THE WANDERING DOCTRINE OF CONSTITUTIONAL FACT

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One of the most misunderstood and undervalued subjects in federal jurisdiction is the doctrine of constitutional fact. The doctrine—which holds that courts must review factual determinations de novo where those determinations underlie constitutional claims—has never been adequately explained, and accordingly, never fully appreciated. For example, if expression sought to be suppressed is determined to be obscene, such suppression does not violate the First Amendment's guarantee of free speech, because obscenity has been categorically deemed to fall outside that constitutional protection. De novo review of such a fact must exist in certain circumstances in order to guarantee due process and maintain separation of powers principles implicit in Article III. But because neither the Court nor any commentator has adequately grounded the doctrine as we do, the doctrine has wandered into settings in which it should not apply. The constitutional fact doctrine originated in the administrative state, where constitutional fact review is necessary to satisfy the due process guarantee of a neutral adjudicator, under which the prophylactically protected judiciary must have ultimate authority to decide constitutional claims, particularly those bearing on a regulator's power. Additionally, Article III requires that, where Congress elects to vest jurisdiction in courts to review administrative action, that jurisdiction must include the ability to determine constitutional facts. But the doctrine has been inexplicably extended to permit constitutional fact review of lower courts, notwithstanding the fact that neither due process or Article III requires such a result. Similarly, constitutional fact review of juries should apply only where there is a possibility of juror bias. Seeking to reinvigorate the doctrine in its proper place, this Article synthesizes a blend of rationales sounding in due process and Article III. This blend is the only proper foundation for the constitutional fact doctrine. Accordingly, we argue that the constitutional fact doctrine should return to its origins in the administrative state and in doing so abandon its unprincipled wandering into review of courts and juries, where it should not apply.

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INTRODUCTION

In today's marketplace for home entertainment systems, there is little use for speakers producing sound that "tend[s] to wander about the room."[1] In this sense, not much has changed since 1984, when an identical—and allegedly false—description of certain Bose speakers ultimately led to a dramatic—and highly questionable—alteration in a deceptively important precept of constitutional law and federal jurisdiction. That precept is the constitutional fact doctrine, under which courts must independently decide factual issues whose resolution will be determinative of constitutional challenges. Though the judiciary found that Bose's speakers did not wander, the constitutional fact doctrine has since wandered, often inexplicably, into areas in which, given its core rationale, it has no business going. And much like bad speakers, there is little use today for a wandering doctrine of constitutional fact. But the problem goes far deeper than this. Indeed, the wandering that has characterized the constitutional fact doctrine is merely symptomatic of a far deeper flaw in the general understanding of why we have chosen to adopt the constitutional fact doctrine in the first place. This is a most serious concern when we realize that the doctrine serves as a cornerstone of our

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1. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 488 (1984).

system of separation of powers in general and judicial independence in particular. It is this foundational confusion that our Article seeks to understand and rectify.

Casual observers of the federal courts might dismiss the constitutional fact doctrine as an arcane topic deserving of little, if any, attention—nothing more than a constitutional anachronism with no contemporary relevance to constitutional law. Those who hold such a view, however, are seriously—and dangerously—mistaken, because the doctrine is truly foundational to our constitutional system and essential to the judicial protection of constitutional rights. And allowing the doctrine to wander aimlessly, as the Court has and as leading constitutional scholars have urged, threatens core values of our countermajoritarian Constitution. Most troublingly, the doctrine has wandered into second-guessing the constitutional fact-finding of the Article III judiciary and juries, disregarding federal district judges' prophylactically insulated competence and juries' constitutionally guaranteed role as a bulwark against judicial overreach. Such has become accepted—but never adequately explained or justified—Supreme Court practice.

Significantly, this practice continues to impact analysis of important contemporary questions of constitutional law. The simple reality is that resolving constitutional challenges of governmental action will often turn on how questions of mixed law and fact, or even pure fact, are resolved—i.e., questions of constitutional fact. For example, if expression sought to be suppressed is determined to be obscene, such suppression does not violate the First Amendment's guarantee of free speech because obscenity has been categorically deemed to fall outside that constitutional protection.[2] On the other hand, if the speech in question is found not to be obscene, then its regulation may well violate the First Amendment. If the regulator, rather than the judicial branch, is given final authority to decide the mixed law–fact question of obscenity, then this effectively undermines, if not circumvents, the judiciary's ability to guarantee protection of constitutional rights. Similarly, if the government deports a U.S. citizen, it unquestionably violates that citizen's constitutional rights.[3] It is doctrinally established, however, that deportation of an alien non-citizen does not give rise to the same constitutional problem. Yet if the very branch of government seeking the deportation possesses final authority to resolve the purely factual issue of citizenship, this inescapably denies the judiciary its role as the final protector of individual rights.

It is perhaps all too easy to dismiss the constitutional fact doctrine as nothing more than a relic of another age long since forgotten, because the doctrine came to prominence during the heyday of the now categorically rejected doctrine of economic substantive due process.[4] But as the two examples just described illustrate all too well, such a cavalier dismissal would be a most dangerous mistake. While the specific constitutional issues involved in the doctrine's seminal cases for the most part no longer matter, in its abstract form, the doctrine remains

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2. Miller v. California, 413 U.S. 15, 18 (1973).

3. *E.g.*, Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); *see infra* text accompanying notes 27–30.

4. *See infra* text accompanying notes 39–43.

essential to assuring that the judiciary fulfills its vital role as interpreter and enforcer of constitutional limitations and protections.

The doctrine's current viability is visible in a number of recent lower federal court decisions. A recent decision by the Tenth Circuit, for example, diverges from other circuits on the issue of whether the determination that a statement is a "true threat" for First Amendment purposes should be treated as a constitutional fact.[5] Additionally, recent decisions addressing police officers' use of force raise the issue of whether the judiciary must have the final say as to whether force has been used excessively in violation of the Fourth Amendment.[6] These are but two of many questions that cannot be answered without an adequate understanding of whether and why the constitutional fact doctrine should exist, and to which constitutional fact-finders it should apply. And there lies the problem, and the reason for this Article: no one appears to fully understand either the underlying political or constitutional rationales for the doctrine, or the scope of its doctrinal or conceptual reach. The two are likely intertwined. The almost total lack of understanding of the true constitutional source of the doctrine has likely led to the doctrine's grossly excessive extension into areas in which it has no business operating. In a classic vicious circle, this improper extension has further clouded the doctrine's proper constitutional source.

To be more specific, the confounding expansion of the constitutional fact doctrine to apply to decisions of lower state and federal courts, as well as to juries, has distracted from the doctrine's origins in the need to preserve the legitimacy of the constitutional system by imposing a baseline level of judicial control of the administrative state. Notwithstanding hints of the doctrine's resurgence in the Court's recent decisions about executive power to detain "enemy combatants" in Guantanamo Bay,[7] extension of the doctrine to review of decision-making by courts and juries has caused the Court to lose sight of the constitutional fact doctrine's fundamental role: the need to police decision-makers whose constitutional fact-finding is most suspect—nonjudicial administrative agencies. Thus, in wandering, the doctrine has lost its bearings. Given these developments, and occasioned by the 30-year anniversary of the two biggest culprits in this wholly improper extension of the constitutional fact doctrine, the Supreme Court's decision in *Bose v. Consumers Union of U.S., Inc.*[8] and Professor Henry

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5. United States v. Wheeler, 776 F.3d 736, 741–42 (10th Cir. 2015) (holding true threat determination is not a constitutional fact); *accord* United States v. Jeffries, 692 F.3d 473, 480–81 (6th Cir. 2012); United States v. Parr, 545 F.3d 491, 497 (7th Cir. 2008); United States v. Schiefen, 139 F.3d 638, 639 (8th Cir. 1998). *But see* United States v. Bly, 510 F.3d 453, 457–58 (4th Cir. 2007) (holding that true threat determination is a constitutional fact); *accord* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1070 (9th Cir. 2002).

6. *See* Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014); Scott v. Harris, 550 U.S. 372, 377 (2007).

7. *See* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 536–37 (2004); *see also infra* notes 173–83 and accompanying text.

8. 466 U.S. 485 (1984).

Monaghan's landscape-altering article on constitutional facts,[9] our Article seeks to bring intellectual discipline and pragmatic direction to this wandering doctrine.

We argue that the constitutional fact doctrine has two plausible rationales. A full understanding of these rationales reveals two insights of vital importance: first, that within its proper scope, adherence to the doctrine is essential to maintenance of the proper balance within our constitutional system, and second, that the doctrine has no business being used to justify appellate courts' de novo review of factual findings made by either lower courts or juries.

The first of the two rationales follows from the Fifth and Fourteenth Amendments' Due Process Clauses,[10] which impose a bedrock requirement of a neutral adjudicator before life, liberty, or property may be deprived. Individuals litigating facts that bear on constitutional rights have a right to process before an independent decision-maker. But certain decision-makers—namely, administrative agencies—cannot be considered sufficiently neutral in finding facts that define constitutional limits on their own regulatory authority. As we explain, such decision-makers are inherently plagued by cognitively dissonant impulses to vigorously carry out what they perceive to be their regulatory mandate, on the one hand, and remain within restrictive constitutional limits, on the other. In such instances, the consonance of constitutional fact review before a neutral adjudicator—a court—as a constitutional check is a necessary component of due process.

The due process rationale is not entirely free of possible problems, however.[11] While we ultimately find these concerns unpersuasive, Article III may provide a satisfactory replacement rationale. Indeed, the Supreme Court focused on Article III as the doctrine's source in the early years.[12] By vesting in the federal judiciary the authority to hear all cases "arising under this Constitution,"[13] Article III arguably underscores the special role that the federal judiciary is designed to exercise in preserving, protecting, and interpreting the Constitution. This fact was recognized and understood by the Framers, who were in large part responsible for Article III.[14]

Yet the alternative grounding of the doctrine in Article III of the Constitution suffers from its own deficiencies. While the Supreme Court has focused primarily on the need to have constitutional facts resolved by judges protected by Article III's prophylactic protections of judicial salary and tenure,[15] Congress possesses well-established power under that provision to take the judicial

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9. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985). Notwithstanding the 30 years that have passed since its publication, we are aware of no scholarship that has adequately responded to Professor Monaghan's misguided restatement of the constitutional fact doctrine, which has largely guided the Court's modern constitutional fact jurisprudence. We endeavor to provide such a response.

10. U.S. CONST. amend. V, cl. 4; *id.* amend. XIV, §1, cl. 3.

11. *See infra* text accompanying notes 121–22.

12. *See infra* text accompanying notes 123–26.

13. U.S. CONST. art. III, §2, cl. 1.

14. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

15. U.S. CONST. art. III, §1, cl. 2.

power away from the federal judiciary.[16] This fact renders dubious exclusive reliance on Article III. But due process helps fill a void that Article III cannot by itself dictate: constitutional fact review in the state courts. If Congress were to deprive inferior federal courts of jurisdiction, as Article III seemingly authorizes, then allowing Congress to vest final constitutional fact-finding power in executive agencies would permit too simple a workaround of the constitutional fact doctrine. Yet nothing in Article III would seem to prevent such a result. If one accepts the due process rationale, however, due process ensures that such a result cannot occur by imposing the limitation that if Congress revokes the adjudicatory authority of the federal courts, the alternative must satisfy the neutral adjudicator requirement. Due process would presumably permit review of federal administrative action by state courts, which possess independence superior to that of administrative adjudicators ruling on their own power. In this way, due process and Article III work in concert to explain and justify the constitutional fact doctrine while at the same time preserving the congressional authority to control federal jurisdiction that Article III has long been held to provide.

Notwithstanding these rationales, the Court has largely relied on a third suggested rationale in its contemporary articulations of the constitutional fact doctrine: the need to supervise the application of constitutional norms by lower courts and juries. This justification, unlike the due process and Article III rationales, is not constitutionally dictated. Rather, it derives from the vague notion that appellate courts possess residual power not only to state what the Constitution requires, but also to second-guess fact-finders to ensure they apply the Constitution properly. A host of concerns, however, ranging from pragmatic limits on the Court's supervisory ability to the theory's susceptibility to both confusion and unprincipled result orientation, demonstrate that this justification is not only not dictated by the Constitution but also ill-conceived as a matter of judicial policy.

Nevertheless, both the Court and leading scholars have sought to ground the modern constitutional fact doctrine squarely in the need to supervise the application of constitutional norms because it is the only rationale that could even arguably permit scrutiny of the constitutional fact-finding of lower courts and juries. But both the Court and scholars ignore the simple fact that appellate courts can fulfill their supervisory role by engaging in de novo review of determinations of *law*, while still providing appropriate deference to trial courts and juries on findings of *fact*.

The constitutional fact doctrine has wandered away from its proper bearings in requiring courts to independently review the constitutional fact-finding of administrative agencies. This Article, by evaluating justifications for the constitutional fact doctrine as applied to four different fact-finders, makes the case that the doctrine should return to its proper grounding by largely abandoning constitutional fact review of courts and juries, while more closely scrutinizing constitutional fact-finding of administrative agencies. Resolving this constitutional puzzle must provide the focus of scholarly and judicial attention if the constitutional fact doctrine is to retain its centrality in our constitutional system. But no scholar or jurist has ever even attempted to provide the careful analysis

16. *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

required to achieve this goal. To the contrary, the best-known scholarly work on the subject, authored by Professor Monaghan in 1985, not only fails even to discuss the foundational issue of constitutional source, but also mysteriously argues for an extension of the doctrine to areas where it has no business going. The goal of this Article, then, is twofold: first, to articulate the proper constitutional source of the constitutional fact doctrine by examining the alternative constitutional directives that could conceivably be employed as that source; and second, to explain the conceptual and pragmatic impropriety of the doctrine's extension to areas that trigger the concerns of neither due process nor Article III.

Our Article begins in Part I by providing a novel perspective on the constitutional fact doctrine through developing a taxonomy of constitutional fact-finders: administrative agencies, state courts, federal courts, and juries. This fact-finder-based taxonomy differs dramatically from all prior efforts to analyze the doctrine, which have focused either on historical developments or a rights-based framework.[17] Part II first synthesizes the two proper justifications for constitutional fact review—ensuring that an independent decision-maker passes on constitutional facts as a matter of due process, and in order to enforce separation of powers principles underlying Article III. It then critiques the third asserted justification, grounded in the need to supervise constitutional norms. Finally, Part III examines all three of these justifications in light of our taxonomy, concluding that appellate courts should aggressively review the constitutional fact-finding of administrative agencies, should do so only where juries are in danger of being plagued by untoward bias, and should never independently review the constitutional fact-finding of lower courts.

I. A NEW APPROACH TO UNDERSTANDING THE CONSTITUTIONAL FACT DOCTRINE: A TAXONOMY OF CONSTITUTIONAL FACT-FINDERS

The wandering doctrine of constitutional fact has inspired a fair amount of scholarship.[18] Most prior accounts have offered a largely chronological summary of the doctrine's development.[19] Others have grouped cases around specific constitutional rights, often excising First Amendment cases for separate scrutiny.[20] Still other commentators have attempted to categorize past invocations

17. *See infra* text accompanying notes 19–23.

18. By "constitutional facts," we mean "adjudicative facts decisive of constitutional claims." Monaghan, *supra* note 9, at 230. As our analysis will demonstrate, however, we believe Professor Jaffe's restyling, under which a constitutional fact is one "asserted [as the] constitutional basis for the exercise of the *power* in question . . . ," better grasps the doctrine's justifications. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 624 (1965) (emphases modified).

19. *See, e.g.*, Monaghan, *supra* note 9, at 247–63; Judah A. Shechter, Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483, 1485–90 (1988).

20. *See, e.g.*, Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1240–76 (1996); Frank R. Strong, *The Persistent Doctrine of "Constitutional Fact"*, 46 N.C. L. REV. 223, 240–83 (1968).

of the doctrine around justifications for constitutional fact review offered in those cases.[21]

The account we offer follows a very different approach. It provides a conceptual taxonomy of the constitutional fact doctrine organized around four different possible constitutional fact-finders: administrative agencies, state courts, federal district courts, and juries. We believe this approach is preferable because it presents a bird's-eye view of the doctrine as it currently stands, permitting the reader to step back and consider institution-specific competencies and limitations where constitutional rights are litigated.[22] Additionally, the taxonomy magnifies the incoherence of the modern form of the doctrine that chronological and right-based reviews mask. As Justice Rehnquist once observed, the constitutional fact doctrine, while justified at its inception, has been "perhaps only reflexively applied in other quite different contexts without further analysis."[23] Our account takes a different approach by avoiding reflexive application of the doctrine.

A. Administrative Agencies

The Supreme Court initially applied the constitutional fact doctrine in a series of decisions reviewing the findings of state and federal administrative agencies. These early cases established two justifications for the constitutional fact doctrine, one based on due process and the other on Article III. Neither constitutional source, however, was fully or adequately explained. In some instances the Court spoke in broad and vague terms, completely ignoring potential analytical flaws. In others, the Court was all but silent as to the constitutional source, leaving virtually everything to a frustrating process of reverse engineering.

The Court's doctrine concerning the constitutional requirement of judicial review of state agencies' constitutional fact-finding began in 1920 in *Ohio Valley Water Co. v. Borough of Ben Avon*,[24] the Court's first modern-era exercise of independent constitutional fact review. *Ben Avon* concerned a Pennsylvania water company's claim that a state commission's determination of what rates it could charge was confiscatory. Reversing the Pennsylvania Supreme Court's ruling that deference should be given to the commission's factual determinations (specifically its valuation of the property at issue), the Supreme Court, in an opinion by Justice McReynolds, held that "the State must provide a fair opportunity for submitting [its valuation] to a *judicial* tribunal for determination upon its own independent

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21. *See, e.g.*, Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1445–46 (2001) (tracking the constitutional fact doctrine through "lines" of justification).

22. Professor Faigman has isolated individual decision-makers and considered constitutional fact review as applied to them. DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 111, 117 (2008). Professor Faigman's account, however, places greater importance on other factors, such as the type of constitutional fact and specific constitutional rights at issue, rather than on specific institutional considerations. *Id.* Our account, by contrast, prioritizes decision-makers' institutional qualities.

23. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 518 n.2 (1984) (Rehnquist, J., dissenting).

24. 253 U.S. 287 (1920).

judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause . . . ."[25] The Court did not elaborate as to why independent review of valuation by a court should take place but made clear that due process would be satisfied if such independent review were to take place in Pennsylvania's state courts.[26]

Independent review of federal agencies' constitutional fact-finding soon followed. Two years after *Ben Avon*, in *Ng Fung Ho v. White*,[27] the Court again held that de novo review by a court of an administrative determination of a constitutional fact was constitutionally required, this time in an opinion by Justice Brandeis. The Bureau of Immigration had ordered the deportation of two foreign-born children of native citizens. Justice Brandeis observed that because the Bureau had jurisdiction to deport only aliens, citizenship was "an essential jurisdictional fact."[28] He then explained that rejection of a claim of citizenship could result in "loss of both property and life, or of all that makes life worth living," which could not occur without the "security" of judicial process.[29] Thus, Justice Brandeis recognized, as had the Court in *Ben Avon*, that in at least some circumstances, due process requires that a court provide independent, de novo review of the Bureau's finding that the children in question were not citizens.

In *Crowell v. Benson*,[30] the Court's best-known articulation of the constitutional fact doctrine in the administrative setting, the Court again recognized a duty to review administrative findings of constitutional facts de novo. *Crowell* concerned a dispute arising under the Longshoremen's and Harbor Workers' Compensation Act, which vested in an administrative commissioner the power to award damages to an employee injured while serving an employer on navigable waters of the United States. Two facts of constitutional stature were at issue: first, whether an accident had occurred on "navigable waters," and second, whether a master-servant relationship existed between employer and employee.[31] The former question concerned a constitutional fact because Congress possesses constitutional authority to regulate only those waters deemed navigable.[32] The latter question concerned an issue of constitutional fact, because in light of the prevailing doctrine of economic due process, absent a master-servant relationship, a judicial order requiring payment to the claimant by the defendant would be unconstitutional. Chief Justice Hughes, speaking for the Court, began by construing the statute to authorize independent review of the facts at issue.[33] Then,

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25. *Id.* at 289 (emphasis added).

26. *Id.* at 291. Justice Brandeis dissented, contending that the state provided adequate process and the Court should "accept the facts as there found." *Id.* at 293–99 (Brandeis, J., dissenting).

27. 259 U.S. 276, 282 (1922).

28. *Id.* at 284.

29. *Id.* at 284–85.

30. 285 U.S. 22 (1932).

31. *Id.* at 36–37.

32. *See generally* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 138–47 (2d ed. 1990).

33. *Crowell*, 285 U.S. at 45–46. Chief Justice Hughes cited both *Ben Avon* and *Ng Fung Ho*, recognizing that due process might also require independent review of the

noting that the existence of these facts not only served to ground the commissioner's jurisdiction, but also Congress's ability under the Constitution to grant jurisdiction in the first place, the Court stated:

> In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process . . . . It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend.[34]

Thus, *Crowell* envisioned the constitutional fact doctrine as vindicating a "supreme function" of "the judicial power of the United States," fearing that endowing an administrative body's constitutional fact-finding with substantial or total judicial deference would "sap the judicial power as it exists under the federal Constitution."[35] This reliance on Article III provided an additional justification for the constitutional fact doctrine above and beyond the due process rationale Justice Brandeis offered in *Ng Fung Ho*.

Justice Brandeis dissented vigorously in *Crowell*. He began by reasoning that while due process can provide a proper justification for constitutional fact review in appropriate circumstances, much as it had done in Brandeis's own opinion for the Court in *Ng Fung Ho*, it failed to do so here.[36] He then rejected the majority's argument grounded in Article III. Emphasizing Congress's "repeatedly exercised authority" not only to create liability, but also to dictate how and who

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facts at issue. *Id.* Thus, the opinion is fairly read as recognizing due process as a justification for constitutional fact review, but also recognizing a rationale based on Article III as a "distinct question." *Id.* at 48–49; *see also id.* at 56 ("Nor have we *simply* the question of due process . . . ." (emphasis added)).

34. *Id.* at 56–57 (citation omitted). By "constitutional courts," Chief Justice Hughes refers to courts that can exercise judicial power under Article III, meaning either state or federal courts. *Id.* at 50 (distinguishing "legislative courts" from "constitutional courts in which the judicial power conferred by the Constitution can be deposited" (quotation marks omitted)). Use of "constitutional courts" highlights separation of powers principles inherent in Article III that he was concerned to uphold. *See id.* at 56.

35. *Id.* at 57, 60. Furthermore, the Court went so far as to hold that, not only should independent review of the commissioner's finding of constitutional facts occur, but a federal court should conduct such review "upon its own record and the facts elicited before it." *Id.* at 64.

36. *Id.* at 80 (Brandeis, J., dissenting) ("I see no reason for making a special exception [to the finality of administrative fact-finding] as to issues of constitutional right, unless it be that, under certain circumstances, there may arise difficulty in reaching conclusions of law without consideration of the evidence as well as the findings of fact. The adequacy of that reason need not be discussed. For as to the issue of employment no such difficulty can be urged." (citations omitted)). For comparison, Justice Brandeis cited *Ben Avon* as an instance in which constitutional fact review might be warranted, notwithstanding his dissent in that case. *Id.*

should find liability, Justice Brandeis maintained that "[t]here is nothing in [Article III] which requires any controversy to be determined as of first instance in the federal District Courts."[37] Nevertheless, the Court subsequently reaffirmed the viability of the constitutional fact doctrine three years later in *St. Joseph Stock Yards Co. v. United States*.[38]

Commentators did not take kindly to the very concept of constitutional facts and the resulting de novo judicial review of the administrative determination of those facts, as expressed in *Ng Fung Ho* and *Crowell*.[39] These criticisms found a receptive audience among commentators of the post-New Deal period, leading many to question the viability and legitimacy of the constitutional fact doctrine.[40] Justice Frankfurter, for example, once commented on perceived "attritions" of the doctrine and quipped, "[O]ne had supposed that the doctrine had earned a deserved repose."[41] And in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, the Court stated that "*Crowell's* precise holding, with respect to the review of 'jurisdictional' and 'constitutional' facts that arise within ordinary administrative proceedings, has been undermined by later cases."[42]

The downfall of *Crowell* and of de novo judicial review of administrative findings of constitutional facts more generally, however, has been greatly overstated. First, *Crowell* itself has never been overruled, nor have any of the other early decisions establishing the constitutional fact doctrine in the administrative context. To the extent the vitality of these decisions has been undermined, it is primarily because the core of their substantive constitutional grounding, economic substantive due process, has itself lost its doctrinal force.[43] Second, *Northern*

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37. *Id.* at 85–86.

38. 298 U.S. 38, 51–52 (1936). The Court retreated, however, from *Crowell*'s de novo record requirement. *Id.* at 53.

39. Professor Dickinson mounted two primary critiques: first, the difficulty in separating jurisdictional facts from non-jurisdictional facts, which tends toward increased independent fact-finding by a reviewing court; and second, the immense burden of jurisdictional fact review, especially paired with an independent record requirement, on the operation of the administrative state. *See* John Dickinson, Crowell v. Benson*: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055, 1069–72, 1077 (1932). *But see* Louis L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 972 (1957) (reading *Crowell* to suggest that "in a given situation certain facts and certain facts only [are] constitutional bases of liability," and the constitutional fact doctrine is limited in application to instances of "peculiar significance" where liberty interests are at issue, rendering "Dickinson's logical critique . . . overly stringent").

40. *See* REDISH ET AL., FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS (7th ed. 2012) (collecting commentators raising "serious questions" "as to the constitutional fact holdings of *Crowell*").

41. Estep v. United States, 327 U.S. 114, 142 (1946) (Frankfurter, J., concurring in result).

42. 458 U.S. 50, 82 n.34 (1982).

43. *Ng Fung Ho* remains good law. In *Agostino v. Immigration & Naturalization Service*, 436 U.S. 748 (1978), Justice Marshall cited *Ng Fung Ho* for the proposition that the Constitution requires some provision for "de novo judicial determination of claims to American citizenship in deportation proceedings." *Id.* at 753. Current law governing such proceedings retains such a provision. *See* 8 U.S.C. § 1252(b)(5)(B) (2012). Similarly, *Ben*

Pipeline did not displace *Crowell*'s broader recognition of the importance of independent judicial review of constitutional facts. To the contrary, the Court there cited favorably to *Crowell*'s rejection of "the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved."[44] As the Court further explained, "the general principle of *Crowell*—distinguishing between congressionally created rights and constitutionally recognized rights—remains valid."[45] The Court's statement that *Crowell*'s "precise" holding has been undermined, therefore, is best understood as referring only to the Court's subsequent abrogation of *Crowell's* requirement that de novo judicial review be done on the basis of a wholly new record.[46]

Thus, as *Northern Pipeline* intimates, it is very unlikely that the Court today would refuse to recognize an obligation of de novo constitutional fact review if presented with an administrative body's finding of constitutional facts underlying a fundamental right.[47] Justice Breyer's dissent in *Stern v. Marshall*—the most recent instance in which a member of the Court has specifically addressed the doctrine—implies as much.[48] Additionally, the Court's 2012 decision in *Elgin*

Avon and *St. Joseph Stock Yards* have never been overruled. Constitutional fact review has disappeared in the context of ratemaking cases due not to rejection of the doctrine in those cases, but instead to a change in the underlying substantive law. The point has been adequately explained and need not be repeated here. Strong, *supra* note 20, at 227 ("[*Ben Avon* and *St. Joseph Stock Yards*'s] impotency is the consequence of the withdrawal of constitutional protection of 'fair value' under the reconstructed Court's reinterpretation of economic due process; it is not explained by any necessary eclipse of the doctrine of constitutional fact.").

44. *Northern Pipeline*, 458 U.S. at 82 (citing Crowell v. Benson, 285 U.S. 22, 60–61 (1932)). The Court also favorably referenced both the Article III and Due Process justifications for constitutional fact review posited in *Crowell*. *Id.* at 82 n.33.

45. *Id.* at 82 n.34; *see also* Colleen P. Murphy, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459, 1470 n.61 (1986) (interpreting *Northern Pipeline* as holding that "non-Article III courts [can] perform conclusive factfinding in actions involving congressionally created rights, but not in actions involving constitutional rights").

46. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 53 (1936). This would seem to be the implication of the Court's citation of *St. Joseph Stock Yards* for the point at issue. *Northern Pipeline*, 458 U.S. at 82 n.34.

47. *See* Monaghan, *supra* note 9, at 258 ("At this point in our history I would be startled to see the Court decide that a litigant pressing a bona fide constitutional claim could be denied access to the independent judgment of a judicial forum."); *see also* KENNETH CULP DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 17.9 (5th ed. 2010) ("Notwithstanding the demise of the constitutional fact doctrine, the Court continues to be extraordinarily protective of a petitioner's ability to obtain judicial consideration of a credible claim that an agency action violates the petitioner's constitutional rights.").

48. 564 U.S. 462, 515 (2011) (Breyer, J., dissenting) (observing that a heightened standard of review would be applicable to "the here-irrelevant matter of what *Crowell* considered to be special 'constitutional' facts"); *cf.* Jaime Dodge, *Reconceptualizing Non-Article III Tribunals*, 99 MINN. L. REV. 905, 929 (2015) ("With respect to fact-finding, permitting initial fact-finding to occur in [a] non-Article III tribunal is not problematic—given both the tribunal's specialization and core competency and lack of Article III concern with *non*-constitutional facts." (emphasis added)).

v. Department of Treasury,[49] while not expressly addressing the applicability of de novo constitutional fact review, did not deny its continuing vitality.[50] Thus, it is safe to conclude that the constitutional fact doctrine remains an active constraint on modern administrative adjudication. This is especially evident in the Court's relatively recent decisions in *Hamdi v. Rumsfeld* and *Boumediene v. Bush*, in which the Court expressly refused executive tribunals' determinations of "enemy combatant" status for detainees in Guantanamo Bay.[51]

B. State Courts

In its early years, the constitutional fact doctrine soon expanded beyond review of administrative agencies. While commentators disagree as to whether the early cases concerning the Supreme Court's constitutional fact review of state court decisions should be read to rely on the same justifications presented for constitutional fact review in the administrative cases,[52] we believe it is important to read the cases as part and parcel of the same mindset. The Court relied, sometimes expressly, on the administrative cases in extending constitutional fact review to Supreme Court review of state court constitutional fact-finding. The Court articulated new justifications for the doctrine in doing so, however, in part because neither due process nor Article III could justify scrutiny of judicial, as

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49. 567 U.S. 1 (2012). *Elgin* concerned whether, under the Civil Service Reform Act, qualifying federal employees objecting to adverse employment decisions could raise claims challenging the constitutionality of a statute exclusively before the Merit Systems Protection Board ("MSPB"), or instead through a separate action in federal district court. *Id.* at 1. The Court construed the Act to exclude the jurisdiction of the federal district courts, and recognized that, while the MSPB could not pass on the constitutionality of statutes, it could develop a factual record as to such challenges for ultimate decision on appeal in the Federal Circuit. *Id.* at 6, 12–18.

50. Some commentators have speculated that *Elgin*'s lack of express recognition that the Federal Circuit should have to review constitutional facts de novo might constitute the Court quietly distancing itself from the doctrine. *See* Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1612 (2013); Michael Dorf, *The* Elgin *Case is a Cornucopia of Fed Courts Issues*, DORF ON LAW (June 13, 2012, 12:30 PM), http://www.dorfonlaw.org/2012/06/elgin-case-is-cornucopia-of-fed-courts.html (surmising that *Elgin* might constitute a "nearly-final nail in the coffin of the constitutional fact doctrine," but acknowledging that such a result would be a "pretty dramatic result to accomplish just in passing"). These concerns, however, are likely overstated. First, the *Elgin* majority favorably cited *United States v. Raddatz*, 447 U.S. 667 (1980), in which the Court expressly affirmed the constitutional fact doctrine. *Elgin*, 567 U.S. at 16. Second, *Elgin* is better understood as recognizing Congress's ability to channel adjudication arising under administrative statutes through certain decision-makers, rather than reaching the more attenuated, and complex, question of constitutional fact-finding power. *Id.* at 20.

51. *See infra* notes 173–83 and accompanying text.

52. *Compare* Strong, *supra* note 20, at 245 ("Neither *Ben Avon*, *Crowell*, nor *Fung Ho* is anywhere cited [in *Norris v. Alabama*, 294 U.S. 587 (1935),] but there is no mistaking the degree of independent judicial review surviving from them constitutes the decision's inarticulated major premise."), *with* Monaghan, *supra* note 9, at 262 ("Some regard [expansion of the constitutional fact doctrine to review of state courts] as an outgrowth of the premises of *Ben Avon*, *Ng Fung Ho*, and *Crowell*. I think that is an error." (footnote omitted)).

opposed to administrative, fact-finding.[53] Thus, drawing only the raw ability to independently review constitutional facts from the administrative cases, the Court independently scrutinized state court findings based on a new rationale: distrust of state courts' ability to apply the Constitution uniformly and accurately.

One of the Court's earliest invocations of the constitutional fact doctrine in reviewing the findings of a state court was its decision in *Norris v. Alabama*.[54] *Norris* concerned a claim that Alabama's practice of selecting juries excluded African Americans in violation of the Fourteenth Amendment. The Supreme Court reviewed and rejected Alabama state courts' findings that African Americans who had been excused were not dismissed because of race, concluding instead that the evidence below (which included jury rolls specifically denoting jurors' race) proved race-based dismissal.[55]

At the outset, the Court rejected the notion that it could not re-examine the trial court's findings of fact. Rather, the Court stated as follows:

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a *state court*, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a *state court* as to a *federal right* and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the *appropriate enforcement of the federal right may be assured*.[56]

The Court's express justification for exercising constitutional fact review inescapably evinces distrust of the Alabama courts' findings of fact, as indicated by the juxtaposition of federal rights and adjudication in state courts. Additionally, the Court points to the reality that, where discrimination is alleged, findings of fact directly influence outcomes. Said more perniciously, a trial court might escape the dictates, or "enforcement," of the Constitution's guarantee of equal protection by manipulating the existence of underlying facts. This is the evil the Court sought to prevent in *Norris*, specifically as perpetrated in state courts.

Norris marked the beginning of expansive application of the constitutional fact doctrine in reviewing the decisions of state courts. Professor Monaghan suggests that, through review in state cases, the constitutional fact doctrine became "the operative measure of the Supreme Court's general appellate jurisdiction."[57] Professor Strong's thorough analysis of the "persistent" application of the doctrine to state court decisions supports Professor Monaghan's

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53. For further elaboration of this point, see *infra* notes 150–56 and accompanying text.

54. 294 U.S. 587 (1935).

55. *See id.* at 587, 590–99.

56. *See id.* at 589–90 (emphasis added).

57. Monaghan, *supra* note 9, at 260.

characterization.[58] In a variety of cases, including jury discrimination claims as in *Norris*, Fourteenth Amendment challenges to forced confessions,[59] and First Amendment cases involving "constructive contempt,"[60] libel,[61] and obscenity,[62] the Supreme Court routinely exercised constitutional fact review. As two of these cases demonstrate, however, the evil the Court sought to remedy through constitutional fact review in *Norris* was soon expanded to include a misguided duty to supervise the application of constitutional norms, erroneously extending constitutional fact review not only to state courts, but federal district courts as well.

The first of these cases is *Pennekamp v. Florida*, which involved a claim that certain newspaper articles were unlawfully critical of "the administration of criminal justice" in certain cases before Florida state courts.[63] The newspaper defended on the basis that the articles did not present a "clear and present danger of high imminence" to the administration of justice, and so were protected by First Amendment freedom of expression in the press.[64] Florida courts denied the defense, holding the newspaper guilty of contempt. The Supreme Court granted certiorari and independently reviewed the record from below, concluding that the editorials did not present a clear and present danger.

The Court justified its exercise of independent review on the conclusory basis of a "responsibility" to

> examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger . . . . [W]e

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58. *See generally* Strong, *supra* note 20, at 240–83.

59. *E.g.*, Lisenba v. California, 314 U.S. 219, 237 (1941) ("Where the claim is that the prisoner's statement has been procured by [coercive] means we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a [state] court . . . ."); *see also* Strong, *supra* note 20, at 249–61.

60. *E.g.*, Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (applying independent review to facts bearing on whether newspaper editorials presented a "clear and present danger" to the fair administration of justice, thereby falling outside the scope of First Amendment protection); *see also* Strong, *supra* note 20, at 261–66.

61. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1966) (describing the Court's "duty" in defamation cases to "review the evidence to make certain that [governing] principles have been constitutionally applied," such that a state court's decision "does not constitute a forbidden intrusion on the field of free expression"). While *New York Times Co. v. Sullivan* involved independent review of the factual findings of an Alabama jury, the Court's invocation of the constitutional fact doctrine applies just as well to findings of state court judges. *See id.* at 285 n.26. For a discussion of other libel cases, see Strong, *supra* note 20, at 267–70.

62. *E.g.*, Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) ("[I]n 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."); *see also* Strong, *supra* note 20, at 270–79.

63. *See Pennekamp*, 328 U.S. at 333–34.

64. *See id.*

> give most respectful attention to [Florida courts'] reasoning and conclusion, but [their] authority is not final. Were it otherwise constitutional limits of free expression in the Nation would vary with state lines.[65]

Thus, the Court was concerned that, without it weighing in on whether the editorials constituted a clear and present danger, state courts could fail to provide uniform First Amendment protection. This concern differs from that present in *Norris*. The Court offered constitutional fact scrutiny here as a means of uniformly shaping the law, rather than preventing selective (and biased) enforcement of constitutional rights.[66]

The shift was even clearer, and more dramatic, in *Jacobellis v. Ohio*, where an owner of a motion picture house claimed that a movie he showed was not obscene and should receive First Amendment protection.[67] Three Ohio judges disagreed. Reviewing the film for itself, the Supreme Court reversed. In doing so, the Court rejected the suggestion that the determination of obscenity is

> a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event . . . can be left essentially to state *and lower federal courts*, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence" . . . . Such an abnegation of *judicial supervision* in this field would be inconsistent with our duty to uphold the constitutional guarantees.[68]

The breadth of the Court's articulation of the doctrine in *Jacobellis* is striking. Its view that constitutional fact review should reach jury verdicts and the "lower federal courts" speaks far more broadly than *Pennekamp* and *Norris*, and entirely unnecessarily so, given the fact-finder at issue was a state court judge. In dicta, the Court accepted constitutional fact review as reaching the findings of two decision-makers of a very different character than state courts without considering different institutional concerns that militate against constitutional fact review. Additionally, the Court's conception of independent review as "judicial supervision" aptly captures the only plausible justification for reviewing the facts of inferior courts: a vague notion that, at least in the First Amendment context, the

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65. *Id.* at 335 (citation omitted).

66. This is not to say that *Pennekamp* should not also be read as an early example of the Court's selective prioritization of First Amendment cases in applying the constitutional fact doctrine. *See, e.g.*, Shechter, *supra* note 19, at 1498 (describing the view that "independent review of facts underlying first amendment claims [is] a requirement implied by the first amendment itself"). But the Court's articulation of the need for constitutional fact review in *Pennekamp*—particularly its concern for "var[iance]" in the scope of First Amendment protection among the states—suggests the two justifications are not mutually exclusive. *But see* Hoffman, *supra* note 21, at 1453 ("Unlike review in [cases raising procedural challenges, such as *Norris*,] the underlying motive for review in First Amendment cases has often been more about the protection of rights in individual cases than about guiding the development of the rule through controlling its application in mixed question of fact and law.").

67. *See* 378 U.S. 184, 185–86 (1984).

68. *Id.* at 187–88 (emphasis added).

Supreme Court should say not only what the law is, but what the facts (or at least some of them) are.

C. Federal Courts

The Court eventually extended the constitutional fact doctrine to appellate review of the decision of a lower federal court. *Bose Corp. v. Consumers Union of U.S., Inc.* involved a product disparagement suit in which Bose accused a Consumer Reports engineer of falsely describing one of its loudspeaker systems as producing sound that "tended to wander about the room."[69] Because Bose was deemed to be a public figure, under controlling First Amendment doctrine it could succeed only if it proved by clear and convincing evidence that the engineer made the statement with "actual malice," defined as knowledge of falsity or reckless disregard of truth or falsity.[70]

At trial, the district court judge determined that the engineer's statement was false and heard testimony from the engineer about why he wrote it. The judge rejected the engineer's explanation for his false description of the speakers' sound, concluding that "[the engineer's] testimony on this point is not credible."[71] Accordingly, the judge found that the engineer knew his statement was false and entered a finding of actual malice. On appeal, Bose contended that the judge's determination should receive deferential review under Federal Rule of Civil Procedure 52(a), under which "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."[72]

The Court disagreed. Instead of extending the deference expressly dictated by Rule 52(a), it chose to review the facts de novo, ultimately rejecting the district judge's finding of actual malice. At the outset, it rejected the suggestion that de novo review should apply only in cases in state court, to which Rule 52(a) is inapplicable. "[Surely] it would pervert the concept of federalism," the Court reasoned, "to lay claim to a broader power of review over state-court judgments than [exercised] in reviewing the judgments of the intermediate federal courts."[73] The Court's opinion then struggled to characterize what type of finding actual malice is, observing that "[a] finding of fact in some cases is inseparable from the principles through which it was deduced," and that "in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust [factual findings] finally to the judgment of the trier of fact."[74] This led the Court to set out a list of considerations that bear on the level of factual scrutiny:

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69. 466 U.S. 485, 487–88 (1984).

70. *See id* at 489–92, 492 n.8; *see also* N.Y. Times Co. v. Sullivan. 276 U.S. 254, 279–80 (1964) (requiring proof that a defendant published a false statement of material fact with knowledge of falsity or reckless disregard as to truth or falsity in order to establish actual malice).

71. *Bose*, 466 U.S. at 497.

72. FED. R. CIV. P. 52(a)(6).

73. *Bose*, 466 U.S. at 499.

74. *Id.* at 501 n.17.

> First, the common law heritage of the [actual malice] rule itself assigns an especially broad role to the judge in applying it to specific factual situations. Second, the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common law adjudication; though the source of the rule is found in the Constitution, it is nevertheless largely a judge-made rule of law. Finally, the constitutional values protected by the rule make it imperative that judges—and in some cases judges of *this Court*—make sure that it is correctly applied.[75]

The final two considerations sound clearly in *Pennekamp* and *Jacobellis*, expressing a desire to supervise the case-by-case development of the law of actual malice through controlling how it is applied. The novel issue *Bose* presented was that, for the first time, the Court had to deal with a countervailing, pre-existing directive: Rule 52(a)'s "clearly erroneous" standard of review. The Court found this to present little obstacle, however, as the "rule of federal constitutional law" directing the Court to conduct independent review, aimed at "preserv[ing] the precious liberties established and ordained in the Constitution," won out.[76]

Post-*Bose* developments largely carried forward the opinion's vision of aggressive constitutional fact review. In *Miller v. Fenton*,[77] decided two years after *Bose*, the Court provided a restatement of the constitutional fact doctrine, in part vindicating Justice Rehnquist's call in *Bose* to defer to credibility determinations and focus instead on perceived shortcomings of the trier of fact. The Court identified two considerations that should guide characterization of constitutional facts: first, whether factual findings bear on a "legal principle that can be given meaning only through its application to particular circumstances of a case," necessitating "a federal appellate court" to assume "its primary function as expositor of the law"; and second, citing Justice Rehnquist's dissent in *Bose*, whether independent review is needed "as a means of compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor . . . .'"[78] The Court explained that where a factual determination "involves the credibility of

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75. *Id.* at 501–02 (emphasis added).

76. *Bose*, 466 U.S. at 510–11. Justice Rehnquist dissented. He criticized the Court's treatment of actual malice as a constitutional fact, describing the finding at issue as a matter of "historical fact" less appropriate for appellate scrutiny than other First Amendment speech. *See id.* at 517 & n.1 (Rehnquist, J., dissenting). He then explained his view of the only permissible justification for constitutional fact review: compensating for bias or other "perceived shortcomings" of the trier of fact. *See id.* at 518. In the case at issue, however, Justice Rehnquist considered the district court judge's finding to be a credibility determination made after hearing the engineer's testimony, which he insisted the Court should not second-guess. *See id.* at 519.

77. 474 U.S. 104 (1985). *Miller* concerned whether a finding that a confession is voluntary is a question of fact that should be "presumed correct" on habeas review, or instead receive independent scrutiny. *See id.* at 109. Citing *Bose*, the Court held that voluntariness determinations should be treated as a question of law not entitled to any presumption of correctness. *See id.* at 113–15.

78. *Id.* at 114.

witnesses and therefore turns largely on an evaluation of demeanor," deference to the fact-finder is appropriate.[79]

Perhaps recognizing *Miller v. Fenton*'s implicit inconsistency with the credibility aspect of its holding in *Bose*, the Court adopted a narrow reading of *Bose* several years later in *Harte-Hanks Communications, Inc. v. Connaughton*.[80] In *Harte-Hanks Communications*, the Court stated that it had rejected the district court judge's finding of actual malice in *Bose* not because of a different assessment of the engineer's credibility, but instead because of a different inference drawn from his testimony.[81] Nevertheless, the Court reaffirmed its classification of actual malice as a constitutional fact, but modified its jargon in doing so. The Court framed the actual malice inquiry as a question of law,[82] signaling a significant change from *Bose*, where the Court strained to avoid characterizing the actual malice question as one of law.

The notion that supervising the application of constitutional norms justifies constitutional fact review continues to influence the Court to closely scrutinize the fact-finding of lower court federal judges.[83] As one might expect, however, just as such a justification contained no limit that would distinguish state from federal courts, so also it invites similar scrutiny of jury findings, notwithstanding juries' unique institutional competencies.

While the Court purported to ground its independent review of constitutional fact-finding by lower courts somewhere in the Constitution, it never clarified what that source is. The reason for this failure is, quite simply, that no such source exists. For reasons to be explained in subsequent discussion,[84] both federal district courts and state supreme courts constitute constitutionally adequate forums to decide issues of both constitutional law and constitutional fact.

D. Juries

The Court's most significant holding in *Bose* was its application of constitutional fact review to a federal judge's factual finding, which was essential to the judge's determination of actual malice for purposes of the First Amendment. That the constitutional fact doctrine should apply to a finding of actual malice in

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79. *Id.* at 114–15.

80. 491 U.S. 657 (1989).

81. *See id.* at 687–88, 689 n.35.

82. *See id.* at 685.

83. For a recent application of *Bose*, see *Snyder v. Phelps*, 562 U.S. 443, 453–54 (2011) (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)). Additionally, *Miller* continues to serve as the precedential basis on which the Court exercises independent review. *See* Teva Pharm. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831, 851 (2015) (Thomas, J., dissenting) (citing Ornelas v. United States, 517 U.S. 690, 697 (1996); Miller v. Fenton, 474 U.S. 104, 116 (1985)) (advocating that where "determinations depend on the specific facts in a case, their role in shaping rules of law demand a *de novo* standard of review").

84. *See infra* text accompanying notes 148–55.

the first place, on the other hand, was established 20 years earlier in *New York Times Co. v. Sullivan*, there to a jury's finding of actual malice.[85]

New York Times Co. v. Sullivan was not the Court's first indication that the constitutional fact doctrine should apply to jury findings. Rather, Chief Justice Hughes's opinion in *Crowell* hinted at just such a result. While through much of his opinion Chief Justice Hughes drew on the finality of juries' findings of ordinary, or non-constitutional fact, he uses the notion of "superintendence [by] a judge" over juries in support of the "security of judicial over administrative action" that the constitutional fact doctrine demands.[86] Additionally, in a number of cases originating in the state courts, the applicability of the constitutional fact doctrine to jury findings was taken as a given.[87] But not until *New York Times Co. v. Sullivan* did the Court consider whether the Seventh Amendment should preclude de novo judicial review of juries' findings. Rejecting an argument that the Amendment should do so, the Court stated:

> [The Seventh Amendment's] ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "(T)his Court will review the finding of facts by a State court where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."[88]

Notably absent from the Court's discussion is any explanation of *why* the Seventh Amendment should not bar application of the constitutional fact doctrine. Rather, the Court merely asserted the rationale offered in prior state cases for constitutional fact review irrespective of the fact-finder at issue.

Justice Stevens's majority opinion in *Bose* reaffirmed the *Sullivan* Court's holding. Justice Stevens added that "[t]he intermingling of law and fact in the actual-malice determination is no greater in state or federal jury trials than in federal bench trials," relying on the distinction as further support for the Court's

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85. 376 U.S. 254, 284–85 (1964). The fact-finder at issue was an Alabama jury. *Id.* at 256.

86. *See* Crowell v. Benson, 285 U.S. 22, 61 (1932) (internal quotation marks omitted).

87. *E.g.*, Chambers v. Florida, 309 U.S. 227, 228–29 (1940) ("The State of Florida challenges our jurisdiction to look behind the judgments below claiming that the issues of fact upon which petitioners base their claim that due process was denied them have been finally determined because [it was] passed upon by a jury. . . . Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the Due Process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, *by review of the facts upon which that issue necessarily turns*." (footnotes omitted) (emphasis added)); *see also* Haynes v. Washington, 373 U.S. 503, 516 (1962).

88. N.Y. Times Co. v. Sullivan, 376 U.S. at 285 n.26 (quoting *Haynes*, 373 U.S. at 515–16).

decision to apply de novo review, notwithstanding Rule 52(a).[89] What seems to have been lost on Justice Stevens, however, was that the factual issue to which he applied the constitutional fact doctrine in *Bose* was not a mixed law–fact issue, but rather a pure issue of fact—whether the Bose investigator had been telling the truth.[90]

In dissent, Justice Rehnquist offered a different perspective. He asserted that juries' constitutional fact-finding "present[s] the strongest case for independent fact-finding by this Court."[91] He continued:

> The fact-finding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more suspect than the fact-finding process engaged in by a trial judge who makes written findings as here. Justifying independent review of facts found by a jury is easier because of the absence of a distinct "yes" or "no" in a general jury verdict as to a particular factual inquiry and because of the extremely narrow latitude allowed appellate courts to review facts found by a jury at common law. Thus it is not surprising to me that early cases espousing the notion of independent appellate review of "constitutional facts[]" such as . . . *New York Times*, should have arisen out of the context of jury verdicts and that they then were *perhaps only reflexively applied* in other quite different contexts without further analysis.[92]

Justice Rehnquist's observations are noteworthy in two respects. First, he correctly argued that significant differences between the institutional capacities of judges and juries should influence the applicability of the constitutional fact doctrine, though most certainly not in the way he suggested. Second, he observed that the Court's constitutional fact doctrine jurisprudence has been markedly "reflexive[,]" wandering into "quite different contexts without further analysis."

The taxonomy of adjudicators to whom the constitutional fact doctrine has been applied which we have just provided underscores the unproductive ways in which the doctrine, originally firmly grounded in constitutional principle, has wandered from its constitutional moorings. The adjudicator taxonomy is only the first step, albeit a necessary one, in an attempt to re-secure the constitutional fact doctrine to its proper grounding in foundational constitutional directive, a task we undertake in the Part that follows. Once that goal is achieved, it will be appropriate to return to our adjudicator taxonomy, but this time with a critical eye. Only in this

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89. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 n.27 (1984) ("And, of course, the limitation on appellate review of factual determinations under Rule 52(a) is no more stringent than the limitation on federal appellate review of a jury's factual determinations under the Seventh Amendment, which commands that 'no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"). If the Court were to hold that the Seventh Amendment should limit the constitutional fact doctrine in reviewing jury findings, such a holding would bring into question this aspect of the majority's reasoning in *Bose*. *See id.*

90. *See supra* text accompanying note 76.

91. *Bose*, 466 U.S. at 518 n.2 (Rehnquist, J., dissenting).

92. *Id.* (emphasis added).

way will we be in a position to comprehend why the doctrine's reach needs to be reinforced in certain contexts, and dramatically pulled back in other contexts.

II. CONSIDERING THE JUSTIFICATIONS FOR THE CONSTITUTIONAL FACT DOCTRINE

A. Due Process

Recall that due process served as the basis for the Court's initial invocation of the constitutional fact doctrine in *Ben Avon*: "[T]he state must provide a fair opportunity for submitting [its valuation] to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause."[93] Indeed, there could have been no constitutional basis for the result in *Ben Avon* other than due process, because Article III has no applicability to state courts. But this idea was not limited to *Ben Avon*. To the contrary, due process provides the thread that binds the Court's four invocations of constitutional fact review in the early administrative cases, as even Justice Brandeis recognized that due process might require constitutional fact review.

Nor was due process a passing concern that fell away from the doctrine after the four early cases involving administrative adjudicators. Rather, the second trigger identified in contemporary applications of the doctrine—"compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor'"[94]—speaks to the continuing vitality of a due-process-based rationale, even if it may have been largely ignored in the modern expansion of the doctrine. The question remains, however: exactly what is it about due process that requires the independent judiciary's constitutional fact review of administrative fact-finders? And insofar as due process requires constitutional fact review, does the rationale apply to every constitutional fact-finder in our taxonomy? Scholars have offered scarcely little help in answering these questions.[95]

It is our position that the due process rationale for the constitutional fact doctrine follows inexorably from the bedrock requirement of due process: that there be a neutral, independent decision-maker. Where a first-instance constitutional fact-finder is not sufficiently neutral, the constitutional fact doctrine demands that a reviewing court provide the level of independence required by due process by independently reviewing the constitutional facts at issue de novo. As we explain, however, if taken to its logical conclusion, the neutral-adjudicator

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93. Ohio Valley Water Co. v. Borough of Ben Avon, 253 U.S. 287, 289 (1920).

94. Miller v. Fenton, 474 U.S. 104, 114 (1985) (citations and ellipses omitted).

95. Professor Monaghan's account of the constitutional fact doctrine does not fully articulate the due process concern present in the early administrative cases, nor does it tie the issue to his discussion of constitutional fact review as a way of combating a fact-finder's biases. *See* Monaghan, *supra* note 9, at 262–63, 272–73. Another account seeks to situate the doctrine in the context of modern procedural due process jurisprudence as articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976), but does not explore the manner in which modern jurisprudence differs in focus from the due process concerns expressed in the early administrative cases or in the Court's more recent invocations of constitutional fact review. *See* Shechter, *supra* note 19, at 1500–07.

dictate could arguably prove too much in this context, because it might lead to the conclusion that independent adjudication is required as to *all* facts, not just those on which a constitutional determination turns. After all, one might reasonably assume that if an adjudicator is not sufficiently objective in making *some* factual findings, it must be deemed insufficiently objective in making *all* factual findings. Closer examination of the manner in which the neutrality requirement manifests itself in the administrative context, however, shows this not necessarily to be the case. The constitutional fact doctrine recognizes that the need for adjudicatory independence is at its height when a decision-maker finds facts that bear on the constitutional limits of its own regulatory authority.

To explain why and when due process requires the constitutional fact doctrine, it is first necessary to establish a fundamental premise: adjudicatory independence and neutrality as essential elements of due process. As one of us has previously written, the foundational element of the Constitution's due process guarantee is the right to be heard before a neutral decision-maker.[96] Without a neutral decision-maker, whatever else due process might require—for example, notice, hearing, or cross-examination—is insufficient to guarantee a full and fair hearing.[97] Fundamental neutrality is essential to achieving instrumental values, such as accuracy, as well as non-instrumental values, such as fairness, equality, and dignity, that due process serves.[98]

The Court has found a variety of influences to compromise a decision-maker's neutrality. In *Tumey v. Ohio*, a village mayor sat as judge in cases charging unlawful possession of alcohol.[99] In addition to fines payable to the village's general fund, the mayor received compensation as judge, but only in the event that a prosecution resulted in conviction.[100] The Court held the procedure violated due process. It did so even in the absence of any showing of impropriety in the individual case before it. "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true," the Court explained, violates due process.[101]

In subsequent years, the Court has reaffirmed and expounded upon *Tumey*'s standard for pecuniary bias,[102] while also recognizing that nonpecuniary

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96. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 477 (1986).

97. *See id.* at 476–77.

98. *See generally id.* at 476–91.

99. *See* 273 U.S. 510, 514 (1927).

100. *See id.* at 520.

101. *Id.* at 532. The Court found this standard violated in *Tumey* even though the mayor stood to earn only $12 per conviction. *See id.* at 531. Despite creating an exception for "costs usually imposed [that] are so small that they may be properly ignored as within the maxim 'de minimis non curat lex,'" and observing "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it," the Court set the standard for bias at whether a financial interest "would offer a possible temptation to the average man as a judge . . . ." *Id.* at 531–32.

102. *See* Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (applying *Tumey* where the mayor sat as judge in minor ordinance and traffic cases, because town fiscal dependence on fines presented possible temptation and placed the mayor in conflict

personal biases[103] or predisposition to the facts of a case[104] can vitiate independence and therefore violate due process. Importantly, the Court has remained faithful to *Tumey*'s limitation on the reach of its constitutional directive that "matters of kinship, personal bias, state policy, [and] remoteness of interest would generally seem to be matters merely of legislative discretion,"[105] and thus insufficient to raise doubts about an adjudicator's independence.

Several years ago, in *Caperton v. A.T. Massey Coal Co., Inc.*,[106] the Court restated its adjudicatory-independence jurisprudence, applying the fundamental principle first developed in *Tumey* in the context of state judicial elections. *Caperton* involved a challenge to the impartiality of a justice of the West Virginia Supreme Court of Appeals. The justice had been elected to office on the support of a substantial donation from the CEO of a company appealing a significant tort judgment. When the justice repeatedly refused to recuse himself from adjudication of the appeal, the party defending the judgment asserted that his participation violated due process. Writing for the Court, Justice Kennedy began by repeating the Court's effort to discern not only actual bias, but the possibility of bias.[107] Then, speaking to the context at issue, he clarified that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," but a campaign contribution that has a "significant and disproportionate influence" on a judge's positive electoral outcome creates an objective risk of bias that compromises the judge's impartiality.[108]

Tumey, *Caperton*, and the constitutional demand of adjudicatory independence that they impose demonstrate how due process rationalizes the

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between executive and judicial duties, notwithstanding that the mayor had no individual pecuniary interest); *see also* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986); Gibson v. Berryhill, 411 U.S. 564, 578 (1973) (finding optometrist board had pecuniary interest in imposing liability on other optometrists).

103. *E.g.*, *In re* Murchison, 349 U.S. 133, 136–39 (1955) (condemning a Michigan procedure under which a judge convening a secret grand jury could also then serve as judge in contempt proceedings related to the earlier grand jury on the basis that the former engagement unduly influenced the judge's adjudication of the latter). The inquiry in this context remains objective and considers whether there exists the potential for bias. *Compare* Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971) (holding that due process required that the judge against whom contemptuous, insulting statements were made should not adjudicate contempt himself on account of an emotional response that could eliminate impartiality), *with* Ungar v. Sarafite, 376 U.S. 575, 591 (1964) (finding contemptuous behavior was not so insulting as to reasonably bring the impartiality of the judge at issue into question).

104. *See Gibson*, 411 U.S. at 578 (affirming conclusion that optometrist board was predisposed to facts of case when board had previously filed a separate complaint alleging wrongdoing based on the same incident).

105. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

106. 556 U.S. 868 (2009).

107. *See id.* at 883 ("The judge's own inquiry into actual bias . . . is not one that the law can easily superintend or review . . . . In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.").

108. *Id.* at 884–85.

constitutional fact doctrine. Beginning with *Ben Avon*, in which the Court summarily held that due process required a court to value the property at issue for itself, Justice McReynolds remarked that the commission's challenged order was "legislative in character."[109] Justice McReynolds did not explain what he meant by "legislative," but his choice of words hinted that the commission's legislative identity might compromise the independence necessary to render judicial process. Chief Justice Hughes later elaborated on the point in *St. Joseph Stock Yards*:

> [T]he Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. *The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding.* Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained.[110]

Taken together, *Ben Avon* and *St. Joseph Stock Yards* highlight the concern that the legislature—through an agent ratemaker—might determine facts shielded by deferential review, and thereby insulate the constitutionality of ratemaking without effective recourse to an independent judicial forum.[111] If regulators were left to police the constitutionality of their own actions, there would be a concern analogous to that in *Tumey* and *Caperton* that the average ratemaker would not hold the balance nice, clear, and true, but instead exercise bias—even if only subconsciously—in favor of its own power. Thus, the Court sought to prevent the ratemaker from finding facts in such a way as to evade judicial scrutiny of the constitutionality of its exercise of power.[112] In these cases, due process was

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109. *See* Ohio Valley Water Co. v. Borough of Ben Avon, 253 U.S. 287, 289 (1920).

110. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51–52 (1936) (emphasis added).

111. *See generally* Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 666 (2001).

112. Commentators have made much of perceived deficiencies in the Court's reasoning. *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW 667–68 (3d ed. 1991) (observing that agencies have greater expertise in fact-finding than legislatures, and the Court affords deference to legislative fact-finding in any event); *see also* Monaghan, *supra* note 9, at 252 & n.126 (asserting the ratemaking at issue is better characterized as adjudicative, and repeating Professor Schwartz's observation about the typical deference afforded legislative fact-finding). These criticisms warrant two brief responses. First, undue focus on characterizing the fact-finding (as legislative or adjudicative) is a tree one misses for the forest at issue: the Court's manifest concern with policing the limits of constitutional power. And second, that the Court might defer to some legislative fact-finding hardly establishes the same deference should be shown to constitutional facts. This is the fundamental premise of the constitutional fact doctrine. *See* Gonzales v. Carhart, 550 U.S. 124, 165 (2007) (citing Crowell v. Benson, 285 U.S. 22, 60 (1932)) ("Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent

necessarily achieved only through the relative adjudicatory independence of a state court. This was so, even though Article III did not mandate review by a state court.

In order to fully understand the due process rationale for constitutional fact review, it is helpful to view the problem through the lens of the psychological theory of cognitive dissonance. Cognitive dissonance is the psychological emotive discomfort one feels in entertaining inconsistent beliefs, impulses, or objectives.[113] In *Ben Avon* and *St. Joseph Stock Yards*, cognitive dissonance was manifest in the ratemaker's dissonant objectives to both act and refrain from acting unconstitutionally.[114] Cognitive dissonance is problematic in this context because, as the theory holds, an individual faced with dissonance naturally attempts to resolve the inconsistency, whether by valuing one belief over another, compromising a belief, or disregarding certain beliefs altogether.[115] In the context of administrative regulation, the competing pulls on the regulator are strong. While the regulator presumably understands in the abstract her obligation to stay within the bounds of the Constitution, the very existence of the regulator is justified by the need to enforce underlying regulatory policies. While the concern will not be problematic in all cases, there is simply too great a danger that the regulator will see constitutional restraints as a threat to her regulatory power, and therefore fail to take into account important constitutional considerations in making relevant factual findings.

It is true that this threat to objectivity is not identical to the due process concern involved in either *Tumey* or *Caperton*. In the former decision, the threat to objectivity came from financial temptation, while in the latter case the threat supposedly derived from a potentially overwhelming feeling of gratitude on the part of the adjudicator. But the regulator's objectivity is nevertheless similarly threatened, in the sense of his inherent aversion to external threats to his regulatory authority.

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constitutional duty to review factual findings where constitutional rights are at stake."). This is so especially if ratemaking *is* adjudicative in nature.

113. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 2–3 (1957).

114. Professor Welsh has put the point as follows: "[A]dministrators' primary role requires them to focus on their agency's chosen course of action and its economic and political survival, while judges are supposed to be shielded by tenure and temperament to be disinterested, impartial, and focused on the needs of the cases and parties before them." Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 442 (2010). To put the point slightly differently:

> "[I]t would be reasonable to assume that [an] intra-branch executive adjudicator would have a subconscious desire to avoid invalidating the decisions made by her superiors, leading her to defer to her fellow executive officials' assertions that certain procedures were not 'really required' to fail the constitutional requirements of neutrality and independence."

Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1405 (2010).

115. *See* FESTINGER, *supra* note 113, at 3, 6.

In a certain sense, the position of the regulator is somewhat closer to the situation in the recent decision in *Williams v. Pennsylvania,*[116] where the U.S. Supreme Court held that a state supreme court justice violated due process when he failed to recuse himself from review of a decision involving a request for post-conviction relief, even though as district attorney 26 years earlier, he had signed off on the death penalty permission request of a prosecutor in the same case. The Court relied on its 1955 decision in *In re Murchison*[117] for the proposition that due process requires an absence of actual bias on the part of the judge.[118] The Court found that any prosecutor who "made a critical decision" in a case should generally be disqualified from sitting in judgment of that prosecution because the judge could not be "wholly disinterested."[119] Much the same logic applies to a regulator presented with a constitutional challenge to the scope of her regulatory authority. Because a regulator is insufficiently disinterested concerning questions about the scope of her authority, she cannot be permitted to make the final decision on that constitutional challenge. Because she cannot decide the very issue of constitutionality, she also should be denied final authority to decide factual issues or issues of mixed law–fact that are inherently intertwined with the determination of constitutionality. Thus, while the Court in *Ben Avon* failed to adequately explain its decision, the fact that the case involved state court review of regulatory factual findings demonstrates the irrelevance of Article III. The only viable constitutional alternative, then, is the Due Process Clause, and the analysis we have just provided explains that conclusion.

Nevertheless, several questions may be raised about the inherent bias of the regulator. In a number of ways it might be thought to prove too much. Initially, it might be argued that the regulator's bias could conceivably extend to *all* factual findings. It could be argued that if a regulator's very existence is premised on the need for regulation, she cannot be deemed a truly neutral fact-finder on any factual issues that are likely to impact the decision of whether or not to regulate. By the reasoning of the due process rationale, logically this would mean that *all* facts found by the regulator should be equally subject to de novo judicial review—a result that would no doubt render the administrative state in shambles. But it is at least plausible to draw the line at facts that directly impact constitutionality. The danger of pro-regulatory bias, it is reasonable to believe, is qualitatively and quantitatively different when the facts being found directly impact the scope of external constitutional limits on the regulator's authority, as opposed to how that authority is to be applied in a particular instance. Within constitutionally acceptable ranges, there is no reason not to provide deference to the regulator's assumed expertise in finding sub-constitutional facts, because however the regulator rules, her ultimate power to regulate will remain unimpaired.

Even accepting this distinction, however, potential problems with the due process rationale for the constitutional fact doctrine remain. After all, a similar concern might be raised about the implications of the regulatory due process

116. 136 S. Ct. 1899 (2016).
117. 349 U.S. 133 (1955).
118. *Williams*, 136 S. Ct. at 1905.
119. *Id.* at 1906.

analysis for the ability of courts to decide facts that determine the scope of their own jurisdiction. Under this reasoning, courts should logically be assumed to be as protective of their own authority as administrative regulators are of theirs. Yet it is well established that courts may rule on the scope of constitutional limits on the exercise of their jurisdiction.

There are clear differences between the two situations, however. Initially, courts must decide the scope of their own authority simply as a matter of adjudicatory necessity: if they do not do so in an individual case, no alternative fact-finder exists. This is far different from the administrative context. In addition, the courts' ability to have final say as to the constitutionality of legislatively imposed limitations on their jurisdictional authority is an essential element of separation of powers. Absent this authority, the judiciary's ability to serve as a constitutional check on the political branches of government could be circumvented and therefore seriously undermined. Finally, it is reasonable to believe that the judiciary's defensiveness over the reach of its own jurisdictional authority is not as inherently intense as that of a regulator. For the most part, the judiciary will always have cases to decide, even if certain applications of its authority have been removed. Moreover, the judiciary has no preexisting commitment to the force of its regulatory authority. Finding constitutional limits on regulators' authority, in contrast, could interfere with an inherent assumption on the part of the regulator of the correctness of the regulatory process of which he or she is an essential part and in which he or she is immersed.

In *Crowell*, the Court exclusively employed Article III to rationalize its decision to adopt the constitutional fact doctrine, although it did not expressly reject the applicability of due process. In fact, Chief Justice Hughes's opinion sounds in the same concerns motivating constitutional fact review in the other cases, and he cites to *Ben Avon* and *Ng Fung Ho*, even though both were expressly grounded in due process.[120] *Crowell* did not deny that due process requires constitutional fact review, but established an additional basis for the doctrine in Article III.[121]

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120. Crowell v. Benson, 285 U.S. 22, 60–61 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."); *see also* JAFFE, *supra* note 18, at 643 ("All of the [early administrative] cases deal with a claim that a constitutional limit has been transgressed, and they reduce to the premise that the judicial function vested in the courts by Article III encompasses a power—perhaps a duty—to determine de novo the relevant facts in all cases involving constitutional limits.").

121. Professors Currie and Monaghan describe the early cases as responding to a "legitimacy deficit":

> [T]he whole process of substituting administrative for judicial adjudication may be thought to suffer from a serious "legitimacy deficit." The constitutional fact doctrine is an effort to overcome this problem, to reconcile the imperatives of the twentieth century administrative state with the constitutional preference for adjudication by the regular courts.

B. Article III

It is conceivable, for reasons just discussed, that one could plausibly reject the due process rationale for the constitutional fact doctrine. It is true, after all, that the cognitive dissonance inherent in the regulatory process is not identical to the temptation of personal gain involved *Tumey*. But we strongly believe it would be incorrect to reach this conclusion. While the improper influence on decision-making is not identical to that in *Tumey*, it is quite close to the problem the Court pointed to in its recent decision in *Williams*.[122] In both *Williams* and the case of the administrative regulator, the decision-maker is potentially influenced by a pre-existing personal stake in the outcome—if only an emotive one. As in *Tumey*, the threat to the regulator's objectivity in determining the constitutionality of her regulatory authority is both pathological and real. But if one were in fact to reject the due process rationale, it becomes necessary to determine whether the alternative rationale of Article III provides an adequate foundation for the doctrine.

Article III remains among commentators the most cited understanding of why the constitutional fact doctrine exists.[123] Notwithstanding some commentators' doubts about the doctrine's vitality, the Court has continued to recognize Chief Justice Hughes's insight that "constitutional courts," not the legislative or executive branches, must have the final say on constitutional facts.[124] Any account of the constitutional fact doctrine would thus be incomplete without understanding the Article III rationale, particularly in the context of the due process rationale and the Court's modern constitutional fact jurisprudence, which is entirely divorced from Article III concerns.[125]

Although both the Court and scholars have historically relied on Article III as the constitutional source of the constitutional fact doctrine, careful analysis reveals serious questions about the provision's viability as a rationale. This analysis demonstrates that at its core, reliance on Article III grossly overstates the provision's implications for the constitutional fact doctrine. But it does not necessarily follow that Article III should play no role whatsoever in rationalizing

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Monaghan, *supra* note 9, at 239, 262–63 & n.184 (footnote omitted) (citing David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 443–45 (1983)).

122. *See supra* text accompanying notes 116–19.

123. *See, e.g.*, Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 734–35 (1988) ("The rationale for the [constitutional fact] doctrine is that the responsibility of Article III courts to safeguard constitutional rights cannot be adequately exercised if administrative bodies and state courts are free to specify the factual context in which the constitutional issue must be judged."); Sohoni, *supra* note 50, at 1612 (2013) (describing the constitutional fact doctrine as "*Marbury*-inspired").

124. Stern v. Marshall, 564 U.S. 464, 514–15 (2011) (Breyer, J., dissenting); N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80–84 (1982); *see also Crowell*, 285 U.S. at 56–57; *supra* notes 47–51 and accompanying text.

125. As opposed to due process concerns, which the Court continues to voice in its current articulation of the doctrine, the Court has ignored the fact that Article III would not support its current incantations of constitutional fact review as applied to inferior courts. *See* Monaghan, *supra* note 9, at 262 ("Quite plainly, no legitimacy deficit can be thought to exist in the adjudications of the inferior courts.").

the doctrine if properly tied to foundational precepts of American constitutionalism, namely, separation of powers and due process.

While we are firmly convinced that the due process rationale, standing alone, fully explains the constitutional fact doctrine,[126] Article III helps to reinforce the due process rationale for constitutional fact review. In turn, due process fills a void of justification that Article III cannot where, consistent with the terms of Article III, Congress has transferred adjudicatory authority from the federal courts to the state courts.

Importantly, the Article III justification for the constitutional fact doctrine cannot be gleaned from a reading of Article III's text. It is true, of course, that Article III expressly vests the "judicial power" in the federal courts. That power quite clearly includes the power to determine constitutionality. But the vesting clause must be read in conjunction with the remainder of the provision, which has traditionally been construed to authorize Congress to remove the judicial power from the federal courts. While authorizing agencies in the executive branch to perform an exclusively judicial function could arguably be deemed a violation of the separation of powers dictates embodied in Articles II and III, the determination of relevant facts in the course of an executive enforcement proceeding can plausibly be deemed an executive function, as well as a judicial one. Thus, nothing in Article III's express grant of Congress's authority to vest judicial power in inferior courts[127] necessarily establishes a doctrine of constitutional fact.[128] Nor does the language of Article III describing the Supreme Court's appellate jurisdiction[129] suggest constitutional fact review is a necessary tenet of its exercise.[130] Article III is the product of the Madisonian Compromise.[131] Presented

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126. *See supra* Section II.A.

127. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

128. Sheldon v. Sill, 49 U.S. 441, 449 (1850). In his famous dialogic analysis of Article III, Professor Henry Hart was careful to state, "I can easily *read into* Article III a limitation on the power of Congress to tell the court *how* to decide [cases]," as opposed to suggesting the limitation was on the face of Article III. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953) (first emphasis added). Our discussion here refrains from considering broader questions of Congress's ability to regulate the jurisdiction of lower federal courts and appellate jurisdiction of the Supreme Court, the wealth of commentary on which is well documented. For recent collections of citations, see James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 195–96 n.16–19 (2007), and Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 252 n.3 (2012).

129. "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

130. *Ex parte* McCardle, 74 U.S. 506, 514 (1868). Returning to Professor Hart, he recognized that the plain text of Article III dictates no restriction on Congress's power to restrict the Supreme Court's appellate jurisdiction, but advocated for an implied limit preserving the Court's "essential role." Hart, *supra* note 128, at 1364–65.

with options requiring the establishment of federal courts on the one hand, and wholly entrusting state courts to hear federal claims in the first instance on the other, the Framers adopted a middle ground, vesting Congress with the *power* to ordain and establish inferior federal courts, but not requiring Congress to exercise that authority.[132] Thus, the text of Article III itself cannot explain the constitutional fact doctrine: it is impossible to argue, on the basis of the provision's text, that Article III dictates de novo federal court review of administrative findings of constitutional facts, when by its express terms it authorizes Congress to remove all jurisdiction from the lower federal courts.[133]

While this inescapable textual reality seriously undermines exclusive reliance on Article III as the legal source of the constitutional fact doctrine, it does not automatically follow that the provision provides no support at all. Indeed, there is one specific context in which Article III does fully support the constitutional fact doctrine: what is appropriately described as the "pre-enforcement" context. To understand the role that Article III plays in the pre-enforcement context, it is first necessary to understand certain core notions of American constitutionalism. That Article III gives Congress discretion to vest the judicial power in inferior federal courts does not mean that it gives Congress the power to control the exercise of that power, once vested. It has long been accepted that Article III's "greater" congressional power to abolish the lower federal courts completely has logically been construed to establish a "lesser" power to limit that jurisdiction.[134] But it surely does not follow that this greater power to abolish the lower federal courts includes the lesser power to control how lower federal court jurisdiction is exercised in individual suits once it is vested.[135] In other words, the Constitution gives Congress a choice between two options: vest jurisdiction in inferior federal courts, or leave the matter to state courts. A third option—nominally vest jurisdiction, but retain legislative power over how that jurisdiction is exercised in individual suits—is not permitted, because controlling precepts of separation of powers dictate that Congress may not itself constitutionally exercise the judicial power.[136] More importantly, Congress may not direct the exercise of judicial power as a way to circumvent constitutional limits on its legislative power. In this way, the structure of the Constitution—of which Article III is a central part—

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131. Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 54 (1975).

132. *Id.*

133. A number of scholars have proposed theories suggesting interpretations of Article III that limit congressional power to remove the jurisdiction of the lower federal courts. *See, e.g.*, Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Lawrence Sager, foreword, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17 (1981). Whatever one thinks about the merits of those theories, however, the fact remains that long-accepted doctrine extends to Congress all but unlimited power to do so. *See, e.g.*, Sheldon v. Sill, 49 U.S. 441 (1850).

134. *See* REDISH, *supra* note 32 at 29–41.

135. *See* United States v. Klein, 80 U.S. 128 (1871).

136. *See* REDISH, *supra* note 32, at 47–52.

dictates the constitutional fact doctrine.[137] A key problem that *Crowell* sought to combat is the situation in which Congress simultaneously vests judicial power in inferior courts while the executive or legislative branch seeks to control how those courts exercise that power.

Justice Rutledge's dissenting opinion in *Yakus v. United States* exhibits a similar insight. *Yakus* concerned the Emergency Price Control Act of 1942, under which Congress allocated challenges of an administrator's price orders to an Emergency Court of Appeals of three federal judges.[138] Upon violating such an order, however, defendants were barred from challenging the lawfulness of the order as a defense.[139] In dissent, Justice Rutledge objected to the Act's scheme, not only on due process grounds, but out of separation of powers concerns as well:

> It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. . . . [W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process . . . .[140]

The constitutional fact doctrine responds to Justice Rutledge's concern that courts must be responsible only to themselves, and not the other branches' findings of constitutional fact, insulated by deferential review. If Congress vests jurisdiction in inferior federal courts, the power to review constitutional facts de novo must follow as well.

How does the constitutional fact doctrine supposedly avoid this breach of separation of powers? Consider a situation in which an agency is vested with the power to make final determinations of constitutional fact but is required to resort to judicial enforcement in order to implement its administrative directives. In such a situation, the federal court is not simply excluded from the process. Instead, the court's jurisdiction is employed to enforce the administrative determination but is

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137. *See* Hart, *supra* note 128, at 1373; *see also* REDISH, *supra* note 32, at 51 ("It is . . . the intrusion of the executive or legislative branches which gives rise to the constitutional problem: if Congress seeks the aura of legitimacy provided by judicial validation of its own actions, it must allow courts, either federal or state, to determine independently whether the government's action is in accord with relevant statutes and the Constitution.").

138. 321 U.S. 414, 427–28 (1944).

139. *Id.* at 430–31.

140. *Id.* at 468–69 (Rutledge, J., dissenting). Notwithstanding the outcome in *Yakus*, the majority seemed to concur in Justice Rutledge's separation of powers concern, emphasizing the importance of an opportunity to challenge lawfulness in *a* court. *Id.* at 446–67 (majority opinion); *see also* Hart, *supra* note 128, at 1380 ("The alternative procedure for the decision of the questions of law [in *Yakus*] was in a court; and everybody assumed it had to be.").

simultaneously denied the power to reach its own conclusion as to the constitutionality of the order it is required to enforce. This is the exact situation feared by Justice Rutledge, and therefore represents a clear separation of powers violation. In this specific context, then, failure to allow the federal court to make its own de novo determination of constitutional facts violates Article III.

But what happens when Congress, employing its textually granted authority under Article III, has entirely excluded the Article III federal courts from reviewing administrative agency decisions, choosing instead to authorize the agency to directly enforce its own decisions? In such a situation, Article III, standing alone, is of no relevance to the constitutional fact doctrine, because Congress will have complied with the express terms of Article III. It is at this point that the Due Process Clause comes directly into play: while Article III makes clear that Congress may exclude the Article III courts from the process, due process, for reasons already discussed, prevents Congress from leaving the agency itself as the final arbiter of the constitutional limits on its authority. Due process, then, dictates that while Congress may take the final authority to determine constitutional facts away from the Article III courts, if it does so, it must vest that authority in a constitutionally independent forum—in this instance, the state courts. Those courts are appropriately deemed sufficiently neutral concerning the scope of agency authority so as to satisfy due process.

In this manner, the due process rationale may be synthesized with the Article III rationale. While Article III, standing alone, is limited in its support of the constitutional fact doctrine, when read in conjunction with the due process rationale, the Article III rationale has force. This synthesis produces the most effective and principled constitutional justification for the constitutional fact doctrine as a strong limit on the authority of the political branches to disrupt the judicial power to independently find facts on which the constitutionality of challenged governmental action directly turns. This constitutional synthesis provides the following justification for the constitutional fact doctrine: while Article III, properly construed, vests in the political branches authority to remove federal court jurisdiction and instead vest the federal judicial power in the state courts, this alternative still must satisfy the Due Process Clause's requirement of adjudicatory objectivity. In ruling on the constitutionality of administrative action, the state courts—no less than the Article III federal courts—avoid the cognitive dissonance that plagues regulators faced with a challenge to the reach of their own regulatory authority. For this reason, Justice Brandeis's criticism of the constitutional fact doctrine, on the grounds that Congress may simply transfer federal judicial power wholesale from the lower federal courts to the state courts, misses the point of the constitutional concern. Article III, read in conjunction with the due process gloss, makes clear that such a transfer is constitutionally unproblematic, as long as the state courts possess the power to make independent findings of constitutional fact.

As the foregoing analysis demonstrates, Article III, as buttressed by due process, provides a valid basis on which to justify judicial scrutiny of the constitutional fact-finding of the executive and legislative branches in order to vindicate core separation of powers principles. As should be equally clear, however, Article III cannot justify scrutiny of the constitutional fact-finding of

inferior courts and juries. Instead, the Court has resorted to a third justification to explain this practice, and it is that rationale to which we now turn.

C. Supervisory Theory

To this point, we have explored the rationales that explain the constitutional fact doctrine as a foundational element of judicial independence and American constitutionalism. As we noted at the outset, however, in recent years the true constitutional underpinnings of the doctrine have been obscured while at the same time the doctrine has wandered, expanding into sub-constitutional areas in which it has no proper role to play. The catalyst for this development is the growth of what is generally referred to as the "supervisory" theory. Pursuant to this theoretical framework, the third suggested rationale for the constitutional fact doctrine is to preserve appellate courts' "primary function" as "expositor[s] of law" where "legal principle[s] can be given meaning only through [their] application to the particular circumstances of a case."[141] This rationale, which features prominently in the Court's most recent invocations of the doctrine, grows out of Professor Monaghan's expressed view that "the perceived need for case-by-case development of constitutional norms is likely to be the single most important trigger for constitutional fact review."[142] This conclusion dictates that federal appellate courts exercise authority to independently review the findings of constitutional facts not only of non-Article III, nonjudicial fact-finders, but also those findings made by Article III district courts. This is so, even though the district courts fully satisfy all of the requirements of both Article III and due process, even in the total absence of any level of appellate review.

The supervisory theory amounts to the notion that an appellate court can (and perhaps should) supersede the role of a lower court as fact-finder in some cases in order to show the lower court how constitutional law applies to constitutional facts, rather than simply telling it what the law is and leaving the lower federal court itself to find facts that have constitutional consequences. *Miller v. Fenton*, in which the Court held that the question of whether a confession was voluntary should be subject to de novo appellate review,[143] illustrates the theory at work. The Court there began by observing the inherent difficulty in characterizing issues as fact, law, or something in between, concluding that the answer depends as much on "allocation" as it does "analysis."[144] The Court continued by emphasizing the value of showing how certain constitutional principles apply.[145]

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141. Miller v. Fenton, 474 U.S. 104, 114 (1985).

142. Monaghan, *supra* note 9, at 273. Other commentators have advanced a similar theory. *See* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2465 (1998).

143. *Miller*, 474 U.S. at 115. The precise issue in *Miller* was whether in the context of a federal habeas corpus proceeding, the voluntariness of a confession is a fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Id.* at 105. The question is distinct from the many instances in which the Court had previously considered the voluntariness inquiry, although the Court noted the great weight of previous decisions. *Id.* at 109–12.

144. *Id.* at 113–14.

145. *Id.* at 114.

Then, determining that the "mixed question of law and fact" of whether a confession is voluntary has a "uniquely legal dimension," the Court explained that reviewing courts should defer to a trial court's findings of "historical fact"—for example, how long a detention was—but determine anew whether the "totality of the circumstances" supports a finding of voluntariness.[146] The Court also reasoned that appellate courts are as competent as trial courts to apply the "totality of the circumstances" inquiry, which does not involve demeanor or credibility determinations.[147]

Miller thus stands for the proposition that reviewing courts are not limited to *telling* a trial court what a voluntary confession is; they may—and perhaps must—*show* the court how the voluntariness inquiry is properly applied. As the Court acknowledged, this is not because any inherent logic consistently separates law from fact. Nor is it the result of anything in the Fourth Amendment that demands independent scrutiny.[148] Rather, due to the nebulousness—coupled with the great importance—of the "totality of the circumstances" test, as well as other pragmatic factors supporting appellate supervision, the supervisory theory in *Miller* holds that independent review of the constitutional fact of voluntariness is proper appellate practice.

Before turning to our critique of the supervisory theory, we pause to consider whether that framework is mandated by the Constitution.[149] The *Miller* decision is somewhat opaque on this point. The Court speaks of constitutional fact review as a means of fulfilling appellate courts' "primary function," but also portrays its decision as pragmatic "allocation," rather than duty-bound "analysis." But earlier cases invoking the supervisory theory spoke of a *duty* of independent review, especially in the First Amendment context.[150] Furthermore, given that the Court's initial administrative cases clearly envision the constitutional fact doctrine

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146. *Id.* at 115–17. The Court also relied in large part on past decisions holding the same and congressional indication that the issue should be considered one of law. *Id.* at 115.

147. *Id.* at 116–17. The Court further suggested that the danger of oft-hidden coercive investigation tactics, combined with inertia against excluding admissions of guilt, necessitates extraordinary oversight of the question of voluntariness. *Id.* at 117–18.

148. Various scholars have dispelled the notion that there is anything endemic to individual constitutional provisions or rights that justifies constitutional fact review, even and especially to the exclusion of other provisions or rights. *See, e.g.*, ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM 556 (1999) (interpreting instances of constitutional fact review as "connected with pervasive principles" rather than specific textual language); Bryan Adamson, *Critical Error: Courts' Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL'Y REV. 1, 43 (2009) (asserting that the basis for constitutional fact review is "not defined solely by the precise language of the relevant constitutional clause"); Monaghan, *supra* note 9, at 268–70 (dispelling the notion that "the [F]irst [A]mendment is special" and therefore requires constitutional fact review to the exclusion of other constitutional rights).

149. Even Professor Monaghan, the theory's author, has conceded it is not mandated by the Constitution. Monaghan, *supra* note 9, at 264–71.

150. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499–500 (1984) (characterizing independent review of the actual malice determination as a matter of "obligation" and "duty").

as required by due process and Article III, one might assume that the same duty carries over when supervising lower court findings.

Any purported duty to supervise inferior courts' applications of constitutional law finds no support in due process, Article III, or any other provision of the Constitution. As for due process, it is well established that there is no due process right to *any* level of appellate review, at least where decisions of inferior courts are concerned, thus undermining any constitutionally dictated requirement of appellate supervision.[151] Nor is "curative" appeal constitutionally necessary when the initial fact-finder fully satisfies due process.[152] As for Article III, as already explained, Congress has near-plenary control over the jurisdiction of inferior federal courts and the standards of review that apply to their judgments where courts are concerned. Regarding inferior state courts, the fact that Article III is inapplicable further underscores the absence of constitutionally dictated duty; and to conclude that the supervisory theory requires greater scrutiny of state court findings would raise serious parity concerns.[153] Nor is there anything inherently "special" about constitutional, as opposed to non-constitutional, claims that give rise to an implied right of supervisory review.[154]

Our prior discussion of the relevance of cognitive dissonance to due process theory also illuminates—in this instance by cognitive dissonance's inapplicability—the absence of a constitutionally dictated duty to review constitutional fact-finding by inferior courts. Simply put, inferior courts cannot suffer from the cognitive dissonance that due process and Article III seek to remedy. Inferior courts are designed to be immune from the dissonant objectives that administrative bodies face.[155] Indeed, the due process and Article III rationales envision courts as uniquely equipped to independently resolve the other branches' dissonance. In this way, courts are facilitators of consonance in our constitutional order, not harbors for the dissonance that constitutional fact review exists to assuage.

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151. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 77 (1972).

152. *See infra* Section III.C.

153. For elaboration on this point, see *infra* Section III.B.

154. Monahan, *supra* note 9, at 267 ("It is, after all, not obvious that all constitutional rights are more valuable than other rights simply because they are mentioned in the Constitution."); *see also* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 702 (2013) (noting that constitutional fact review "follows naturally from the idea of constitutional preeminence," and criticizing the notion that the constitutional rights should receive privileged attention over non-constitutional rights).

155. The Framers' withholding of the powers of the sword and purse and affording Article III's salary and tenure provisions were meant to preclude dissonance. THE FEDERALIST NO. 78 (Alexander Hamilton). Granted, one might argue that the countermajoritarian difficulty is the source of great dissonance in the judiciary. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (2d ed. 1986). That constitutional fact cases—at least in the adjudicatory setting—do not involve striking down legislation, however, removes some of the dissonance that the countermajoritarian difficulty might otherwise pose. Additionally, as previously noted, the Rule of Necessity permits judges to fulfill their duty to decide cases where no one else can. S*ee* Martin H. Redish & Matthew Heins, *Premodern Constitutionalism*, 57 WM. & MARY L. REV. 1825, 1883 (2016).

Our objection to the supervisory theory, however, rests on broader grounds. Not only is the supervisory theory not mandated by the Constitution; it is also ill-conceived purely as a matter of sub-constitutional judicial policy. Perhaps most importantly for purposes of our inquiry, the logic of the supervisory theory has nothing to do with the *constitutional* nature of facts. It is just as readily applicable to cases involving factual findings having implications for application and interpretation of statutory norms. Thus, unlike due process and Article III, the supervisory theory cannot justify constitutional fact review.

In addition, the supervisory theory gives rise to pragmatic difficulties. Its use in the review of lower federal courts increases waste by inviting unjustified appeals and by undermining litigant confidence in the district courts. Importantly, however, the supervisory theory also masks another key insight: that due process and Article III should apply only where certain fact-finders are involved. The constitutional fact doctrine is properly rationalized only under a synthesis of due process and Article III justifications, and even then only to certain decision-makers in our taxonomy. Thus, we proceed to discuss the decision-makers to which the constitutional fact doctrine should and should not apply.

III. APPLYING JUSTIFICATIONS FOR THE CONSTITUTIONAL FACT DOCTRINE TO THE TAXONOMY OF FACT-FINDERS

A. Administrative Agencies

As our preceding discussion indicates, the due process and Article III justifications for constitutional fact review are most salient where administrative fact-finders are concerned. Administrative decision-makers, insofar as they find facts bearing on the constitutional limits of their own power, lack the neutrality that due process requires. Similarly, Article III precludes the executive and legislative branches from controlling courts' exercise of judicial review by insulating administrative agencies' findings of constitutional fact.

In the modern administrative state, adjudication generally occurs—at least initially—through use of administrative law judges ("ALJs").[156] Agencies are not required to use ALJs, however, and many adjudicate through non-ALJ hearing examiners employed by the agency.[157] For our purposes, however, the difference between the two is largely inconsequential. ALJs do not possess the independence that Article III requires, nor do the agencies themselves or non-ALJ adjudicators they employ. Where ALJs are concerned, one commentator puts the point this way: "ALJs are equal to Article III judges, except for the Article III part."[158] And even beyond Article III, ALJs lack the independence of state court judges. They are selected by the agency they serve and whose actions they adjudicate.[159] Their

156. VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 1 (2010); *see also* Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343–45 (1992).

157. BURROWS, *supra* note 156, at 9–10; Verkhuil, *supra* note 156, at 1345–47.

158. Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 799 (2013).

159. 5 U.S.C. § 3105 (2014). Agencies do not have complete freedom in selecting ALJs, but must instead select from candidates ranked and certified by the Office of

decisions as to facts and law are completely reversible by the agency.[160] And they are removable by the agency for "good cause," a standard which commentators have described as "uncertain" and wide-ranging.[161]

Decision-making on questions of constitutional fact, either by an agency itself or by a non-ALJ hearing examiner employed by the agency, fares no better as a matter of due process. In fact, non-ALJ decision-makers are generally understood to be even less independent.[162] To that end, agencies housed within the executive branch have little claim to neutrality on the constitutional scope of their own authority. Their vulnerability to being "jawboned" by the President is well documented.[163] Those that are not—so-called "independent agencies"—are bound within the strictures of their authorizing statute and required to accomplish the tasks Congress assigns them.[164] Thus, they suffer from fundamental cognitive dissonance, which the constitutional fact doctrine seeks to avoid.[165]

Similarly, the Article III justification for the constitutional fact doctrine was borne of separation of powers concerns resulting from according finality to agency findings of fact.[166] Specifically, where Congress provides for judicial review, agencies cannot evade constitutional scrutiny of the facts essential to their exercise of power. To hold otherwise would unduly pervert our basic constitutional structure and dangerously aggregate power in administrative agencies.

Judicial review in the modern administrative state accommodates this concern. A natural starting point is the substantial evidence standard under the Administrative Procedure Act, which has no express exception for constitutional facts.[167] The substantial evidence standard is best read, however, in concert with the rest of § 706, which separates constitutional claims, providing that reviewing courts should "hold unlawful and set aside agency action, *findings*, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity," without limiting courts' scope of review.[168] Section 706 further provides that findings should be set aside where "unwarranted by the facts to the

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Personnel Management on the basis of minimal qualifications. BURROWS, *supra* note 156, at 2.

160. 5 U.S.C. § 557(b) (2014). An agency can limit its scope of review by rule. *Id.*

161. *Id.* § 7521; *see* Barnett, *supra* note 158, at 807–08 (noting "significant adjudicatory errors" and "insubordination" have been found to constitute good cause).

162. BURROWS, *supra* note 156, at 10.

163. *E.g.*, Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2459 (2011).

164. For example, the National Labor Relations Board's statutory responsibility is to ferret out unfair labor practices committed by employers. 29 U.S.C. § 160 (2010); *see also* Benjamin J. Hogan, *Awakening the Spirit of the NLRA: The Future of Concerted Activity Through Social Media*, 118 W. VA. L. REV. 841, 849 (2015).

165. *Supra* notes 113–18 and accompanying text.

166. *Supra* notes 123–34 and accompanying text.

167. *See* 5 U.S.C. § 706(2)(E) (2014).

168. *Id.* § 706(2)(B) (emphasis added); *see also* Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward A Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 539 (2006) (opining that "the current scope of review doctrine under the Administrative Procedure Act satisfies" the rule of law, in part because it permits constitutional fact review).

extent that the facts are subject to trial de novo by the reviewing court,"[169] language plausibly broad enough to encompass the constitutional fact doctrine.

Two additional aspects of black-letter administrative law bolster the continued relevance of the constitutional fact doctrine. First, *Chevron* deference is not owed to agencies' interpretations of the Constitution.[170] There is little reason, then, to accord deference to agencies' findings of constitutional fact, as the Court established in *Crowell*. Second, the Court has resisted legislative efforts to strip the judiciary's ability to decide challenges to the constitutionality of agency action.[171] In *Johnson v. Robison*, the Court held that construing a statute to remove courts' jurisdiction would "raise serious questions" about the provision's constitutionality.[172] While the Court's holding did not address the standard that should be used to evaluate factual determinations underlying such challenges, the separation of powers principle implicit in the Court's resistance is consistent with the Article III justification for constitutional fact review.

A recent series of important cases that address executive power to detain enemy combatants at Guantanamo Bay demonstrates the continuing applicability of the due process and Article III justifications where administrative bodies are concerned. These cases, specifically *Hamdi v. Rumsfeld*[173] and *Boumediene v. Bush*,[174] not only involved claims in some respects unique to the War on Terror, but also have broader constitutional significance.[175] Together, they affirm that due process requires that the neutral judiciary retains the ability to find constitutional

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169. 5 U.S.C. § 706(2)(F) (2014).

170. *E.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574–75 (1988); *see also* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 914 (2001).

171. Johnson v. Robison, 415 U.S. 361, 366–67 (1974); *see also* INS v. St. Cyr, 533 U.S. 289, 326 (2001); Webster v. Doe, 486 U.S. 592, 603 (1988).

172. 415 U.S. at 366. The Court cited to Justice Brandeis's concurrence in *St. Joseph Stock Yards* and Professor Hart's dialogue. *Id.* at 366 n.8. The cited portion of Justice Brandeis's concurrence exhibited his hostility toward constitutional fact review in certain contexts. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936). Given the tenor of *Robison*, however, it seems unlikely the Court intended to treat review of constitutional facts differently from review of constitutional law. Even if it did, the citation to Professor Hart would endorse constitutional fact review.

173. 542 U.S. 507 (2004).

174. 553 U.S. 723 (2008).

175. Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535, 578–79 (2010) ("*Boumediene*'s factfinding requirement, rather than being a unique feature of the Guantánamo cases, is deeply entrenched in constitutional doctrine."); *see also* Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 413–14 (2009) ("*Boumediene* seemed concerned with protecting constitutional rights, irrespective of whether the failure to do so results in detention."); Stephen I. Vladeck, Boumediene's *Quiet Theory: Access to the Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2145 (2009) (contending that the separation of powers rationale motivating *Boumediene* "may be more *evident* in the context of habeas cases," but "serves as a similar check on the executive branch" in other circumstances as well (emphasis added)).

facts, and that separation of powers principles implicit in Article III require the same.

Hamdi involved a U.S. citizen, Yaser Hamdi, who had been seized in Afghanistan, declared by the military to be an enemy combatant, and detained at Guantanamo. Hamdi challenged his classification as an enemy combatant and detention on due process grounds. The Court ruled that Hamdi, and all citizens detained as "enemy combatants," must have a "meaningful opportunity" to contest the factual assertions underlying their detentions before a "neutral decisionmaker."[176] In doing so, however, the Court stated that an administrative process might be sufficient to accomplish what due process requires. Combatant Status Review Tribunals ("CSRTs") soon followed. CSRT procedures slanted heavily in favor of the government; factual findings were subject to judicial review only in the D.C. Circuit and only under a deferential standard that did not permit factual scrutiny.[177]

The Court responded in *Boumediene*, holding that CSRT procedures unconstitutionally foreclosed habeas corpus without formal suspension and without offering a viable substitute. A viable substitute, the Court explained, would need to provide detainees, "at minimum, the opportunity to challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release . . . ."[178] Thus, the Court reasoned that detainees were not jurisdictionally barred from pursuing habeas claims in federal district court. The Constitution's insistence on "freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers" compelled such a result.[179]

The Court's opinions in *Hamdi* and *Boumediene* transcend the context of executive detention or the Suspension Clause. In one commentator's words, the Court's holding in *Boumediene* "jealously guards the ability of Article III courts to find facts in constitutional cases."[180] The Court did not explicitly invoke the constitutional fact doctrine, perhaps because it did not believe constitutional facts to be at issue.[181] But the principles motivating constitutional fact review are unmistakable in the Court's decisions.

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176. *Hamdi*, 542 U.S. at 509.

177. For an overview of the creation of CSRTs and their operation prior to *Boumediene*, see David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1006–11 (2008).

178. Boumediene v. Bush, 553 U.S. 723, 729 (2008).

179. *Id.* at 730.

180. Mulligan, *supra* note 175, at 578.

181. One commentator has suggested that the question of enemy combatant status is one of jurisdictional fact, invoking *Crowell*. *See* Franklin, *supra* note 177, at 1028–34. The parallel with *Ng Fung Ho* is similarly striking, both scenarios involving a threshold determination of citizenship status from which deprivation of liberty follows. *Id.* at 1034.

First, the Court stressed the need for a neutral, independent adjudicator to find facts that bear on individual liberty.[182] While *Hamdi* suggested an administrative tribunal could serve as a neutral decision-maker, *Boumediene* clarifies that this is only so if a court retains ultimate control over the facts at issue. Otherwise, a CSRT, suffering from dissonant impulses to restrain enemy combatants and uphold individual liberties, would have the final say on facts underlying detainees' constitutional rights.

Second, the Court resisted the other branches' efforts to isolate their actions from constitutional scrutiny by restricting the manner in which courts conduct judicial review.[183] In doing so, the Court vindicated fundamental separation of powers notions implicit in Article III, which preclude the other branches from controlling the courts' exercise of jurisdiction once granted. Congress could not grant jurisdiction to the D.C. Circuit, yet restrict its review powers in such a way as to unconstitutionally suspend habeas corpus.

B. Inferior Courts

Put simply, there is no justification, constitutionally dictated or otherwise, for applying the constitutional fact doctrine to appellate review of lower courts. Unlike situations in which administrative fact-finders are concerned, judges of inferior courts are adjudicators whose independence—like that of judges of all Article III federal courts—is prophylactically shielded by the salary and tenure protections of Article III. They therefore satisfy due process. Additionally, the separation of powers concerns underlying Article III that arguably ground the constitutional fact doctrine as applied to administrative bodies are irrelevant where the initial fact-finder is a judicial body. Finally, the notion that reviewing courts should supervise lower courts' application of constitutional norms is neither constitutionally grounded nor well founded as a policy matter.[184] Thus, the modern practice of independently reviewing the constitutional fact-finding of lower courts—as in *Bose*, *Miller*, and their progeny—should be abandoned.

Two further points are worth discussing. The first is to emphasize that we leave open the possibility for a reviewing court to characterize a particular mixed law–fact constitutional question as legal in nature and resolve to treat it as such. The court can and should make the functional choice to label a question "legal" if the issues to which it gives rise are most appropriate for de novo appellate scrutiny.[185] But as stated previously, that channeling decision has nothing to do with the Constitution or the constitutional fact doctrine and should never be cast in such terms.

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182. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (citing Ward v. Monroeville, 409 U.S. 57, 61–62 (1972)). In *Boumediene*, the Court "mad[e] no judgment whether the CSRTs . . . satisfy due process standards," but hinted at serious doubt, holding that "there is considerable risk of error in the [CSRTs'] findings of fact." 553 U.S. 723, 785 (2008).

183. *See* Vladeck, *supra* note 175, at 2145 (observing that the constitutional fact doctrine, like habeas corpus, "serves as a similar check on the executive branch, whose interpretation of legal questions might otherwise be unreviewable").

184. *See supra* text accompanying notes 149–56.

185. *Id.*

Second, we see no reason to treat state and federal courts differently for purposes of this inquiry. At least as long as one assumes parity, as the Court has done (rightly or wrongly),[186] the constitutional fact doctrine should not apply to state courts' fact-finding for the same reasons it does not apply to federal courts, and vice versa. To be sure, one may reasonably question the very foundations of the parity theory. But the modern Court has shown no intention to do so. Given this fact, there is no logical basis for treating the constitutional fact doctrine aberrationally.

The Court's modern position, as explained by Justice Stevens in *Bose*, certainly embraces parity: "[S]urely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts."[187] Reading more closely, however, this seemingly routine recognition rests on some doubt. Take the Court's opinion in *Miller*: "We *reiterate* our confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants."[188] But this has by no means always been the Court's attitude. To the contrary, as our prior discussion demonstrated,[189] the Court transferred constitutional fact review from the administrative context to review of state courts out of distrust of state courts.

It defies reason to suggest that the Court would take the same approach to findings in a federal court. Rather, it is plainly evident that the Court, concerned about the ability of southern state courts to evenly apply the Constitution to issues involving race, utilized constitutional fact review as a remedy for distrust that belies parity. More importantly, however, the state court constitutional fact cases are not forgotten. Rather, they provide a key piece of the foundation for modern constitutional fact review. The cases that followed *Norris v. Alabama*, however, subtly shifted the narrative of the constitutional fact doctrine, grounding it in the need to assure uniformity in applying the Constitution, especially where rights and facts are "intermingled."[190] In doing so, the Court glossed over the larger teaching of *Norris*, which sought to assure uniformity *because of* distrust. Missing this link, the Court soon applied constitutional fact review to *all* inferior courts, state *and* federal, even though the doctrine's true origins rest against parity and in distrust of state courts.

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186. *E.g.*, Burt v. Titlow, 134 S. Ct. 10, 12, 15 (2013) (acknowledging "a foundational principle of our federal system" that "[s]tate courts are adequate forums for the vindication of federal rights"). We should note that the parity theory is quite controversial. *See, e.g.*, Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236 (1988). However, there is no doubt that the Supreme Court has consistently adhered to this principle.

187. 466 U.S. 485, 499 (1984).

188. 474 U.S. 104, 117 (1985) (emphasis added).

189. *See supra* text accompanying notes 54–69.

190. *See* Jacobellis v. Ohio, 378 U.S. 184, 187–88 (1964) (grounding constitutional fact review in the need for "judicial supervision" of courts applying the Constitution); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (expressing concern that constitutional values could vary as applied from state to state).

Our effort at reconstructing this history is relevant not only for any broader implications for the parity debate, which we refrain from entering here, but also because it confirms our conclusion that the supervisory theory is a foundationless rationale for the constitutional fact doctrine. That *Bose* and *Miller* rely on a mistaken inference from *Norris* is all the more reason to abandon constitutional fact review of the findings of inferior courts. Alternatively, the Court could follow *Norris* and apply constitutional fact review only to state courts. But such a shift would necessarily bring parity down along with it.

C. Juries

We turn to the final constitutional fact-finder in our taxonomy: the jury. The jury's unique constitutional position raises questions about the applicability of the constitutional fact doctrine that are in some respects more complex than where administrative agencies or inferior courts are concerned.[191] Notwithstanding these complexities, the Court has neglected to explore the jury's unique institutional qualities and the extent to which the justifications for the doctrine we have discussed do or do not apply where the jury is concerned. Importantly, the Court has failed to properly consider an additional constraint on whether juries can be deprived of the authority to find constitutional facts, and the extent to which those findings may be reviewed: the Seventh Amendment.[192] On a broader level, the Court has inadequately dealt with the fundamental tension between the jury's identity as a bulwark of liberty and the potential dangers the jury's majoritarian status might be thought to present in applying our countermajoritarian Constitution.[193]

In this Section, we argue that this tension should be resolved by presumptively allocating to the jury all questions of constitutional fact, and having courts refrain from re-examining such findings without the traditional deference required by the Seventh Amendment. This presumptive allocation follows from basic notions of American constitutionalism as expressed in Article III, due process, and the Sixth and Seventh Amendments' jury trial guarantees. But as we suggest, this allocation should have the status only of a rebuttable presumption. Embracing the Court's contemporary, functional approach to dividing questions

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191. Few commentators, however, have explored the constitutional fact doctrine's specific applicability to juries. For a recent scholarly account, see Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 226–45 (2015), and see also FAIGMAN, *supra* note 22, at 122–25.

192. Recall that the Court in *New York Times Co. v. Sullivan* and *Bose* summarily determined that the Seventh Amendment does not preclude constitutional fact review without providing any explanation as to why. *See supra* notes 85–88 and accompanying text. Similarly, Professor Monaghan, while recognizing the need to square the doctrine with the Seventh Amendment, simply assumed the Seventh Amendment did not apply. Monaghan, *supra* note 9, at 234 n.28, 264 n.192.

193. *Compare* Chapman, *supra* note 191, at 230, 237 (arguing the jury's unique role is antithetical to de novo review of its constitutional fact-finding and supporting uninhibited allocation to juries of questions of mixed constitutional fact and law), *with* FAIGMAN, *supra* note 22, at 123 ("Because the jury represents values associated with the political majority, it cannot fully be entrusted with protection of the values inherent in the Bill of Rights.").

between judge and jury, the Court should preempt the jury's ability to find constitutional facts where majoritarian bias proximately threatens the jury's impartiality. In such cases, the Court should treat constitutional questions that mix fact and law as questions of law.

We begin by considering whether the justifications for the constitutional fact doctrine apply where juries are concerned. We conclude that the justifications for the most part do not apply, and courts should therefore generally not exercise constitutional fact review where juries find constitutional facts.

For ease of understanding, we proceed in a slightly different order than we followed in Part II and begin with Article III. The question can be disposed of quite simply: Article III provides no basis for doubting juries' findings of constitutional fact.[194] This position finds support textually in Article III's recognition of the right to a jury trial in criminal cases, and in the fact that the Sixth and Seventh Amendments condition the judicial power on jury trial guarantees.[195] But it finds even more compelling support in basic notions of what the Framers understood the jury's role to be. They viewed the jury as an integral constitutional component that would prevent governmental overreach, even by the Article III-protected judiciary, and especially where constitutional rights were at issue.[196] Thus, to suggest Article III requires or even supports Article III judges second-guessing juries' findings of constitutional fact would be to pervert basic foundations of our constitutional structure.

On much the same basis, one could reject reliance on due process as a basis for applying the constitutional fact doctrine to review of jury findings. Indeed, it would be odd for the Framers to have guaranteed due process, and yet in three other instances, explicitly provided for a jury right. Additionally, most courts have rejected the notion that due process can require avoiding jury trials in complex cases, and where courts have recognized such an exception, they have not done so for constitutional claims.[197] While we believe this intuitive understanding is generally correct, we do not believe the answer is so easy in every instance.

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194. A pair of commentators have read *Crowell* to suggest otherwise. *See* Woolhandler & Collins, *supra* note 111, at 668 ("In discussing 'the difference in security of judicial over administrative action,' for the protection of rights in *Crowell*, the Court had in mind the federal judge, not the judge-jury combination." (quoting Crowell v. Benson, 285 U.S. 22, 61 (1932)). In our view, this interpretation misreads Chief Justice Hughes's opinion, which endorses a judge's "superintendence," or supervision, of the jury, not rote substitution of the judge's power and judgment.

195. U.S. CONST. art. III, § 2, cl. 3; *cf.* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996) (holding that the "the Eleventh Amendment restricts the judicial power under Article III").

196. *See* Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 YALE L.J. 1131, 1183, 1185 (1991) (explaining that the jury, "more than a permanent government official—even an independent Article III judge—was required to safeguard liberty").

197. *See* SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1130 (Fed. Cir. 1985) (rejecting a so-called "complexity exception," and collecting citations to the Ninth, Fifth, and Seventh Circuits' similar rejections or refusals to apply). Only the Third Circuit, in a case involving claims under antitrust and antidumping laws, has recognized the

Recall that due process, as the core justification for the constitutional fact doctrine, operates in part to preempt fact-finder bias. This point has received particular emphasis in the Court's most recent articulations of the doctrine.[198] Where the Court has performed constitutional fact review of jury findings, it has in some cases spoken of concern for potential juror bias.[199]

The due process concern at issue is essentially that a majority of the citizenry, and in turn the jury, might share skepticism or ill sentiment toward the protection afforded unpopular minorities by certain constitutional rights in certain contexts.[200] These predispositions could conceivably infect the jury's fact-finding with bias, or at the very least, remove independence, and thereby compromise due process. A contemporary example is a citizen's suit against a police officer under § 1983 for using deadly force in violation of the Fourth Amendment.[201] In such a case, it might be feared that any potential jury, infused with anti-police sentiment of the day, would find the constitutional facts underlying the claim without impartiality, favoring a finding of unreasonable force.[202] Accordingly, as follows from our explanation of the due process justification, it would be necessary to review a jury's factual findings in such a case de novo.

This concern, however, is ameliorated somewhat by a countervailing force: voir dire.[203] To satisfy the Constitution's guarantee of an impartial jury and

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exception. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980).

198. *Supra* notes 107–09 and accompanying text.

199. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 276–77 (1971) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (expressing the concern that a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks'").

200. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 888 (2009) ("One reason for independent factfinding is to assure adequate enforcement of constitutional guarantees toward which there is majority antagonism that could seep into jury factfinding."); *see also* FAIGMAN, *supra* note 22, at 123.

201. In *Scott v. Harris*, the Supreme Court held that a police officer who collided with a fleeing motorist's car in order to end a dangerous, high-speed chase did not act with unreasonable force, and therefore did not violate the Fourth Amendment. 550 U.S. 372, 386 (2007). The motorist sued the officer under § 1983, and the posture of the case when it reached the Court was the police officer's summary judgment motion. *Id.* at 372, 375. The Court concluded that no reasonable jury could have concluded the officer's actions were unreasonable and violated the Fourth Amendment. *Id.* at 378–81, 386; *see also* Plumhoff v. Rickard, 134 S. Ct. 2012, 2021–22 (2014) (holding that police officers acted reasonably in shooting at a car to prevent it from fleeing); *see generally* Kahan et al., *supra* note 200, at 888.

202. *See* Kahan et al., *supra* note 200, at 888.

203. Voir dire is aimed at "ascertain[ing] whether [a] juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (quoting Connors v. United States, 158 U.S. 408, 413 (1895)). A presumption of prejudice on the part of an empaneled jury arises despite the structural protections of voir dire "only [in] extreme case[s]." Skilling v. United States, 561 U.S. 358, 381 (2010).

ensure that a jury trial satisfies due process, courts thoroughly probe potential biases in voir dire and excuse jurors that exhibit partiality.[204] In our deadly force example, the court during voir dire would ask jurors about their ability to apply Fourth Amendment jurisprudence as given, regardless of their personal beliefs or whether their views of the credibility of police officers predispose them toward a particular outcome.[205] If such a predisposition were to exist, the court would excuse the juror, unless the juror could agree to place the predisposition aside.[206] Additionally, if selected, jurors take an oath to apply the law as given to them and to put aside prejudice in arriving at a decision.[207] Thus, voir dire procedures, and the oath that follows, are designed to root out any threat to due process that trial by jury could otherwise present.

Accordingly, unless there is specific reason to believe in a certain class of constitutional cases that voir dire cannot supply an impartial jury, there is no reason that constitutional fact review of jury findings should be deemed required by due process. Still, as we discuss below, courts should take into account potential biases as a factor in determining if a constitutional question of mixed law and fact should be allocated to the jury. And accounting for bias may have additional, indirect benefits. While the mere potential for inconsistent outcomes among jury verdicts should not merit constitutional fact review, curing bias may have the further effect of reducing inconsistency.[208]

To that end, we do not believe that the supervisory rationale can ever justify constitutional fact review, especially where juries are concerned. In guaranteeing the right to trial by jury in certain circumstances, the Framers deliberately entrusted juries with the authority to apply constitutional law to facts.[209] The jury is a "bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."[210] The jury right is as important as other rights the Constitution

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204. *See Mu'Min*, 500 U.S. at 428–32.

205. G. BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 48–49 (Federal Judicial Center 1982), http://www.fjc.gov/public/pdf.nsf/lookup/jurselpro.pdf/$file/jurselpro.pdf.

206. *Cf.* Irvin v. Dowd, 366 U.S. 717, 723 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.").

207. A typical oath is as follows: "You, and each of you do solemnly swear . . . that you will well and truly try, and true deliverance make in the case now on trial, and render a true verdict according to the law and the evidence; So Help You God." BERMANT, *supra* note 205, at 21.

208. Kahan et al., *supra* note 200, at 888 ("[W]here a court can perceive that enforcement of a constitutional norm will turn on a type of factual perception that a discrete subcommunity does not share . . . summary adjudication is necessary to avoid inconsistent verdicts across jurisdictions and within particular jurisdictions over time." (footnote omitted)).

209. *See* Amar, *supra* note 196, at 1185, 1187; Chapman, *supra* note 191, at 214, 220.

210. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting); *see also* Amar, *supra* note 196, at 1183 ("The dominant strategy to keep agents

protects, and the jury is the preferred method for enforcing those rights.[211] Additionally, the ability to participate in how the law is applied is directly correlated with the democratic vision of citizens participating in making law in the first place.[212] This highlights the true value of the jury: multiple individual unique perspectives on the law, drawn from a cross section of the community, in order to evaluate the claims of one of their own.[213] To that end, jurors' opportunities to deliberate by expressing their views endow the Constitution with legitimacy.[214] Ultimately, as Alexis de Tocqueville famously observed, jury service is an opportunity both for courts to teach the citizenry about the law, and for citizens, through jury service, to learn about the law.[215]

Thus, in embracing the jury ideal, the Constitution adopts a preference for jury adjudication in certain circumstances at the cost of the uniform, consistent, and potentially more accurate perspective of judge-based adjudication.[216] Put simply, the Framers indulged the jury's civic value notwithstanding the opaqueness and unpredictability that can characterize jury verdicts.[217] The Constitution therefore trusts juries to determine the facts that underlie constitutional claims and apply constitutional law to facts, recognizing that in doing so, identical facts could produce inconsistent outcomes. Thus, to the extent that contemporary constitutional fact scrutiny of jury verdicts follows from disappointment with inconsistent verdicts and a desire to not only tell juries what the law is, but also show them how to apply it, the doctrine has wandered into a place it most definitely should not go.[218]

The basic framework through which to view the Seventh Amendment's applicability is this: first, the Seventh Amendment presumptively applies to jury

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of the central government under control was to use the populist and local institution of the jury.").

211. *See* Amar, *supra* note 196, at 1183.

212. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 249, 251 (J.P. Mayer & Max Lerner eds., 1966); Amar, *supra* note 196, at 1183–85.

213. *See Parklane*, 439 U.S. at 344 (Rehnquist, J., dissenting) ("[J]uries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community."); *see also* Chapman, *supra* note 191, at 238.

214. Chapman, *supra* note 191, at 238; Kahan et al., *supra* note 200, at 884.

215. *See* TOCQUEVILLE, *supra* note 212, at 252.

216. *See Parklane*, 439 U.S. at 343 (Rehnquist, J., dissenting) ("[T]he concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration."); TOCQUEVILLE, *supra* note 212, at 249 ("If it were a question of deciding how far the jury, especially the jury in civil cases, facilitates the good administration of justice, I admit that its usefulness can be contested.")

217. *See* Kahan et al., *supra* note 200, at 882–83.

218. We pause to note that the Seventh Amendment would not apply where the Court reviews the fact-finding of state juries, although we see no reason the Court's approach should differ notwithstanding this point. Additionally, the Seventh Amendment will not apply to constitutional facts as found in a criminal case, but the Court has adhered to similarly deferential review of jury fact-finding in criminal cases. *See* Jackson v. Virginia, 443 U.S. 307, 318–19 (1979).

findings of constitutional fact and therefore insulates those findings from re-examination.[219] Thus, courts cannot engage in constitutional fact review of jury findings without violating the Seventh Amendment. This leaves open, however, the Court's ability to characterize a constitutional question of mixed fact and law as a question of law, thereby removing it from the jury's purview without contravening the Seventh Amendment. This allocative ability follows from the Court's functional approach to mixed questions in *Markman v. Westview Instruments, Inc.*,[220] and concern for a jury's potential majority bias. We elaborate on this framework in what follows.

Because the constitutional claims at issue presumptively trigger the Seventh Amendment's Preservation Clause, the Reservation Clause follows: the jury's findings of constitutional fact cannot be re-examined other than by methods established at the time of the Amendment's reservation.[221] Again, this should be unsurprising, as a jury right is no right at all if government agents whom the jury is designed to check can simply overrule the jury's findings.

The Court has given only passing attention to the Seventh Amendment in recent constitutional fact cases. Following *New York Times Co. v. Sullivan* and *Bose*, it seemed fair to understand the Court as suggesting the Seventh Amendment should not apply at all, even to a jury's findings of historical fact.[222] In *Harte-Hanks*, however, the Court backed off this conclusion somewhat, implicitly conceding that the Seventh Amendment applies to juries' findings of historical fact and thereby precludes re-examination by way of the constitutional fact doctrine.[223] Still, the Court affirmed its stance on questions that mix constitutional fact and law—specifically, the question of actual malice[224]—implicitly maintaining either that the Seventh Amendment does not apply to such determinations, or that if it does, the Seventh Amendment does not bar independent review of juries' findings.

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219. Professor Louis's assumption that the Seventh Amendment does not apply to mixed questions of constitutional fact and law—which seemingly relies only on the Court's similar assumption in *Bose*—conflates the question of the Seventh Amendment's basic applicability with questions of pragmatic allocation. *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 996–97 & n.19, 1008–10, 1018 n.174 (1986).

220. 517 U.S. 370 (1996); *see also infra* notes 225–228 and accompanying text.

221. *See* Chapman, *supra* note 191, at 196; Marc E. Sorini, Note, *Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases*, 82 GEO. L.J. 563, 578 (1993). *But see* Michael L. Wells, Scott v. Harris *and the Role of the Jury in Constitutional Litigation*, 29 REV. LITIG. 65, 88–89 & n.115 (2009) (pointing to commentators' absence of an affirmative argument that the Seventh Amendment precludes constitutional fact review of juries); Woolhandler & Collins, *supra* note 111, at 691.

222. *See supra* notes 85–90 and accompanying text.

223. *See* Chapman, *supra* note 191, at 196 (suggesting *Harte-Hanks* not only establishes that reviewing courts should defer to a jury's credibility determination in determining historic constitutional facts, but also that the mixed question of actual malice should receive deference).

224. *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688–89 (1989).

Both positions, however, seem to mask what the Court is actually thinking. We doubt the Court would dispute that the Seventh Amendment *can* apply to questions of mixed constitutional fact and law. The more difficult question is if the Seventh Amendment *should* apply.[225] This follows from the Court's modern Seventh Amendment jurisprudence as expressed in *Markman v. Westview Instruments, Inc.*, under which "[if] history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury . . . ."[226] In *Markman*, the Court recognized that construction of texts is a task for which judges are best suited, while credibility determinations should remain in the jury's province.[227] The Court further noted that concern for uniformity in resolving a particular type of legal question lends in favor of judicial determination.[228] Thus, the Court's true approach appears to be one of functionally allocating mixed questions among fact-finders. The important question, therefore, becomes what functional considerations matter. Unfortunately, the Court has not adequately evaluated relevant functional considerations unique to juries in allocating questions of mixed constitutional fact and law. We turn to that question.

As we have suggested, there are a number of factors that could come into play in deciding whether to declare a mixed constitutional question factual, and give it to a jury, or to declare it legal, and prevent the jury from deciding it in the first place. In our view, there are two factors on which the Court should focus, and one it should avoid, in deciding whether to allocate mixed constitutional questions to juries. The first factor the Court should focus on is potential for bias in jury fact-finding. If the Court has good reason to believe that a jury, even after voir dire, cannot faithfully and impartially give constitutional protection where unpopular, it should not entrust enforcement to the jury. To do otherwise subordinates the intended effect of our countermajoritarian Constitution. We recognize that discerning jury bias that persists beyond voir dire will present difficulties. But if we have confidence in the Court's ability to ferret out bias in the judiciary,[229] we see little reason to doubt the Court's ability to ferret out bias where juries are concerned. Additionally, the use of special interrogatories in constitutional fact

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225. *See* Louis, *supra* note 219, at 1004, 1032 ("The problem is to determine which ultimate facts are so exceptional that they require exceptional handling and what are the underlying considerations in making that classification."); *see also* Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 50 (1985) ("One is left with the distinct impression, following *Bose*, that independent review of the record in [F]irst [A]mendment cases does not violate the [S]eventh [A]mendment because it calls on the court, not to usurp the jury's function to resolve disputed issues of fact, but rather to reach a *legal* conclusion based on its own evaluation of the evidence." (emphasis added)).

226. 517 U.S. 370, 388 (1996) (citing Miller v. Fenton, 474 U.S. 104, 114 (1985)).

227. *See id.* at 388–90.

228. *See id.* at 390–91.

229. *See supra* note 101 and accompanying text. We suggest the Court use a similar, prophylactic standard that aims to detect "possible temptation" or the mere possibility of bias. *See id.*

cases may serve as a helpful aid, enabling a reviewing court to better detect bias that would remain hidden behind a general verdict.[230]

In addition to considering jury bias, the Court should be attentive to instances in which vague constitutional standards give rise to a need for clarification. The urge to show a jury how to apply the law may result from lingering deficiency in what the Court has said the law is. In such cases, it is incumbent upon the Court to choose between competing visions of what a constitutional rule should be. This may entail receding to a bright-line rule that leaves very little discretion for juries in applying the law.[231] Or the Court may decide to leave an open-ended test to juries' discretion, believing it better for the diverse perspectives of 12 people to dictate the scope of protection.[232] Either way, the Court must make a choice, rather than splitting the difference by leaving constitutional standards vague and open-ended, and then reviewing jury determinations de novo.

To that end, the desire to achieve consistency and uniformity through guiding the application of a complex constitutional standard is a factor that should *not* influence the allocation of mixed questions. As we have discussed, the Constitution prioritizes juries' democratic participation in applying Bill of Rights protections over the accuracy that supervision might entail. Additionally, the jury ideally responds to the complexity of such determinations by requiring the Court to explain the Constitution such that lay citizens can understand and apply it, and challenges citizens in the task of understanding. In this way, the jury's unique role in applying the Constitution tips in favor of allocating mixed questions to a jury, a tendency that might diverge from the typical calculus where non-constitutional questions are involved.

CONCLUSION

A wandering legal doctrine has many undesirable side effects, all of which are on display in the present form of the constitutional fact doctrine. The most understated of these effects is arguably the most unfortunate: by wandering, a doctrine can lose its grounding in its well-founded origins. When this happens, it is natural to question why the doctrine existed in the first place.

Our goal has been to give new life to the constitutional fact doctrine and to set it back on its proper course. This can be accomplished through reconnecting the doctrine, in varying degrees, to two proper justifications: First, those pressing constitutional claims should have the facts that underlie their claims determined by a neutral, independent adjudicator, rather than an adjudicator whose power depends on the claims asserted. And second, that adjudicator should be free from the controlling influence of those the adjudicator is empowered to scrutinize. Based on a synthesis of these justifications, there is little role for the constitutional fact doctrine in second-guessing judges and juries, but greater scrutiny to apply in reviewing administrative agencies. Under this approach, the constitutional fact doctrine does not wander; to the contrary, it flows logically from basic constitutional principles.

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230. *See, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 690–91 (1989) (analyzing jury answers to special interrogatories in order to independently assess determination of actual malice).

231. *See* Chapman, *supra* note 191, at 242.

232. *See id.* at 244–45.