union River Logging R.R. Co., 147 U.S. 165 (1893) (injunction restraining Secretary of Interior and Commissioner of General Land Office from revoking plaintiffs maps for right of way and from molesting plaintiffs enjoyment). As was true for private parties who sought to attack a land patent, the government had to initiate an equity action. See, e.g., Maxwell Land-Grant Case, 121 U.S. 325 (1887) (bill in equity filed by U.S. to set aside land patent); United States v. Burlington & Mo. River R.R. Co., 98 U.S. 334 (1878) (equity action by United States to annul patents).

112 Polk's Lessee v. Wendall, 13 U.S. (9 Cranch) 87, 98 (1815). In tax sales, however, the Court treated procedural formalities as necessary for valid agency action. See French v. Edwards, 80 U.S. (13 Wall.) 506 (1871) (in ejectment action, irregularity in sale for delinquent taxes of not selling smallest parcel that any buyer would take, as required by California statute, rendered tax sale void; Court noted that many statutory requisites intended to guide officers do not render exercise of power in their disregard void, but this provision was especially meant for the protection of the citizen); Boardman v. Lessees of Reed and Ford, 31 U.S. (6 Pet.) 328, 342 (1832) (individual who claims land under tax sale must show that substantial requisites of law have been observed); Stead v. Course, 8 U.S. (4 Cranch) 403 (1808) (Marshall, C.J.) (vendee in tax sale must show that sale of whole tract was necessary to satisfy sale for tax arrears).

113 See Polk's Lessee v. Wendall, 13 U.S. (9 Cranch) 87, 98 (1815). Equity allowed for expansion of pleadings to place more than legal title at issue. Cf. Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1129 (1969) (equity pleadings required telling a more complete story to justify intervention of equity). Also, equity could allow all interested parties to be brought in, which was necessary in some cases where a claim against the United States would call into question title that a third party obtained from the United States. See United States v. Comm'r, 72 U.S. (5 Wall.) 563, 565 (1867). Sometimes state procedures allowed equitable defenses to be raised in legal actions. Cf. Quinby v. Conlan, 104 U.S. 420, 421 (1881) (California practice allowed equitable cross-complaints to legal actions). But cf. Hooper v. Scheimer, 64 U.S. (23 How.) 235, 249 (1859) (no action in ejectment on equitable title even if state law would allow, where defendant held patent from federal government).

patent conferred legal title. In denying review of the merits of Land Office determinations, the Court often reminded the litigants that more plenary review of title could be had in equity between private parties.[114] In actions in equity, the court could go beyond legal title, and the issues were not limited to the agency's lack of jurisdiction to issue the patent. Fraud and mistake were also considered,[115] both of which were traditional equitable bases to challenge collaterally otherwise valid judgments. Attacks based on failure of the agency to comply with procedural formalities prior to issuance of the patent, however, were generally not cognizable in equity any more than they were in common-law actions.[116]

Eventually, however, the Court began to expand its review of land department decisions in both law and equity cases. Expansion of the concept of "jurisdictional error" was one way the res judicata model could approach review of agency action on the merits, without a total sacrifice of its formal logic.[117] For example, the Court expanded the concept of jurisdiction to include not merely the question of whether the land acquired by patent in fact belonged to the United States but also such questions as whether Congress had statutorily allocated the land for sale[118] and whether land was "swampland" under applicable legislation.[119]

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[114] Cf. Marquez v. Frisbie, 101 U.S. 473, 475 (1879) (equity court could consider validity of patent once title passed from government, but patent would be considered valid absent mistake of law on undisputed facts); Gaines v. Thompson, 74 U.S. (7 Wall.) 347 (1868) (denying equitable relief against government officers, but noting availability of equity actions between private parties).

[115] Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 86 (1871) (decisions of land office within scope of authority generally considered conclusive absent fraud or mistake); Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839) (mistake could be cured in equity unless issue had been previously litigated before agency); see also Philadelphia and Trenton R.R. Co. v. Stimpson, 39 U.S. (14 Pet.) 448 (1840) (no other tribunal could reexamine the sufficiency of evidence of lack of fraud in patent for invention if properly laid before tribunal).

[116] See Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881); Polk's Lessee v. Wendall, 13 U.S. (9 Cranch) 89, 98-99 (1815). But cf. cases cited supra note 112 (regarding procedural formalities in tax sales).

[117] L. Jaffe, supra note 24, at 624-33 (jurisdictional fact doctrine used to allocate decisional authority between court and agency, by determining what was important error); Monaghan, supra note 32, at 249 & n. 111 (same); Dickinson, Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact," 80 U. Pa. L. Rev. 1055, 1059 (1932); see also Bator, supra note 5, at 470 (useless to make sensible guidelines in habeas corpus context once concept of "jurisdiction" taken beyond question of court's competence to deal with type of offenses charged and person of prisoner).

[118] Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881) (if land was never public property, or had been previously disposed of, or if Congress made no provision for its sale, or had reserved it, department would have no jurisdiction to transfer land).

[119] J. Dickinson, supra note 2, at 310 (swamp character of lands sometimes considered jurisdictional). By the swamplands acts beginning in 1849, see Scalia, supra note 2, at 884

Expanding court review by deeming additional matters "jurisdictional" maintained at a verbal level the logic of a res judicata model. But by the 1870s, the Court deviated from this formal consistency in equity actions contesting land titles when it stated that among the mistakes that the court would review in equity were errors of law on uncontested or agency-found facts.[120] "Mistake" as a ground to attack judgments collaterally in equity generally had not included mistakes of law, but only a fairly narrow category of factual error.[121] The Court in equity thus expanded its de novo review of legal issues beyond those that it tagged jurisdictional. The Court would not, however, review "mixed" questions of law and fact, just as a court would generally not review mixed questions under a writ of error from a jury verdict.[122] Allowing review of law on uncontested facts thus more closely resembles the intermediate model of error—review of legal questions but limited or no review of contested facts—rather than the res judicata model where most legal issues are off-limits on review. The reviewing court, in more freely reviewing errors of law, thus treats the agency more like an inferior tribunal over which

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n. 80, the United States granted swamplands to the states, and the courts deemed the grants to be "present grants" by which the states acquired rights even prior to surveying and issuance of patents. See, e.g., Wright v. Roseberry, 121 U.S. 488, 496 (1887); Railroad Co. v. Smith, 76 U.S. (9 Wall.) 95, 98 (1869). Frequently the land office would later issue a patent to a private party for land that was arguably swampland and that the United States thus arguably no longer owned. Because the Court had deemed the grant of swamplands to the states to be a present grant, the issue of whether the land was swampland duplicated the issue of whether the land belonged to the United States at the time the Land Department issued a patent for it. The Court's according plenary review on the issue of whether land was swampland thus was in line with prior cases that treated as jurisdictional the question of whether land belonged to the United States at the time the Land Department purported to issue a patent for it. Where the Land Department had made an explicit determination that land was swampland, however, the Court might insulate that determination from collateral attack. See French v. Fyan, 93 U.S. 169 (1876) (action at law).

120 Quinby v. Conlan, 104 U.S. 420 (1881) (Field, J.) (reciting liberal standard); Moore v. Robbins, 96 U.S. 530, 536 (1877) (finding Secretary of Interior made mistake of law); Shepley v. Cowan, 91 U.S. 330, 340 (1875) (Field, J.) (upholding department's decision but reciting liberal standard); Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 84-86 (1871) (Miller, J.) (1858 statute provided that conflicting preemption claims would be heard by the Commissioner of Land Office with appeal to Secretary of Interior; Court overturned decision of Secretary for misconstruction of law on facts found); id. at 91 (Clifford, J., dissenting) (Secretary's decision should be conclusive absent fraud or mistake); cf. Smelting Co. v. Kemp, 104 U.S. 636, 646 (1881) (Field, J.) (in legal action, deciding merits of whether patents void on face as matter of law because patent embraced contiguous mining grants).

121 See, e.g., United States v. Ames, 99 U.S. 35 (1878) (mistake of law not ground for relief in equity, and ignorance of fact would not be ground for relief if the information could have been obtained with reasonable diligence); Hunt v. Rhodes, 26 U.S. (1 Pet.) 1 (1828) (equity will not ordinarily relieve mistake of law).

122 The formula was later used in some of the ICC cases. See J. Dickinson, supra note 2, at 161.

it exercises appellate review, rather than like a coordinate tribunal to which ordinary preclusion rules apply.

2. The res judicata model apart from land cases

As noted above, the res judicata model hit its high-water mark during the tenure of Chief Justice Taney. Under the influence of Jeffersonian separation of powers doctrine, the Taney Court took several occasions to accord finality to executive actions even apart from the area of land patents. For example, in Decatur v. Paulding,[123] the Court held that matters of statutory interpretation were within the discretion of federal executive officials and hence were not subject to judicial review.[124] In Decatur, Stephen Decatur's widow sued to compel the Secretary of the Navy to pay her a pension under a special congressional bill; she was, however, already collecting under a general pension statute. The Secretary of the Navy and his predecessor had interpreted the two laws to allow Decatur's widow to collect only one pension. Rather than affirming the Secretary's quite plausible interpretation of the statutes on the merits, the Supreme Court held that it lacked jurisdiction to order the Secretary to pay the additional pension because the Secretary's interpretation of law was within his discretionary judgment.[125] In this particular case, moreover, the widow seems to have had no alternative avenue by which to seek review of the executive interpretation of law that denied her the pension she claimed; the executive's reading of the law was effectively final.[126]

In a similar manner, the Taney Court in Cary v. Curtis[127] interpreted a congressional statute providing for administrative review in customs disputes as implicitly abrogating the preexisting common-law assumpsit remedy against the collector.[128] The old assumpsit action had allowed a private citizen

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123 39 U.S. (14 Pet.) 497 (1840).
124 Id. at 515.
125 Id. at 513-17; see also Woolhandler, supra note 28, at 422-24.
126 Since Susan Decatur claimed under a special bill designating a pension for her, there would have been no sovereign immunity problem in ordering the relief she sought. See Woolhandler, supra note 28, at 424. In some cases in which the Taney Court accorded finality to executive actions, relief would have involved payment of government funds without such a prior special appropriation. See, e.g., United States v. Guthrie, 58 U.S. (17 How.) 284 (1854); Reeside v. Walker, 52 U.S. (11 How.) 272 (1850); Brashear v. Mason, 47 U.S. (6 How.) 92 (1848).
127 44 U.S. (3 How.) 236 (1845).
128 Id. at 243-44.

to sue the collector himself to recover duties paid under protest; assumpsit had been a common form of judicial review in the early nineteenth century when the de novo model was preeminent. The statute at issue in Cary required collectors to pay to the Treasury any duties paid to them under protest and also provided some minor administrative remedies for aggrieved parties. By interpreting this statute as implicitly abrogating the preexisting common-law action,[129] the Taney Court again revealed its reluctance to allow for judicial review of executive action.[130] And it did so, despite the then-familiar canon that statutes in derogation of the common law were to be narrowly construed.

3. Countertrends

The trend toward greater bureaucratization of remedies implicit in the disallowance of judicial review under the res judicata model met with some reverses. Despite the efficiencies of limiting remedies to agency tribunals, there was a countervailing impulse to protect the citizen from arbitrariness in direct government exactions by maintaining traditions of judicial review. Judicial abrogation of the assumpsit action in Cary provoked sharp dissents to making the executive the final arbiter of the law.[131] Congress too had antibureaucratic biases, and it expressly attempted through legislation to restore the assumpsit remedies for governmental monetary exactions that Cary had wiped out.[132] Congress' explanatory legislation provided that "nothing contained [in the statute] shall take away, or be construed to take away or impair," the common-law action against the collector.[133]

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[129] J. Dickinson, supra note 2, at 58.

[130] See also United States ex. rel. Tucker v. Seaman, 58 U.S. (17 How.) 225 (1854) (Taney, J.) (deferring to Superintendent of Public Printing's statutory interpretation).

[131] 44 U.S. (3 How.) at 264 (McLean, J., dissenting); see also id. at 256 (Story, J., dissenting).

[132] See E. Freund, supra note 55, at 243 (discussing actions against collector; noting that in 1863, Congress provided in proper cases that Treasury pay judgments against the collectors). By legislation in 1890, Congress abolished the right of action against collectors to recover duties, and substituted a procedure whereby protests against decisions of customs officials were first heard by a board of general appraisers, whose decision then might be appealed to the United States Circuit Court. J. Dickinson, supra note 2, at 275. By an Act of August 5, 1909, ch. 6, sec. 29, 36 Stat. 11, 105-08, Congress created the Court of Customs Appeals to exercise the jurisdiction previously exercised by the federal courts. Id. at 276. The decisions were at first not reviewable in other courts, but an Act of August 22, 1914, ch. 267, 38 Stat. 703, allowed certiorari.

[133] See Scalia, supra note 2, at 916 n.222 ("Congress promptly remedied this unfortunate decision [Cary] by passing 'an Act explanatory of [the 1839 statute].' That Act provided that 'nothing

Subsequently, however, the Taney Court limited the statute's effect by interpreting it to accord finality to administrative determinations of the value of the goods on which duties were assessed.[134] Quoting a land case, the Court used res judicata reasoning to justify its result: "It is a general principle, that when power or jurisdiction is delegated to any public office or tribunal over a subject-matter, and its exercise is confided to his . . . discretion, the acts so done are binding and valid as to the subject-matter."[135] Only want of power in the officer, or fraud, would be grounds for attacking the valuation[136]—in other words, the same limited grounds for attacking agency decisions (such as issuance of a land patent) under a res judicata model.

Nevertheless, the new legislation apparently led the Taney Court to entertain a number of assumpsit actions against customs collectors in which the plaintiff alleged more than a disagreement about valuation. Indeed, the limitation on review of mere valuation questions led importers who challenged customs collections to emphasize procedural defects in appraisal.[137] The focus in administrative law on procedural issues is a natural direction for judicial

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contained [in the 1839 statute] shall take away, or be construed to take away or impair,' the right of action against the collector, and it added to the elements of that right of action . . . that the protest against payment be in writing. 5 Stat. 727 (1845). See Curtis's Adm'x v. Fiedler, 67 U.S. (2 Black) 461 (1862).").

134 Bartlett v. Kane, 57 U.S. (16 How.) 263, 272 (1853) (discussed in J. Dickinson, supra note 2, at 58). Finality as to valuation persisted beyond the Taney Court. See Hilton v. Merritt, 110 U.S. 97, 104-06 (1884). The statute provided for judicial review of "rate and amount." See id. at 105-06; Belcher v. Linn, 65 U.S. (24 How.) 508, 522-23 (1860). It does not appear that customs officials had developed traditions of professionalism that would entitle them to court deference on any issue. See supra note 69. Indeed the court in Bartlett had accorded finality to the administrative determination of value even though the Court said that the wrong methods of valuation had been used to determine value in the particular case. 57 U.S. (16 How.) at 272.

135 57 U.S. (16 How.) at 272.

136 Id.

137 The Taney Court allowed trial de novo, by a jury in a later assumpsit action, to consider value where the appraisers had not complied with the statutory procedure of inspecting one in ten of the imported goods. Converse v. Burgess, 59 U.S. (18 How.) 413 (1855). Because the Court had limited judicial review of valuation simpliciter, importers apparently urged procedural issues such as compliance with statutory procedures for valuation, as a requisite to getting a determination of the merits of valuation. This tactic seems to have met with success. See, e.g., id. (Campbell, J.) (plaintiff could show appraiser had not made proper inspection); Oelbermann v. Merritt, 123 U.S. 356, 364 (1887) (importer could show statutory procedures for valuation not complied with); Greely v. Thompson, 51 U.S. (10 How.) 225 (1850) (Woodbury, J.) (upholding judgment in assumpsit against collector; rejecting department's interpretation of statute as to proper time for valuation; rejecting collector's objection to instruction requiring actual examination by appraisers; also court had properly instructed jury that removal of appraisers who disagreed with government was improper); see also Homer v. Collector, 68 U.S. (1 Wall.) 486 (1863) (deciding on merits against importer a dispute about classification of goods); Marriott v. Brune, 50 U.S. (9 How.) 619 (1850) (affirming judgment for importer in assumpsit action; importer could contest determination of quantity in assumpsit).

review when review on the merits is limited.[138] And later Courts continued to accord plenary review in actions against collectors presenting issues other than valuation of admittedly dutiable goods.[139]

In internal revenue cases, moreover, the Court two years after Taney's death declined to read a statute requiring collectors to pay collections over to the Treasury, similar to the customs statute at issue in Cary, as abrogating the common law assumpsit action.[140] Justice (then-Professor) Scalia noted that "precisely the same issue" of implicit abrogation as in the Cary case was presented in that case, yet the Court's result was different.[141] Although Congress in that statute had provided for appeals to the Commissioner, the Court read this as a prerequisite to, not a displacement of, the assumpsit remedy against the collector.[142]

One can thus detect a brake on trends toward bureaucratization of remedies in the tenacity of the common-law remedies against officers. Courts after the Taney era appear to have been less animated by the idea that the branches could not control each other, and were less likely to read statutes in ways that would abrogate preexisting judicial remedies.[143] In addition, the Court increased the level of judicial review in land cases by reviewing issues of law on uncontested or agency-found facts. Given their relatively short life

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[138] See Damaska, Structures of Authority and Comparative Criminal Procedure, 84 Yale L.J. 480, 527 (1975) (in systems where adjudicators are autonomous and much of their decisionmaking is unchallengeable, procedural problems assume great importance).

[139] Oberteuffer v. Robertson, 116 U.S. 499 (1886) (action removed from state court to circuit court after following statutory procedure for protest and appeal to Secretary of Treasury; finding that under statute, cartons were not dutiable); Homer v. Collector, 68 U.S. (1 Wall.) 486, 490 (1863) (rejecting on merits importer's claim that almonds should be classified as "dried fruit" rather than "almonds" and therefore subject to a lower duty than the one importer had paid under protest); see also J. Dickinson, supra note 2, at 274 (while courts would not review valuation, they would review erroneous classification).

[140] City of Philadelphia v. Collector, 72 U.S. (5 Wall.) 720, 730-33 (1866) (assumpsit against internal revenue collector; statute contemplated continuation of common law action against collector).

[141] Scalia, supra note 2, at 916 n.222. "Precisely the same issue [as in Cary] later confronted the Court with respect to internal revenue collections; and the Court held, even without the benefit of an 'explanatory Act,' that the requirement of payment into the Treasury did not eliminate the cause of action against the collector. The Court justified its apparent departure from the reasoning of Cary v. Curtis, supra, by finding in other statutes the implication that the old right was expected to continue. City of Philadelphia v. Collector, 72 U.S. (5 Wall.) 720 (1866)."

[142] 72 U.S. (5 Wall.) at 730-33.

[143] See, e.g., Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75 (1872) (allowing recovery against collector of internal revenue for taxes illegally assessed and paid under protest); Erskine v. Hohnbach, 81 U.S. (14 Wall.) 613, 616 (1871) (affirming judgment against collector of internal revenue in trespass for seizure of goods; an appeal to the Commissioner of Internal Revenue was required only in suit to recover taxes paid).

span, the extreme deference of some of the Taney Court decisions thus could be viewed as something of a sport.

IV. The error model

A. Common law background

The error model represents an approximate midpoint between the de novo and res judicata models. The error model is derived from the common-law writ of error, which was used in ordinary litigation to review judgments based on jury verdicts and, later, to review judgments entered in bench trials in actions at law.[144] When applied to judicial review of agency action, the reviewing court would analogize the agency to an inferior court in the same court system over which it was exercising direct review.

Having the degree of review midway between the de novo and res judicata models reallocates decisional power between the courts and the agencies. Under the error model, the reviewing court would give a significant degree of finality to the original tribunal's determination of facts, but did not generally give deference to determinations of law. The error model thus divides final decisional authority between agency and court along the shady border between fact and law.[145]

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[144] In the nineteenth century, a writ of error was the form of review for judgments on jury verdicts. R. Pound, Appellate Procedure in Civil Cases 109-10 (1941); see also Ryan v. Carter, 93 U.S. 78, 81 (1876) (writ of error to circuit court in ejectment action tried before judge; only review of fact would be for sufficiency to sustain judgment, as would be true for jury verdict); R. Pound, supra, at 220. The courts tended to analogize the review of facts in judge-tried cases to those of a jury. Id. at 225; Resnick, supra note 17, at 991-94 (discussing procedures in appeal and error). The Seventh Amendment limits review of facts found by a jury to reexamination only in accordance with the common law, which limited appellate courts to reviewing legal sufficiency of evidence. This standard survives today for review of facts found by juries, and now is commonly articulated as a reasonable juror standard. In 1865, Congress extended the writ of error to judgments at law where the court had been the fact finder.

[145] Even where decisional authority on issues of "fact" lies with one decision maker, such as an agency or jury, and plenary authority on issues of "law" lies with another, this division of function will not preclude allocation of some authority over law to the fact decider, and some allocation of authority over facts to the law decider. Our jury system allows some applications of law to fact to be treated as matters of fact subject to deference by reviewing courts. By not reviewing mixed questions of law and fact decided by juries, the court allocates significant lawmaking functions to the trier of fact. Appellate courts more explicitly allow lower courts to determine judicial particularizations of legal standards, conceded to be legal issues, under an abuse of discretion standard. Like the deference to triers of fact for "mixed" questions of law and fact, the abuse of discretion standard effectively allows for some trial court variation in

A "pure" version of the error model was not a common method of review of agency action in the nineteenth century, but a closely related method of review by "appeal" was. Although review by writ of error and review by appeal were distinct, they were both forms of what now would be called "appellate" review. Appeal, however, was the method of review in equity actions, while error was the method of review at law.[146] As in error review, review by appeal treated the prior decision as one of an inferior court within the same court system. In review by appeal, however, review of facts (as well as of law) was originally de novo, since the equity appeal was considered to be in the nature of a new proceeding rather than a continuation of the original one.[147] Under error review, by contrast, the reviewing court was very deferential to the original fact finder, review of facts was limited to the legal sufficiency of the evidence. During the course of the nineteenth century, however, equity practice evolved toward more deference to the factfindings of the court below, as manifested in the development of the "clearly erroneous" standard of review of factual findings in equity cases.[148]

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questions of law. See generally Davis & Childress, Standards of Review in Criminal Appeals: Fifth Circuit Illustrations & Analysis, 60 Tul. L. Rev. 461, 510 (1986).

Hence the fact/law division of power may nevertheless allow allocation of lawmaking competency to agencies, just as it does to juries. As described above, under the res judicata model, the court slipped into saying it would review questions of law on uncontested facts, which was in a sense an error formulation that still allowed substantial lawmaking competency to agencies for "mixed" questions.

Just as the trier of fact in an error model may nevertheless exercise some lawmaking power that will be accorded finality by the reviewing court, the law-trier may decide questions of legal sufficiency of evidence that involve evaluations of fact; this review may be necessary to preserve the integrity of the legal standard. In addition the law-trier may explicitly allocate some initial factual decisions to itself, such as factual issues in jurisdictional, constitutional, and evidentiary disputes.

146 R. Pound, supra note 144, at 109-10, 289.

147 Id. at 300. The courts conceptualized review by writ of error, as well as by appeal, to some extent as new proceedings, id. at 298, 300 (appeal), hence the language of "plaintiff in error." But cf. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 410-11 (1821) (writ of error to Supreme Court by party who lost to state below is not "suit" against state forbidden by Eleventh Amendment; same would be true of appeal). Over the course of the nineteenth century, however, the courts increasingly saw appellate review as a continuation of the original proceeding.

148 See R. Pound, supra note 144, at 301. Federal Rule of Civil Procedure 52 provides a clearly erroneous standard on review of facts found by judges in bench trials, whether at law or equity. The 1938 Federal Rules of Civil Procedure extended the clearly erroneous standard for review of facts to cover not only review of judge-found facts in equity, but also judge-found facts in legal actions. This ended the additional deference that reviewing courts gave findings of a judge sitting as a trier of fact in actions at law. See 5A Moore's Federal Practice H 52.01 [2], at 52-5 (committee note of 1937 on Rule 52); see also Resnik, supra note 17, at 861 (many of procedural innovations of last two hundred years have moved away from a Single Judge/ Finality Model to a form that includes a second tier of review).

In ordinary federal court litigation, the availability of appeal and writs of error were both matters of congressional statute. Without a statutory provision for review, neither a writ of error nor an appeal would lie from a decision of a lower court. If a statute provided for a writ of error or appeal from one court to another, however, review was nondiscretionary. Similarly, in the context of judicial review of agency action, direct review along the lines of a writ of error or appeal was possible only when Congress expressly provided such review.[149] Thus the Court employed appellate-style review only when there was legislation explicitly providing a direct avenue of judicial review of agency action.

B. Origins of the error model in review of agency proceedings

Under the current understanding of administrative law, nineteenth century courts were reluctant to conceptualize their role in reviewing agency action as being in the nature of a higher court's review of a lower court's findings.[150] This difficulty, in turn, is thought to have produced an all-or-nothing approach to review. Frederic Lee, who is largely credited with developing this theory of nineteenth-century administrative law, attributed this difficulty to a rigid view of separation of powers that did not allow the judiciary to sit in direct review of executive action.[151] As set out more fully below, however, the relative scarcity of appellate-style review resulted less from a rigid view of separation of powers and more from the particular jurisdictional statutes enacted by Congress and the nature of appellate review at the time.

Lee relied heavily on the Taney Court's decision in United States v. Ritchie[152] to support his proposition that nineteenth-century courts would

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[149] Of course the difference between an appeal and the de novo form was not great. First, the reviewing court would only view its role as "appellate" if a statute provided a direct avenue of review from the agency to the courts. The reviewing court using appellate-style review as its model rather than a de novo model would be likelier to conceptualize the agency decision as that of a "tribunal" rather than as mere executive action. It also would be likelier to receive a record of agency decision, even if it might allow supplementation of the record. The 1803 Act providing for appeals in federal equity cases, however, forbade new evidence to be introduced on appeal except in cases of admiralty or prize. R. Pound, supra note 144, at 303 & n.8.

[150] See supra note 10.

[151] See Lee, supra note 10, at 287, 299-300, 305, 309.

[152] 58 U.S. (17 How.) 525, 533-34 (1854).

not review agency decisions in the manner of an appellate court reviewing the actions of an inferior tribunal. Ritchie involved a congressionally prescribed review proceeding in a California land case. Congress had provided for judicial review in the case of California titles in which the person claimed title under Spanish or Mexican grants.[153] All such claims first had to be brought to a commission, and were subject to "review" or "appeal" in the federal district court at the behest of the United States or the claimant.[154] Further review of the district court findings could be had in the Supreme Court.

One of the parties in Ritchie argued that the judiciary could not sit in direct review of the actions of an executive agency. This was an argument likely to appeal to the Taney Court, which had taken the position that in cases not involving explicit statutory review procedures, the judiciary could not sit in direct review of the actions of the federal executive. On the other hand, deference to congressional schemes for administration was characteristic of the Taney Court and the legislative scheme in this case provided for a direct avenue of review from the agency to the courts.

In Ritchie the Court summarily disposed of the supposed difficulty of one branch sitting in direct review of the other by finding that the proceedings were not really an "appeal," even though so denominated under the 1852 Act. Instead, the Ritchie Court characterized the judicial action as a de novo proceeding, in which the district court could hear new evidence.[155] Thus at a formal level, the Court skirted the problem of a federal court sitting in review of an agency. Although the Court approved a congressional scheme in which agency procedures fed directly into court actions, it interpreted the court role to be more or less collateral to the agency proceeding.[156]

Although Lee interpreted Ritchie to mean that the nineteenth-century courts had difficulty viewing judicial review of agency procedures as similar to a higher court's review of a lower court decision,[157] he may have made too much of the case. Apart from decisions of the Taney era, the Supreme Court

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[153] Statutes for other territories had other procedures. For example, in New Mexico, Congress provided by an 1854 Act that the Surveyor-General make a report subject to congressional confirmation on preexisting claims. See Tameling v. United States Freehold & Emigration Co., 93 U.S. 644, 662 (1876). The Court would not review the validity of a congressionally confirmed claim. Id. at 663; Maxwell Land-Grant Case, 121 U.S. 325, 366 (1887); see also supra note 103.

[154] Act of Mar. 3, 1851, 9 Stat. 632, as amended 10 Stat. 99 (1852).

[155] 58 U.S. (17 How.) at 533-34. See Lee, supra note 2, at 299-300.

[156] Lee, supra note 2, at 299-300.

[157] Id. at 299.

had little difficulty articulating its role as a form of appeal or review of an agency decision. In Durousseau v. United States,[158] for example, the Marshall Court had not been troubled by its appellate role in reviewing the decisions of article I decision makers in the territorial courts.[159] Later, in an 1874 land case, the Court referred to agency procedures in California land cases as "essentially judicial," and its own role as appellate.[160] And in invention patent cases, the Court countenanced a procedure whereby persons could appeal decisions of the Commissioner of Patents to the Circuit Court of the United States for the District of Columbia, and later to the Supreme Court for the District of Columbia.[161] In one such case, the Court referred to provisions that had originated under 1836 legislation for appeal of patent denials to the United States Circuit Court for the District of Columbia as making decisions of the patent office "subject to a review by judicial tribunals whose jurisdiction is defined by the same statute."[162]

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158 10 U.S. (6 Cranch) 307 (1810).

159 Id. at 312-13. See also Morgan v. Callender, 8 U.S. (4 Cranch) 370 (1808). In the case of territorial courts, the analogy to review of state court judgments under section 25 of the 1789 Judiciary Act was stronger than when the Court reviewed less formal agency decisions. But decisions of territorial courts are now generally considered to be similar to agencies for constitutional analysis. The Supreme Court's discussion of jurisdiction in Durousseau turned on statutory construction rather than article III. See C. Wright, Federal Courts 41 (4th ed. 1983) ("although Marshall had said that the jurisdiction of the territorial courts is not part of the judicial power of the United States, it has been held from the earliest times that the Supreme Court may review decisions of a territorial court"). While the Court also engaged in appellate-style review of decisions of the Court of Claims, the Court apparently saw that court as an article III tribunal. For discussion of the history of the Court of Claims and swings of the Supreme Court as to whether the Court of Claims was an article I or article III court, see Glidden v. Zdanok, 370 U.S. 530 (1962).

160 Tameling v. United States Freehold & Emigration Co., 93 U.S. 644, 662 (1876) (New Mexico land case).

161 See Butterworth v. United States ex rel. Hoe, 112 U.S. 50, 60-65 (1884). Legislation beginning in 1836 had allowed certain appeals from denials of patents to the Circuit Court of the United States for the District of Columbia. Id. at 65. Under patent laws in effect at the time of Butterworth, a person who had followed agency procedures to obtain a patent and who had been denied a patent could appeal to the Supreme Court of the District of Columbia. Id. at 59-60. The Court may have seen the role of the District of Columbia court as administrative, but it also referred to the appeal as "to a judicial body," that was "sitting on appeal from the commissioner." Id. at 61. Further provisions in effect at the time of Butterworth allowed for a bill in equity in courts of the United States. This was apparently a de novo proceeding. Id. This appeal right, however, was not in derogation of the basically de novo determinations in infringement actions although the decision would bind the patent office. Id. at 62-63.
The Supreme Court later struggled with whether review of patent office decisions was "judicial" and hence reviewable by an article III tribunal, since the validity of patents could be called into question in subsequent infringement suits. See Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 699 (1927); Kurland & Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals, 18 Geo. Wash. L. Rev. 192 (1950).

162 Butterworth, 112 U.S. 50 at 67 (1884). The Court referred to the decision of the commissioner that was being reviewed also as "judicial" action. Id. at 67.

Thus, the Court appears frequently to have been willing to go along with a role in reviewing agency decisions similar to appellate review, so long as statutes explicitly provided for such a role. Writs of error and appeal were creatures of statutes. For the first hundred years of administrative law, the Court did not generally treat its review as appellate because Congress rarely provided for statutory review. But when Congress did so provide, the Court (notwithstanding Ritchie) generally had no trouble sitting in direct review of agency action.[163]

When the courts did directly review agency action under congressional statutes explicitly providing for "appeals" or "review," the review was generally de novo. The use of de novo review in such cases does not necessarily indicate that the courts did not conceive of their role vis-à-vis the agencies as appellate in nature, as Lee believed.[164] Rather, in "appeals" from equity proceedings, reviewing courts at that time were generally according de novo review of facts and law found by trial court, the more deferential clearly erroneous standard for review of factual determinations in equity having not yet fully developed.

Evidence of the proposition that de novo review of facts was consistent with an appellate-style role of the courts vis-à-vis the agencies is found in the California land cases. The Supreme Court, sitting in review of the district courts in cases that originated before the California land commissions, gave no more deference to the district courts' findings of fact and law than it did to those of the commissions.[165] The evolution in equity appeals away from de novo review of facts to a clearly erroneous standard may have encouraged deference to agency-found facts in statutory review proceedings. It appears that the more deferential style of review for facts in equity and in statutory

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[163] In Ritchie, moreover, the Court did not strike down the congressional scheme, but merely interpreted it in a way that the Court thought avoided constitutional problems. 58 U.S. (17 How.) 525 (1854).
One can also see the Court's viewing its role as similar to that of a higher court reviewing judgments of a lower court in the land cases that the court originally reviewed under a res judicata model. When the Court in the land cases said it would review questions of law on uncontested facts, it was adopting a standard used in writs of error to review judgments on verdicts.

[164] Lee, supra note 2, at 299-300.

[165] See, e.g., Rodrigues v. United States, 68 U.S. (1 Wall.) 582 (1863) (affirming; clearly involving factual issue); United States v. Vallejo, 66 U.S. (1 Black) 541 (1861) (same); United States v. Cambuston, 61 U.S. 120 (How.) 59 (1857) (reversing district court and commission).

review actions under the Interstate Commerce Act[166] evolved at roughly the same time.[167]

V. Factors affecting the choice of a particular model of review

This article thus far has described three different models of judicial review of agency action, and has attempted to give a sense of when each model would be used in terms of the changing philosophies toward judicial review of agency action. This historical record shows that the nineteenth century cannot be viewed as a monolithic age of judicial deference to agency decisionmaking. Many of the decisions reflected, on one hand, the Marshall Court's (and later Justice Field's) strong belief in the judiciary having the last word, and, on the other, the Taney Court's belief that one branch (especially the judiciary) should not sit in direct review of another.

In addition, other factors helped determine the model of review that a court would use apart from questions of judicial philosophy and congressional statutes. Some have argued that the extent of agency review may have turned on whether the agency decision affected a governmentally conferred "privilege" as opposed to a preexisting "right" protected at common law.[168] As discussed more fully below, this so-called right/privilege distinction, while not without explanatory force, has been overemphasized as a predictor of the

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[166] Lee has described how the Court apparently had problems with directly reviewing agency findings under the first Interstate Commerce Act. Commission findings, which the statute provided should be considered "prima facie" evidence, were liberally reconsidered by the courts, and further evidence could be presented on court review. Lee, supra note 2, at 301-02; see also Young, supra note 3, at 814 (discussing standards of review in ICC cases). On the other hand, the Court may have been doing no more than what Congress intended, since in invention patent cases the "prima facie" effect given findings by the patent office had long been interpreted to mean basically de novo review by the courts. Around the turn of the century the Court accorded greater deference to ICC fact finding. Lee, supra note 2, at 304-05.

[167] See R. Pound., supra note 144, at 301 & n.4. In Morewood v. Enequist, 64 U.S. (23 How.) 491, 495 (1860), an admiralty case (and therefore one reviewed by appeal), the Court said, in refusing to overturn a judgment on factual grounds, "We have frequently said that appellants should not expect this court to reverse a decree of the Circuit Court merely upon a doubt created by conflicting testimony." In Gumaer v. Colorado Oil Co., 152 U.S. 88, 91 (1893), however, in reversing a judgment in an equity case in which the court below had not made specific factual findings, the Court engaged in de novo determination of the evidence.
At the time of the enactment of the Federal Rules of Civil Procedure in 1938, the clearly erroneous standard embodied in Rule 52 was the existing standard for review of fact in equity cases. Lee traced the beginning of appellate-style review in agency cases to the turn of the century. Lee, supra note 2, at 305.

[168] See supra note 8.

level of judicial review of agency action. An equal if not more influential factor than any such right/privilege distinction in determining the level of review seems to have been "instrumentalism," or a desire to promote commerce. The move from a mercantilist to a laissez-faire theory of economic development in the 1830s appears to have accentuated the differences in styles of judicial review between Marshall and Taney.

A. Was there a right/privilege distinction?

Some commentators have maintained that because of the supposed presence of a so-called right/privilege distinction, the Court used a deferential style of review in many nineteenth-century cases.[169] According to this view, judicial reluctance to review the merits of federal administrative action reflected the fact that many cases involved governmental largesse (*e.g.*, the giveaway of federal land), and the Court's belief that Congress could hand out "privileges" on whatever terms it chose. Also, according to this theory, the Court would use more searching review when the government took away the liberty or property of the citizen—that is, when the government made a coercive exaction affecting the citizen's preexisting "rights." The right/privilege theory makes the nineteenth-century deferential style of judicial review fit more comfortably with current notions that the judiciary should play an active role in policing the agencies in many areas. The downside is that the right/privilege dichotomy suggests that Congress may provide a rougher form of justice for claims to government benefits that have come to be labeled the "new" property.[170]

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[169] Closely allied with this view is the idea that "public" rights, as distinguished from "private" rights could be adjudicated in nonarticle III tribunals. See Fallon, supra note 62, at 923, 951 (while legislative courts have been used in almost all areas, including government coercion against the citizen, historically "privileges" assumed to be unenforceable); id. at 963 (traditionally claims for entitlement have received sharply distinct treatment from allegations of coercive violation of common law liberty and property rights); Monaghan, supra note 7, at 16 (judicial control at its maximum with coercive government conduct, as distinguished from benefits); Young, supra note 3, at 787 (Supreme Court first became accustomed to non-article III adjudication through federal executive-action cases, or in broad sense, government-benefit cases); id. at 794, 797-99 & n.157, 818-20 (characterizing cases in which Court was deferential to decisions of executive as involving privileges); cf. J. Dickinson, supra note 2, at 56, 59 (government gratuity cases a distinct category for review; immigration exclusion cases seen as involving privilege).

[170] See Reich, The New Property, 73 Yale L.J. 733 (1964).

Using the right/privilege theory to explain older patterns of judicial review of agency action is problematic. One obvious problem is that the Court itself did not use language of right and privilege as an explanation for different levels of deference to agency decisions. What is more, the Court sometimes reviewed government exactions affecting private rights under the deferential res judicata model. At other times, the Court accorded rigorous judicial review in cases seeking remedies for denials of government benefits or largesse.

In Murray's Lessee v. Hoboken Land & Improvement Co.,[171] for example, the Court indicated that Congress could allocate matters of "public right" for final determination to agencies rather than courts for determination.[172]Murray's Lessee, however, is best described as a case of a government exaction.[173] The Treasury had levied directly on the property of the former customs collector of New York who had embezzled government funds, and the Court upheld the use of this summary procedure. Those who would characterize Murray's Lessee as involving a government benefit[174] can do so only because the party against whom the exaction was being sought had been a government employee, and the seizure was to make up for deficiencies in government accounts.[175] Quite clearly, a direct levy on property is not on the privilege side of the right/privilege distinction.

Customs cases, which involved government exactions against importers—persons who were not government employees—were also reviewed under the res judicata model, particularly for valuation questions. Although these cases are sometimes distinguished as involving an exception from stringent judicial review because they involved issues of revenue collection,[176] any such revenue-collection exception admits a gaping hole in the right/privilege, or exaction/benefit, dichotomy. Similarly, in some cases involving vested property rights (such as agency determinations of rights to land claimed under grants from

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171 59 U.S. (18 How.) 272 (1855).

172 Id. at 284-85. Professor Bator noted that "[t]he statute in question did permit the collector a subsequent court action to challenge the finding of indebtedness." Bator, supra note 35, at 246. The Court, however, indicated that Congress need not have consented to having the question of indebtedness drawn into question. See Murray's Lessee, 59 U.S. (18 How.) at 284.

173 See Bator, supra note 35, at 247-48.

174 See Young, supra note 3, at 794.

175 Cf. id. at 797.

176 Dickinson noted that the courts were most deferential to the agencies in cases involving collections of revenue. J. Dickinson, supra note 2, at 40, 58, 67; cf. Murray's Lessee, 59 U.S. (18 How.) at 274-75.

foreign governments prior to acquisition of territory by the United States), the Court allowed for congressional preclusion of judicial review.[177]

As these examples show, the Court did not limit its willingness to allow legislative displacement of judicial remedies to areas of government benefits or largesse. Similarly, the availability of judicially enforceable remedies did not necessarily depend on whether the claimant asserted a "right" as opposed to a "privilege." On several occasions, the Court recognized that one could acquire an enforceable right under a statute, even to a governmental benefit.[178] For example, the Court treated the delivery of a federal land patent to the claimant after its issue as a judicially enforceable right.[179]

Of course, even if one distinguishes right and privilege as calling for different levels of judicial process, the Court must set a point at which a government benefit becomes the vested property of the recipient and fully protectable under the common law. The real issue therefore was to ascertain the kinds of interests with respect to which the Court might recognize an enforceable right, and at what point the right would become enforceable. Chief Justice Marshall's early recognition of an enforceable right to a commission to office in Mar bury v. Madison[180] was one of the more expansive interpretations of the type of interest that the Court found legally protectable; other cases in which the nineteenth-century Court found enforceable rights relating to public office were rare.[181] Marbury, however, remained good precedent for the proposition that an issued-yet-undelivered land patent coming from the government gave the beneficiary an enforceable property right, and several nineteenth-century cases enforced claims to benefits based on such a concept of vesting or passage of title.[182]

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[177] See, e.g., West v. Cochran, 58 U.S. (17 How.) 403, 415-16 (1854) (precluding judicial review of commission determinations on claims derived from former governments in Louisiana territory); see also supra notes 103, 153.

[178] See, e.g., Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) (mandamus to postmaster general to pay money as provided by special bill), cf. United States v. Schurz, 102 U.S. 378 (1880) (approving mandamus to compel Secretary of Interior to deliver patent that had been issued); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164-65 (1803) (Secretary of State subject to mandamus to deliver commission).

[179] See, e.g., United States v. Schurz, 102 U.S. at 403.

[180] 5 U.S. (1 Cranch) at 167.

[181] See infra text accompanying notes 196-202.

[182] See United States v. Schurz, 102 U.S. 378 (1880) (mandamus to compel Secretary to issue patent since title had passed with issuance); Moore v. Robbins, 96 U.S. 530, 533 (1877) (government may not without court action withdraw a patent it has issued, since title has passed); Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law, 35 Stan. L. Rev. 69, 76 (1982) (noting changes in terminology, but also noting "a long and unbroken tradition of

The Court, moreover, seldom expressed the idea that merely because government was giving something away, it could do so on whatever terms it wished.[183] Rather, invention and land patents were sometimes referred to as matters involving private rights, thus implying that some traditional judicial protections were available in cases involving these claims.[184] The giveaway or sale on favorable terms of government land was the classic government benefit. The Court, however, edged into more searching forms of review of land office determinations by expanding issues deemed reviewable as "jurisdictional," and by reviewing questions of law on uncontested or agency-found facts.[185] Thus even in areas of government "privilege," the Court sometimes accorded relatively searching review.

Nevertheless, it is understandable why the right/privilege distinction is read back into the nineteenth-century cases. As discussed below,[186] the de novo model was most tenacious in the area of direct government exactions upon person and property. This tenacity may in part have resulted from the courts' viewing common-law actions against officers—in which the official as an individual was sued for committing a common-law harm such as trespass without legal justification—as involving matters of private right and as inherently calling for judicial process.[187] Where the res judicata model took

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viewing the legal universe in terms of a division between interests that are formally vested and interests that are merely legally inchoate wants"); cf. Sinking-Fund Cases, 99 U.S. 700, 719 (1878) (United States "cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad").

Also, throughout the nineteenth century, a plain legal duty could give rise to an action against the official for government benefits without reliance on a passage of title or vesting theory. The Court, however, varied the stringency for the plain legal duty requirement. The Taney Court was less willing to find plain legal duties than others. See Woolhandler, supra note 28, at 418-19, 436-37, 440-41. But cf. Fallon, supra note 62, at 965 n.276 (nineteenth-century political and social thinking could not comprehend modern entitlement theory).

183 The Court rarely talked about government largesse as a "privilege" in the early nineteenth-century cases. Cf. Young, supra note 3, at 802 n.186 (government benefits justification sub silentio provided justification for executive actions cases); id. at 799-800 (Murray's Lessee seldom cited, but nevertheless was the justification for judicial deference). Occasionally the Court did recite a privilege rationale for the lack of judicial review. See, e.g., Morehouse v. Phelps, 62 U.S. (21 How.) 294 (1858) (commission's determinations on preemption claims to federally-owned land was conclusive; Congress could give out land on terms it chose; distinguishing Spanish-derived claims since titles then were private property).

184 Cf. Butterworth v. Hoe, 112 U.S. 50, 56 (1884) (invention patent case, referring to Land Office determinations under the preemption laws as "questions of private right"); id. at 59 (referring to invention patent cases as involving "public and private rights").

185 See supra text accompanying notes 117-22.

186 See infra text accompanying notes 209-20.

187 See Stewart, supra note 1, at 1717 (traditionally only interests protected against government were those enjoying protection at common law against invasion by private parties).

hold in the exaction cases, its grip was weak, at least until Congress provided elaborate legislative courts.[188] Although the right/privilege distinction has some power to describe nineteenth-century judicial review of administrative action, the courts did not adhere strictly to full-fledged judicial process for all direct exactions on property. Furthermore, the cases do not support a bitter-with-the-sweet approach to review of dispensation of government benefits.

B. Instrumentalism as a factor in the level of judicial review

A factor that was perhaps equally important to any implicit right/privilege distinction in determining the degree of judicial deference to agency determinations was "instrumentalism"—that is, the Court's explicit desire to promote commerce.[189] The use of the res judicata model in land patent cases made attacks on government-issued invention titles difficult. While presumably influenced by preexisting doctrines allowing only certain attacks on legal title, the Court was also explicitly influenced by the view that great deference must be accorded government land patents in order to facilitate the transferability of property, which in turn would promote economic growth.[190] The Court's deference to long-standing constructions of statutes by the executive seems to have been similarly influenced by the need for reliability in land patents to avoid obstructions on the sale and use of land.[191]

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[188] See supra text accompanying notes 131-42.

[189] *See generally M. Horwitz, supra note 42.*

[190] See Steel v. St. Louis Smelting & Refining Co., 106 U.S. 447, 451-52 (1882) (Field, J.); Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881) (Field, J.). In both cases, Justice Field also emphasized the vagaries of jury determinations as a reason not to allow attacks on patents in actions at law.

[191] See Wright v. Roseberry, 121 U.S. 488, 497 (1887) (Field, J.) (there must be clearest evidence of error in department's interpretation of statute before overturning, since many titles would be affected); United States v. Burlington & Mo. River R.R., 98 U.S. 334, 341 (1878) ("Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question."). The canon of deference was used in areas, however, that may have involved less need for certainty but where nevertheless expectations had formed from agency interpretations. See United States v. Philbrick, 120 U.S. 52, 59 (1887) (pay to captain pursuant to long-standing construction by Secretary of Navy that was not clearly erroneous); Hahn v. United States, 107 U.S. 402, 406 (1883) (appeal from Court of Claims; deferring to longstanding interpretation of Secretary of Treasury as to distribution of fines to customs officials, quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 209 (1827) and other cases); see also United States v. Graham, 110 U.S. 219, 221 (1884) (appeal from Court of Claims; claim by naval officer for travelling expenses; long-standing departmental interpretation unimportant when statute clear).

In contrast to the Court's approach to land patents, the desire to promote commerce led the Court not to give deference to government grants of invention patents. To be sure, the organic statutes governing land and invention patents contained significant differences that encouraged more searching judicial review of the issuance of invention patents.[192] Yet even taking account of the statutory nature of review in invention patent cases, one might have expected the courts to give deference to the Patent Office decisions to issue an invention "patent" just as it deferred to Land Office decisions to issue land "patents."[193] Both land and invention patents issued after certain formalities and factual and legal determinations by the agency. Both also involved, arguably, government privileges evidenced by a formal document; furthermore, both impaired the rights of persons who were not represented in the agency proceeding. Thus one might assume, particularly if a right/privilege distinction were the primary determinant of the level of judicial review, that agency determinations to issue both land and invention patents would be treated with similar deference by the courts.

Nevertheless, the Court's instrumentalism led to quite different degrees of deference to these two sorts of patents. While the Court saw deference to government-issued land patents as facilitating commerce in land by adding predictability to transactions, the Court viewed deference to government-issued invention patents as clogging competition by restraining other persons from profiting by related inventions.[194] Both because of this view, as well as

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[192] Congress provided statutory review procedures for invention patents, while land patent cases came before the courts more frequently by way of traditional ejectment and equity actions. Those who claimed to have been wrongfully denied a patent could seek court review as specified under varying legislation, see J. Dickinson, supra note 2, at 289 n.115, while those aggrieved by issuance of a patent to another could typically raise their claims as defendants in statutory infringement actions. The patent acts explicitly referred to a number of issues that could be raised in defense to infringement actions, thereby indicating that Congress intended the matters to be subject to de novo determination. See Philadelphia & Trenton R.R. v. Stimpson, 39 U.S. (14 Pet.) 448, 459 (1840) (1836 act provided special requirements for pleading defense of prior invention). Some defenses that the statute did not mention, however, were nevertheless reviewed de novo by the court. See infra notes 19495.

[193] The verbal similarity that both involve "patents" did not escape the courts. See Stimpson, 39 U.S. (14 Pet.) at 459. In both invention and land patent cases, the courts were reluctant to interfere with proceedings that were pending before the agency. Compare Commissioner of Patents v. Whitely, 71 U.S. (4 Wall.) 522 (1866) (mandamus was not proper remedy to review decision of commissioner that assignee of partial interest in patent could not get reissue) with United States v. Commissioner, 72 U.S. (5 Wall.) 563 (1867) (mandamus to compel commissioner of land office to issue patent not proper remedy where party claimed that commissioner should have issued patent to the party rather than another).

[194] See Reckendorfer v. Faber, 92 U.S. 347, 351 (1875) (infringement action; issue of patentability open to redetermination by court). The Reckendorfer Court showed an absolutism about

differences in the organic statutes governing the two areas, the Court showed little respect for government-issued patents. Determinations by the Patent Office of patentability issues were considered merely prima facie evidence in infringement suits,[195] and the courts proceeded to engage in basically de novo review of such issues.

The Supreme Court's eventual decision not to give office-holders rights to remain in office also resulted in part from an emerging free-market philosophy.[196] Although Chief Justice Marshall recognized Marbury's entitlement to his commission,[197] later courts declined to recognize judicially

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judicially-determined facts, stating that "[i]t is not sufficient that it is alleged or supposed, or even adjudged, by some officer, to possess these requisites [to patentability]. It must, in fact, possess them; and that it does possess them the claimant must be prepared to establish in the mode in which all other claims are established; to wit, before the judicial tribunals of the country." Id. at 350. It appears that almost all issues relating to patent were open to court determination. Id. at 350-52. Perhaps in this area the idea that an invention patent was a privilege led the court to more stringent review, in order to protect the non-privileged. See Planing-Machine Co. v. Keith, 101 U.S. 479, 485 (1879) (allowing alleged infringer to show abandonment by inventor prior to issuance of patent; "An inventor cannot without cause hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it, and keeping the field of his invention closed against other inventors").

195 Reckendorfer, 92 U.S. at 354-55 (patentability issues); Keith, 101 U.S. at 483 (action of Commissioner of Patents in granting letters patent did not conclude question of abandonment in infringement action); cf. Lehnbeuter v. Holthaus, 105 U.S. 94 (1881) (plenary court determination of defense of lack of first invention). The effect of treating the patent as prima facie evidence apparently was to switch both the burden of production and proof to the party contesting the patent. See Cantrell v. Wallick, 117 U.S. 689, 695-96 (1886). But this still left the issue open for de novo determination. See Lehnbeuter, 105 U.S. at 98 (apparently considering evidence de novo in infringement action, while noting that the patent is prima facie evidence of novelty and utility). By contrast, the Court stated that Land Department factual determinations that the patentee had performed the acts antecedent to obtaining the patent were immune from "collateral attack." Smelting Co. v. Kemp, 104 U.S. 636, 645 (1881) (and cases cited therein).

196 See Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 416 (1850) (direct review of state court decision under section 25 of Judiciary Act of 1789; rejecting contract clause claim of commissioners for whom statute had reduced pay and term of office; stating that progress would be arrested, and government would become one great pension establishment, if terms of office could not be changed by statute); cf. United States v. Fisher, 109 U.S. 143, 145 (1883) (statute fixing salary forjudge of Wyoming Territory was not contract that salary would not be reduced during term of office); United States v. Guthrie, 58 U.S. (17 How.) 284 (1854) (Circuit Court of United States for District of Columbia had no power to issue mandamus to compel payment to judge of Minnesota Territory for remainder of four-year term).

197 Prior to Andrew Jackson's presidency, many federal employees remained in office during good behavior (excepting Jefferson's 1801-02 removals), although this system was not provided by statute. See L. White, The Jacksonians, supra note 51, at 33. The Tenure of Office Act of 1820, setting four-year terms for many offices, was designed to promote rotation in office and senatorial influence through advice and consent rather than to give protection to appointees. See L. White, The Jeffersonians, supra note 52, at 370, 375, 386-92; L. White, The Jacksonians, supra note 51, 105-06. Jackson and his successors regularly made use of the removal power for

enforceable claims to public office. Claims to government monopolies, like the Charles River Bridge,[198] and claims to office were of a piece.[199] Recognition of legally enforceable rights in them would be tantamount to approving a government "privilege" in the pejorative sense in which the United States Bank had created governmental privilege. Such recognition would limit democratic and competitive values that rotation in office and freedom from monopoly would promote.[200] Thus, what we would now call "new property"—claims to entitlements in office, or claims to continue contractual relationships with government—was, in the minds of the Jacksonians, the "old," Federalist property. While modern commentators have described the decline of the right/privilege distinction,[201] Americans in the early nineteenth century were busy discarding some types of claims of entitlement against government to free up competition.[202]

The general trend away from mercantilist views to the preeminence of laissez-faire in the 1830s thus tended to accentuate the differences between the Marshall and Taney Courts. While Chief Justice Marshall's belief that protection of governmental grants promoted commerce may have made him

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political reasons. L. White, The Jacksonians, supra note 40, at 33. The notorious 1867 Tenure of Office Act (repealed in 1887) requiring senatorial consent before removal of department heads and others appointed with the advice and consent of the Senate, was clearly designed to increase senatorial power at the expense of the executive rather than to give entitlements to officeholders. See L. White, The Republican Era: 1869-1901, at 28-29 (1958).

198 Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837). See generally Hovenkamp, The Classical Corporation in American Legal Thought, 76 Geo. L.J. 1593, 160515 (1988) (tracing change from a mercantilist to a classical laissez-faire model in corporate law, the classical model predominating from the 1830s; discussing Taney Court's emasculation of Marshall Court's public contract clause doctrine).

199 See Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 417 (1850) (citing Charles River Bridge case in suit denying contract clause claim of canal commissioners whose pay and terms of office were altered by legislation); Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839) (clerk of court could be freely removed by appointing authority; tenure of ancient common law offices have no application to offices created by constitution and laws). The Butler opinion distinguished contracts that create "perfect" or "vested" rights. 51 U.S. (10 How.) at 416.

200 See L. White, The Jacksonians, supra note 51, at 4, 318-19. See generally Hovenkamp, supra note 198.

201 *See, e.g., Reich, supra note 170.*

202 See M. Horwitz, supra note 42; Max Weber on Law and Economy in Society, supra note 50, at xxxiii (in Weber's ideal type of bureaucracy, no office appropriated to its incumbent, although incumbent may have a right to position as safeguard to objective fulfillment of duties). The Civil Service Act of 1883, see L. White, The Republican Era, supra note 197, at 1, created statutory entitlements to office at the end of the period under study. These statutory entitlements fostered a sense of right to office in modern times even when statutes did not create such entitlements. See also United States v. Perkins, 116 U.S. 483 (1886) (when Congress vests appointment of inferior officers in department heads, it can limit power of removal).

more willing to entertain citizen claims to government benefits,[203] Chief Justice Taney's view that competition promoted industry reinforced his tendency to look unfavorably upon citizen claims to entitlements from government.[204]

VI. Survival of the models

Writers on administrative law in the early part of this century saw the modernization of administrative law as necessarily involving a trend toward appellate-style review.[205] In other words, sophistication in administrative law would necessarily entail treating agency decisions as reviewable along the lines of a decision by an inferior court.[206] These predictions have not been entirely borne out. In fact, a largely de novo style of review has survived in the constitutional tort area because of the Court's plenary powers to elaborate the content of constitutional law.[207] In addition, the predominant form of administrative review is a hybrid of the res judicata and appellate or error models: deference is given to agency fact-finding under substantial evidence and arbitrary and capricious standards, while issues of law may be deemed appropriate for either plenary or, alternatively, highly deferential judicial review. This hybrid makes sense because of the need to balance the efficiency of delegating both lawmaking and fact-finding functions to the agencies on the one hand, and our strong traditions of judicial lawmaking on the other.[208]

A. Persistence of De Novo review in constitutional tort litigation

Although the de novo model gave way to more bureaucratic forms of administration in certain areas during the course of the nineteenth century, the de novo model survived in other areas, particularly areas involving direct

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[203] See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); see also Hovenkamp, supra note 198, at 1606-15 (discussing Taney Court's emasculation of Marshall Court's public contract clause doctrine).

[204] See supra notes 196-202 and accompanying text.

[205] See supra note 10 and accompanying text.

[206] Id.

[207] See generally Monaghan, supra note 7.

[208] One may trace the categories of review in the Administrative Procedure Act (APA), 28 U.S.C. §706 (1988) more proximately from the ICC cases than from the case law described in this article. See supra note 2 and accompanying text.

government levies on person and property. Such direct exactions are those for which we tend to think that due process is judicial process. Thus criminal prosecutions remained under the de novo model, as did the civil actions against officials that fit most squarely into the common-law forms of action.[209]

The common-law tradition of de novo actions against officers received new support in the Reconstruction era with the passage of the general federal question statute in 1875,[210] and with the passage of the 1871 Civil Rights Act.[211] After Congress provided for general federal question jurisdiction in 1875, the trespass action against state officials for violation of federal norms became increasingly common.[212]

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[209] During the course of the pre-ICC era, the Court allowed trespass actions against federal officials for holding a civilian during the Civil War without bringing him before a magistrate, see Beckwith v. Bean, 98 U.S. 266 (1878) (potential liability of provost-marshal and assistant provost-marshal (army captains) for holding a civilian without bringing him before a magistrate), and against a United States marshal who seized goods from the wrong party under a general writ, see Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1865); cf. Kilbourn v. Thompson, 103 U.S. 168 (1880) (trespass action against the Sergeant-at-Arms of the House of Representatives for seizing a person pursuant to orders of members of Congress). The Court allowed a trover action against a postmaster for refusal to deliver a newspaper for allegedly incorrect postage, Teal v. Felton, 53 U.S. (12 How.) 284 (1851), discussed in Scalia, supra note 2, at 913 n.215, and entertained an ejectment action against officers of the United States military who occupied land claimed by the plaintiff. See United States v. Lee, 106 U.S. 196 (1882).
Similarly, in the area of customs collection, the assumpsit action against customs and internal revenue officials who received payments under protest persisted, with congressional blessing, despite development of some administrative remedies. See Woolhandler, supra note 28, at 414 n.87: cf. Barnes v. The Railroads, 84 U.S. (17 Wall.) 294, 301, 307 (1872) (in trespass action against collector of internal revenue removed to federal court, Court noted that payment under protest and bringing assumpsit was approved way to question legality of tax). The common-law action against the collector of internal revenue, later the director, endured until it was explicitly abolished by Congress in 1966, and the injunction against the District Director survives. Scalia, supra note 2, at 915-16 & nn.222-23; see also E. Freund, supra note 18, at 12 (describing implied contract suits as still an important remedy against collectors); Smietanka v. Indiana Steel, 257 U.S. 1 (1921) (collector's successor was not proper party to sue since action was personal).

[210] The successor provision is now codified at 28 U.S.C. §1331 (1988).

[211] Now codified as 42 U.S.C. §1983 (1988).

[212] See Collins, "Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983, 77 Geo. L.J. 1493 (1989). The Court approved trespass and equity actions against state officials who seized property and threatened to seize property for taxes after the taxpayer had tendered coupons that the state had sought to disallow for use in payment of taxes in violation of the contracts clause, see The Virginia Coupon Cases, 114 U.S. 269 (1884), and against state officers who seized property and threatened to seize property under a state law that violated the commerce clause. Scott v. Donald, 165 U.S. 58, 101 (1897) (damages against state constables who seized liquor under statute that violated commerce clause).

The citizen action against state and local officials for a trespassory harm, or in equity to prevent a trespassory harm, began to be transmuted around the turn of the century into implied constitutional damages actions and later, suits under 42 U.S.C. §1983. See Woolhandler, supra note 28, at 399, 442-53, 458-60; Collins, supra.

Modern implied constitutional actions, typically against federal officials, and section 1983 suits against state and local officials, have retained the essentials of de novo review, like their predecessor common-law actions against officials. That constitutional tort actions have remained exemplars of the de novo model of review seems entirely appropriate, not only because of their common-law antecedents, but also because "[i]n constitutional adjudication, Marbury indicates that the court's [interpretive] duty is that of supplying the full meaning of the relevant constitutional provisions (except for "political questions")."[213] The Court does not generally defer to interpretations of the Constitution made by the other branches, but rather retains plenary authority to elaborate the meaning of the Constitution both generally and as applied in particular cases. Use of a model that gave greater finality to administrative determinations of law in the constitutional area would not accord with the general allocation of final decisional authority under our constitutional scheme.

Although fact-finding could be placed constitutionally in a body other than the courts,[214] few economies result if that body is accorded no deference in developing the law. Policing of the law necessarily requires some policing of the facts, and especially the application of law to fact.[215] The constitutional fact doctrine that the courts previously used in some areas of administrative review[216] allowed a reviewing court to review de novo facts bearing on

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[213] Monaghan, supra note 7, at 6; see also Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197, 225, 227 (article III essence would be preserved by requiring an article III court to adjudicate all direct constitutional challenges to actions of federal government, although also suggesting alternative of making article III bodies final adjudicators by way of appellate style review of all article III, section 2 cases).

[214] An error model in which the courts retain plenary review of the law with some finality for facts found by the executive poses fewer constitutional problems than a system that displaced judicial decisionmaking as to both law and fact. The constitutional role of the courts does not necessarily require that they retain plenary control of the facts as distinguished from constitutional law. See Monaghan, supra note 32, at 237. The Court has approved congressional displacement of implied constitutional damages actions for government employees in systems that more or less follow an error model as to constitutional issues. For example, in the civil service scheme under which federal employees must litigate their constitutional issues, the Court gives deference to civil service determinations of fact, but not of constitutional law. Bush v. Lucas, 462 U.S. 367, 385-88 (1983); see also Redish, supra note 213, at 227 (suggesting that appellate-style review of agency and legislative court determinations should satisfy article III). And the courts routinely defer to many agency determinations of fact that bear on issues of constitutional law.

[215] See Monaghan, supra note 32, at 238 (distinctive feature of constitutional fact review is requirement of independent judicial judgment on issues of constitutional law application).

[216] See Crowell v. Benson, 285 U.S. 22 (1932) (employer entitled to de novo review of jurisdictional facts of master-servant relation and whether accident occurred on navigable waters). The

constitutional issues, and reflected the insight that if the courts are to have plenary control of the law, they need plenary control of the facts as well.[217] Our system, however, maintains judicial control of the facts in a significant number of core constitutional cases not by a constitutional fact doctrine, which selects out certain issues for heightened review, but rather by leaving such cases totally under a de novo model.[218] Congressional reluctance to displace the role of the courts in the constitutional tort area reflects a shared understanding that the de novo model is appropriate for many cases in which the cause of action derives directly from the Constitution.[219]

The common perception that the courts should control both fact and law in cases where the main issues are constitutional has affected congressional allocation of decisional authority for statutory rights that are indirectly based on the Constitution. For example, most federal antidiscrimination laws, while requiring some preliminary agency skirmishing, accord no finality to federal agency determinations, at least unless the claimant opts to stay in the administrative process. Rather, the cases are left for plenary determination of law and facts along the de novo model. Thus the general area of "civil rights" at the federal level is pervasively one of court decisionmaking, while in economic regulation Congress has spread decisional authority more between courts and agencies.[220]

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constitutional fact doctrine now is used primarily in reviewing jury and lower court factual determinations in First Amendment cases.

[217] See generally Monaghan, supra note 32; see also Fallon, supra note 62, at 988 (recommending maintenance of a reserved power in courts to review constitutional facts de novo, since such facts raise fairness and separation of powers issues to degree ordinary facts do not). See generally Note, De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights, 88 Colum. L. Rev. 1483 (1988). The constitutional fact doctrine is often applied even as between courts in the same system, and when the Supreme Court reviews state court judgments. Id. at 1496-97.

[218] Cf. Monaghan, supra note 32, at 257-58 (constitutional claims generally get independent judgment of judicial forum).

[219] While constitutional torts have remained under the de novo model, the rise of modern doctrines of official immunity has undermined the de novo model in constitutional tort actions. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). The good faith immunity from damages, absent a clear violation of established constitutional rights, has effectively diluted the de novo nature of the determination of legality of government action, in the constitutional sphere, in actions for damages. Since the court will not allow the action to proceed absent a clear violation of the law, the executive's initial determination of the legality of the invasion, even if legally erroneous but so long as not too erroneous, is given finality in damages actions. See Woolhandler, supra note 28, at 413, 470-77.

[220] See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1988). This is not to say that there are not examples of Congress providing for a de novo model for economic regulation, as it did under the Sherman Act. See generally Pierce, Judicial Review, supra note 13.

B. Hybrid error and res judicata models

One can still find examples of pure forms of the res judicata[221] and error models[222] in current administrative law, but the most common forms of judicial review under the Administrative Procedure Act (APA)[223] are hybrids of the error and res judicata models. Many aspects of judicial review of agency action resemble review of an inferior court consistent with an error model. The road from the agency to the courthouse is generally direct and statutory, under either the APA or organic statutes. In addition, almost all questions of law or fact are subject to some review on the merits—at a minimum for rationality—without limitation to jurisdictional questions as would be true under a res judicata model.

For review of facts, judicial review of agency action closely resembles an error model. As in appellate review, most factual determinations of the agencies receive deference. Generally a court will apply a substantial evidence[224] or arbitrary and capricious standard to agency-found facts. Review of facts is rarely de novo (as under a de novo model),[225] but neither is it limited to issues that the court deems jurisdictional (as under the res judicata model). Courts and scholars generally discuss the substantial evidence and arbitrary-and-capricious standards in terms of their proximity to the rational juror and clearly erroneous standards, both of which are standards applied when a court reviews fact-findings of an inferior tribunal within the same system.[226]

As to review of law, however, administrative review has not in fact evolved toward a fully appellate model—one in which most agency legal determinations would be reviewed de novo. Instead, the courts have engaged in a hybrid form of error and res judicata review. The various standards for review of law in the APA suggest that both de novo review of law (as would be used under an error model) and deferential styles of review (as would be used under a res judicata model) are appropriate at various times.[227] And the

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[221] See Fallon, supra note 62, at 981 (Veterans Administration and parts of Social Security and Medicare Acts preclude judicial review of issues of law).

[222] See Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 48-50 (2d Cir. 1976) (substantial evidence review of agency found facts, but no deference on issues of law).

[223] 5 U.S.C. §706 (1988).

[224] See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[225] See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[226] See 4 K. Davis, Administrative Law Treatise §29.02 (1958).

[227] Certain provisions of the APA suggest a de novo review of law even apart from constitutional questions (e.g., "the reviewing court shall decide all relevant questions of law, interpret

courts for many years, without much predictability, sometimes engaged in de novo review of law and at other times deferred to agency legal decisions.[228]

More recently, the Court has added more predictability to the level of review by entertaining a presumption of delegation of lawmaking power to agencies. In Chevron U.S.A., Inc. v. Natural Resources Defense Council,[229] the Court created a presumption that Congress meant to delegate lawmaking authority to agencies when it creates agencies to administer federal regulatory schemes. As long as the statute or its legislative history do not clearly preclude the agency interpretation and the interpretation is substantively reasonable, the Court will defer to the agency.[230] The Court limited the de novo aspects of court review of law to constitutional issues and clear questions of statutory interpretation.[231] Chevron thus represents a reallocation of decisional authority to the agency and from the courts.[232] One could still characterize review as a hybrid of res judicata and error models, but Chevron moved review closer to a res judicata model by casting the courts primarily in the role of policing agencies for statutory jurisdiction insofar as questions of law were concerned.[233]

It is easier to understand the current form of review, which accords deference to agency determinations of law as well as fact, once one recognizes that agencies may be delegated lawmaking as well as fact-finding authority.[234] The res judicata model, which operated without a doctrine that legislative power could be delegated to agencies,[235] nevertheless had allocated significant lawmaking powers to the agencies by analogizing them to courts in collateral

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constitutional and statutory provisions"), 5 U.S.C. §706, while other provisions suggest more of a jurisdiction/policing role (e.g., reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion," or "in excess of statutory jurisdiction, authority, or limitations"). Id. at §706(2)(A) and (2)(C).

228 Compare NLRB v. Hearst Publications, Inc., 322 U.S. 111, 132, 135 (1944) (NLRB interpretation of statute only to be set aside if not reasonable basis in law) with NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-89 (1974) (de novo review of statutory interpretation). The question of when de novo versus deferential review of questions of law is appropriate has long troubled the courts and scholars. See, e.g., 4 K. Davis, supra note 226, at §§30.01.09 (1958); Pierce, Agency Theory, supra note 13, at 1255; Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Admin. L. Rev. 329, 331-36 (1979).

229 467 U.S. 837, 843-44 (1984).

230 Id. at 844-45.

231 Id. at 843.

232 See Breyer, supra note 13, at 372.

233 Since the courts review all agency decisions for rationality, however, all issues receive some merit review.

234 See Kmiec, supra note 13.

235 See supra notes 82-88 and accompanying text.

judicial systems. The res judicata model distributed lawmaking functions between the courts and agencies by treating some issues as jurisdictional, and hence appropriate for final court interpretation, and other issues as nonjurisdictional, and hence appropriate for final agency decisionmaking.[236]

The existence of some historical precedent for a deferential style of review, however, does not necessarily suggest that either history or political theory fully supports the Chevron decision. Defenders of Chevron rely primarily on arguments of legitimacy—that the allocation of decisional authority to the agencies is preferable because they are more politically accountable than the courts insofar as the President retains removal power for policy disagreements.[237] However, congressional intent is also a source of legitimacy and it is unlikely that Congress, by silence, always intends to delegate such plenary lawmaking powers to the agency as Chevron accords.[238]

History, too, is a source of legitimacy. And while there is precedent for agencies' exercising significant delegated lawmaking power under the res

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[236] See Young, supra note 3, at 801, 803 (agencies allowed substantial policymaking discretion under deferential style of review in nineteenth century).

[237] See Kmiec, supra note 13, at 281; Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J. L. Econ. & Org. 81, 91-99 (1985) (delegations to agencies may provide political accountability superior to legislative specificity); Pierce, Political Theory, supra note 13, at 471-72, 506, 520; Pierce, Judicial Review, supra note 13, at 307; Starr, supra note 13, at 308. But cf. Sunstein, In Defense of the Hard Look, supra note 13, at 57-58 (questioning political accountability of agencies). See also Sunstein, Constitutionalism After the New Deal, supra note 13, at 462 (rise of presidential control has fundamentally transformed the New Deal agency).
Professor Richard Pierce uses a distinction between policymaking and lawmaking to assist in the allocation of functions between court and agency. See Pierce, Judicial Review, supra note 13, at 304. This dichotomy would prove unworkable did not Pierce further refine the courts' lawmaking role to be one of "real statutory interpretation," i.e., finding if Congress really resolved the policy issue at hand, and refusing to tease meaning from statutes. Id. at 308, 312. This is in line with Chevron's division of lawmaking functions between court and agency. If the issue is determined to be "policymaking" rather than real statutory interpretation, the court should only review the interpretation for reasonableness rather than de novo. While Sunstein would maintain more judicial supervision, he seems to suggest a division of lawmaking powers among courts and agencies that distinguishes political decisions as calling for more presidential and legislative supervision, legalistic decisions as more appropriate for the court, and technocratic issues as calling for executive ascendancy. Sunstein, Constitutionalism After the New Deal, supra note 13, at 484; see also Breyer, supra note 13, at 382-97 (current law anomalous in deferring to agencies on law while conducting in-depth review of policy; judicial review should be tailored to comparative institutional competencies).

[238] See Sunstein, In Defense of the Hard Look, supra note 13, at 55 (history of APA does not support deferential posture for courts); Breyer, supra note 13, at 376 (congressional silence does not necessarily mean that Congress intended the agency to decide a question of law). Justice Scalia has taken the position that it is generally a fictional intent the courts impute to Congress to confer discretion on the agency. He nevertheless says that the fictional intent is an appropriate background assumption for Congress to legislate against. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517.

judicata model, there is also significant precedent for the courts' exercise of lawmaking power. The common law allocated great policymaking power to judges,[239] as did the related de novo model which was our earliest model of administrative law and one that still prevails in many areas.[240] Even in the areas where the res judicata model was most prevalent, such as the Land Office cases, the res judicata model edged into more plenary review of questions of law. And in the areas of customs and revenue, later courts backed away from the Taney Court's highly deferential style of review. Allocating a great amount of final decisionmaking authority to the agencies under a pure version of the res judicata model therefore never took hold, despite Chief Justice Taney's best efforts. The historical record demonstrates that both in the areas of government largesse and government exactions, our legal system has generally left significant lawmaking functions to the courts, and has not long left the courts in the narrow role of jurisdiction-policers of agencies.

Conclusion

In the nineteenth century, as in the twentieth, the interaction of statutes and precedent with political and economic theory changed the degree of judicial review of agency action. Under both the common law and the Marshall Court's de novo style of review, the courts exercised a large slice of federal lawmaking power. Although the Taney Court temporarily reallocated much final decisional authority to the executive branch by using the res judicata model, which focused on the "jurisdiction" of the executive to act, de novo review was not entirely cast aside. Later courts mixed aspects of an error model with res judicata review, especially in government land cases. In addition, de novo review persisted in customs and revenue cases. Thus, the highly deferential res judicata model did not hold full sway in the areas

[239] See Sunstein, In Defense of the Hard Look, supra note 13, at 51 (noting role of courts as regulators under common law); Sunstein, Constitutionalism After the New Deal, supra note 13, at 486 (growth of presidential and judicial supervision replicates some of the most distinctive features of original constitutional scheme without impairing regulatory functions).

[240] See Fallon, supra note 62, at 954-55 (while an important strand in our constitutional tradition reflects the premise that sovereign prerogatives and functional necessities may preclude judicial review of governmental lawbreaking, it is equally entrenched that there must be judicial review of and effective remedies for coercive violations of constitutional rights). Some accounts of nineteenth-century judicial review of administrative actions seem to take too little account of the persistent de novo strand of review. See, e.g., Young, supra note 3, at 801, 819.

of either government benefits or exactions. And while the right/privilege distinction had some bearing on the level of judicial review, the judicial desire to promote commerce was also a significant and probably more determinative factor in fixing the level of judicial scrutiny of agency action.

One can perhaps draw many lessons from the variegated pattern of nineteenth-century administrative law. But more important may be those lessons that one cannot draw. To begin with, one cannot conclude that the first hundred years of administrative law were a monolithic age of deference to federal executive or agency action. Also, the historical record reveals that courts were regarded as no less legitimate recipients of delegated lawmaking power than agencies. And, most important for today's defenders of the administrative law status quo, one cannot conclude that there is one ideal and elegant allocation of power between court and agency where administrative law will necessarily have to rest, Chevron notwithstanding.

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