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Jury Review of Administrative Action

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JURY REVIEW OF ADMINISTRATIVE ACTION

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Any scholar of modern administrative law surely knows that there is an error in the title of my paper. Federal administrative law in our era provides for *judicial* review—not *jury* review—of administration action. More than sixty years ago, the Supreme Court, in *Cox v. United States*,[1] definitively rejected the notion that the jury had any role—either under the Constitution or under "settled federal administrative practice"—in "reviewing the action of an administrative body" or in "pass[ing] on the validity of an administrative order."[2] In the quarter century after the Supreme Court's decision in *Cox*, the two leading commentators in the field—Kenneth Culp Davis and Louis Jaffe—both recognized and accepted *Cox* as standing for the general proposition that, even in actions otherwise being tried before a jury where the invalidity of an administrative order is a proper defense, the court should "withhold[ ] from the jury the question of validity of the order."[3] Indeed, the practice of forbidding any jury review of administrative action is so settled that the most prominent current treatises in the field do not even bother mentioning *Cox*.[4]

This settled law would seem to make an inauspicious start for an article about jury review of administration action, but for one problem: In at least one field of federal administrative law—indeed the branch of administrative law involving one of the oldest surviving federal agencies—juries are routinely and explicitly called upon to pass on the "validity" of federal administrative action.[5] In the field of federal patent law, juries

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[1] 332 U.S. 442 (1947).

[2] *Id.* at 453 (plurality opinion). While those quotes are from a plurality opinion, two of the dissenters in the case expressly agreed with the plurality on this point, writing that the question of the validity of the administrative order "is properly one of law for the Court" and that, "[t]o that extent," the dissent "join[ed] in the opinion of the Court." *Id.* at 455 (Douglas, J., joined by Black, J., dissenting).

[3] 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 8.16, at 597 (1958) (asserting that "seven Justices" agreed on this point in *Cox*); *see* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 394 (1965) (reading *Cox* to mean that, even though "[t]he validity of an administrative order depends on certain facts," those facts "need not be determined by a jury" because they go only to "the validity of the order," which is an issue reserved for the court).

[4] *See* CHARLES H. KOCH, JR. ET AL., ADMINISTRATIVE LAW TC-3 (5th ed. 2006) (table of cases); RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW 582 (4th ed. 2004) (table of cases). The discussion of *Cox* was dropped from Professor Davis's treatise in the second edition. *See* 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 480 (2d ed. 1984) (table of cases).

[5] Kinetic Concepts, Inc. v. Smith & Nephew, Inc., 688 F.3d 1342, 1359 (Fed. Cir. 2012) (holding that the legal issue of patent validity may be submitted to a jury and that, after the jury

have long been charged with passing on the validity of patents duly issued by the Patent Office or its modern successor, the U.S. Patent and Trademark Office (USPTO). The tradition dates back at least to 1854, when the Supreme Court held that "the jury are to judge" not only "the novelty of the invention" but also other fundamental questions of patent validity such as "whether the specifications, including the claim, were so precise as to enable any person skilled in the [relevant technical art] to make the invention," "whether the invention has been abandoned to the public," and in the case of a "renewed patent," and "whether the renewed patent is for the same invention as the original patent."[6] All of these issues are, of course, matters that the Patent Office would have—or should have—decided prior to the issuance of a patent. This practice of using juries to evaluate the legal validity of patents continues to this day,[7] though the practice has recently begun to generate some controversy.[8]

It might be tempting to view the use of juries in patent cases as an isolated anomaly of a specialized field of law. Until recently, patent law has remained relatively insulated

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renders its verdict on the validity issue, "the court must accept implicit factual findings upon which the legal conclusion is based when they are supported by substantial evidence"); Kinetic Concepts, Inc. v. Blue Sky Med. Grp., Inc., 554 F.3d 1010, 1020 (Fed. Cir. 2009) (holding that patent validity issues submitted to a jury are to be reviewed with deference to the jury's verdict); Upjohn Co. v. MOVA Pharm. Corp., 225 F.3d 1306, 1310 (Fed. Cir. 2000); Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1234 (Fed. Cir. 1989) ("It is established that the jury may decide the [validity] questions of anticipation and obviousness."); Perkins-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 895 n.5 (Fed. Cir. 1984) (rejecting the views that jury decisions on patent validity issues are to be treated as merely "advisory" and courts should decide validity issues "independently").

[6] Battin v. Taggert, 58 U.S. (1 How.) 74, 85 (1854).

[7] *See, e.g.*, Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238 (2011) (deciding the relevant standard of proof applicable to patent validity issues in a case where the litigants did not challenge the common practice of submitting patent validity issues to a jury); *see also* cases cited *supra* note 5.

[8] Recent challenges to the jury's role in reviewing patent validity date back at least to 2009, when a petition for certiorari from the Federal Circuit decision in *Kinetic Concepts, Inc. v. Blue Sky Med. Group, Inc.*, 554 F.3d 1010 (Fed. Cir. 2009), first raised the conflict between administrative law doctrine and the prevailing practice in patent infringement cases. *See* Petition for Writ of Certiorari at 19–22, Medela AG v. Kinetic Concepts, Inc., 558 U.S. 1024 (2009) (No. 09-198), 2009 U.S. S. Ct. Briefs LEXIS 806, at *37–43 (U.S. Aug. 13, 2009) (arguing that the jury's role in patent cases is inconsistent with *Cox v. United States*) (the author of this Article co-authored the petition). That Petition garnered amicus support from major companies that also noted that patent practice was inconsistent with administrative law. *See* Brief for Apple, Inc. et al. as Amici Curiae Supporting Petitioners at 23 n.5, *Medela AG*, 558 U.S. 1024 (No. 09-198), 2009 U.S. S. Ct. Briefs LEXIS 2200, *32 (U.S. Sept. 16, 2009). The controversy over the jury's role in reviewing patent validity has continued in the secondary literature. *See, e.g.*, Michelle Ernst, *Reforming the Non-Obviousness Judicial Inquiry*, 28 CARDOZO ARTS & ENT. L.J. 663, 682 (2011) (commentary supporting the position that current patent practice is inconsistent with modern administrative law); Theresa Weisenberger, Note, *An "Absence of Meaningful Appellate Review": Juries and Patent Obviousness*, 12 VAND. J. ENT. & TECH. L. 641 (2010).

from the mainstream of administrative law. Indeed, as late as 1998, an en banc Federal Circuit unanimously held that the basic standards of judicial review set forth in the Administrative Procedure Act (APA) were inapplicable to judicial review of patent decisions.[9] While the Supreme Court reversed that en banc decision the next year,[10] patent law continues to have a system of judicial review remarkably different from the norms prevailing elsewhere in federal administrative law.[11] Thus, for example, the Federal Circuit maintains that review of USPTO decisions is asymmetric, with patent denials subject to review but judicial review of patent grants "impliedly precluded" by law.[12] And the Supreme Court has held that, when accused patent infringers challenge the validity of a patent in litigation, the challenger must overcome a statutory "presumption of patent validity" by proving the factual predicates of invalidity by "clear and convincing" evidence[13]—a process wholly alien to the standardized set of judicial review procedures set forth in the APA.[14]

Nevertheless, there are at least two good reasons not to dismiss jury review of administrative action as merely an isolated aberration. The first reason is historical. While jury review of administrative action may seem highly unusual today, it was not so in the nineteenth century. One prominent example is Justice Holmes's opinion for the Supreme Judicial Court of Massachusetts in *Miller v. Horton*.[15] There, the court held that, after a state commission found a horse to be sick with a contagious disease and ordered it to be destroyed, the horse's owner could recover the value of the horse in a tort action against the officials who, pursuant to the commission's order, carried out the destruction of the horse if *a jury* found the horse had, in fact, not been sick.[16] Though *Miller v. Horton* was a decision for a divided Supreme Judicial Court of Massachusetts, it cannot be dismissed as an aberrant state case. The case was soon cited with favor by the Supreme Court,[17] and it has gained a significant degree of fame in the standard canon of administrative law.[18] Moreover, in nineteenth- and twentieth-century federal

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[9] *In re* Zurko, 142 F.3d 1447 (1998) (en banc), *rev'd sub nom.* Dickinson v. Zurko, 527 U.S. 150 (1999).

[10] *Dickinson*, 527 U.S. at 165.

[11] *See, e.g.*, Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269 (2007) (detailing the divergences between existing patent practices and administrative law).

[12] Pregis Corp. v. Kappos, 700 F.3d 1348, 1358–59 (Fed. Cir. 2012).

[13] Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2245–46 (2011).

[14] *See* 5 U.S.C. § 706 (2006).

[15] 26 N.E. 100 (Mass. 1891).

[16] *Id.* at 101–03.

[17] *See* N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 318–19 (1908).

[18] Many standard texts on administrative law refer to *Miller v. Horton*. *See, e.g.*, ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 537–38 (2d ed. 2001) (describing *Miller* as a precedent demonstrating "the origins of judicial review of agency action in significant part lay in common-law actions against public officials"); STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 803 (7th ed. 2011) (describing *Miller* as "a

cases involving land patents, rulings of the Interstate Commerce Commission, and of course patents on inventions, jury review of administrative action was an ever-present alternative that played an enormously significant role in shaping doctrine.[19] Thus, even if it had never been quite a dominant mechanism for checking administrative action, jury review was an accepted alternative well within the mainstream of state and federal administrative practice in the nineteenth and early twentieth centuries.

The second reason for considering jury review is that the topic reveals a deep connection between administrative law and the traditions of criminal procedure. Even today, criminal courts allow jury review of executive decisions in certain types of criminal cases. At common law, for example, individuals had a right to resist unlawful arrests.[20] In such instances, the legality of the arrest (or attempted arrest) was an issue for the jury, as it still is in those states that have not modified the common-law rule.[21] Similarly, the offenses of failure or refusing to obey lawful orders of police seem to include as a basic element a review of the legality of the order (though the case law for such minor offenses appears to be sparse). For such offenses, the juries are permitted—indeed required—to exonerate defendants where the jury finds the predicate executive action to have been unlawful under the particular facts and circumstances.[22]

Jury review of executive action in the criminal context inexorably leads to the jury's traditional and continuing power to review challenges to the reasonableness of executive branch decisions involving searches and seizures.[23] The history underlying that area of law includes a profound insight: Jury review of executive action can be entirely supplanted by a set of procedures that includes initial executive determination with significant, independent (but possibly deferential) judicial oversight. In the areas of searches, seizures, and arrests, the warrant process is the mechanism of judicial oversight that developed long ago as an appropriate substitute for jury review of executive action. Thus, where officers acted without warrants, they would be subject to damages actions if a jury were to later decide that, under the facts and circumstances, the officers' actions were "unreasonable."[24] Warrants, however, gave executive branch officers immunity from such jury second-guessing. In effect, the warrant process substituted, in place of jury review of executive decisions, a more elaborate form of executive branch decisionmaking with judicial review.

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famous tort action to recover damages for a horse that a health inspector had destroyed"); RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 808 (6th ed. 2011) (describing *Miller* as "well-known"); JERRY MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 1172 (6th ed. 2009) (describing *Miller* as a "well-known example" of case law "impos[ing] liability for official acts").

[19] *See infra* Part III.

[20] Elk v. United States, 177 U.S. 529, 534 (1900).

[21] *See infra* Part II.

[22] *See infra* Part II.

[23] Cavanaugh v. Woods Cross City, 718 F.3d 1244 (10th Cir. 2013).

[24] *See* California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1178–79 (1991).

That history supplies the overarching thesis for this Article. Jury review of executive and administrative actions is precedented and possible, *but not preferred*. Where there is no other mechanism for determining and reviewing the legality of executive branch action, jury review will be employed as a backstop—as a default rule. But jury review of administrative and executive action comes with severe inconveniences. Thus, across broad areas of law, our legal culture has pushed to replace this mechanism with a combination of executive branch decisionmaking coupled with judicial oversight.[25]

The strength of this thesis is that it provides a unifying theme for a vast body of experience across centuries and different areas of law. It explains, for example, why *Miller v. Horton* was rightly decided, but that the Supreme Court's statements in *Cox v. United States* are correct too. Justice Holmes in *Miller v. Horton* was right: Jury review of executive action may be the ultimate protection against unreasonable executive action. The protection of the jury, however, is contingent on the absence of any substantial alternative processes by which issues may be fairly adjudicated without the jury. At the time of *Miller v. Horton*, such processes did not exist,[26] and so the jury was the only available mechanism to check inaccurate executive decisions.

By the time of *Cox* in 1947, legislation and judicial decisions had clearly established pervasive rights to administrative process and judicial review. In that era and in that area of law, it is perfectly correct—indeed quite preferred—to rule that the use of a jury to review of administrative action is against "settled federal administrative practice."[27] Because such procedural protections are ubiquitous in the modern era, the assertion in *Cox* is empirically true. Nevertheless, a denial of any role for the jury in the administrative state is both inconsistent with history and theoretically bankrupt. Rather, the possibility of jury review of administrative action, with all its costs and ineffectiveness, should remain and does remain a possibility—a background threat—that spurs government to provide fair administrative and judicial processes as a substitute for the jury.

This thesis explains not only cases such as *Miller v. Horton* and *Cox*, but also decisions in other areas such as land patents, rate-unreasonableness cases involving the ICC and, at least to some extent, immigration cases. In each area, jury review has been a possibility and sometimes a reality, but legislatures and courts have continually sought alternatives.[28] Where alternative processes—including administrative processes subject to judicial oversight—are available, the courts have favored those alternatives. Indeed,

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[25] *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 954 (2012) (requiring a warrant prior to the use of GPS tracking, obviating the need for a jury to determine the reasonableness of the tracking for every case).

[26] *See* Miller v. Horton, 26 N.E. 100, 100–01 (Mass. 1891) (noting that the administrative board at issue in the case provided the horse's owner with "no notice or opportunity to be heard" and framing the issue as whether "the Legislature can make the *ex parte* decision of a board *like this* conclusive upon [the owner]" (emphasis added)).

[27] Cox v. United States, 332 U.S. 442, 453 (1947).

[28] *See infra* Part III.

in the context of the rate-unreasonableness cases, this favoritism took the form of the command by the Supreme Court to employ administrative alternatives in the place of more traditional jury processes.[29] The Court's command, which had no statutory basis, became known as the "primary jurisdiction" doctrine.[30] Though that doctrine is now thought of as an entire subfield in administrative law, it has its roots in a judicial innovation to replace jury review of administrative action with additional administrative processes subject to judicial review.

Part I of this Article compares the apparently polar results in *Miller v. Horton* and *Cox v. United States*. Despite the apparent dissimilarity in the cases, closer examination reveals important consistencies and also explains why, even under Massachusetts law, *Miller v. Horton* has been held *not* to require jury review of modern state administrative orders. The reconciliation of *Miller v. Horton* and *Cox v. United States* also provides a basis for explaining the anomalous current practice of having juries review the validity of patents.

Part II of the Article investigates the criminal procedure precedents and shows how jury review of executive action survives except where an alternative process of executive action with judicial review has been put in place. This Part shows the deep unity between precedents like *Cox* and the warrant process. It also explains why *Cox* has not been applied by the lower courts in criminal tax cases where taxpayers challenge the validity of administrative assessments of tax liability.

Part III of the Article examines precedents from a host of other areas of administrative practice across history. These precedents show jury review of administrative action as the default process—available yet subject to being displaced by more administratively convenient alternatives. The last Part offers conclusions on the broader implications of the law's general experience with jury review of administrative action.

I. *COX V. UNITED STATES* AND *MILLER V. HORTON*: RECONCILING POLAR OPPOSITES AND EXPLAINING THE PATENT VALIDITY ANOMALY

Any discussion of the role of juries reviewing administrative action should begin with *Cox v. United States*[31] and *Miller v. Horton*.[32] *Cox* is a U.S. Supreme Court case directly addressing the role of the jury in reviewing federal administrative action and thus obviously must be central to any serious analysis of the subject.[33] Surprisingly enough, *Miller v. Horton* is the more famous of the two cases,[34] even though it seems

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[29] *See infra* notes 167–78 and accompanying text.

[30] *See infra* notes 176–78 and accompanying text.

[31] 332 U.S. 442 (1947).

[32] 26 N.E. 100 (Mass. 1891).

[33] *Cox*, 332 U.S. at 452–53.

[34] *Miller* is still cited in many modern administrative law case books, while *Cox* is not. *See supra* note 4.

to state a rule about jury review directly contrary to that in *Cox*. Yet while the two cases initially appear quite different in their approaches to having a jury review administrative action, that first impression is not entirely accurate. The two cases can be reconciled, and in fact, the subsequent case law applying each decision shows the path to the reconciliation.

Though predating *Cox* by just fifty-six years, *Miller* arose in a quite different era of administrative law. By the time of *Cox*, the APA had been enacted, and "administrative law" was already recognized by the legal profession as a separate field of law.[35] In the time of *Miller*, however, administrative law was just in its infancy.[36] That difference in time helps to explain the different approaches of the two courts, but more importantly, it helps to explain the difference in the two administrative procedures, with the procedure in *Miller* being shockingly summary.

The case of *Miller* began with a horse that may or may not have been sick with an infectious and fatal disease known alternatively as "farcy" or "the glanders."[37] In 1888, a report about the possible illness of the horse reached the Massachusetts Cattle Commission, which was a state administrative board. One of the commissioners of the state board, accompanied by a veterinarian, examined the horse and decided that it did have the glanders.[38] Thereafter, on November 3, 1888, the state board of cattle commissioners issued an order to the local board of health commanding the members of the local board to destroy the horse.[39] The local board members at first balked. The horse's owner, Caleb Miller, was able to produce two veterinarians who concluded that the horse was not sick, and so the local board members contacted the state board to see whether the order to destroy the horse should be carried out.[40] The state board refused to modify the order, and the local officials carried out the destruction. For their

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[35] The Administrative Procedure Act was enacted in 1946, the year before *Cox* was decided. *See* Pub. L. 79-404, 60 Stat. 237 (1946). By that time, several casebooks devoted to the field of "administrative law" had already been published. *See* FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW (1932); FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND MATERIALS ON ADMINISTRATIVE LAW (2d ed. 1935); ERNST FREUND, CASES ON ADMINISTRATIVE LAW (1911); ERNST FREUND, CASES ON ADMINISTRATIVE LAW (2d ed. 1928); WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS (1940).

[36] Roscoe Pound dated the origins of administrative law in the United States to 1880–1890, the very period in which the *Miller v. Horton* controversy arose. *See* Roscoe Pound, *The Growth of Administrative Law*, 2 WIS. L. REV. 321, 325 (1924) ("Beginning in this country about 1880, growing stronger about 1890, assuming large proportions at the beginning of the present century, and extending continually, at the end of the first quarter of the century this phenomenon of administrative justice is perhaps the conspicuous feature of our American law.").

[37] *Miller*, 26 N.E. at 100.

[38] *Id.*

[39] *See* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1122 (1981).

[40] *Id.*

trouble, the local officials were sued in tort by Miller, who sought compensation for the lost horse.[41]

The trial judge, sitting without a jury, found as a matter of fact that the horse did not have the glanders, but nonetheless concluded that the members of the local board of health were legally justified in carrying out the destruction of the horse based on the order issued by the state cattle commissioners.[42] The Supreme Judicial Court of Massachusetts, per Justice Holmes, reversed. Technically, the court's holding was based merely on statutory interpretation. The relevant section of the statute invoked by the state commissioners applied only "[i]n all cases of farcy or glanders," and the high court noted that "[t]aken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders."[43] But in refusing to go beyond that narrow literal meaning—i.e., in refusing to recognize any statutory justification unless the destroyed horse actually had the glanders—the court reasoned that the narrower construction of the statute was to be preferred given "the grave questions which would arise as to the constitutionality of the clause if it were construed the other way."[44]

In articulating precisely what "grave question[ ]" was being avoided, the court seemed to recognize a fairly broad right—or at least a presumptive right—to jury review of administrative action. It described the question as being "whether, if the owner of the horse denies that his horse falls within the class declared to be [subject to being destroyed as a nuisance], the legislature can make the *ex parte* decision of a board like this conclusive upon him."[45] The court found the answer to that question in its prior case law, which held that "the owner has a right to be heard, and, further, that *only a trial by jury* satisfies the provision of article 12 of the declaration of rights, that no subject shall be deprived of his property but by the judgment of his peers, or the law of the land."[46]

There's an oddity about this portion of Holmes's opinion. Though Holmes began the discussion with what today would be considered a standard reference to the canon of constitutional avoidance—preferring one construction of the statute over another to avoid the "grave questions" that would otherwise be presented—the opinion seemingly goes on to answer the crucial constitutional question by construing prior case law as granting a right to "trial by jury" before the owner can be "deprived of his property."[47] If read broadly, the opinion in *Miller* could be viewed as establishing a right to have the jury serve as a fundamental protection against unlawful administrative action.

Yet such a broad reading of *Miller* is almost certainly not consistent with the views of a majority of the Justices who decided the case. The issue decided by the court was

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[41] *Miller*, 26 N.E. at 100.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 101.
[45] *Id.*
[46] *Id.* (emphasis added).
[47] *Id.*

not whether any administrative process could finally decide the owner's right but whether an "*ex parte* decision of a board like this" could make a conclusive determination.[48] Administrative law was in its infancy in the 1880s, and that lack of maturity is evident in the administrative process employed in this case. The court described the process as "ex parte" and strongly suggested that the owner was not given any right to be heard at any stage of the administrative process.[49] Indeed, later in the opinion, Holmes recognized that "[o]f course there cannot be a trial by jury before killing an animal supposed to have a contagious disease" and assumes that the administrative process could authorize the killing "without a hearing beforehand."[50] But "[i]f [the owner] cannot be heard beforehand he may be heard afterwards," Holmes observed, by providing a statutory process for compensating the owner if the ex post hearing determined the horse not to be diseased.[51] If, however, the legislature does not allow for either an ex ante or ex post hearing, then the statute "leave[s] those who act under it to proceed at their peril, and the owner gets his hearing in [a tort] action against them."[52] These passages seem pretty clearly to indicate that the court might very well be willing to permit the legislature to foreclose jury oversight of administrative decisions if more administrative process were provided. The court allowed the jury to retain a default role: If the legislature established no substantial administrative process, then jury trial rights would remain, and the administrative decision would be subject to jury review—indeed, apparently de novo jury review, with no deference given to the earlier decision.

A narrow interpretation of *Miller* also explains why the court suggested that, "[i]f the [state cattle] commissioners had felt any doubt [about whether the horse was diseased], they could have had the horse appraised under section 12."[53] Such an appraisal would be pointless if it too did nothing to protect the local officials who carried out the order to destroy the horse, and the court expressly reserved judgment about "[w]hether [a tort] action would have lain in that case."[54] By suggesting the statutory appraisal process as a possible alternative to leaving the local officials exposed to tort liability, the court seemed to indicate that its holding was limited to the specific ex parte condemnation process that the state commissioners had chosen to employ in that case. The statute's appraisal process might have afforded the owner more procedural protections than the condemnation process, and those protections might have been sufficient to foreclose de novo jury review.

Interpreting *Miller* narrowly is also consistent with the slim 4–3 majority held by the Holmes's opinion. The dissent by Justice Devens argued that defendant local officials who carried out the destruction order should be protected in their actions because

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[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 100–01.
[54] *Id.* at 101.

they "acted by direction of a body to whom the legislature lawfully could and did confide the power of deciding whether the animal in question was affected with disease."[55] Devens drew an analogy to the warrant process, in which "an officer is protected by his warrant, if it issue from a court having jurisdiction, no matter what previous error may have been made which led to the issuance of it."[56] And, he embraced the theory that "*quasi* judicial" functions could be conferred on "boards of administration in order that the public safety may be guarded."[57] The majority's cautious language qualifying the reach of the court's holding has to be read in light of the dissent. The majority conceded the dissent's point that the legislature could create administrative bodies such as the state cattle commission.[58] The difference between the two opinions then comes down to administrative procedure, with the majority unwilling to go quite as far in accommodating the primitive administrative process in the particular section of the statute invoked by the administrative body.

Subsequent Massachusetts cases have adhered to the narrow interpretation of *Miller v. Horton*. The most authoritative subsequent treatment came in the 1960 case of *DiMaggio v. Mystic Building Wrecking Company*.[59] The case bore an undeniable resemblance to *Miller*: Boston's building commissioner examined the plaintiff's property, determined it to be unsafe and ordered it to be razed.[60] After the defendant wrecking company razed the building, the plaintiff sued the company for trespass and damage to real estate.[61] The company naturally pointed to the commissioner's order as a lawful justification for the trespass and destruction of the property.[62] Just as Miller had challenged the validity of the administrative order to destroy the horse, the plaintiff property owner in *DiMaggio* wanted the opportunity to challenge the validity of the administrative order to destroy the building; he sought to have the jury instructed that the administrative order would provide no defense if the jury were to find that "in fact public safety did not require [the building] to be demolished."[63] In other words, the plaintiff sought precisely the sort of jury review that Holmes had held to be available to the plaintiff in *Miller*.

Despite the obvious similarities between *Miller* and *DiMaggio*, the plaintiff in *DiMaggio* was denied jury review.[64] Instead, the trial judge instructed the jury that, if

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[55] *Id.* at 104 (Devens, J., dissenting).

[56] *Id.*

[57] *Id.*

[58] *Id.* at 100–01 (majority opinion).

[59] 166 N.E.2d 213 (Mass. 1960).

[60] *Id.* at 215.

[61] *Id.* at 214. The plaintiff also sued the wrecking company for conversion of some personal property that had been left in the building and was supposedly taken by the wrecking company. *Id.* The order from the building commissioner could not justify conversion of any personal property, and the defendant lost on that claim. *Id.*

[62] *Id.*

[63] *Id.* at 215.

[64] *Id.* at 215–16.

the building commissioner had followed the statutory steps necessary to issue the order for razing the building, then the administrative order would justify the trespass and destruction of the building "and there is no liability on the city or the wrecker."[65] That instruction was affirmed on appeal and the wrecker was found not liable.[66]

The determinative difference between *Miller* and *DiMaggio* was the maturity of the administrative process in 1960. As the *DiMaggio* court noted, the 1887 statute at issue in *Miller* "contained no requirement of notice to the owner of the horse" and "gave no reasonable opportunity for a hearing at any stage, or for an appeal and review of the commissioners' decision by an independent administrative board, or for a court review on questions of law."[67] By contrast, the building commissioner in *DiMaggio* sent the property owner notice by certified mail and posted a copy of the order on the building four weeks prior to the property's destruction.[68] The 1938 Administrative Code relevant in *DiMaggio* also afforded the property owner a right to appeal the order to an administrative board of appeal and thereafter to seek judicial review, which would include some review of the factual basis of the administrative order under an appropriately deferential standard.[69] In sum, the 1938 Administrative Code was enacted more than a half century after the statute from *Miller v. Horton*, and it was utterly different in terms of administrative process. Because of that fundamental difference, the *DiMaggio* court unanimously distinguished *Miller* and held that the administrative order authorizing destruction of the building "cannot be the subject of collateral attack in [a tort] action."[70]

The *DiMaggio* court also suggested that, even in Massachusetts, *Miller* might not be good law. The court wrote that it "need not consider whether *Miller v. Horton* will now be followed on its precise facts" and that "in recent cases, [*Miller*] has not been considered on the issue of its basic holding."[71] Those comments also show the development of, and change in, administrative law. Even by 1960, the resolution authorized by the majority in *Miller*—jury review of the validity of an administrative order in a tort action—seemed so radical that the *DiMaggio* court doubted that a modern court would ever countenance such a procedure.[72] That viewpoint seems reasonable only because administrative bodies are now subject to extensive procedural protections.

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[65] *Id.*

[66] *Id.* at 219.

[67] *Id.* at 217.

[68] *Id.* at 215.

[69] *Id.* at 217. Under the standard of review for issues of fact, the property owner was permitted to argue only "that the evidence which formed the basis of the action complained of or the basis of any specified finding or conclusion was *as matter of law insufficient* to warrant such action, finding or conclusion." *Id.* (emphasis added) (quoting the statutory provisions governing review).

[70] *Id.*

[71] *Id.*

[72] *See id.*

Remove those procedural protections and jury review no longer seems an unattractive solution. Indeed, this last point can also be seen in reviewing the line of cases that at first appears to be the polar opposite of *Miller v. Horton*—the Supreme Court's decision in *Cox v. United States*[73] and the lower court cases applying *Cox*.

The controversy in *Cox* arose over the military service draft instituted during World War II,[74] and despite the obvious necessity of swift administrative decisions in such matters, the rights afforded to the defendants in the administrative process were much greater than those that had been given in *Miller*. All three defendants in *Cox* sought to be classified as "minister[s]," which would have totally exempted them from compulsory "selective service" under the statutory scheme.[75] They were afforded the right before the local draft board to submit evidence in support of their claims that they were ministers, and each availed himself of that right by submitting documentary and testimonial evidence.[76] In each case, the local draft board rejected the claim for status as a minister and instead awarded each of them the status of "conscientious objector," which provided an exemption from military service but nonetheless required compulsory civil service.[77] The defendants were also given the right to appeal the local board's decision to an administrative board of appeal. Again, each availed himself of that right but lost the appeal.[78]

The defendants had initially reported to a "civilian public service camp," as required under the terms of their final orders, but soon thereafter deserted.[79] They were charged with being absent without leave from the camp—a criminal offense under the Selective Service and Training Act of 1940.[80] During their criminal trials, they sought to have juries review the validity of their classification as conscientious objectors rather than ministers.[81] The trial courts refused to allow the juries to review the validity of the administrative orders and instead specifically "instructed the juries that they were not to concern themselves with the validity of the classification orders."[82] The Supreme Court affirmed that instruction, with six of the Justices agreeing that "the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order" and that such jury involvement would also be "contrary to settled federal administrative practice."[83]

Two points about the *Cox* decision demand emphasis. First, the Supreme Court was not hostile to affording the defendants procedural protections beyond those provided

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[73] 332 U.S. 442 (1947).
[74] *Id.* at 443.
[75] *Id.* at 444.
[76] *Id.* at 444–47.
[77] *Id.* at 444, 446–47.
[78] *Id.* at 444–46.
[79] *Id.* at 443.
[80] Pub. L. No. 76-783, § 11, 54 Stat. 885 (1940).
[81] *Cox*, 332 U.S. at 443.
[82] *Id.*
[83] *Id.* at 453 (citing Yakus v. United States, 321 U.S. 414 (1944)).

within the administrative process. Indeed, the Court specifically affirmed the right of the defendants to have the administrative order "submitted to the trial judge and the [appellate] courts" for review.[84]

Second, in prior case law, the Court had already determined that a selective service order would be subject to review in court under a deferential standard—the order could be set aside "only if there is no basis in fact for the classification."[85] While the Court paraphrased that standard in various ways (elsewhere describing the judicial inquiry as searching for an "adequate basis" or a "substantial basis"),[86] the Court did not waiver from viewing the appropriate review process as deferential review based on the record compiled at the administrative level.[87] That standard of review meant that, to accept the right to jury review asserted by the defendants, the Court would have to recognize a quite unconventional function for a jury—with the jury reviewing a paper record to determine whether, under a deferential standard, the record contained sufficient evidence to support the administrative body's decision.[88] Alternatively, if the Court maintained a traditional role for the jury—deciding issues of fact de novo based on evidence presented at trial—the Court would have been permitting criminal defendants both to circumvent the deferential standard of review that the Court had just established, and also to make the administrative process largely irrelevant to their ultimate selective service classifications.

The unattractiveness of those alternatives must have been part of the reason why the Court ruled as it did, but it also provides significant insight into the ultimate reason why jury review of administrative action is so rare *if the administrative action is supported by a significant prior administrative process*. If the administrative process is to have any weight, then court review of the administrative order needs to proceed with some measure of respect or deference to the judgment reached at the end of that administrative process, and such rules of deference will, almost invariably, have to take into account the amount and quality of evidence presented to the administrative decision maker. Reviewing a record of prior legal proceedings and granting some measure of deference to those proceedings is a function traditionally allocated to judges not only because the function requires the ability to read (a skill that historically could not be taken for granted among jurors) but also because it requires legal training about the meaning and nature of legal deference.

That insight also accurately predicts the exceptions that the lower courts have found to the broadly stated principle in *Cox*. The leading case on the limits of *Cox* is the Seventh Circuit's decision in *United States v. England*.[89] There the defendants, a father

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[84] *Id.*

[85] Estep v. United States, 327 U.S. 114, 122 (1946).

[86] *Cox*, 332 U.S. at 451, 453.

[87] *See id.* at 453 ("[W]hen a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew.").

[88] *Id.*

[89] 347 F.2d 425 (7th Cir. 1965).

and his son, were charged with tax evasion and sought jury instructions that "would have permitted the jury to find the [tax] assessments valid or invalid as a matter of fact."[90] The judge rejected the proposed instructions and instead charged the jury that the tax assessments were to be assumed correct as a matter of law, and the jury convicted the defendants.[91]

In reversing the convictions, a divided panel of the Seventh Circuit engaged in an extensive analysis of *Cox* and found it inapplicable to the tax assessments at issue.[92] Some of the reasons relied upon by the court were unique to that particular case. For example, the court noted that the tax assessments were issued only against the father, not the son.[93] The government prosecuted the son on the theory that he had knowledge of, and was part of, his father's fraud.[94] Nonetheless, the court majority reasoned, the son did not have any rights to challenge the tax assessments against his father.[95] Similarly, the validity of the particular assessments at issue "could be proved only by a showing of fraud—a factual question and a matter collateral to and apart from the record upon which the assessment itself was based."[96] Those reasons highlight a fundamental point: *Cox* has direct applicability only where the administrative record has at least some significant weight in reviewing the validity of the administrative order.

The particular facts of the *England* case do not, however, explain why the lower court case law on criminal tax prosecutions has generally followed the Seventh Circuit's decision and why the government has not sought Supreme Court review of that case law.[97] The more fundamental explanation for this "tax assessment" exception to *Cox* is that, unlike the administrative order in *Cox*, tax assessments are generated with a paucity of administrative process and thus are generally entitled to little weight. Even outside the context of a criminal trial for tax evasion, tax assessments are only prima facie

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[90] *Id.* at 429.

[91] *Id.* at 429–30.

[92] In its discussion, the court wrote that the position "in *Cox* has often been defended on the ground that the validity of administrative action is a question of law." *Id.* at 440. Referring to the "fine" line between law and fact, the court's analysis concluded that *Cox* presented a question of law whereas the tax issues at bar in *England* presented a question of fact. *Id.*

[93] *Id.* at 439.

[94] *Id.*

[95] *Id.* ("[T]he administrative review of the validity of the assessment was not available to the co-defendant, William B. England, Jr.").

[96] *Id.* at 440.

[97] *See, e.g.*, United States v. Silkman, 156 F.3d 833 (8th Cir. 1998). In *Silkman*, the court relied on *England* to reject the government's "startling contention" that the agency's assessment should be conclusive proof of the tax owed by the defendant in a criminal prosecution for tax evasion. *Id.* at 835. The *Silkman* court ordered a new trial because the defendant had "an absolute right to a jury determination" that taxes were in fact owed. *Id.* (quoting *England,* 247 F.2d at 430); *see also* Boulware v. United States, 552 U.S. 421, 424 (2008) (confirming that the existence of a tax deficiency is an element of tax evasion that must be proven beyond a reasonable doubt by the government).

evidence of tax liability.[98] For example, as the court in *England* noted, another way to challenge the validity of a tax assessment is for the taxpayer to pay the assessed tax and then to file an action seeking a refund in federal district court.[99] In such actions, plaintiffs bear the burden of proving their cases, but the assessments are not entitled to any special deference (indeed, in some circumstances, the burden of proof shifts onto the government to establish the taxpayer's liability).[100] As the Supreme Court instructed long ago in *United States v. Rindskopf*,[101] "every material fact upon which [the taxpayer's] liability was asserted [in the tax assessment] [is] open to contestation."[102]

Miller v. Horton, with the limits placed on it by *DiMaggio*, and *Cox v. United States*, with the limits placed on it in the tax assessment context, show a general consistency: jury review of administrative action may exist where the procedures used at the administrative level are thin, and the courts are not willing to give the agency's decision any substantial weight (as in *Miller* and *England*). By contrast, where the administrative process affords many protections and the courts are willing to limit oversight to some form of deferential judicial review (as in *DiMaggio* and *Cox*), the administrative process coupled with judicial oversight will generally be sufficient to displace jury review.

A thorough appreciation of *Cox v. United States*, *Miller v. Horton*, and of the subsequent cases limiting them also provides the basis for understanding both why the apparent anomaly of jury review in patent validity originally made sense in patent cases and why the law in that area may very well be changing. Jury review of patent validity made perfect sense in the patent system that existed two hundred years ago. In that era, the Patent Office issued patents through an ex parte registration system, with no administrative examination to determine that the alleged invention satisfied the statutory patentability standards.[103] In other words, the administrative process of the patent system was even less substantial than the process at issue in *Miller v. Horton*. Thus, where a

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[98] *See* United States v. Lease, 346 F.2d 696, 698 (2d Cir. 1965) (holding that in an action to enforce a tax lien, the assessment was only prima facie evidence of the actual amount owed in taxes and that the amount due could be challenged by the taxpayer).

[99] *England*, 347 F.2d at 437.

[100] *See* Tilman v. United States, 644 F. Supp. 2d 391, 398 (S.D.N.Y. 2009) (noting the traditional rules (i) that IRS tax assessments are "presumptively correct" and (ii) that the taxpayers suing for refunds bear the burden of persuading the fact finder that the assessment is incorrect, but also noting that a 1998 statute, 26 U.S.C. § 7491(a) (1998), shifts the burden of proof to the government on factual issues related to a taxpayer's liability in certain circumstances).

[101] 105 U.S. 418 (1881).

[102] *Id.* at 422. Because the assessment is entitled to such little weight, it is also true that the record evidence used at the administrative level need not be reviewed by the jury. *Id.* at 420 (noting that the trial judge in that case had explained to the jury that "it is not necessary that the evidence upon which the commissioner acted should be laid before the jury").

[103] *See* John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1124–28 (2000) (detailing the patent registration system that existed between 1793 and 1836 and discussing the reasons for the system's demise in 1836).

defendant in patent infringement litigation raised patent invalidity as a defense, the patent's validity was not really being *re*viewed; it was being *decided in the first instance*. Moreover, in that era, all of the crucial patentability issues—such as whether the invention was new and whether the patent's specification properly enabled practitioners of the relevant art to make and use the invention—were considered to be factual in nature and thus would naturally be assigned to the jury, as the Supreme Court held in *Battin v. Taggert*.[104]

When the Patent Office first began to examine patent applications and to decide patent validity issues as part of the process for granting rights, the case for permitting juries to pass on patent validity was weakened but still quite plausible. The weight carried by the patent in that era was similar to the weight carried by an IRS tax assessment: The Patent was "prima facie" evidence of the patent's validity; the burden of proof was placed on the party asserting invalidity; and the validity issue was tried without any special rules of deference to the agency's decision or restrictions on the evidence that could be admitted to attack or defend validity.[105] In those circumstances, jury review of patent validity made as much sense as does the jury review of tax deficiency assessments that was authorized in *United States v. England*.

Jury review of patent validity becomes much less justifiable as the administrative processes of the Patent Office have become more elaborate and have been afforded more weight in court. The presumption of patent validity is the key variable that has changed across time. While originally the presumption merely meant that the patent was prima facie evidence of validity, it became stronger in the late nineteenth century, with Supreme Court decisions holding that "every reasonable doubt" should be resolved against any party challenging the validity of an issued patent.[106] By the early

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[104] 58 U.S. (1 How.) 74, 85 (1854).

[105] *See, e.g.*, Hayden v. Suffolk Mfg. Co., 11 F. Cas. 900, 902 (C.C.D. Mass. 1862) (charging the jury that "the burden of proof to show that [the patentee] was not [the inventor], is upon the defendants, and they must maintain the allegation by a preponderance of the evidence to be entitled to the verdict"); Whipple v. Baldwin Mfg. Co., 29 F. Cas. 930, 931 (C.C.D. Mass. 1858) (charging the jury that the issued patent is "prima facie proof that [the plaintiff] is the first and original inventor" and that, to prove invalidity, "the burden of proof is then upon the defendant" but imposing no heightened burden). The circuit court decisions in *Hayden* and *Whipple* were consistent with the Supreme Court's decision in *Philadelphia & Trenton Railroad Co. v. Stimpson*, which also described patents as providing merely "prima facie evidence" of validity. 39 U.S. (1 Pet.) 448, 459 (1840). Though *Philadelphia & Trenton* was decided after the Patent Act of 1836 created an administrative examination system, the patent in suit was issued (and reissued) before 1836. *See id.* at 457–58. At least one statement in the case suggests that the Court believed, incorrectly, that the Patent Office had conducted an examination of the relevant patent. *See id.* ("[W]here, as in the present case, an act is to be done, or patent granted upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act or granted the patent, is prima facie evidence that the proofs have been regularly made, and were satisfactory.").

[106] Coffin v. Ogden, 85 U.S. (1 Wall.) 120, 124 (1873); *see also* Cantrell v. Wallick, 117 U.S. 689, 695 (1886) (quoting *Coffin*).

twentieth century, the more muscular presumption of validity became tied to deferential judicial review of administrative decisions, with the Supreme Court expressly refusing to distinguish between cases where a "court that sits as a reviewing body" over an administrative agency (where deference to the agency's decision is the norm) and cases where a party is challenging patent validity in an infringement action.[107] As the Supreme Court recently held, it was that stronger presumption of validity that Congress codified in 1952.[108]

The addition of the presumption of validity moves the review of patent validity away from the administrative model at issue in *Miller v. Horton* and the tax assessment cases and closer to *Cox*. No longer is the administrative process to be given no weight or the slight weight of prima facie evidence. Rather, the agency's decision to issue the patent now carries substantial force.

Still, challenges to patent validity—at least where raised as defense to patent infringement litigation—are not identical to the situation presented in *Cox*. In *Cox*, the parties challenging the validity of the administrative order were limited to the evidence in the administrative record; they could not introduce new evidence once they were in court. The agency's decision in *Cox* was truly being *re*-viewed only: The Court was trying to determine whether the administrative record, as it existed at the time of the agency's action, had a "substantial basis" to support the agency's decision.[109] By contrast, the party challenging patent validity in patent infringement litigation—who, of course, would not have had an opportunity to present evidence during the ex parte administrative process leading to the issuance of a patent—is not limited to the administrative record; new evidence may be introduced. That feature of patent validity review adds an element of fact-finding not present in *Cox*, but it is still not decoupled from the administrative process. Under the Supreme Court's interpretation of the presumption of validity, the weight to be given to the evidence produced by the party challenging the patent varies based on its relationship to the administrative record.[110] Thus, review of patent validity is a hybrid—not based solely on the administrative record, but not de novo fact-finding either.

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[107] Radio Corp. of Am. v. Radio Eng'g Labs., Inc., 293 U.S. 1, 9–10 (1934). The Court thought that making a distinction between the two contexts would lead into a "land of shadows." *Id.* at 10.

[108] Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2252 (2011).

[109] Cox v. United States, 332 U.S. 442, 452 (1947).

[110] *i4i*, 131 S. Ct. at 2251 (citations omitted) (agreeing with lower court precedent establishing that "new evidence supporting an invalidity defense may 'carry more weight' in an infringement action than evidence previously considered by the PTO [the Patent and Trademark Office]" because "if the PTO did not have all material facts before it, its considered judgment may lose significant force"); *see also* KSR Int'l Co. v. Teleflex, Inc., 550 U.S. 398, 426 (holding that, where the challenge to the patent's validity was based on evidence not considered by the PTO, "the rationale underlying the presumption [of validity]—that the PTO, in its expertise, has approved the [patent] claim—seems much diminished").

Reviewing patent validity in modern patent litigation can thus be seen as outside the tradition where juries have been allowed to review agency action (like *Miller v. Horton* and the tax assessment cases) but also not squarely controlled by *Cox* either. Nevertheless, although the situation is not identical to *Cox*, review of patent validity in modern litigation requires similar competencies—beyond the traditionally presumed abilities of jurors.

Jury review of administrative action is generally rare in the administrative state because if the administrative process is to be given any substantial weight in subsequent court proceedings (and generally it is), then evaluating the validity of the administrative order will require complex and interrelated judgments about issues such as whether the administrative record evidence supports the agency's factual conclusions, whether those factual conclusions support the agency's ultimate legal conclusions, and perhaps even whether the agency can create presumptions for or against certain inferences or impose an especially demanding or lax standard of proof.[111] On each of those issues, the agency may, or may not, be entitled to some measure of deference, depending on the statutory powers afforded the agency and, possibly, constitutional considerations about the proper scope of legislative, executive, and judicial power. Such analysis is far beyond the traditional role of juries in finding facts, and jury instructions designed to teach jurors the applicable principles of deference could not provide the necessary guidance without the instructions turning into something like a law school class on administrative law.

In modern patent infringement litigation, the legal process for reviewing patent validity is at least as complex as the process involved in the more standard judicial review of administrative action. While it is true that the analysis of patent validity is not limited to an existing administrative record, the addition of new evidence merely increases the complexity of the problem. Patent validity is not evaluated exclusively on evidence before the agency nor solely on the evidence produced in court. Rather, the process requires the decision maker to determine whether the evidence produced in court "differs

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[111] In *Cox* itself, for example, the administrative record contained a variety of affidavits and some documentary evidence about the defendants' alleged work as religious ministers, but the local draft boards determined that the evidence was insufficient to establish ministerial exceptions from the draft. Review of those decisions could require judgments about whether the evidence was credible (i.e., whether the defendants' affidavits about their ministerial activities were accurate); whether, accepting the credibility of the evidence, the defendants' ministerial activities were sufficient to entitle them to a draft exemption; and whether the agency could impose a stringent burden on parties seeking such an exemption. For two of the defendants, the Court resolved the cases by holding that the limited amount of ministerial activity alleged was itself a sufficient reason for the agency to deny a minister's classification. *See Cox*, 322 U.S. at 451. For the third defendant, the Court sustained the agency's legal ability to impose a stringent standard of proof, holding that the agency "might have reasonably held that nothing less than definite evidence of his full devotion of his available time to religious leadership would suffice under these circumstances." *Id.*

from that evaluated by the PTO [Patent and Trademark Office]," to evaluate whether that evidence is "materially new," and to weigh "that the PTO had no opportunity to evaluate [any new evidence] before granting the patent."[112] Furthermore, unlike in the nineteenth century where patent validity issues were held to be issues of fact, the Supreme Court's more recent decisions have emphasized that "the ultimate question of patent validity is one of law."[113] Thus, reviewing a patent's validity in modern litigation requires consideration of the administrative record, the evidence produced in court, the relationship between those two bodies of evidence, and the degree of respect that should be afforded to the agency's decision given the administrative record—and the entirety of this process is directed toward resolving a question of law. Such a task is quite distant from the traditional role of a jury as a de novo fact-finding body and seems to demand as much legal sophistication as other processes typically assigned to judges as part of the judicial review of administrative action. All of this suggests that jury review of patent validity—which is already an anomaly in modern administrative law—might also soon be displaced by judicial review of patent validity.

II. JURY REVIEW OF EXECUTIVE DECISIONS OUTSIDE OF THE ADMINISTRATIVE CONTEXT

Administrative processes are merely more elaborate forms of executive branch decisionmaking. Thus, a continuity exists between a decision by a single police officer on the street and the most elaborate and formal order of an administrative agency. The two are separated by the degree and form of procedures required prior to reaching a decision and, relatedly, the legal weight afforded to the final decision. But the difference is less dramatic than it may first appear, and if the thesis articulated in the prior Part of this Article is valid, it should be capable of explaining the patterns of jury review of executive decisions even far outside the parts of the executive branch that are generally considered "administrative."

The most procedurally austere executive order—the one probably most distantly related to an order produced after the elaborate procedures of a modern administrative agency—is a simple order from a police officer to do, or to refrain from doing, some action. In many jurisdictions, failure to obey such an order has been made a criminal offense, albeit typically a minor misdemeanor.[114] The offense lies, however, not merely in disobeying *any* police order, but in disobeying a *lawful* police order.[115] Criminal

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[112] *i4i*, 131 S. Ct. at 2251.

[113] Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 17 (1966).

[114] *See, e.g.*, IND. CODE ANN. § 9-21-8-1 (West 2013); WASH. REV. CODE ANN. § 46.61.022 (West 2013).

[115] *See* Streit v. District of Columbia, 26 A.3d 315, 319 (D.C. 2011) (holding that the government must prove beyond a reasonable doubt that the police order was *lawful* to uphold the convictions for disobeying the order).

prosecutions for such offenses present in basic terms an issue central to the study of administrative law: review of the legality of executive branch commands.

The case law on failure to obey lawful police orders is understandably thin. The charge is typically a minor one,[116] and one suspects that many prosecutions are dropped, with the de facto penalty for failing to obey the police order being merely the hassle and inconvenience of the arrest and temporary detention. Furthermore, even if a prosecution is brought, the case may not generate any reported decision.

Streit v. District of Columbia[117] is a rare example in which a prosecution for failure to obey a police order did produce an appellate opinion. The case arose out of a demonstration protesting the war in Iraq.[118] The anti-war protesters, who were conducting a silent prayer vigil in front of the White House, had obtained a valid permit for the demonstration, but the captain of the U.S. Park Police on the scene "chose to revoke the demonstrators' permit" due to some perceived violations of National Park Service regulations prohibiting stationary signs in front of the White House.[119] After the supposed revocation of the permit, police thrice ordered the demonstrators to disperse and warned that they would be arrested if they refused to comply.[120] After the demonstrators refused to go, they were arrested, tried and convicted for "failure to obey a lawful order of a police officer," a misdemeanor offense which the court abbreviated as "FTO."[121]

On appeal, the D.C. Court of Appeals reversed, holding that "[t]he lawfulness of the order is an element of the offense of FTO" and thus "[i]t is the government's burden to prove that element beyond a reasonable doubt . . . ."[122] The legality of the order to disperse, the court reasoned, turned on whether the revocation of the demonstrators' permit was lawful, "for if the decision to revoke the permit was not lawful, the order to disperse contravened the terms of the permit and was in derogation of [the demonstrators'] First Amendment rights."[123] The court then reviewed the decision to revoke the permit and found that, although the Park Police justified the decision to revoke the permit based on the demonstrators' supposed violation of regulations forbidding stationary signs, "the government presented no evidence whatsoever that this regulation was

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[116] *See, e.g.*, VA. CODE ANN. § 18.2-464 (West 2013) (failing to obey police officer is a class 2 misdemeanor).

[117] 26 A.3d 315 (D.C. 2011).

[118] *Id.* at 316.

[119] *Id.* at 317.

[120] *Id.*

[121] *Id.* The relevant provision of the D.C. Code of Municipal Regulations identified by the court provides:

> No person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians and to the operators of vehicles.

D.C. MUN. REGS. tit. 18, § 2000.2 (2013).

[122] *Streit*, 26 A.3d at 319.

[123] *Id.*

violated."[124] The court reviewed the record and found that no officer called to testify at trial reported seeing any stationary signs.[125]

Streit did not involve a jury because the offense charged was a minor misdemeanor with the possibility of only a small fine.[126] Nevertheless, the court's holding that the lawfulness of the police order is an element of the offense means that, in cases where the jury trial right is triggered (because the offense carries a higher penalty or because other charges trigger the right), then the jury would have to pass upon that element and find, beyond a reasonable doubt, that the prosecution had established the legality of the police order.

An example of such a case is *Arthur v. State*,[127] decided by the Maryland Court of Appeals in 2011. The case arose after a police officer began to ask questions of the defendant Arthur who, in response, began to yell at the officer.[128] The policeman ordered Arthur to lower his voice.[129] When Arthur continued yelling, the officer attempted to arrest him for the offense of failing to obey a lawful order of the police, but Arthur resisted arrest.[130] After he was eventually subdued and arrested, Arthur was charged, tried and convicted of both failing to follow a lawful order and resisting arrest.[131]

On appeal, Arthur's convictions on both counts were overturned because the trial court refused to give the jury a specific instruction about the right to resist an unlawful arrest.[132] Failure to give that instruction undermined the conviction on resisting arrest because, as the appellate court reasoned, "[a] reasonable juror, without the benefit of an instruction on this point, might believe that, when a police officer tells him he is under arrest, he must succumb, regardless of the circumstances, and wait for relief (and release) until he is taken before a judicial officer."[133] The Maryland Court of Appeals also held that failure to give the requested jury instruction on resisting unlawful arrests might have prejudiced Arthur on the count charging a failure to follow a lawful order because, due to the erroneous instruction, the jury may have improperly believed that the officer's initial order commanding Arthur to lower his voice "must have been a lawful one."[134] The court's reasoning demonstrates that in order to convict on the failure

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[124] *Id.*

[125] *Id.* A lieutenant, when asked how many protestors held signs, answered, "I don't know," and another officer's testimony failed to mention the protestors possessing any signs or placards at all. *Id.*

[126] *See* D.C. MUN. REGS. tit. 18, § 2000.10 (2013) (authorizing only a fine of $100 to $1,000 as punishment for a violation of D.C. Municipal Regulations title 18, section 2000.02); *see also* District of Columbia v. Clawans, 300 U.S. 617, 619 (1937) (holding that a jury trial is unnecessary for minor criminal offenses).

[127] 24 A.3d 667 (Md. 2011).

[128] *Id.* at 670.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 669.

[132] *Id.* at 677.

[133] *Id.*

[134] *Id.*

to obey charge, the jury had to review the lawfulness of the police order and thus the conviction was undermined by erroneous instructions suggesting a conclusion about that issue.

Most of the court's attention in the *Arthur* case is devoted to the law governing resisting arrest. The cases and commentary on that issue are much more voluminous,[135] although much of that commentary and case law deals with the quite separate issue of the criminal liability arising where the person being wrongfully arrested kills the arresting officer.[136] Still, the cases also include many examples where the party resisting arrest was charged with no crime other than resisting arrest.[137] In those situations, the traditional common-law approach was to charge the jury that legality of arrest was a necessary predicate to a conviction.[138] For example, the court in the 1887 Michigan Supreme Court case of *People v. Rounds* affirmed the propriety of the following jury charge:

> The officer could arrest without a warrant only for a breach of the peace actually being committed in his presence, and if you believe, from all the evidence in the case, that no such breach of the peace took place until the arrest was made, and then only in resisting such arrest to the extent of striking several blows with the fist, then such resistance was justifiable, and you should acquit the defendant.[139]

Rounds is an interesting case because the jury instruction there also articulated the underlying theory as to why the review of the legality of the arrest is necessary: "If an officer does not keep within the law, he is not acting as an officer, nor entitled to protection as one."[140]

While the right to resist arrest remains controversial (and the right is certainly not absolute[141]), the key point here is that, traditionally and still in many jurisdictions,[142]

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[135] *See, e.g.*, Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1128, 1138 (1969).

[136] *See, e.g.*, Elk v. United States, 177 U.S. 529 (1900).

[137] *See, e.g.*, People v. Rounds, 35 N.W. 77, 77 (Mich. 1887).

[138] *Id.* at 78.

[139] *Id.*

[140] *Id.*

[141] Even under the common-law approach, a party subject to an illegal arrest had no right to kill the officer, though the illegality of the attempted arrest would mitigate the crime from murder to manslaughter. *See Elk*, 177 U.S. at 534–35.

[142] Those jurisdictions include Maryland, Michigan, and Florida, among others. *See, e.g.*, State v. Espinosa, 686 So. 2d 1345, 1347 (Fla. 1996) ("[T]he law is well settled that the legality of the arrest is an element of the offense of resisting arrest without violence . . . ."); Monk v. State, 619 A.2d 166, 168 (Md. Ct. Spec. App. 1993) ("[A]n essential element of resisting arrest is that the arrest be lawful."); People v. Reed, 203 N.W. 756, 757 (Mich. Ct. App. 1972) (holding

juries are called upon to review the legality of executive branch decisions, specifically the decisions by police to arrest.[143] Of course, those decisions are made on the spot, by individual officers, with no procedural protections. The jury's power to review the legality of an arrest changes dramatically where a warrant has been issued for the arrest. In such circumstances, no inquiry is made into the legality of the warrant. As the court stated in the early case of *United States v. Thompson*,[144] "if a warrant contains on its face a cause of arrest within the jurisdiction of the magistrate, and purports to have been issued within his local jurisdiction, and is, in other respects, formal, the officer is bound to execute it, and resistance is unlawful."[145] That rule remains good today and is followed even in jurisdictions, such as Maryland, that still permit juries to review the legality of warrantless arrests.[146]

The point extends beyond arrest warrants to search warrants too. Where warrantless searches occur and are challenged in a subsequent tort action (including § 1983 actions), "the reasonableness of a search or seizure is a question for the jury."[147] And in determining reasonableness, the jury also gets to pass on "the existence of probable cause, . . . even though [that issue] is normally determined by a court during the warrant application process."[148]

That final passage reveals a basic truth: History, tradition, and even current practice shows that the warrant process itself is a procedural substitute for jury review of executive action. Without a warrant, executive branch officers may search, seize, and arrest, but they will often be subject to jury review of their decisions.[149] If, however,

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that "it was necessary for the jury to pass upon the legality of defendant's arrest in order to convict him of resisting arrest" because "the legality of the arrest is an element of the offense of resisting arrest"). Many jurisdictions have modified the common-law rule. *See, e.g.*, Craig Hemmens & Daniel Levin, *"Not a Law at All": A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 Sw. U. L. REV. 1, 35, 37, 50 (1999).

[143] *See, e.g.*, *Reed*, 203 N.W. at 757.

[144] 28 F. Cas. 89 (C.C.D.C. 1823).

[145] *Id.* at 90. Further factual background on the *Thompson* case is provided by Chevigny, *supra* note 135, at 1132.

[146] *See, e.g.*, Rodgers v. State, 373 A.2d 944, 946, 952 (Md. 1977).

[147] Cavanaugh v. Woods Cross City, 718 F.3d 1244, 1253 (10th Cir. 2013) (quoting Sherouse v. Ratchner, 573 F.3d 1055, 1059 (10th Cir. 2009)); *see* Muehler v. Mena, 544 U.S. 93, 98 n.1 (2005) (recognizing that, in § 1983 tort actions, the jury is permitted to decide factual issues, though the Court need not grant any deference to the jury's decision in determining whether the facts as found constitute a constitutional violation). The tradition of permitting the jury to assess the reasonableness of search and seizure is longstanding. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (noting that, at common law, "[a]n officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was 'reasonable'").

[148] *Cavanaugh*, 718 F.3d at 1253 (quoting Bruner v. Baker, 506 F.3d 1021, 1028 (10th Cir. 2007)). Traditionally, the jury might have ruled merely on the reasonableness of the search or seizure, with the concept of "probable cause" technically being limited to the warrant process. *See* Amar, *supra* note 24, at 1179–80.

[149] *See* cases cited *supra* notes 146–48.

they apply for a warrant, and comply with the procedures associated with seeking a warrant (including that they articulate their "probable cause" in advance, provide an "[o]ath or affirmation" and "particularly describ[e] the place to be searched, and the persons or things to be seized"),[150] they can circumvent jury review.

In effect, the warrant process permits executive branch action (a particularized sworn statement) with judicial oversight to supplant the jury. As Professor Amar has noted, "A warrant issued by a *judge* or *magistrate*—a permanent government official, on the government payroll—has had the effect of taking a later trespass action away from a *jury* of ordinary Citizens."[151] Professor Amar argued that, because the warrant process was a substitute for juries and "[b]ecause juries could be trusted far more than judges to protect against government overreaching . . . , warrants were generally *dis*favored."[152] On that last point, however, this Article can remain agnostic, for the key point here is merely that the creation of executive-judicial processes as a substitute for jury review is an old phenomenon extending far beyond the realm of traditional administrative law. The warrant process confirms the general pattern seen in decisions such as *Miller v. Horton*, *Cox v. United States*, and their subsequent applications: Jury review is possible, but the courts are ready to displace the jury if reasonable alternative processes—like the warrant process or an administrative process—exist.

III. SUBSTITUTES FOR JURY REVIEW IN OTHER ADMINISTRATIVE CONTEXTS

Jury review of administrative action arises sporadically in administrative law, for there are numerous ways the validity of administrative action can become relevant in both common law and criminal proceedings. The courts are creative in keeping jury review to a minimum, however, while also not leaving the administrative process unchecked.

A good example comes from nineteenth-century Supreme Court case law on land patents. In an action at law—such as a trespass or ejectment action—the underlying validity of title to the land is an issue that could and would be given to the jury under the common law.[153] As the Supreme Court recognized in *Smelting Co. v. Kemp*,[154] that common-law approach had the potential, however, to create vast problems in the administration of the U.S. General Land-Office.

Kemp arose "in the usual form of actions for the possession of real property," with the plaintiff bringing an action at law to oust the defendant from possession of the property.[155] Among the defenses asserted, the defendant challenged the validity of the

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[150] U.S. CONST. amend. IV.
[151] Amar, *supra* note 24, at 1179.
[152] *Id.*
[153] Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881).
[154] *Id.*
[155] *Id.* at 637.

plaintiff's title, which derived ultimately from a grant issued by the "General Land-Office at Washington."[156] The trial court allowed the defendant to make such a challenge and to introduce at the trial "a certified copy of the record of proceedings in the General Land-Office," which was produced "to show the regularity or irregularity of the proceedings before the executive department in obtaining the [land] patent."[157] The trial court allowed the challenge to the land patent to go to the jury, and the jury found for the defendants.[158]

On appeal, the Supreme Court reversed, holding that the validity of the land patent was "not open to rebuttal in an action at law."[159] Concern about juries reviewing administrative actions was clearly stated in the Court's reasoning. "If intruders upon [the granted lands] could compel [the grantee] . . . to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it," the Court stated, "the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation."[160] That "ruinous litigation" could, in turn, be traced to the variability of juries, for the grantee of federal lands would be forever subject to keeping "one portion of his land if the jury were satisfied that the evidence produced justified the action of [the Land Department]," while "los[ing] another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion."[161] Jury review of the validity of titles would mean that a federal land grantee's "rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."[162]

The *Kemp* Court was not claiming that the administrative processes of the Land-Office were infallible or even that those processes should go unchecked. Indeed, the Court expressly noted several circumstances in which a land patent could be collaterally attacked, including cases where the Land-Office lacked "jurisdiction."[163] But the Court insisted that, to remedy such jurisdictional defects, an aggrieved party "must resort to a court of equity for relief."[164] Courts of equity would, of course, sit without juries and thus the chief problem of jury review—"the fluctuating prejudices of different jurymen" and "their varying capacities to weigh evidence"—were avoided by the Court's decision.[165]

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[156] *Id.* at 638.

[157] *Id.*

[158] *Id.* at 639.

[159] *Id.* at 641.

[160] *Id.*

[161] *Id.*

[162] *Id.* (internal citations omitted).

[163] *Id.* at 646 ("[A] patent may be collaterally impeached . . . by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others.").

[164] *Id.* at 647.

[165] *Id.* at 641.

If the Court's decision in *Kemp* was very obviously designed to eliminate jury involvement in reviewing the legality of the Land Office's decisions, the Court's decision in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*[166] represented a more subtle curtailment of jury involvement. The case arose under the system of railroad rate regulation administrated by the federal Interstate Commerce Commission (ICC).[167] Under that system, railroads were required to file their rates with the ICC, and those rates were then binding on the railroads. Under the common law, however, shippers had a recognized right to sue common carriers (such as railroads) for charging unreasonable rates, and in those suits, juries could decide whether the rate was unreasonable.[168] Section 22 of the Interstate Commerce Act (ICA) appeared to preserve such common-law rights expressly,[169] and so it seemed that jury review of the rates filed with the agency should have remained available.

Yet despite section 22's express preservation of common law rights, the Supreme Court held that the statute "cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act."[170] The Court interpreted the purpose of the ICA as attempting "to establish schedules of reasonable rates which should have a uniform application to all" without preferences or discriminations.[171] That goal of uniform rates could not be maintained if "the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by *a court and jury* as unreasonable, without reference to prior action by the Commission."[172] If that common-law process were permitted, some shippers could obtain lower rates on "the basis that the established rate was unreasonable, *in the opinion of a court and jury*," even though the schedule of rates filed with the administrative agency would continue to be enforced against all other shippers.[173] In sum, the decentralized litigation process of jury trials could upend the statute's core goal of achieving "uniform application" of railroad rates.

The *Abilene Cotton* Court's repeated references to juries is odd, given that the case before the Court had not been tried to a jury in the lower court. But the Court must have understood what was previously stated by the Court in *Kemp* explicitly: Juries are known to be variable because of different juries' "fluctuating prejudices" and "varying capacities to weigh evidence."[174] The *Abilene Cotton* Court's solution to that problem

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[166] 204 U.S. 426 (1907).

[167] *Id.* at 436.

[168] *Id.* at 440.

[169] *See id.* at 446 (quoting section 22, which provided "[n]othing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies").

[170] *Id.* at 446.

[171] *Id.* at 439.

[172] *Id.* at 440 (emphasis added).

[173] *Id.* (emphasis added).

[174] Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881).

was creative. Rate unreasonableness actions could continue to be brought—i.e., shippers would be protected. The Court held, however, that shippers challenging the reasonableness of a rate in the administrative agency's rate schedule "must, under the Act to Regulate Commerce, primarily invoke redress through the Interstate Commerce Commission."[175] Seeking an administrative determination of the rate's reasonableness was only appropriate because, the Court explained, that administrative "body alone is vested with power originally to entertain proceedings for the alteration of an established schedule" due to the unreasonableness of the rates in the schedule.[176] The Court's holding is considered the foundation of the "primary jurisdiction" doctrine,[177] but the important point here is to appreciate that the Court's holding substituted an administrative process, with judicial oversight, for a common-law cause of action that would have permitted jury review of administrative action.

A final example comes from the immigration context, where jury review was once a possibility but one that was never realized because an alternative process for review was developed. The issue of jury review arose in cases where non–U.S. citizens were being criminally prosecuted for failure to obey a deportation order challenged the legality of the deportation order. The Supreme Court first confronted the situation in *United States v. Spector*,[178] but the non-citizen had failed to raise his challenge to the deportation order in a timely fashion, so the Court refrained from deciding the issue. Nevertheless, the Court cited *Cox v. United States* and commented that "[i]t will be time to consider whether the validity of the order of deportation may be tried in the criminal trial either by the court *or by the jury* . . . when and if the appellee seeks to have it tried."[179]

The *Spector* Court's reference to the jury, coupled with the citation to *Cox*, is jarring. *Cox*'s holding had seemed to foreclose the possibility that the validity of an administrative order such as an order of deportation could be tried to the jury in a criminal case. Moreover, Justice Jackson—one of the Justices who joined the plurality opinion in *Cox*—dissented, apparently on the ground that Congress should not be able to circumvent jury rights by "subdivid[ing] a charge against an alien and avoid[ing] jury trial by submitting the vital and controversial part of it to administrative decision."[180] If Congress could do that, Jackson reasoned that "the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."[181] Justice Jackson's pro-jury dissent coupled with the majority's reservation of the issue signaled to some contemporaneous lower courts that

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[175] *Abilene Cotton*, 204 U.S. at 448.

[176] *Id.*

[177] Bernard Schwartz, *Timing of Judicial Review—A Survey of Recent Cases*, 8 ADMIN. L. REV. AM. U. 261, 262 (1994).

[178] 343 U.S. 169 (1952).

[179] *Id.* at 172–73 (emphasis added).

[180] *Id.* at 177 (Jackson, J., dissenting).

[181] *Id.* at 177–78.

the strength of *Cox* as a precedent that had been undermined by "a shift in the position of the several Justices who had previously considered the issue."[182]

When the issue was finally addressed by the Supreme Court thirty-five years later, the Court did not limit *Cox* or suggest that juries should review the legality of deportation orders. Rather, the Court in *United States v. Mendoza-Lopez*[183] held that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding."[184] The Court made clear, however, that the "meaningful review" of the administrative proceeding could be supplied by "judicial review,"[185] and nothing in the Court's opinion suggested that jury review of the deportation order's validity would be required or possible.

Jury review had been a threat—a possibility—in *Spector*, but by the time of *Mendoza-Lopez*, the Court was willing to accept judicial review as an alternative. Subsequently, Congress went even a bit further and legislatively restricted the ability of non-citizens to mount collateral challenges to their deportation orders in subsequent criminal proceedings.[186] Under that legislation, an alien charged with defying a deportation order cannot challenge the legality of the deportation order except upon proof that: "(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair."[187] The effect of this legislation is to push legal challenges to deportation orders back into the administrative process (with the judicial review that is generally available after such administrative processes) and away from any possibility of jury review of the administrative action in the criminal trial. The threat of jury review of the deportation orders was thus never realized, but the threat itself might be partly responsible for the extensive administrative and judicial remedies that are now available to correct aberrant executive action.

CONCLUSION

It is especially fitting that this Article appears in a special issue dedicated to my former colleague Charles Koch, for the story of jury review of administrative action reinforces the importance of two lessons taught by Charles's writings. The first is the value of a historical perspective. As Charles modestly wrote in the introductory chapter to

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[182] United States v. England, 347 F.2d 425, 441 (1965).

[183] 481 U.S. 828 (1987).

[184] *Id.* at 837–38.

[185] *Id.* at 838.

[186] *See* 8 U.S.C. § 1326(d) (2006).

[187] *Id.*; s*ee also* United States v. Lara-Unzueta, 287 F. Supp. 2d 888, 891 (N.D. Ill. 2003) (noting that Congress enacted this legislation in 1996 as a response to *Mendoza-Lopez*).

the first edition of his administrative law treatise, "A practitioner can profit from some historical perspective on an area of law and some historical antecedent is even more practical in dealing with a legal discipline, such as administrative law, which is still in an active state of evolution."[188] That modest, nearly apologetic, remark introduces two subchapters on the history of administrative law, and indeed the entirety of the treatise reveals Charles's remarkable attention to and concern with historical perspective.

This Article follows in that tradition of appreciating the value of history. Jury review of administrative action is a historical puzzle. It is an oddity that arises from time to time across centuries, and it runs counter to the current standard practice of judicial review of administrative action. Yet it has an undeniable historical pedigree, secured by cases such as *Miller v. Horton*, and it teaches by way of counterexample some fundamental points about administrative processes and their deep connection to other, older processes, such as the warrant process, by which courts have maintained checks on executive branch action even as they permit executive processes, coupled with judicial oversight, to supplant jury review.

The second relevant lesson from the writings of Charles Koch comes from the subchapter he entitled "Basic Goals for Administrative Law System," which also appears in the introduction to the first edition of his treatise.[189] Charles began this section with the honest plea that "[t]his is the type of section as a reader I would ordinarily skip but I urge you not to do so."[190] Those words turn out to be good advice, for the next few pages of Charles's treatise provides one of the best summaries of the goals of administrative law. Charles identified three goals—"fairness, responsiveness and efficiency"[191]—which may not be so surprising, but Charles's insight is in recognizing that these goals are always directed towards, and subservient to, the citizenry's ultimate "interest in effective government."[192] In other words, administrative law is ultimately very pragmatic; it cares for theory only as a means to serve the practical end of the effective government desired by citizens.

That overarching pragmatism can be seen here in the law's experience of jury review of administrative action. The courts throughout the years have been willing to use jury review as a traditional default, but both they and legislatures are continuously innovating in their search for, as Charles described it, the "optimum."[193] "Finding this optimum, however, is mind boggling and hence theoretically as well as practically the subject is both intellectually interesting and frustrating."[194] That theoretically interesting, frustrating, mind-boggling search for optimum procedures best explains why jury

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[188] 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 1.8, at 17 (1st ed. 1985).

[189] *Id.* § 1.11, at 24.

[190] *Id.*

[191] *Id.* at 25.

[192] *Id.*

[193] *Id.* at 28.

[194] *Id.*

review of administrative action survives even if it is often only a theoretical possibility. A still evolving field of law dedicated to pursuing the optimum will not and should not definitively forsake alternatives that might possibly work well in some contexts. Options—such as jury review of administrative action—remain valuable even if exercised only rarely.