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## Why Judicial Deference to Administrative Fact-Finding is Unconstitutional

*Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.*

*John Adams*<sup>1</sup>

### I. INTRODUCTION

There are currently 1,792 federal administrative law judges (ALJs),<sup>2</sup> but the five ALJs employed by the Securities & Exchange Commission (SEC) have received more attention in the last five years than the other 1,787 combined. The SEC has been widely attacked for implementing what critics perceive as a strategy to prevent Article III judges from adjudicating SEC enforcement actions and put as many enforcement actions as possible in front of the SEC's own judges.<sup>3</sup>

The Dodd-Frank Act made this possible. In reaction to the excesses of the financial sector that led to that crisis, Congress in 2010 passed a significant package of financial accountability and regulatory reforms, titled the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>4</sup> One such reform granted the SEC increased authority to bring enforcement actions before its own ALJs rather than Article III judges.<sup>5</sup>

Both the Wall Street Journal and the New York Times have since concluded that post-Dodd-Frank enforcement actions heard by SEC

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1. Alan B. Bookman, *We the People*, 80 FLA. B.J. 6, 6 (2006).

2. Office of Personnel Management, *ALJs by Agency*, OPM.GOV (last updated Mar. 2016), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>.

3. *See, e.g.*, Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, WALL ST. J. (Oct. 21, 2014 9:40 AM), <http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590>.

4. Pub. L. 111-203, 124 Stat. 1376-2223 (Jul. 21, 2010).

5. *See, e.g.*, Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J. (Aug. 4, 2014 7:36 PM), <http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362> (“[T]he 2010 Dodd-Frank law vastly expanded SEC discretion to charge wrongdoers administratively.”).

ALJs are systemically biased against defendants.<sup>6</sup> For example, SEC ALJs find against defendants between eighty and ninety percent of the time, whereas federal district court judges find against defendants in only sixty-three to sixty-nine percent of SEC enforcement cases.<sup>7</sup> Furthermore, when the ALJ decisions are appealed to the SEC commissioners, “[t]he commissioners decided in their own agency’s favor concerning 53 out of 56 defendants in appeals—or 95%—from January 2010 through this past March [2015].”<sup>8</sup> As the ALJs have heard more cases, the SEC has taken longer to decide appeals of ALJ decisions.<sup>9</sup> The icing on the cake is that SEC officials are choosing to initiate proceedings before SEC ALJs, rather than before federal district court judges, with increasing frequency; in 2014, the SEC initiated eighty percent of its enforcement actions before ALJs rather than federal district court judges.<sup>10</sup>

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6. Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>; Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES, Oct. 6, 2013, at BU.1 (“The administrative forums also restrict defendants’ abilities to take depositions, obtain documents from the government’s witnesses and conduct other discovery. The appeals process is similarly narrow; defendants seeking a reversal must first go to the commission itself. If unsuccessful there, they must go to a circuit court of appeals, which is typically hesitant to question administrative law judges’ findings as they are considered experts in their areas, Mr. Riccio [a professor and former dean of Seton Hall Law School] says. The S.E.C. says successful appeals have been rare.”)

7. Eaglesham, *supra* note 6 (“The SEC says its judges are impartial and the process is fair. It attributes the difference in outcomes partly to case mix. For instance, most of its complicated insider-trading cases have been heard in federal court, not by its in-house judges.”); *see also* Morgenson, *supra* note 6. Empirical evidence does support the SEC’s position; specifically, Adam Pritchard and Stephen Choi found that the SEC does indeed send its most complex cases to the federal district court, while retaining the so-called “easy cases” for resolution by ALJ. Adam C. Pritchard & Stephen Choi, *The SEC’s Shift to Administrative Proceedings: An Empirical Assessment*, UNIV. OF MICH. LAW SCH. SCHOLARSHIP REPOSITORY (Working Paper No. 119, 2016), [http://repository.law.umich.edu/law\\_econ\\_current/119](http://repository.law.umich.edu/law_econ_current/119); *see also* David Zaring, *S.E.C.’s In-House Judges Not Too Tough, A Review Shows*, N.Y. TIMES (Aug. 31, 2015), <http://www.nytimes.com/2015/09/01/business/dealbook/secs-in-house-judges-not-too-tough-a-review-shows.html>.

8. Eaglesham, *supra* note 6.

9. Jean Eaglesham, *SEC Appeals Process on the Slow Track*, WALL ST. J. (Dec. 21, 2015, 7:12 PM), <http://www.wsj.com/articles/sec-appeals-process-on-the-slow-track-1450743130>.

10. Eaglesham, *supra* note 6 (“‘It is a fundamental change,’ said Joseph Grundfest, a former SEC commissioner who is now a law professor at Stanford University. ‘By bringing more cases in its own backyard, the agency is not only increasing its chances of winning but giving itself greater control over the future evolution of legal doctrine.’”).

One New York City securities attorney observed: “I’ve been involved in these administrative proceedings for many years and have been struck by the unfairness and lack of neutrality in the system. . . . The judge’s mind-set reflects the agenda of the agency, which in this arena is enforcement.”<sup>11</sup> Even in the absence of hard evidence of actual bias, Professor Ronald J. Riccio has observed, “If you get caught up in the web of an agency investigation, you’re investigated, prosecuted, and judged by agency personnel. . . . Even if it doesn’t create actual bias, it doesn’t look good.”<sup>12</sup>

Several prominent businesspeople targeted by the SEC have challenged the ALJs and their dramatically expanded caseloads on constitutional grounds, with varying degrees of success.<sup>13</sup> For example, Mark Cuban, the owner of the Dallas Mavericks and an acquitted former SEC defendant, has been an outspoken opponent of the SEC’s litigation “home-court advantage” for years.<sup>14</sup> This past year, Lynn Tilton, an investment executive known for rescuing struggling start-ups, joined the opposition when the SEC brought an

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11. Morgenson, *supra* note 6; *see also* Eaglesham, *supra* note 6 (“One former SEC judge said she thought the system was slanted against defendants at times. Lillian McEwen, who was an SEC judge from 1995 to 2007, said she came under fire from Ms. [Brenda] Murray [the SEC’s chief ALJ] for finding too often in favor of defendants. ‘She questioned my loyalty to the SEC,’ Ms. McEwen said in an interview, adding that she retired as a result of the criticism. Ms. McEwen said the SEC in-house judges were expected to work on the assumption that ‘the burden was on the people who were accused to show that they didn’t do what the agency said they did.’”); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), [https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faad0-c2ed-11e2-9fe2-6ee52d0eb7z1\\_story.html](https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faad0-c2ed-11e2-9fe2-6ee52d0eb7z1_story.html) (“[A]gency proceedings are often mockeries of due process, with one-sided presumptions and procedural rules favoring the agency.”).

12. Morgenson, *supra* note 6.

13. *See, e.g.*, Raymond J. Lucia Companies v. SEC, No. 15-1345, 2016 WL 4191191 (D.C. Cir. Aug. 9, 2016); Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016); Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016); Duka v. SEC, No. 15 Civ. 357, 2015 WL 5547463 (S.D.N.Y. Sept. 17, 2015); Timbervest, LLC v. SEC, No. 1:15-CV-2106-LMM, 2015 WL 7597428 (N.D. Ga. Aug. 4, 2015).

14. *See* Todd Davis, *Mark Cuban Takes His Grudge Against the SEC to the Supreme Court*, DALL. MORNING NEWS (Mar. 16, 2016, 6:09 PM), <http://www.dallasnews.com/business/business-headlines/20160316-mark-cuban-takes-his-grudge-against-the-sec-to-the-supreme-court.ece>; Jean Eaglesham, *Mark Cuban Latest Fight With SEC: In-House Judges*, WALL ST. J. (Sept. 15, 2015, 4:13 PM), <http://blogs.wsj.com/moneybeat/2015/09/15/mark-cuban-latest-fight-with-sec-in-house-judges/>.

enforcement action against her firm, Patriarch Partners.<sup>15</sup> Because of this widespread backlash, the SEC “quietly pulled back on its use of in-house judges,”<sup>16</sup> and modified its procedural rules to allow for more discovery during ALJ adjudications.<sup>17</sup> However, to the extent that the real issues with ALJ adjudications are constitutional rather than political, these reforms fall short.<sup>18</sup>

Criticisms of the administrative state that focus on separation-of-powers or Appointments Clause issues<sup>19</sup> overlook another fundamental constitutional question: Does (1) granting ALJs the power to conduct jury-less fact-finding in what are essentially civil actions, or (2) deferring to that fact-finding on appeal, violate the Seventh Amendment. The Seventh Amendment to the Constitution provides: “In suits at common law, . . . the right of trial by jury shall be preserved . . . .”<sup>20</sup> Under the Supreme Court’s “historical test,” any

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15. See Jonathan Stempel, *Lynn Tilton Sues SEC Again, Calls Cases Unconstitutional*, REUTERS (Sept. 9, 2016, 9:53 PM), <http://uk.reuters.com/article/us-sec-tilton-idUKKCN11F2JX>; Alison Frankel, *Distressed Debt Diva Lynn Tilton on ‘Unfair’ SEC Trial: ‘You Don’t Believe It Could Happen’*, REUTERS (July 27, 2016), <http://blogs.reuters.com/alison-frankel/2016/07/27/distressed-debt-diva-lynn-tilton-on-unfair-sec-trial-you-dont-believe-it-could-happen/>.

16. Jean Eaglesham, *SEC Trims Use of In-House Judges*, WALL ST. J. (Oct. 11, 2015, 9:00 PM), <http://www.wsj.com/articles/sec-trims-use-of-in-house-judges-1444611604>.

17. Jean Eaglesham, *SEC Gives Ground on Judges*, WALL ST. J. (Sept. 24, 2015, 8:03 PM), <http://www.wsj.com/articles/sec-gives-ground-on-judges-1443139425>; Mark Schoeff, Jr., *SEC Approves Reforms to In-House Process for Enforcement Cases*, INV. NEWS (July 13, 2016, 12:47 PM), <http://www.investmentnews.com/article/20160713/FREE/160719966?template=printart> (“Parties will now have more time to prepare for a hearing and to be able to take depositions, but concerns of fairness remain.”).

18. See Joseph Quincy Patterson, *Many Key Issues Still Left Unaddressed in the Securities and Exchange Commission’s Attempt to Modernize Its Rules of Practice*, 91 NOTRE DAME L. REV. 1675 (April 2016); Eaglesham, *supra* note 17 (“Some critics say the changes don’t go far enough.”); Peter J. Henning, *S.E.C. Finds Itself in a Constitutional Conundrum*, N.Y. TIMES (June 15, 2015), <http://www.nytimes.com/2015/06/16/business/dealbook/sec-finds-itself-in-a-constitutional-conundrum.html>; Suja A. Thomas & Mark Cuban, *A Jury, Not the S.E.C.*, N.Y. TIMES (Oct. 16, 2015), <http://www.nytimes.com/2015/10/17/business/dealbook/a-jury-not-the-sec.html>; Jean Eaglesham, *SEC Faces ‘Crisis of Confidence’ Over In-House Court, Ex-Official Says*, WALL ST. J. (Dec. 2, 2015, 3:45 PM), <http://www.wsj.com/articles/sec-faces-crisis-of-confidence-over-in-house-court-ex-officials-says-1449089157>.

19. See, e.g., Peter J. Henning, *S.E.C. Finds Itself in a Constitutional Conundrum*, N.Y. TIMES DEALBOOK (June 15, 2015), <http://www.nytimes.com/2015/06/16/business/dealbook/sec-finds-itself-in-a-constitutional-conundrum.html> (describing recent constitutional challenges to SEC’s enforcement actions); Jonathan Stempel, *SEC beats new challenge to in-house judges in Atlanta federal court*, REUTERS (June 17, 2016, 6:18 PM), <http://www.reuters.com/article/us-sec-court-proceedings-idUSKCN0Z32K6> (same).

20. U.S. CONST. amend VII.

issue that a jury would have heard under 1789 English common law must be heard by a jury today;<sup>21</sup> civil enforcement actions fall in this category. Furthermore, even under an alternative historical approach—based on the Framers’ original intent—in-house enforcement actions, and judicial deference to administrative fact-finding, fail the Seventh Amendment.

Part II will discuss the historical roots of the Seventh Amendment and the development of the Supreme Court’s feeble Seventh Amendment jurisprudence. Part III will discuss Suja Thomas’s work on the unconstitutionality of summary judgment, upon which this Comment is modeled. Part IV argues that in-house enforcement actions without civil juries, and judicial deference to administrative fact-finding, are unconstitutional under the Seventh Amendment’s historical test, as well as unconstitutional under the alternate “legislative history” approach to the Seventh Amendment. Because fact-finding by SEC ALJs is unconstitutional under either interpretation of the Seventh Amendment, our country must take steps to either reconcile the Seventh Amendment with current administrative practice, or vice versa. The best answer would be to require the SEC to bring its enforcement actions in federal district court in the first instance. Although that change would create practical and logistical problems, which Congress would need to address, that process is most consistent with the original intent of the Seventh Amendment.

## II. BACKGROUND

### *A. Passage of the Seventh Amendment*

When the Continental Congress issued the Declaration of Independence on July 4, 1776, its members elected to include in that document a specific list of grievances they had against King George III’s administration in the American colonies. Between the more obvious violations of human dignity named in that document— “[P]rotecting [royal troops], by a mock Trial, from punishment for any Murders which they should commit on the inhabitants of these States,” “[R]avag[ing] our Coasts, burn[ing] our towns, and

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21. See, e.g., Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 147 (2007).

destroy[ing] the lives of our people,” and forcing Americans captured at sea “to bear Arms against their Country, to become the executioners of their friends and Brethren”<sup>22</sup>—the American colonists expressed their outrage at King George III “[f]or depriving us in many cases, of the benefits of Trial by Jury.”<sup>23</sup>

Perhaps in our day it is surprising to see that the Framers so revered the right to “Trial by Jury” that they were willing to publicly condemn their king for depriving them of that right, framing it as part of “a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny.”<sup>24</sup> Yet this was exactly the tenor of the colonists’ feelings regarding this right: they viewed it as a sacrosanct bulwark against the tyranny of the King’s judges.<sup>25</sup> In a period when tensions were beginning to develop between the King and his American subjects, it was common for royal judges to suspend jury trials and hear cases themselves.<sup>26</sup> This deprived the American colonists of the opportunity to inject their perspective into the outcome of the case. On the other hand, when colonial juries were allowed in court proceedings, the colonists invariably used the opportunity to protest by nullifying the King’s allegedly oppressive laws.<sup>27</sup> So it was that

[i]n the 1770s, the jury emerged as *a symbol of the struggle for independence*. Its reputation as a defender of liberty meant that it was destined to occupy a prominent place in the creation of the new state governments. Indeed, the attachment to the jury was such that every state constitution guaranteed the right to trial by jury in both civil and criminal cases.<sup>28</sup>

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22. THE DECLARATION OF INDEPENDENCE paras. 17, 26, 28 (U.S. 1776).

23. *Id.* at para. 20; see Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 148–49 (1991). As shown below, this refers to both criminal juries and civil juries.

24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

25. Scheiner, *supra* note 23, at 148–49.

26. See, e.g., Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 164–67 (2001).

27. See *id.* at 159–68.

28. *Id.* at 168 (emphasis added); see Scheiner, *supra* note 23, at 149 (“During the later ratification debate, Antifederalists held that one of the goals of the Revolution had been to win back the civil jury trial right.”); see also Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1972) (“In fact, ‘[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions . . . .’ The attachment to this form of trial was so strong that it was even prescribed to be used in prize cases

When the Constitutional Convention met in the hot summer of 1787 to draft a new framework for the paralyzed new Confederacy, the members of that Convention chose to lay out the scheme for a national government stronger than what had existed under the Articles of Confederation.<sup>29</sup> This new federal government, which would share sovereignty with the state governments in a novel “federal system,” would consist of a legislature, an executive, and a judiciary.<sup>30</sup> Yet the new Constitution did not mention any claim to jury trial for litigants under the proposed new government—rather, the proposal had been briefly considered and then set aside.<sup>31</sup>

This seemingly minor omission was a major stumbling block during the Constitution’s ratification process—a weakness that the Antifederalists latched onto in their opposition to the new Constitution.<sup>32</sup> Indeed, “[e]ven before the Philadelphia Convention adjourned, plans were being laid to attack the Constitution that was eventually proposed *because of the absence of any guarantee of civil jury trial in the new federal courts.*”<sup>33</sup> Some even went so far as to suggest that the omission of explicit mention of the jury trial right in the Constitutional text was part of an insidious Federalist plot to surreptitiously smother the jury trial right altogether.<sup>34</sup> That Alexander

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that were triable to the only central judicial authority created by the states under the Articles of Confederation.”), quoting LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 281 (1963 reprint) and citing ART. OF CONFEDERATION, art. IX, in 1 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 12–15 (F. Thorpe ed. 1909).

29. See, e.g., JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783–1789* (2015).

30. *Id.*

31. Wolfram, *supra* note 28, at 656–60. Ironically, part of the reason the Constitutional Convention didn’t further consider a civil jury trial guarantee was because they believed it would be too difficult to specify which cases were entitled to civil jury trials, and which cases were not. *Id.* at 663–64.

32. Scheiner, *supra* note 23, at 146, n.23 (“The civil jury trial right was the first right that participants in the convention found missing from the new Constitution.”), citing Wolfram, *supra* note 28, at 658–59; Harrington, *supra* note 26, at 184–85 (“It is . . . important to note that antifederalist support for the civil jury was far more substantive than an argument that civil juries were merely ‘a good thing.’”). The civil jury trial right was the first right that participants in the convention found missing from the new Constitution. *Id.*

33. Wolfram, *supra* note 28, at 662 (emphasis added).

34. Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 412 (1999) (reviewing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)) (“[T]he Antifederalists charged that this omission was part of a Federalist conspiracy against civil juries, which had silently been banished



Hamilton—who had no significant personal attachment to civil juries—devoted his *Federalist No. 83* solely to explaining why the Constitution did not mention any right to a jury trial, and assuring early Americans that the jury trial was not in danger, provides strong evidence of the importance of the civil jury in its day.<sup>35</sup>

Eventually, the Federalists were able to secure the needed state approvals for ratification only by promising<sup>36</sup> that the first priority of the new federal government would be to draft and put into effect a Bill of Rights, which would inevitably include the civil jury trial right.<sup>37</sup> When the first Congress convened in 1789, James Madison made good on this promise by introducing resolutions in the House of Representatives to amend the Constitution to include guarantees of individual rights.<sup>38</sup> Madison’s proposed amendments would be the constitutional progenitors of what today is known as the Bill of Rights. The original proposed language of the Seventh Amendment was: “In

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from the federal courts.”); see also Brandon L. Boxler, *Judicial Gatekeeping and the Seventh Amendment: How Daubert Infringes Upon the Constitution Right to a Civil Jury Trial*, 14 RICH. J. OF L. & PUB. INT., no. 3, 2011, at 483 (“Patrick Henry, Samuel Adams, and George Mason rallied opposition to the Constitution ‘by asserting that [it] would abolish civil juries altogether.’”).

35. It was no secret that Alexander Hamilton, one of the chief proponents of the newly drafted Constitution, was not as ideologically attached to the jury trial right as others among the Framers. See Scheiner, *supra* note 23, at 146 n.21 (“Although Hamilton opposed the civil jury, he recognized that some viewed it as the ‘very palladium of free government.’”); Harrington, *supra* note 26, at 184; *id.* at 147 n.23 (citing THE FEDERALIST NO. 83, at 495 (Alexander Hamilton) (C. Rossiter ed. 1961)) (“The objection to the plan of the convention, which has met with the most success in [New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases.”).

36. Wolfram, *supra* note 28, at 656 (“Ratification was ultimately achieved probably only on the strength of assurances that the basic protections of a bill of rights would be incorporated as amendments (or enacted as statutes, according to some assurances) at the first meeting of the Congress provided for under the Constitution.”); see also *id.* at 672 (“[O]n the matter of civil jury trial[, if not on the matter of the Constitution’s ratification generally,] the antifederalists won. . . . [T]he antifederalist arguments concerning civil jury trial . . . ultimately prevailed.”). Indeed, “[t]he antifederalist pressure did not relent after the Constitution was finally adopted,” and “[m]any federalist candidates for elective office in the new federal government, such as Madison, had to promise constituents that a bill of rights would promptly be made a part of the Constitution by amendment.” *Id.* at 725.

37. Of course, there were numerous civil rights embodied in the Bill of Rights that were important in the ratification debate as well. Nevertheless, the civil jury trial right played a special role. See Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1010 (1992) (at the time of the Constitution’s ratification, “[t]he only disagreement seem[ed] to be over whether civil jury rights were the most important of all individual rights, or simply one of the most important rights”).

38. Klein, *supra* note 37, at 1018–20.

suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.”<sup>39</sup>

After sparse debate and revision<sup>40</sup> (about which little is known<sup>41</sup>), this guarantee was eventually adopted in the form that we know today: “In Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”<sup>42</sup>

With the benefit of more than two hundred years of hindsight, it is safe to say that the general attitude of indifference toward the civil jury right today, both among average Americans<sup>43</sup> and among the legal community,<sup>44</sup> has drifted significantly from the Framers’ treatment of

39. Krauss, *supra* note 34, at 428 (reviewing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998), *reprinted in* *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 493 (Neil H. Cogan ed., 1997) (quoting Proposal by Madison in House (Jun. 8, 1789))).

40. Most importantly to the purposes of this Comment, the phrase “between man and man” was eliminated from the final version of the amendment.

41. Harrington, *supra* note 26, at 212 (“There is little direct legislative history surrounding the passage of the Seventh Amendment’s guarantee of the right to trial by jury in civil cases—or indeed, of any of the amendments proposed in the House by James Madison. What is clear is that the jury trial right, like other proposed amendments, was designed to allay the fears of those who believed that the Constitution did not contain adequate protections for individual liberty.”).

42. U.S. CONST. amend. VII.

43. Scheiner, *supra* note 23, at 147 (“Today the seventh amendment stands emptied of the political and moral content necessary to sustain it as a constitutional principle.”); *see, e.g.*, Dan Rodricks, *Jury duty and the inconvenience of being a citizen*, *BALT. SUN* (Apr. 6, 2013), [http://articles.baltimoresun.com/2013-04-06/news/bs-md-rodricks-0407-20130406\\_1\\_jury-duty-jury-pool-jury-selection](http://articles.baltimoresun.com/2013-04-06/news/bs-md-rodricks-0407-20130406_1_jury-duty-jury-pool-jury-selection); *How to Get Out of Jury Duty*, WIKIHOW, <http://www.wikihow.com/Get-Out-of-Jury-Duty> (last visited Nov. 7, 2016) (“While it is your duty to attend jury duty, there are some secrets to ‘getting out’ of it if it does not fit into your life at the moment.”); Andrew Ferguson, *What Every Harvard Law Student Should Know About Juries*, *HARV. L. REV.* (Nov. 25, 2015), <http://hlrecord.org/2015/11/what-every-harvard-law-student-should-know-about-juries/> (“Juries are in crisis. The jury trial exists today unloved, neglected, and largely avoided in legal practice. Procedural barriers and civic apathy have combined to gut one of the central tenets of America’s constitutional structure.”); Alex Mayyasi, *How A Lawsuit Over Hot Coffee Helped Erode the 7th Amendment*, *PRICEONOMICS* (Oct. 3, 2016), <http://priceonomics.com/how-a-lawsuit-over-hot-coffee-helped-erode-the-7th/> (the famous Stella Liebeck ‘hot coffee lawsuit’ “is . . . arguably[] part of a much larger story: the least publicized death of a constitutional right in the history of the United States—the right to a trial by jury”).

44. The Supreme Court has generally taken a narrow, formalistic view of the jury’s role in civil litigation . . . . This antiseptic conception of the jury’s purpose is

the Seventh Amendment, which “was flush with historical, political, and moral significance to the early Americans.”<sup>45</sup> Indeed, at the time of the Constitution’s ratification, “[t]he only disagreement seem[ed] to be over whether civil jury rights were the most important of all individual rights, or simply one of the most important rights.”<sup>46</sup> This decline in solicitude for the civil jury trial right has coincided with the erosion of that right,<sup>47</sup> in part due to the rise of summary judgment in federal court proceedings, as well as the doctrine of judicial deference to administrative fact-finding, discussed below in Parts III and IV, respectively.

### *B. Supreme Court’s Feeble Seventh Amendment Jurisprudence*

The Supreme Court ostensibly claims to protect the civil jury trial right. The Court has said, for example, “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>48</sup> The actual trajectory of the federal courts’ preservation of this right has been far less exacting, and the courts have allowed the Seventh Amendment guarantee to be “curtail[ed]” significantly. This modern Seventh Amendment atrophy was precipitated by the Court’s adoption, in the early twentieth century, of a weak and insufficient test by which to assess Seventh Amendment claims. This frail test has repeatedly proven to be inadequate in preserving the civil jury trial right,<sup>49</sup> and indeed has led to the current situation with SEC ALJs.

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inconsistent with the passion and violence with which the civil jury was defended during the Revolutionary era and the constitutional ratification debate. The civil jury trial provision was not a ‘technical amendment’ to the Constitution, but a crucial element in the political bargain that permitted ratification.

Scheiner, *supra* note 23, at 145–46.

45. *Id.* at 146.

46. Klein, *supra* note 37, at 1010.

47. See *Colgrove v. Battin*, 413 U.S. 149, 166 (1973) (quoting *Galloway v. United States*, 319 U.S. 372, 397 (1943) (Black, J., dissenting)) (“Some . . . years ago, Mr. Justice Black warned his Brethren against the ‘gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.’”).

48. Peter A. Arhangelsky, Note, *Nullifying the Constitution: Federal Asbestos Tort Reform and the Abrogation of Seventh Amendment Rights*, 98 SUFFOLK U. L. REV. 95, 98 (2006) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

49. See, e.g., Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811 (2013).

To analyze whether a specific procedure or district judge's actions violate the Seventh Amendment, the Supreme Court declared that the "measuring-stick" is a historically-based test.<sup>50</sup> At its foundations, the "historical test" requires the appellate court to decide only whether a jury would have been required to dispose of a certain claim under the common law of England as it stood in 1791.<sup>51</sup> If a jury would have been required in 1791, the Seventh Amendment (presumably) requires a jury trial now.<sup>52</sup> Of course, as we move increasingly further from the year 1791 with the passage of time, it becomes increasingly difficult to map modern disputes onto the English common law as it existed in 1791.<sup>53</sup>

This is not the end of the analysis, however. The Supreme Court has further explained that the Seventh Amendment was meant to preserve only the "substance"<sup>54</sup> of the civil jury trial right, not its "form"<sup>55</sup> or incidents. Therefore, Congress, the executive, and the judiciary are free to alter those procedures and characteristics of the jury trial that fall outside of the sacred "substance."<sup>56</sup> A perverse twist in this constitutional calculus is that

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50. *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

51. *See, e.g.*, Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 147 (2007).

52. *See, e.g.*, Wolfram, *supra* note 28, at 640 ("If a jury would have been impaneled in this kind of case in 1791 English practice, then generally a jury is required by the seventh amendment.")

53. *See* Mark I. Greenberg, *The Right to Jury Trial in Non-Article III Courts and Administrative Agencies after Granfinanciera v. Nordberg*, 1990 U. CHI. LEGAL F. 479, 483 (1990) ("Today, however, discerning whether a particular action would, in eighteenth-century England, have come in the Chancery or the law courts can often prove difficult, as *Granfinanciera* illustrates. In that case, the majority looked primarily to old English case law and came to the conclusion that the Chancery court would have probably refused to hear an action for the recovery of a fraudulent conveyance. Justice White, in dissent, analyzed much of the same material and found the record inconclusive."); Klein, *supra* note 37, at 1024.

54. *See, e.g.*, Thomas, *supra* note 51, at 147 (citing *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931) and *Colgrove v. Battin*, 413 U.S. 149, 157-60 (1973)).

55. *Id.* (citing *Gasoline Products*, 283 U.S. at 498).

56. *But see* Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 610-11 (1984) ("It is reasonable to assume that the framers foresaw an evolution of the common law and did not intend for the jury right to be lost as soon as any major judicial reform was implemented. Neither the language of the amendment, nor the available legislative history, however, supports the conclusion that the framers intended that the focus of an inquiry into the limits of the right to a civil jury be *only* on the "substantive" aspects of the trial, that is, the rights asserted and the remedies sought, and never on its procedural elements. Accepting that the seventh amendment's explicit call for the "preservation" of rights existing at the time of ratification implied that a historical perspective is constitutionally

[t]he Court has [never] defined what constitutes the substance of the English common law jury trial in 1791. Instead the Court has individually compared various common law procedures to modern procedures. Under this approach, the Court has approved every procedure that it has considered that removes cases from juries, before, during, or after trials, even though such procedures did not exist under the English common law.<sup>57</sup>

This means that, under the current historical test, the original “substance” of the civil jury trial right may hardly have been preserved at all. Rather, perhaps the Court has simply declined to demarcate the Seventh Amendment “substance” in order to be free to declare each challenged procedure only a modification to the incidentals of the common law jury trial. In this way, the Court can effectively mask what in reality are modifications of the undefined “substance.”<sup>58</sup>

Ultimately, the historical test has proven unable to protect the Seventh Amendment against modern-day encroachment. The Seventh Amendment has, for whatever reason, been afforded significantly less vigorous judicial protection than other Constitutional rights. Federal courts have long seen themselves as guardians of these rights:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and

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required, there still remains a question as to whether, if one departs too far from the procedural aspects of jury trials as they were conducted in 1791, one can still be said to be preserving the right to jury trial.”).

57. Thomas, *supra* note 51, at 147; *see also* Paul B. Weiss, Comment, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 737 (1988) (“To date, the United States Supreme Court has artfully avoided any pronouncement of what substantive jury functions are ‘preserved’ by the right to trial by jury in suits at common law, as guaranteed by the seventh amendment to the Constitution . . . . [T]he Court has yet to define in specific terms which substantive functions are so inherent to trial by jury, so elementary and necessary, that the seventh amendment preserves them from judicial or legislative encroachment.”).

58. *See, e.g.*, Lerner, *supra* note 49, at 811 (alteration in original) (“[B]oth state and federal court[s] . . . adopted originalist tests [to apply civil jury trial rights]. These tests, however, proved so flexible that they allowed legislatures and courts great discretion in modifying civil jury trial.”).

assembly, and other fundamental rights many not be submitted to vote; they depend on the outcome of no elections.<sup>59</sup>

In this guardian role, federal courts have extended substantial protections to constitutional rights. Take, for example, the freedom of speech laid out in the First Amendment. Content-neutral regulations of speech (regulations, for example, of time, place and manner of speech, but not of content) are subject to intermediate (also called “heightened”) scrutiny review.<sup>60</sup> To satisfy intermediate scrutiny, the speech regulation must be promulgated in response to a “substantial” government interest, “closely” tailored to accomplish that interest (in other words, the restriction does not apply to more speech than necessary), and preserve ample alternative avenues for the speaker to speak.<sup>61</sup> This is a difficult constitutional standard for any statute to clear.

Even more stringent is the strict-scrutiny standard of review, which is affectionately known among First Amendment scholars as “‘the kiss of death,’ because it is almost always fatal when applied”<sup>62</sup> to a law challenged under the First Amendment. Strict scrutiny is applied to content-based regulations of speech—in other words, statutes that regulate speech based on the ideas presented by the speaker. Under strict scrutiny, the Court has invalidated laws that prevent convicted criminals from profiting off memoirs detailing their crimes,<sup>63</sup> that prohibit state judicial candidates from expressing views on controversial political subjects,<sup>64</sup> and that ban flag burning.<sup>65</sup>

The Court does not stop “at the water’s edge” in protecting free speech rights, however, and has been more than willing to launch what are best described as pre-emptive attacks against free speech violations

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59. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

60. *See, e.g., Turner Broadcasting Sys., Inc. v. Fed. Comm’ns Comm’n*, 512 U.S. 622 (1994).

61. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28 (2010) (citing *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

62. P.J. Puryear, *Life After NCRL v. Leake: Can North Carolina’s Disclosure Laws Survive a Constitutional Challenge?*, 87 N.C. L. REV. 1252, 1259 (2009) (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 380 (1995) (Scalia, J., dissenting); Lecture by RonNell Anderson-Jones, BYU Law School (October 2015) (on file with author).

63. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

64. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

65. *Johnson*, 491 U.S. at 397; *United States v. Eichman*, 496 U.S. 310 (1990).

under the chilling effect doctrine.<sup>66</sup> Under the most common usage of the doctrine, “chilling effect refers to a concern that an otherwise legitimate rule will curb protected expression outside its ambit. This phenomenon generally arises when would-be speakers, faced with the uncertainties of the legal process, refrain from making protected statements.”<sup>67</sup> In other words, the regulation at issue changes the incentives of the expression sufficiently for the would-be speaker to refrain from exercising a constitutional right. This means that the Supreme Court may invalidate “an otherwise legitimate law” based solely on the nebulous possibility that the law will cause some speaker, somewhere, to forgo exercising his or her constitutional right to speak.<sup>68</sup> According to the Supreme Court, some constitutional rights even cast “penumbras” that create ancillary rights, strong enough themselves to void statutes for unconstitutionality.<sup>69</sup> In short, the Court has provided formidable protection to other civil liberties.

The Seventh Amendment civil jury right, on the other hand, enjoys no such protection. Under the historical test, procedures and regulations are merely examined to determine whether they infringe on the undefined “substance” of the Seventh Amendment, and if they do, they are invalidated. There is no required showing of a substantial (or even legitimate) governmental purpose for the regulation; there is no requirement that the regulation be narrowly tailored to serve the government’s interest. In fact, the “historical test” is even weaker in practice than it is in theory: “[T]he Supreme Court has upheld [against Seventh Amendment challenge] every new procedure that it has considered by which a court removes cases from the determination of a jury before, during, or after trial.”<sup>70</sup>

Furthermore, there is no such thing as prophylactic protection for the Seventh Amendment, as there is for the freedom of speech under the chilling effect doctrine—even though the Seventh Amendment

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66. For a general overview of the chilling effect doctrine, see Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685 (1978).

67. Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1655 (2013) (emphasis omitted).

68. *Id.* at 1650.

69. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a contraceptive use law that “intrude[d] upon the right of marital privacy,” a penumbral right created by the First Amendment); *id.* at 486 (Goldberg, J., concurring); G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 OHIO N.U. L. REV. 403 (1989).

70. Thomas, *supra* note 51, at 142.

could sorely use such protection. For example, mandatory arbitration arguably alters citizens' incentives enough to discourage would-be litigants from exercising their rights to jury trials at all.<sup>71</sup> If there were the functional equivalent of a chilling effect doctrine in place to protect the "penumbra" of the Seventh Amendment, it would offer at least more protection (than the historical test) against possible civil jury right violations brought about, for example, by compelled arbitration<sup>72</sup> and summary judgment.<sup>73</sup>

As discussed in Part III below, the Supreme Court has approved substantive changes in the modern-day role of the civil jury that arguably fail the historical test and certainly contradict the legislative history behind the Seventh Amendment's enactment. Specifically, one of the great purposes of the jury trial was to prevent, or nullify, the actions of oppressive or biased legislatures, executives, and judiciaries.<sup>74</sup> Therefore, whenever a judge or an administrative agency is allowed to act as fact-finder in civil suits in place of a jury, the Seventh Amendment is or should be offended under the historical test.

### III. "WHY SUMMARY JUDGMENT IS UNCONSTITUTIONAL"

Some have made similar Seventh Amendment arguments against, for example, summary judgment. According to Professor Suja Thomas, for example, the 1938 canonization of summary judgment proceedings in the Federal Rules of Civil Procedure significantly (and unconstitutionally) displaced the Seventh Amendment's civil jury right.<sup>75</sup> Proponents of summary judgment, of course, claim that the procedure does not infringe on the jury trial right because it may only be invoked to end proceedings where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

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71. See generally Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669 (2001).

72. See Cory Tischbein, *Animating the Seventh Amendment in Contemporary Plaintiffs' Litigation: The Rule, or the Exception?*, 16 U. PA. J. CONST. L. 233 (2013).

73. Thomas, *supra* note 51.

74. Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811 (2013); Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1197 (2014) ("When America was founded, juries functioned differently—as an integral part of government in both England and the colonies.").

75. Thomas, *supra* note 51.



of law.”<sup>76</sup> Professor Thomas’ article served as a major influence on this Note, and deserves a short summary here.

In analyzing a motion for summary judgment under Rule 56, the Supreme Court has explained that there is a genuine dispute of material fact “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party”;<sup>77</sup> “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”<sup>78</sup> Additionally, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.”<sup>79</sup> However, even if there is no genuine dispute of material fact, the judge may “deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.”<sup>80</sup>

Under these standards, then, the federal judge acts as a proxy jury in considering summary judgment. The judge effectively tries to step into the jury’s shoes and decide whether any reasonable jury could, based on the evidence produced, find for the nonmoving party.<sup>81</sup> If the judge believes that there is no work for the jury to do, then the judge is able to grant the motion for summary judgment and avoid the difficulty and expense of conducting a civil jury trial.

However, according to Professor Thomas, Rule 56 summary judgment does violate the Seventh Amendment historical test.<sup>82</sup> Professor Thomas begins by defining the “substance” of the civil jury right—an important analysis that the Supreme Court has yet to undertake. She identifies three important aspects of the civil jury trial’s role under the English common law, which represent “the substance,” or the “core principles” of the civil jury trial right at common law.<sup>83</sup> First, “the jury or the parties determined the facts.”<sup>84</sup> This was accomplished either through a jury trial, or through the parties stipulating to a certain version of the facts; the judge “never decided

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76. FED. R. CIV. P. 56(a).

77. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

78. *Id.* at 249.

79. *Id.* at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158–59 (1970), *superseded on other grounds by Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

80. *Anderson*, 477 U.S. at 255 (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948)).

81. Thomas, *supra* note 51, at 145–46.

82. *See generally* Thomas, *supra* note 51.

83. Thomas, *supra* note 51, at 143.

84. *Id.*

the case without such a determination by the jury or the parties, however improbable the evidence might be.”<sup>85</sup> Second, “only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict”; if the court so found, the court “would order a new trial.”<sup>86</sup> Finally, “a jury would decide every case in which there was any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party.”<sup>87</sup>

Professor Thomas measures the Rule 56 summary judgment procedure against these three principles—which, if truly the substance of the common law civil jury right, must constitutionally be preserved—and concludes that summary judgment fails constitutional review by impermissibly modifying all three of these principles. First, she writes, summary judgment impermissibly infringes on the jury’s common law functions because “the court decides the case without a jury or the parties deciding the facts. The court assesses the evidence, decides what inferences from the evidence are reasonable, and decides whether a reasonable jury could find for the nonmoving party.”<sup>88</sup> The fact that judges considering summary judgment motions are directed to predict what a “reasonable jury” would find is a subtle indication to the careful thinker that summary judgment treads on territory into which the judge should not venture alone.

Second, Thomas argues that summary judgment under Rule 56 is unconstitutional because the court weighs the sufficiency of the evidence the parties have presented *before trial*, rather than after, as at common law.<sup>89</sup> Thomas’ third observation is that summary judgment allows a moving party to be granted judgment as a matter of law without admitting to the evidence and facts alleged by the nonmoving party.<sup>90</sup> Whether or not judges believe they are “weighing evidence” in an impermissible manner, Rule 56 removes evidence determinations

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 160.

89. Thomas, *supra* note 51, at 160.

90. *Id.*

from the jury in a manner that did not—and could not—exist under the English common law.<sup>91</sup>

Additionally, she dismisses the suggestions that summary judgment is just a modern form of common law procedures such as the demurrer to the pleadings,<sup>92</sup> the demurrer to the evidence,<sup>93</sup> the nonsuit,<sup>94</sup> the special case,<sup>95</sup> and the new trial,<sup>96</sup> none of which modified the three principles that Professor Thomas identified as the substance of the common law. Overall, Professor Thomas' piece analyzes the historical test's contours with greater detail and depth than anything the Supreme Court has produced.

Ultimately, Professor Bronsteen probably said it best when he wrote, “[s]ummary judgment might be a wonderful procedure were it not inefficient, unfair, and unconstitutional.”<sup>97</sup> Unfortunately for the Seventh Amendment, summary judgment is not the only recent jurisprudential development that has narrowed the civil jury trial guarantee. This Comment next discusses the significant effect that chaining federal courts to administrative agencies' fact-finding has had on the civil jury trial right.

#### IV. WHY JUDICIAL DEFERENCE TO ADMINISTRATIVE FACT-FINDING IS UNCONSTITUTIONAL

Another doctrine that deprives the civil jury of its constitutionally apportioned fact-finding function—and therefore violates the Seventh Amendment—is judicial deference to fact-finding by administrative adjudicatory proceedings.<sup>98</sup> More and more, Congress creates

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91. See, e.g., Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469, 469 (2009) (citing D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 884 nn.57–58 (2006)) (“Today summary judgment is granted on issues of reasonableness, state of mind, and credibility, results that were [once] inconceivable.”).

92. Thomas, *supra* note 51, at 148–50.

93. *Id.* at 150–54.

94. *Id.* at 154–56.

95. *Id.* at 156–57.

96. *Id.* at 157–58.

97. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 551 (2006).

98. See Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1281 (1977) (“The decision of the Supreme Court in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* has seriously weakened the protection afforded by the seventh amendment to the United States Constitution.”).

administrative agencies to enforce various civil laws, write regulations, and administer penalties,<sup>99</sup> as well as adjudicate disputes arising under those laws and regulations.<sup>100</sup> Congress has also decided, in many cases where the administrative agencies' decisions are subject to judicial review,<sup>101</sup> that the factual findings of the administrative agencies will be given deference by—and therefore be effectively binding on—the federal court.<sup>102</sup> There is no jury because all of the facts are effectively

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

100. “Administrative agencies currently adjudicate more disputes than federal courts.” David A. Brown, Note, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?*, 73 CORNELL L. REV. 817, 817 (1988). Furthermore, “[i]n 2001, the U.S. government had 1,370 Administrative Law Judges (ALJs)—more than twice the number of Article III judges . . . . Although it is unclear how many of these administrative proceedings are ‘trials’ in the traditional sense, what is clear is that more disputes are now being resolved *outside* our judicial system than inside it.” David J. Beck, *The Consequences of the Vanishing Trial: Does Anyone Really Care?*, 1 HOUS. L. REV.: OFF THE RECORD 29, 35–36 (2010) (emphasis in original).

There are currently thirty-four federal agencies that use administrative law judges to adjudicate disputes under the civil laws the respective agencies are authorized to enforce: the Coast Guard, the Commodity Futures Trading Commission, the Department of Agriculture, the Department of Health and Human Services (Department Appeals Board and the Office of Medicare Hearings and Appeals), the Department of Housing and Urban Development, the Department of the Interior, the Department of Justice (Executive Office for Immigration Review), the Department of Labor, the Department of Transportation, the Department of Veterans Affairs, the Drug Enforcement Administration, the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Federal Aviation Administration, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Mine Safety and Health Review Commission, the Federal Trade Commission, the Food and Drug Administration, the International Trade Commission, the Merit Systems Protection Board, the National Labor Relations Board, the National Transportation Safety Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Office of Financial Institution Adjudication, the Patent and Trademark Office, the Postal Service, the Securities and Exchange Commission, the Small Business Administration, and the Social Security Administration. *Agencies Employing Administrative Law Judges*, ASS’N OF ADMIN. L. JUDGES, <http://www.aalj.org/agencies-employing-administrative-law-judges> (last visited Oct. 8, 2016).

101. See 5 U.S.C. § 706(2). However, some administrative fact-finding is not subject to judicial review in any form. See, e.g., Neil D. Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs*, 12 HAMLINE L. REV. 633, 638–39 (1988) (pointing out that 7 U.S.C. § 1385 prohibits judicial review of certain Department of Agriculture determinations).

102. 5 U.S.C. § 706(2)(E) (“The reviewing court shall . . . hold unlawful and set aside agency . . . findings . . . found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . .”); Judah A. Shechter, Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483,

pre-determined by the administrative agency's proceedings.<sup>103</sup> Through incremental doctrinal development, which culminated with the Supreme Court's 1977 decision in *Atlas Roofing Co. v. OSHA*,<sup>104</sup> the Supreme Court has held that such deference does not violate the Seventh Amendment. However, as discussed below in Sections IV.A through IV.C, the Supreme Court decided this question incorrectly; judicial deference to administrative fact-finding—even when analyzed under the historical test's malleable requirements, fails to pass constitutional muster and operates in direct contradiction to the Framers' intent in passing the Seventh Amendment.

*A. The "Appellate Review Model" and the Supreme Court's  
Misguided Approval*

The Supreme Court did not arrive at its *Atlas Roofing* holding overnight. Rather, *Atlas Roofing* was merely the most recent manifestation of a deeply embedded jurisprudential trend known as the "appellate review model of administrative law."<sup>105</sup> Criticism of these court decisions has largely centered on the separation-of-powers doctrine undergirding the constitutional structure.<sup>106</sup> There has not

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1483 (1988) ("With the rise of the modern administrative state, . . . courts have ceded much ordinary fact-finding and law application to agencies, subject to only limited judicial review.").

103. *See, e.g.*, 29 U.S.C. § 660(a) (stating that in judicial review of decisions of the Occupational Safety & Health Commission, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive").

104. 430 U.S. 442 (1977).

105. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 943 (2011) ("[T]he appellate review model is so thoroughly embedded in contemporary administrative law that modern lawyers take it for granted.").

106. Modern constitutional law scholars frequently suggest that the appellate review model of administrative law violates the plain meaning of Article III of the Constitution. They argue that Article III vests the "judicial power of the United States" exclusively in courts composed of judges who enjoy life tenure and secure compensation. The judicial power, it is further assumed, includes the power to find both the facts and the law needed to resolve particular cases and controversies. The appellate review model, however, calls for a sharing of this power with federal tribunals that do not have the independence of Article III courts. The appellate review model, from this perspective, represents a major challenge: Is there a principled justification for what appears to be a violation of the plain requirements of the Constitution? *Id.* at 979–80 (citation omitted).

been, as yet, much serious discussion on the Seventh Amendment implications of the appellate review model.<sup>107</sup>

The appellate review model sees the relationship between administrative agencies and the Article III judges who review their decisions as analogous to that which exists between trial court judges and appellate court judges. The administrative agency (like a trial court) is seen as entitled to deference on appeal with regard to certain decisions.<sup>108</sup> Under this model, the administrative agency (like a trial court or trial jury) is more capable at making accurate factual findings, and therefore the reviewing court should give such findings deference and disturb them only if they are not based in “substantial evidence.”<sup>109</sup>

Professor Thomas Merrill, a constitutional scholar at Columbia Law School, describes in depth the historical development of the appellate review model, tracing its origins far past the commonly accepted starting point of the doctrine<sup>110</sup> (generally supposed to be the decision in *Crowell v. Benson*<sup>111</sup>). Indeed, “[r]ecovering the early history of the appellate review model allows us to understand why one of the most significant constitutional questions posed by the rise of the modern administrative state<sup>112</sup> was never seriously deliberated by

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107. Even in a seventy-page article discussing in great detail the doctrine that developed to prevent federal courts from reviewing administrative agencies’ factual findings in civil proceedings, Professor Merrill does not mention the Seventh Amendment once. *Id.* at 939. This is not a criticism of Professor Merrill; however, the idea that judicial deference to administrative fact-finding could be unconstitutional under the Seventh Amendment is conspicuously absent from the cases that Professor Merrill discusses. The sole exception is *Crowell v. Benson*, 285 U.S. 22 (1932), where the Court summarily rejected the Seventh Amendment argument because the case at hand was a maritime case within the Court’s admiralty jurisdiction, and therefore the Seventh Amendment did not apply. *Id.* at 45. Later cases, where the Seventh Amendment presumably should apply, do not raise this argument further.

108. Merrill, *supra* note 105, at 941 (“The reviewing court conceives of its role vis-à-vis the administrative agency in terms of the conventions that govern the appeals court-trial court relationship.”).

109. *Id.*

110. *Id.* at 943–44.

111. 285 U.S. 22 (1932).

112. To Professor Merrill, these were questions raised by the doctrine of the separation-of-powers. Even his very thorough seventy-page law review article on the development of the appellate review model fails to discuss the implications of the appellate review model for the civil jury trial right preserved by the Seventh Amendment.

the Supreme Court,” because that “model was adopted twenty years before the decision in *Crowell*.”<sup>113</sup>

The appellate review model began at the creation of the Interstate Commerce Commission (ICC) in 1887, “the first major national regulatory agency.”<sup>114</sup> The ICC’s decisions and factual determinations were given little deference when reviewed by Article III federal courts under what was effectively de novo review.<sup>115</sup> The ICC eventually buckled under the weight of the Supreme Court’s cavalierly non-deferential review of ICC determinations. According to Stephen Skowronek, “[b]y 1896–97, the Court was openly declaring that it was not bound by the conclusions of the commission, that it could admit additional evidence, and that it could set aside the commission’s findings altogether,”<sup>116</sup> and “[t]he Court’s aggressive review threatened to reduce the ICC to the status of ‘a mere statistics-gathering agency.’”<sup>117</sup>

Lest the country’s first foray into the promising world of administrative law be abandoned to ignominious defeat, Congress (after significant debate) passed the Hepburn Act,<sup>118</sup> which granted the ICC additional power.<sup>119</sup> Professor Merrill writes:

From the perspective of the Supreme Court, the message encoded in the Hepburn Act was twofold. First, the public and the politicians were deeply unhappy with the Court’s existing practices regarding judicial review of ICC rate orders. Second, Congress and the President had provided no direction regarding what to do about it. The net effect was to delegate authority to the Court to decide on the new standard of review, with the implied threat that if the Court

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113. Merrill, *supra* note 105, at 943–44.

114. *Id.* at 950.

115. *Id.* at 950–53 (“[T]he breadth of review of agency action in the nineteenth century varied, but the nature of the review was uniformly what we would now call de novo, certainly as to the development of the record. The understanding that courts would develop the record for review exerted a powerful pull on the standard of review, and so the tenor of review even in statutory review cases was nearly always one of independent judgment. There was little rhetoric of deference, and even less evidence of it in practice.”).

116. Merrill, *supra* note 105, at 953–54 (citing STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF ADMINISTRATIVE CAPACITIES 1877–1920*, at 154–55 (1982)).

117. Merrill, *supra* note 105, at 954 (quoting SKOWRONEK, *supra* note 116, at 151).

118. Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

119. Merrill, *supra* note 105, at 955–59.

did not back off from its aggressive review practices, more drastic action would be in the offing.<sup>120</sup>

The Court did, in fact, “back off”; shortly thereafter, small glimpses of the appellate review doctrine began to show up in the Supreme Court’s opinions.<sup>121</sup> For example, in *Illinois Central Railroad Co. v. Interstate Commerce Commission*,<sup>122</sup> the Court “emphasiz[ed] the law-fact distinction familiar to judges from the conventions associated with judicial review of jury verdicts” and declined to intrude into the ICC’s factual findings at issue in the case.<sup>123</sup> Additionally, in *Cincinnati, Hamilton & Dayton Railway Co. v. Interstate Commerce Commission*,<sup>124</sup> the Supreme Court established the “clear and unmistakable error” standard, “invoking the language used to review factual determinations of judges sitting without a jury.”<sup>125</sup>

Finally, in *Interstate Commerce Commission v. Union Pacific Railroad Co.*,<sup>126</sup> “we witness the birth of the famous ‘substantial evidence’ standard of review of agency findings of fact. The standard was borrowed—without citation of authority—from the established understanding of the standard of review that an appeals court applies in reviewing a jury verdict.”<sup>127</sup> In other words, the Supreme Court was putting the final touches on the appellate review model; a federal court reviewing administrative agency actions would review the agency’s factual findings under the same standard of review as if the findings had been made by a duly impaneled civil jury. The separation-of-powers concerns about the doctrine were essentially ignored;<sup>128</sup> the Court did not even feel the need to address the Seventh Amendment.

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120. *Id.* at 959 (citations omitted).

121. *Id.* at 959–63.

122. 206 U.S. 441 (1907).

123. Merrill, *supra* note 105, at 960–61.

124. 206 U.S. 142 (1907).

125. Merrill, *supra* note 105, at 961.

126. 222 U.S. 541 (1912).

127. Merrill, *supra* note 105, at 961–62.

128. Merrill, *supra* note 105, at 972–79 (describing the scholarly work of John Dickinson in encouraging and ‘cheerleading’ the growth of the appellate review model, and noting that “Dickinson’s indifference to the Article III implications of delegating the fact-finding mission to administrative agencies both reflected existing precedent and helped shape the Court’s response when the issue finally came to the fore in 1930s.”).



Eventually, in the Mann-Elkins Act,<sup>129</sup> Congress created the Commerce Court, “a specialized Article III tribunal devoted exclusively to review of ICC decisions.”<sup>130</sup> Professor Merrill notes that the Mann-Elkins Act’s passage “arguably ratified—or at least signaled [Congress’] strong approval of—the Supreme Court’s newly deferential stance toward review of decisions of the ICC.”<sup>131</sup> In fact, the Commerce Court was eventually disbanded because, among other things, the Commerce Court “engaged in very aggressive review of ICC decisions.”<sup>132</sup> Later manipulation of the appellate review model in Federal Trade Commission (FTC) cases—declaring certain issues to be issues of law rather than fact, and therefore subject to full review in federal courts—prompted Chief Justice Taft to “remind[] his colleagues that [they] should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the Court should in its rulings preserve the Board’s character as such.”<sup>133</sup> Since these formative years, “the appellate review model [has become] so thoroughly embedded in contemporary administrative law that modern lawyers take it for granted.”<sup>134</sup>

This brings us to *Atlas Roofing*, a manifestation of the continuing vitality of the appellate review doctrine and the most recent analysis of the appellate review doctrine under the Seventh Amendment. In a unanimous decision, the Court upheld, against a Seventh Amendment challenge, statutorily-prescribed judicial deference to administrative fact-finding pertaining to employment law violations.<sup>135</sup> In *Atlas Roofing*, an employer appealed the Occupational Safety and Health

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129. Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910).

130. Merrill, *supra* note 105, at 965.

131. *Id.* at 966.

132. *Id.* at 966–67.

133. *Id.* at 971 (quoting *FTC v. Curtis Pub. Co.*, 260 U.S. 568, 583 (1923) (Taft, C.J., doubting)).

134. Merrill, *supra* note 105, at 943; *cf.* Richard A. Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. 491, 503 (2008) (“The proliferation of these administrative agencies . . . starts from the assumption that these agencies are a part of the modern constitutional order. Accordingly, the rearguard battle that we have to fight today is whether the same kind of judicial discipline applies to the output of administrative agencies as it does to the combination of work that follows the usual patterns of Congressional legislation and Presidential enforcement.”).

135. Justice Blackmun recused himself. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 461 (1977).

Review Commission's determination that the employer's working conditions had breached the Occupational Safety and Health Act (OSHA).<sup>136</sup> As required by OSHA,<sup>137</sup> when the employers appealed the Commission's determinations to the federal appeals courts, the Commission's factual findings were binding, and the case was never submitted to a civil jury for fact-finding.<sup>138</sup> The Supreme Court held that this administrative fact-finding procedure did not violate the Seventh Amendment, on the grounds that cases like this involved "statutory public rights" rather than "private rights," and that civil litigation related to "public rights" was not guaranteed a jury trial at the common law.<sup>139</sup>

This reasoning tracks the second of two theories discussed by Professor Merrill that modern scholars attempt to use to reconcile the appellate review model with Article III. The first, the "adjunct theory," posits that in cases where the federal courts defer to administrative fact-finding, the agencies are essentially "functioning as 'adjuncts' to courts, in a manner analogous to the way juries function in trials at law."<sup>140</sup> The second theory (to which the *Atlas Roofing* opinion subscribes) draws a distinction between administrative adjudications involving "public rights" and those involving "private rights."<sup>141</sup> Under this approach, cases involving private rights may be more thoroughly reviewed in federal court, while those involving public rights may not.<sup>142</sup>

However, this Comment argues that the Supreme Court wrongly decided *Atlas Roofing* because it failed to properly analyze judicial deference to administrative fact-finding under the historical test. Furthermore, (putting aside the much-maligned historical test), trying administrative cases without civil juries contradicts the

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136. 29 U.S.C. §§ 651–78 (2012).

137. 29 U.S.C. § 660(a) (2012) ("The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.").

138. *Atlas Roofing*, 430 U.S. at 448.

139. *Id.* at 455–56.

140. Merrill, *supra* note 105, at 981–82. The adjunct theory attracts several important criticisms, however, chief among which is the correct observation "that juries . . . have a direct basis in the constitutional text, whereas adjudication by federal administrative agencies does not. Juries are mentioned both in Article III and in the Bill of Rights." *Id.* at 982.

141. *Id.* at 984.

142. *Id.*

legislative history behind the Seventh Amendment's drafting and ratification, and therefore fails constitutional scrutiny even outside of the Supreme Court's test.

*B. Deference to Administrative Fact-Finding Fails the Supreme Court's Historical Test*

The settled analysis for whether a given procedure or statute violates the Seventh Amendment is the historical test.<sup>143</sup> As discussed in Section II.B, there are essentially two routes to applying this test. To determine whether a specific cause of action requires a jury trial right under the historical test, the appellate court must decide whether a jury would have been required to dispose of a certain claim under the 1791 English common law.<sup>144</sup> The second route applies to procedures and devices, which must not infringe on the Seventh Amendment's "substance,"<sup>145</sup> but may alter or eliminate its "form"<sup>146</sup> or incidents. Therefore, Congress, the executive, and the judiciary are free to alter those procedures and characteristics of the jury trial as long as they do not interfere with the "substance." Of course, as discussed above, the Supreme Court has never defined exactly what constitutes the substance of the Seventh Amendment right, and therefore has approved every new procedure or doctrine that litigants have claimed to be violations of the Seventh Amendment.<sup>147</sup> This Comment argues that judicial deference to administrative fact-finding in enforcement actions fails the historical test under either route.

*1. Enforcement actions to recover a civil penalty require a jury trial as of right*

If we view the issue as a question of whether a specific cause of action (in this case, a civil enforcement action) requires a civil jury trial right, in-house enforcement actions, and judicial deference to the fact-finding therein, fail the historical test. In *Granfinanciera, S.A. v.*

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143. See *supra* Section II.B.

144. See, e.g., Wolfram, *supra* note 31, at 640 ("If a jury would have been impaneled in this kind of case in 1791 English practice, then generally a jury is required by the seventh amendment.").

145. See, e.g., Thomas, *supra* note 51, at 147 (citing *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931) and *Colgrove v. Battin*, 413 U.S. 149, 156–57 (1973)).

146. *Id.* (citing *Gasoline Products Co.*, 283 U.S. at 498).

147. *Id.*

*Nordberg*, the Court divided the cause-of-action route for the historical test into two parts: “First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”<sup>148</sup>

As to the first element of the *Granfinanciera* formulation, government actions for recovery of civil penalties fall into the class of actions that would have been brought in common law courts, as shown by the Federal Judiciary Act of 1789. Several scholars have argued persuasively that the Federal Judiciary Act of 1789<sup>149</sup> is of particular relevance when determining the legislative intent behind the Seventh Amendment.<sup>150</sup> Indeed, the Supreme Court itself has said that “[t]he Judiciary Act . . . was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.”<sup>151</sup> Of special relevance to the current inquiry is section nine of the Judiciary Act of 1789, stating:

the district courts . . . shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, *and of all suits for penalties and forfeitures incurred, under the laws of the United States.* . . . And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, *shall be by jury.*<sup>152</sup>

That the Framers considered it appropriate for cases involving “penalties and forfeitures incurred, under the laws of the United States” to be heard by civil juries is powerful evidence that the common law presumption was that such cases would be brought in common law courts, rather than equity courts.<sup>153</sup> Additionally, as the

148. *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 42 (1989).

149. Ch. 20, 1 Stat. 73 *et seq.* (1789).

150. *See, e.g.*, Harrington, *supra* note 27, at 149–50 (arguing that the Seventh Amendment language “shall be preserved” refers to “the compromise already embodied in the Judiciary Act [of 1789],” rather than the 1791 English common law).

151. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1887).

152. Ch. 20, 1 Stat. at 77, § 9(a), (d) (emphasis added).

153. *See also* Brief for Petitioner, *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, No. 75-748, 75-746 (1976), 1976 WL 194263 at \*17 (“[A] governmental proceeding for a civil penalty for violation of a statute would have been triable to a jury, whether

petitioners in *Atlas Roofing* pointed out, the Supreme Court has said that “in a just sense, [the Seventh Amendment] may well be construed to embrace *all suits which are not of equity and admiralty jurisdiction*, whatever may be the peculiar form which they may assume to settle legal rights.”<sup>154</sup>

Regarding the second element of the *Granfinanciera* formulation of the historical test, the remedy sought—a civil penalty—is legal, not equitable, by nature. For the purposes of the lawsuit, the civil penalty operates as a monetary damages award to the government,<sup>155</sup> and as every first-year Contracts student learns, a claim for money damages was traditionally a claim at common law, not at equity.<sup>156</sup>

Therefore, an administrative agency’s lawsuit to recover a civil penalty is best viewed as a legal cause of action for which parties to the litigation would have a civil jury trial right. On this point, it is significant to note that had the claim in *Atlas Roofing* been brought originally in a federal district court, there would have been a right to civil jury trial, even though no such right existed when the claim was originally brought in an administrative proceeding.<sup>157</sup> Whether Congress may permissibly assign an administrative agency to adjudicate the dispute is a separation-of-powers question that is beyond the scope of this Comment. What is highly relevant to the Seventh Amendment, however, is how the federal courts treat the factual findings of the agency once given the chance to review the administrative proceedings. And under the Seventh Amendment’s historical test, viewing enforcement actions as a claim for money damages presents serious constitutional issues when Article III courts defer to administrative fact-finding.

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the proceeding was brought by a representative of the Crown or by an informer on behalf of the Crown.”).

154. Brief for Petitioner, *supra* note 153, at \*23 (emphasis added).

155. *Id.* at \*17.

156. *See, e.g.*, 27A Am. Jur. 2d Equity § 32 (“In general, equity does not have jurisdiction in cases in which the remedy sought is the recovery of money, whether as collection on a debt or as damages. Actions to recover money are generally considered actions at law.”).

157. Brief for Petitioner, *supra* note 153, at \*17. The Supreme Court has held, however, that where the rights being adjudicated are “private rights” rather than “public rights,” the Seventh Amendment right to jury trial may still apply even to administrative proceedings. Mark I. Greenberg, *The Right to Jury Trial in Non-Article III Courts and Administrative Agencies after Granfinanciera v. Nordberg*, 1990 U. CHI. LEGAL F. 479 (1990) (discussing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)).

*2. Judicial deference infringes on the jury trial right's substance*

Coming at the historical test from the second approach (substance-versus-incidents), the historical test demands that the procedural rules governing deference not infringe on the actual “substance” of the Seventh Amendment right. Therefore, we must first define the substance of the civil jury trial right, for which definition we turn to Professor Thomas.<sup>158</sup>

*a. The jury finds facts.* First, “the jury or the parties determined the facts.”<sup>159</sup> This was accomplished either through a jury trial, or through the parties stipulating to a certain version of the facts; the judge “never decided the case without such a determination by the jury or the parties, however improbable the evidence might be.”<sup>160</sup> Additionally, “a jury would decide every case in which there was any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party.”<sup>161</sup>

Under these principles, a Seventh Amendment challenge to judicial deference seems to be an easy case. The Supreme Court has said that the Seventh Amendment preserves the civil jury right’s “substance,” and, as Professor Thomas has argued, the substance is the principle that “the jury or the parties determined the facts.”<sup>162</sup> To have an arm of the executive branch effectively predetermine the facts in a federal judicial proceeding obviously violates this principle,<sup>163</sup> and should therefore be held unconstitutional under the historical test’s “substance” approach.

Judicial deference also falls short of satisfying the second “substance” principle applicable here—that “a jury would decide every case in which there was any evidence, however improbable the

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158. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. In the technical sense that the entity adjudicating an administrative proceeding is also ultimately the same entity prosecuting the claim, one could argue that the parties have determined the facts where deference is given to administrative fact-finding. However, allowing an executive arm of the government to determine the facts of a dispute clearly defeats the legislative history of the Seventh Amendment, discussed below in Section IV.C.

evidence was.”<sup>164</sup> Conversely, under the Administrative Procedure Act (APA), the general rule, where formal adjudication occurs, is that the administrative body will take evidence<sup>165</sup> and make factual findings,<sup>166</sup> and any federal court eventually reviewing administrative adjudications will “hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence.”<sup>167</sup>

Consider a hypothetical: the fictional Federal Eggs and Cheese Commission initiates administrative proceedings against a dairy farmer to assess a civil penalty for violating a National Cheese Curd Quality Act. In the resulting administrative adjudication, the farmer presents evidence that she is compliant with the statutory requirements. As long as the Eggs and Cheese Commission can marshal “substantial evidence” that the farmer is not in compliance with the statute, the Commission may find against the dairy farmer, and those findings will not be disturbed upon judicial review of the proceedings—even though this is essentially a question of judgment that could go either way.<sup>168</sup> For administrative fact-finding to bind the reviewing court except where the fact-finding is so outrageous as to be “unsupported by substantial evidence” constitutes a wholesale displacement of the civil jury trial right, which required that “a jury would decide *every* case in which there was *any* evidence.”<sup>169</sup>

*b. The public-right/private-right fiction.* A final point: the public-right/private-right dichotomy that determined the outcomes in both *Atlas Roofing* and *Granfinanciera* did not even exist in 1791 English common law,<sup>170</sup> and therefore should not be the deciding factor for a

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164. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007).

165. 5 U.S.C. § 556(b) (2012).

166. § 557(c) (“The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof.”).

167. § 706(2)(E).

168. This is similar to the “abuse-of-discretion” standard of review for reviewing trial judge’s discretionary actions; the question is not whether the trial judge made the best decision, but rather only whether the trial judge’s decision was rational.

169. Thomas, *supra* note 164, at 143 (emphasis added).

170. “The public rights rule had to be created to decide the *Atlas [Roofing]* case; it is not the holding of any earlier opinion.” Roger W. Kirst, *Administrative Penalties and the Civil Jury*:

right that, according to the historical test, is based on 1791 English jurisprudence. To reach this public rights exception, the Supreme Court falsely analogized common law tax proceedings, which were executive actions, to civil penalty enforcement actions.<sup>171</sup> In fact, no such power existed outside the realm of tariffs and internal revenue proceedings.<sup>172</sup>

At any rate, the public-right/private-right distinction is simply not a sturdy deciding factor on which to base the enjoyment of constitutional rights.<sup>173</sup> For example, the Court in *Atlas Roofing* maintained that no jury trial was required because the Occupational Safety and Health Commission was enforcing public rights, rather than private rights.<sup>174</sup> This is true, in the sense that the Commission was enforcing worker safety standards, grounded in congressionally approved public policy, against employers who might take advantage of such workers. In other words, as the Supreme Court said in

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*The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1287 (1977); Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1293–311 (1977) (declaring that “there is no evidence that anyone in 1791 understood there was such an open-ended exception [as the public rights exception]” and saying that the Court’s discussion of this right is based on a “misuse of precedent”); Joseph Czerwien, Note, *Preserving the Civil Jury Right: Reconsidering the Scope of the Seventh Amendment*, 65 CASE W. RES. L. REV. 429, 430 (2014) (arguing that “[t]his ‘public rights exception’ is inconsistent with the amendment’s purpose”); *id.* at 448 n.130 (citing Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial In Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407 (1995) (criticizing the public rights exception)).

171. Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1299–305, 1311–28 (1977) (calling the majority opinion “a clear example of misuse of precedent”).

172. *Id.* at 1299 (calling the majority opinion “a clear example of misuse of precedent”).

173. “The term ‘public rights’ was coined in the mid-nineteenth century to describe a class of rights, disputes over which could be conclusively resolved by the executive or legislative branches of the federal government, without participation by the judiciary. Thus, causes of action involving public rights do not necessarily enjoy adjudication by a judge whose independence is guaranteed by Article III. But it is not clear why such causes of action should also be free of the commands of the Seventh Amendment. *Moreover, the Supreme Court has never provided a workable definition of public rights.*” Mark I. Greenberg, *The Right to Jury Trial in Non-Article III Courts and Administrative Agencies after Granfinanciera v. Nordberg*, 1990 U. CHI. LEGAL F. 479, 481 (1990) (emphasis added). The Supreme Court has said that “[t]he distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases . . . .” *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982).

174. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 450 (1977).



*Granfinanciera*, “a public right [is] a statutory right closely intertwined with a federal regulatory scheme.”<sup>175</sup>

However, the Commission’s actions, while “closely intertwined with a federal regulatory scheme,” also heavily implicate what are (outside of administrative law) generally considered private rights. For example, the employers were fined for violating civil laws and therefore deprived of their financial resources.<sup>176</sup> Together, the two employers in *Atlas* were fined \$5,935 for OSHA violations<sup>177</sup>—\$23,588.49 in 2016 dollars. And it seems absurd, with respect to both the common law in 1791,<sup>178</sup> and the legislative history discussed below in Section IV.B, that the employers would be entitled to a jury trial under the Seventh Amendment only if the party seeking to exact \$5,935 were another private individual rather than the federal Leviathan.<sup>179</sup> Since the Framers viewed the Seventh Amendment, as with the rest of the Bill of Rights, as a protection against government,<sup>180</sup> at the very least we should allow the “historical test” to be slightly more historically informed. Consider this statement by the preeminent English legal mind, William Blackstone:

Every new tribunal erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or

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175. Czerwien, *supra* note 170, at 448 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989) and *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011) (affirming this model of public rights)).

176. Criticizing the SEC’s use of administrative law judges, Professor Ronald J. Riccio said that “[t]here’s no reason not to have an independent corps of hearing examiners . . . . When you look at what’s at stake—a person’s livelihood—why should that be subjected to second-class due process?” Morgenson, *supra* note 6.

177. *Atlas Roofing Co.*, 3 OSAHRC 19, at \*7 (No. 1130, 1973) (\$600 penalty); *Frank Irey, Jr., Inc.*, 4 OSAHRC 1, at \*17–18 (No. 701, 1973) (\$5,335 penalty).

178. This even seems to violate ideas as old, for instance, as Magna Carta’s provision that “No freeman is to be . . . disseised of his free tenement or of his liberties or free customs, . . . save by lawful judgment of his peers or by the law of the land.” MAGNA CARTA cl. 29 (1215).

179. This seems roughly analogous to denying a criminal defendant the right to a jury trial because the prosecutor is merely ‘enforcing public rights.’ In fact, the proposition of denying the right to a jury trial in a criminal case seems ridiculous because of the Sixth Amendment. Why should the same deprivation seem less ridiculous in administrative enforcement proceedings, given the Seventh Amendment?

180. *See, e.g.*, Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 S.M.U. L. REV. 1745 (Fall 2009).

any other standing magistrates) is a step towards establishing . . . the most oppressive of absolute governments.<sup>181</sup>

Measured against these principles, judicial deference to administrative fact-finding impermissibly violates the substance of the Seventh Amendment right. In fact, deference seems to fit well within Justice Marshall's language in his *Colgrove v. Battin* dissent: judicial deference to administrative fact-finding constitutes "wholesale abolition and replacement [of the jury] with a different institution which functions differently, produces different results, and was wholly unknown to the Framers of the Seventh Amendment."<sup>182</sup>

*C. Deference to Administrative Fact-Finding is Contrary to the Seventh Amendment's "Legislative History"*

Setting aside the criticized historical test (as many have suggested the Supreme Court do),<sup>183</sup> scholars have shown that the legislative history of the Seventh Amendment condemns in-house enforcement actions and judicial deference to administrative fact-finding even more harshly.<sup>184</sup> Recall that the ratification debate was a Herculean political

181. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 380 (1768).

182. *Colgrove v. Battin*, 413 U.S. 149, 166–67 (1973) (Marshall, J., dissenting).

183. *See, e.g.*, Harrington, *supra* note 26, at 148. ("The problem with the Supreme Court's historical test is that it is based on a fundamental misconception about the purposes of the Seventh Amendment. In other words, to ponder whether English courts in 1791 would have tried a particular cause of action to a jury is to ask the wrong question. This is because the historical test is entirely without warrant in the historical record."); JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES (2006) (criticizing the historical test and arguing for a more fluid, modern approach); Wolfram, *supra* note 28, at 731, 747 ("That such an accident of history should continue to control application of the seventh amendment would be justifiable only if there were available no other principled reading of the amendment. . . . Perhaps it is too late for wholesale abandonment of the historical test, a relatively firmly imbedded part of the law for over a century and a half. But recent musings of the Supreme Court suggest that a re-thinking of the historical test might not be precluded by stare decisis. If precedent is not an insurmountable obstacle, then one may hope that the time is near when the dead hand of the historical test will be lifted from the seventh amendment."); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1007 (1992) ("It is time to end this charade. The sooner we confess that both as a matter of original intent and subsequent evolution, the Seventh Amendment is not what we have made of it, the sooner our legal system will address the task of defining civil jury rights in a way that is philosophically and jurisprudentially sound."). *But see* Czerwien, *supra* note 170, at 430 ("This Note argues that the Court's historical test is in keeping with the amendment's scope and purpose.").

184. Klein, *supra* note 37; Harrington, *supra* note 26; Scheiner, *supra* note 23.

struggle between the Federalists who saw strong national government as a stabilizing force for the fledgling nation, and the Antifederalists, who saw strong national government as a threat to state government and individual liberties.<sup>185</sup> The Federalists' arguments carried the day overall—the new Constitution was ratified and implemented—but the Antifederalists forced some very important concessions. One of these concessions was a constitutional amendment guaranteeing the right to civil jury.<sup>186</sup> Indeed, “[t]he Antifederalist attitudes provide a relevant position from which to negotiate with the insistent demands of hierarchy, technocracy and the administrative state,”<sup>187</sup> and the Seventh Amendment is best interpreted by reference to the Antifederalist position.<sup>188</sup>

One of the strongest and most common arguments the Antifederalists put forth in favor of an explicit civil jury guarantee was that the civil jury trial acts as a democratic check on governmental tyranny. The American colonists despised that King George III had authorized the vice-admiralty courts (which heard cases with no civil jury) to enforce civil penalties against colonial subjects.<sup>189</sup> To allow an arm of the federal government to effectively predetermine facts in federal judicial proceedings is to revive vestiges of the very supposed

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185. See, e.g., *Federalist & Antifederalist Positions*, POLYTECHNIC SCH., <http://faculty.polytechnic.org/gfeldmeth/chart.fed.pdf> (last visited Jan. 4, 2016).

186. One more general matter should be emphasized concerning the debate between the supporters of the proposed Constitution and the antifederalists who unsuccessfully attempted to prevent its adoption: on the matter of civil jury trial the antifederalists won. While many of their arguments concerning the form of the national government and the extent of its power were ultimately rejected, the antifederalist arguments concerning civil jury trial (and other guarantees that were enacted into the Bill of Rights) ultimately prevailed.

Wolfram, *supra* note 28, at 672; see *supra* Section II.A.

187. Scheiner, *supra* note 23, at 148.

188. *Id.* (“Any attempt to create a vital civil jury trial right should be informed by the rhetoric of those who fought for its preservation, and won that fight—primarily, the Antifederalists. This is not to say that the ‘original understanding’ of the seventh amendment must define its current contours, or that discovery of such an understanding is practicable or possible. Antifederalist rhetoric does not offer definitions, but attitudes—suspicion toward judicial power, fear that the government will serve the few against the many, and respect for the civil jury as the last bulwark against oligarchy and the last redoubt of self-government.”); see also Wolfram, *supra* note 28, at 672–73.

189. See, e.g., Harrington, *supra* note 26.

tyranny that the colonists fought to abolish in the Revolutionary War.<sup>190</sup>

In fact, among the Antifederalists' justifications for demanding a civil jury trial right was "protection against abuse by government officials"<sup>191</sup> and "protection against biased or corrupt judges."<sup>192</sup> This argument is of particular relevance with regard to the relationship between Article III courts and administrative agencies, because in administrative adjudications, the potentially biased and abusive government officials *are the judges*—the ALJs—who hear the dispute. This is not an insubstantial possibility, given well-founded concerns about the neutrality and unfairness of ALJs and administrative proceedings generally.<sup>193</sup> The SEC's ALJs, for example, have been

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190. A far more immediate concern, however, was the fear that the national government would utilize its legislative power to oppress the citizenry. Without specific protection for the jury, antifederalists argued, Congress might enact tax or revenue statutes that allowed a customs or excise officer to prosecute violations in federal courts without juries. Such an argument, of course, rekindled all the old complaints about the colonial vice-admiralty courts.

*Id.* at 186.

191. *Id.* at 185.

192. *Id.* at 187; *see also* Wolfram, *supra* note 29, at 670–71; Scheiner, *supra* note 23, at 148, 150 (listing aspects of the antifederalist "conception of the role of the civil jury," which include the civil jury as a "bulwark against ministerial tyranny," and to "offset judicial bias in favor of the government").

193. Administrative agencies exist to promote efficiency in government. Despite the utility of administrative proceedings, the importance and necessity of administrative tribunals must also be examined in light of the atavistic concern the agency has in the outcome of each case before them. Administrators, whose function includes administering and implementing a stated legislative purpose, make administrative determinations, not judges. Administrative Law Judges (ALJs), therefore, do not adopt the judicial attitude of impartiality, but 'rather the attitude of an executive who wants to get a job done.' Every search for the truth, and every effort at compensating the wronged party must be tempered toward accomplishing the agency's legislative charter. To this end, some agencies have evidenced everything from antipathy to outright discouragement of participation by outside counsel. Simply put, agencies are parties to the very proceedings they conduct.

Heather Rutland, *Civil Rights Are Civil Rights Are Civil Rights: The Inapplicability of Preclusion to Unreviewed State Administrative Decisions*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 199, 201–02 (2000); *see also* Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532 (1995); Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 770 (2005) ("Even though the regulations provide ALJs with standards by which to evaluate claims, few will deny that bias inevitably seeps into their decision-making process. With some ALJs, however, bias more than seeps. It gushes. From racial, gender, and class prejudice to bias against disability claimants in general, ALJs might possess—and exhibit

criticized for being unfair to defendants.<sup>194</sup> To be faithful to the spirit in which the Seventh Amendment was ratified, the Seventh Amendment must be interpreted so as to provide jury protection from the federal government.

Furthermore, if the Antifederalist position is any guide, the jury trial right was intended to extend to civil enforcement actions. There is evidence that the Antifederalists who ultimately drove the Seventh Amendment's passage<sup>195</sup> believed

that the jury was essential in cases involving suits between a citizen and the national government as well as suits brought by the government under the revenue laws. While the criminal jury remained the most obvious protection against an oppressive prosecution, the civil jury remained, they said, an essential weapon against arbitrary enforcement of the government's laws. A citizen's right to sue the officers of the government for violations of his rights was a nullity without the right to put the case to a jury of his peers.<sup>196</sup>

In a civil enforcement action like *Atlas Roofing* or post-Dodd-Frank SEC proceedings, this argument is most potent because the government itself is directly levying the weight of the federal government against the employer.<sup>197</sup> Indeed,

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in their decisions—any viewpoint extant in the world. In some cases, the manifestations of such biases would dismay even the most ardent advocates of judicial discretion, prompting the question of how to remedy such bias. And in such a case, an aggrieved Social Security disability claimant may be greatly disappointed as his lawyers are confronted with a procedural and evidentiary nightmare.”); Epstein, *supra* note 134, at 492–93 (“[E]xpertise [in administrative agencies] is an overrated virtue, while the risk of political capture by interest groups and the discord that faction produces is an underappreciated vice.”).

194. Ryan, *supra* note 5; Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015, 9:25 PM), <http://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970>.

195. “Since the antifederalists were the generative force behind the seventh amendment, it seems that their arguments should be given due weight in determining the purpose behind the seventh amendment and should be resorted to as an aid in resolving interpretative problems that arise under its language.” Wolfram, *supra* note 28, at 672–73.

196. Harrington, *supra* note 26, at 185; *see also* Wolfram, *supra* note 28, at 670–71 (asserting that one of the purposes of the Seventh Amendment, to the Antifederalists, was “the vindication of the interests of private citizens in litigation with the government”).

197. Professor Wolfram notes that “[a]nother important function of the civil jury, according to the antifederalists, was to provide the common citizen with a sympathetic forum in suits against the government.” Wolfram, *supra* note 28, at 708. Surely this same reasoning applies with extra vigor when the government is targeting the private individual.

[f]or the Antifederalists, the civil jury would play a dual role in the new Republic: *it would protect the common people against the judges' biases in favor of the government and the private ruling class*, and also establish a small preserve of direct self-government in the face of the remote Federal regime.<sup>198</sup>

If the executive branch's factual determinations are practically final and conclusive, then the employer is left with little protection indeed against the possibility of a vindictive and abusive governmental enforcement—which was the Antifederalists' darkest fear.

Furthermore, responding to the Federalist argument “that criminal juries [alone] were sufficient to guard against tyranny,”<sup>199</sup> an idea still in currency today, one Antifederalist wrote:

Are there not a thousand civil cases in which the government is a party?—In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution[,] yet these are all of them civil causes. . . . These modes of harassing the subject have perhaps been more effectual than direct criminal prosecutions.<sup>200</sup>

Ultimately, even if allowing administrative agencies to adjudicate disputes does not violate the constitutional principle of separation-of-powers, such proceedings are independently unconstitutional for other reasons. The lack of civil jury right in such proceedings, and the limitations on federal judge review of administrative fact-finding, creates serious Seventh Amendment problems when considered against the legislative history and Antifederalist roots of the Amendment. The Antifederalists saw the civil jury trial largely as a substantive protection against the federal government, and specifically envisioned that such a right would exist in cases between the federal government and private citizens.

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198. Scheiner, *supra* note 23, at 144 (emphasis added). SEC enforcement cases add a little historical irony to this perspective, since those securities traders against whom the SEC brings enforcement actions are often grouped into “the private ruling class” that corrupt judges would favor.

199. *Id.* at 151.

200. *Id.*, citing 3 THE COMPLETE ANTI-FEDERALIST 28 (Hebert J. Storing ed., 1981). However, “[n]ot all of those who supported the civil jury . . . may have intended that it be guaranteed in cases involving the government as a party.” Scheiner, *supra* note 23, at 151 n.46.

## V. CONCLUSION

The Supreme Court in *Atlas Roofing* ruled that judicial deference to administrative fact-finding is constitutional under the Seventh Amendment.<sup>201</sup> The Supreme Court in *Atlas Roofing* was also wrong. Neither Congress nor the judiciary may simply ignore the constitutional problems presented by jury-less trials before ALJs in civil enforcement actions, or by judicial deference to administrative fact-finding.

The legal community is not blind to the serious problems with the civil jury. Critics complain that much legal analysis surpasses the average juror's comprehension.<sup>202</sup> Jury trials are expensive for everyone involved—including the judiciary, which must provide meals, lodging, and per diem payment for each juror.<sup>203</sup> Furthermore, federal district courts are already overworked as it is.<sup>204</sup> Nevertheless, the pros and cons of the civil jury are ultimately a policy question, and it is a policy question that the United States settled in 1792 when the Seventh Amendment was ratified. If our country wants to revisit that question, it must do so by passing a constitutional amendment.

Whether under the Supreme Court's flawed historical test or the alternative legislative history analysis, the practice of deferring to administrative fact-finding in Article III federal courts is an infringement of the civil jury trial right enshrined in the Seventh Amendment. And simply ignoring a portion of the Constitution, or pretending that contradictions between labyrinthine jurisprudence

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201. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977).

202. See, e.g., Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (May 1980); Alan Reifman, Spencer M. Gusick, & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539 (Oct. 1992); Erin Fuchs, *This Is Why Juries Shouldn't Decide Court Cases*, BUS. INSIDER (July 3, 2014, 1:36 PM), <http://www.businessinsider.com/america-should-get-rid-of-the-jury-trial-2014-7>.

203. Fuchs, *supra* note 202.

204. See, e.g., Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015, 2:15 PM), [http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies\\_us\\_55d77721e4b0a40aa3aaf14b.s](http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b.s); *Overloaded Courts, Not Enough Judges: The Impact on Real People*, PEOPLE FOR THE AM. WAY, [http://www.pfaw.org/sites/default/files/lower\\_federal\\_courts.pdf](http://www.pfaw.org/sites/default/files/lower_federal_courts.pdf) (citing Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015, 2:09 PM), <http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746>; Alicia Bannon, *Testimony: More Judges Needed in Federal Courts*, BRENNAN CTR. FOR JUST. (Sept. 10, 2013), <https://www.brennancenter.org/analysis/testimony-federal-courts-need-more-judges>).

and the apparent meaning of the constitutional text do not exist, only serves to: compound the problem; lessen respect for the judiciary; and cheapen the integrity of the other clauses of the Constitution.

Broadly speaking, there are two possible solutions to the problem. The first option is to bring the Constitution in line with the administrative state, through a formal amendment to the Constitution in order to allow for jury-less administrative proceedings. The second option is to bring the administrative state in line with the Constitutional text, probably through amendments to the APA and other administrative statutes. Both options have merit, and ultimately will need to be decided in a detailed policy debate at the national level. But one option must be chosen. The most historically justifiable choice would be to require the SEC, and all similar administrative agencies, to bring enforcement actions in an Article III court in the first instance. Multiple avenues (some better than others) could initiate this change: the Supreme Court could bring its case law more in line with historical understanding of the civil jury trial right; Congress could amend the APA and the SEC's organic statute; even the SEC could change its policy, to voluntarily discontinue bringing enforcement actions before in-house tribunals. There, of course, practical and logistical issues that would follow such a change, but surely protection of liberty (safeguarded by the civil jury) must outweigh efficiency concerns. Players in each of the three branches have the power to solve the problem, even if only temporarily.

The longer the legal world pretends this problem does not exist, the harder it will be to remedy the issue and establish a consistent legal landscape in the future.<sup>205</sup> As we have seen, one hundred years of administrative law has already ossified the judicial deference doctrine; we must not let it go further. At some point, someone needs to point out that the emperor has no clothes.

*John Gibbons\**

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205. Klein, *supra* note 37, at 1007 (“It is time to end this charade. The sooner we confess that both as a matter of original intent and subsequent evolution, the Seventh Amendment is not what we have made of it, the sooner our legal system will address the task of defining civil jury rights in a way that is philosophically and jurisprudentially sound.”).

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