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Constraint Through Independence

ABSTRACT. A tide of skepticism of the administrative state has been rising among members of the judiciary and the academy. Uncomfortable with the ways doctrines like *Chevron* and *Auer* seem to leave bureaucrats unchecked, pressure has been building to cut back on deference to agencies' legal interpretations. Similarly, these "anti-administrativists," as those skeptical of the current regime have been called, have advocated for striking down statutory regimes granting independence to certain bureaucratic actors, such as administrative law judges (ALJs), who are partially insulated from the President's removal power. Underlying both of these prongs of the "anti-administrativist" program is the idea that the federal judiciary needs to be doing more to constrain the exercise of administrative force by unaccountable regulatory bodies.

Taking as given the need for greater judicial constraints on the administrative state, this Note argues that the two-pronged program of the anti-administrativists, challenging deference and ALJ independence, is both incomplete and counterproductive. It is incomplete because, while focusing intently on issues of statutory interpretation, it has ignored an entire hemisphere of agency decision-making and judicial review: fact-finding. It is counterproductive because it fails to appreciate the way in which—on a system level—independence, fact-finding, and legal interpretation interact.

Tightening the tourniquet around legal deference creates incentives for agencies to obscure their policy-making in fact-finding, a hemisphere where judicial review is significantly less effective. As this Note shows using a novel empirical study of nearly three hundred holdings, judicial review of agency fact-finding is dependent on the identification of "red flags" in the administrative record, that is, of evidence of factual manipulation. Independent ALJs, who generate the initial administrative record, are critical in planting those red flags and, as a result, essential for effective judicial review. Exploring these institutional dynamics in the context of both labor and financial regulation, this Note reveals the importance of the counterintuitive observation that judicial review depends on deference and bureaucratic independence.

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INTRODUCTION

Barely even thirteen pages long, the Supreme Court's opinion in *Lucia v. SEC* seemed to render overblown the great anticipation leading up to the case.[1] Several commentators predicted that the Court's opinion would fundamentally change the authority and independence of administrative law judges (ALJs), non-Article III adjudicators who are mainstays of the modern federal bureaucracy. Instead, Justice Kagan, writing for the majority, relied on a fact-specific comparison to a past precedent to explain that the Securities and Exchange Commission (SEC) had appointed its ALJs in an unconstitutional manner—going forward, the Commissioners themselves, and not their staff, had to sign off on new hires.[2] Because the decision ostensibly made no new law, some have said that "*Lucia* went out with a whimper."[3] But while such a conclusion is understandable given the narrowness of the Court's reasoning, Justice Breyer's separate opinion suggests more far-reaching consequences. By embracing a constitutional, as opposed to statutory, ground for ruling against the SEC, Justice Breyer warned, the Court opened the door to finding unconstitutional the removal protections applied to ALJs throughout the administrative state.[4] Such a holding, he noted, would undermine a "central part" of the Administrative Procedure Act's (APA's) "overall scheme" by eroding the independence these adjudicative officers have from their respective agencies.[5]

Justice Breyer's prognostications were no mere musings. Under the current statutory regime, an agency can only remove its ALJs for "good cause" and only with the consent of an independent federal agency, the Merit System Protection Board (MSPB).[6] This requirement insulates ALJs, at least to some extent, from the influences of their respective agencies' political appointees. Seeking to unravel ALJ independence, the government declined to defend the SEC and instead

1. 138 S. Ct. 2044 (2018). The excitement included, for example, an online symposium with over twenty contributions. *See Symposium on* Lucia v. SEC, YALE J. ON REG.: NOTICE & COMMENT (2018), http://yalejreg.com/nc/category/symposia/symposium-on-lucia-v-sec [https://perma.cc/VP5M-5LXF].

2. *Lucia*, 138 S. Ct. at 2047-48.

3. Jennifer L. Mascott, *"Officers" in the Supreme Court:* Lucia v. SEC, 2017 CATO SUP. CT. REV. 305, 329.

4. *Lucia*, 138 S. Ct. at 2059 (Breyer, J., concurring).

5. *Id.* at 2060.

6. 5 U.S.C. §§ 1202(d), 7521(a)-(b) (2018).

pressed the Court to go beyond the appointments question and address removal.[7] The government's position is best understood in light of the Trump Administration's stated objective to reduce and reshape the power of the administrative state.[8] Indeed, the current administration's deep skepticism of independent ALJs is part of a larger program of opposition to the bureaucratic arm of the federal government—a program that includes fervent condemnation of *Chevron* deference, the doctrine directing courts to uphold agency interpretations of statutes so long as they are reasonable,[9] and *Auer* deference, the parallel doctrine regarding agency interpretations of their own regulations.[10] As Gillian Metzger described, this "anti-administrativism"—which we might alternatively call administrative skepticism—represents a core position of a modern conservative movement that is pushing for greater judicial constraint of administrative agencies.[11]

To those concerned with administrative overreach, the calls to pull back on independence and interpretive deference are intuitively attractive. But despite the plausibility of this modern critique, there is reason to believe that these efforts are counterproductive—that they would actually decrease judicial constraints on administrative agencies. The problem for the anti-administrativists is that their movement focuses myopically on individual doctrines and particular facets of administrative law, without considering the system as a whole. This failure to look at the bigger picture has abetted the Trump Administration's effort to do away with removal protections for ALJs, despite the fact that adjudicator independence—we argue—is essential to facilitating judicial oversight of agencies like the SEC.

In this Note, we argue for a return to a vision of the administrative state that looks to the bigger picture, by explaining how the failure to adopt such a system-

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7. *See* Brief for Respondent SEC Supporting Petitioners at 45-55, *Lucia*, 138 S. Ct. 2044 (2018) (No. 17-130).

8. *See* Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/C2JS-SM7N].

9. *See* Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018), http://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html [https://perma.cc/JHM4-CJ64].

10. *See, e.g.*, Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. PUB. POL'Y 103, 105 (2018); Allyson N. Ho, *Why* Seminole Rock *Should Be Overruled*, YALE J. ON REG.: NOTICE & COMMENT, (Sept. 19, 2016), http://yalejreg.com/nc/2039-2 [https://perma.cc/8SDS-YZVX].

11. Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

level view has led supporters of the modern conservative critique to advocate reforms that actually undermine their stated goals. Our starting point for this analysis is an observation made by Judge Ralph Winter half a century ago.[12] Using judicial review of the National Labor Relations Board (NLRB)[13] as a case study, Judge Winter suggested that the failure to afford the agency sufficient freedom in its statutory interpretation would undermine efforts to constrain the Board. It would do so, he suggested, by incentivizing the Board to avoid courts' scrutiny on issues of law by manipulating factual findings to carry out its policy ends furtively. Taking seriously these institutional dynamics, Judge Winter made a case for loosening review of statutory interpretation while making review of factual conclusions more vigorous.[14]

Undertaking our own analysis of the recent case law involving review of the NLRB, we show that Judge Winter's criticism remains true. Although the courts closely stand guard over the agency's legal conclusions, ready to deny deference and substitute their own reasoning where they determine it is appropriate, judicial review of the agency's determinations on factual matters is far more lenient.[15] This analysis suggests that those interested in constraining administrative agencies engaged in adjudications should be more concerned with the threat of unchecked fact-finding than with deference to statutory interpretation. To forward this project, we offer a detailed analysis, including a first-of-its-kind empirical study, of how courts engage in review of the NLRB's factual conclusions. We draw from these observations and data suggestions for reforms.[16]

Among other insights, our analysis of review of fact-finding reveals how deeply judicial scrutiny is tied to examining the administrative record for "red

12. Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53.

13. The National Labor Relations Board, or NLRB, is an independent agency created pursuant to the 1935 National Labor Relations Act. It has five members, each of whom are appointed by the President and confirmed by the Senate for staggered five-year terms. Its mission, broadly speaking, is twofold: to protect employees' right to organize and bargain effectively with their employers and to prevent and remedy unfair labor practices of private-sector employers and unions. The NLRB carries out its mission through investigations, adjudications, and, where necessary, enforcement actions in the U.S. Courts of Appeals when parties fail to comply with Board orders. Adjudications first occur before one of forty administrative law judges (ALJs), and parties can then appeal the ALJ's decision to the Board. Parties may further appeal Board decisions to the federal courts. *See Administrative Law Judge Decisions*, NAT'L LAB. REL. BOARD, http://www.nlrb.gov/cases-decisions/decisions/administrative-law-judge-decisions [https://perma.cc/UK6P-HRFT]; *What We Do*, NAT'L LAB. REL. BOARD, http://www.nlrb.gov/about-nlrb/what-we-do [https://perma.cc/8BBF-FG9B].

14. Winter, *supra* note 12.

15. *See infra* Part II.

16. *See infra* Section III.B.

flags," that is, suggestions that the agency has manipulated its findings to reach its desired goals. As we explain, the reliance on such red flags in order to carry out judicial review reveals the critical importance of ALJs who have some degree of independence from the agencies within which they work. ALJs generate the initial administrative record, often providing the key evidence upon which the courts rely in identifying red flags in the agency's conclusions. Courts and ALJs are thus engaged in a form of cooperative review, constraining agency fact-finding from both the top and the bottom. Absent an independent ALJ, the agency would be free to develop the administrative record in a way that would prevent the appearance of red flags, essentially nullifying effective judicial review.

In addition to supporting this thesis through a qualitative review of appellate cases reviewing NLRB decisions, we constructed and analyzed a data set of nearly two hundred opinions—containing nearly three hundred holdings—in which the circuit court reviewed the NLRB's fact-finding after an initial hearing by an ALJ. This quantitative study reveals that in cases in which the ALJ and the agency agree on the facts, the court almost never overturns the NLRB's order. In contrast, where the ALJ disagrees with the NLRB on the facts, which gives rise to a "red flag" in the record, the court is as likely to overturn as not. This data strongly suggests that judicial review of agency fact-finding without an initial hearing by an ALJ is toothless; absent the red flag of ALJ disagreement, the court will simply defer in the vast majority of cases.

Looking to examples beyond the NLRB as well, we illustrate that ALJs are critical to the functioning of judicial review. Courts simply lack the experience and expertise necessary to determine, ex post, whether the agency was fair and reasonable in its fact-finding. For this reason, there is no clear alternative to reliance on the record development provided by an independent ALJ system. The implication is thus that the skeptics have it backwards: if the goal is to constrain the administrative state in the context of complex regulatory regimes, then neither paring down deference nor attacking ALJ independence is advisable. Reducing deference would motivate a retreat into the facts, where it would be harder for both courts and political actors, including Congress, to monitor agency policy-making. Cutting back on ALJ independence would weaken the first line of defense against manipulation of the facts by agency enforcement officers.

This Note proceeds in three Parts. Part I provides an overview of the anti-administrativist position and the system-level view that we offer in response. Part II reconsiders Judge Winter's observations half a century later, by analyzing recent cases reviewing the NLRB and examining the level of deference accorded to both the agency's legal and factual conclusions, respectively. Part II uncovers the important role of ALJs through a detailed look at how courts engage in review of agency fact-finding, including our novel empirical study of disagreement

between the ALJ and the agency and its relationship to courts' deference on the facts. Part III discusses the implications of our findings, most notably the importance of independent ALJs to facilitating judicial review.

I. LOOKING AT THE BIGGER PICTURE

A. The "Anti-Administrativists" and the Call for Constraint

A tide of skepticism of the administrative state has been rising among members of the judiciary and the academy. In her recent *Foreword* to the *Harvard Law Review*, Metzger describes this growing chorus, which has condemned the current state of administrative law as emboldening a bureaucratic regulatory regime that does violence to the Framers' vision of the Constitution and threatens to trample on individual rights.[17] Particularly within the Supreme Court, two interrelated lines of constitutional attack have typified the "anti-administrativist" trend that Metzger discusses—which are, she notes, intertwined with a larger, politically conservative critique of the administrative state.[18] The first line seeks to strike down as unconstitutional constraints on the President's appointment and removal powers, the hallmarks of agency independence.[19] The second line seeks to overturn precedents, such as *Chevron*[20] and *Auer*,[21] that direct judges to defer to agency interpretations of statutes and regulations so long as they are reasonable.[22]

Both of these positions are motivated by a distrust of the technocratic bureaucracy, seemingly unchecked by either the judiciary, commanded as it is to defer, or the politically accountable President. Metzger's response is to appeal to history. Through a comparison of the debates of today to those that occurred in the 1930s, Metzger reveals strong parallels between the legal challenges to the

17. Metzger, *supra* note 11, at 4 (citing Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring)).

18. *Id.* at 7.

19. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044 (2018) (holding that SEC ALJs were "Officers of the United States" and thus must be appointed in conformity with the Appointments Clause); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (invalidating the for-cause removal protections for members of the Public Company Accounting Oversight Board).

20. Chevron, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

21. Auer v. Robbins, 519 U.S. 452 (1997).

22. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

administrative state today and those that were raised during the New Deal.[23] Further, she argues that the legal landscape developed during that period was intended to serve the very ends the anti-administrativists seek, that is, to supervise and constrain executive power.[24] "[T]he administrative state," she argues, "is the solution and not the problem."[25] At its heart, Metzger's argument is that there is no need to undo the administrative state, including its commitment to independence, on the basis of objections that lost out in the legal and political struggles of the 1930s.

While Metzger's analysis is highly regarded by some,[26] her argument is unlikely to persuade many drawn to the modern conservative critique of the administrative state. In fact, her appeal to the New Deal era as a source of guiding norms is prone to drive such judicial and academic critics only further away. Fundamentally, this is because many skeptics of the administrative state view the Progressive Era, of which they see the New Deal as a product, as dominated by a worldview grounded in social Darwinism and an antipathy towards democratic governance.[27] Steven Calabresi and Gary Lawson provocatively connect the New Deal's embrace of expert commissions to a "pervasiveness of eugenics-based ideas in the United States in the New Deal and pre-New Deal era," which justified "belief in omnipotent government by socially superior experts."[28] Constructed upon these foundations, they argue, administrative law's commitment to defer to independent, expert bureaucrats is antithetical to our constitutional ideals. According to this critique, the period to which Metzger points was one in which the Constitution and its Madisonian system of checks and balances were brazenly ignored,[29] such that any body of law which finds its roots in this epoch of American history is deeply suspect.

Calabresi and Lawson's broadly constitutional argument has been expressed in a variety of forms. One of the voices behind this view of administrative law and its history is Philip Hamburger,[30] who has argued strenuously for the need

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23. Metzger, *supra* note 11, at 51-62.

24. *Id.* at 95.

25. *Id.*

26. *See* Aaron L. Nielson, *Confessions of an "Anti-Administrativist,"* 131 HARV. L. REV. F. 1, 1 (2017) ("Professor Gillian Metzger's analysis is timely and insightful."); Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13, 13 (2017).

27. Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 866 (2018).

28. *Id.* at 833, 839.

29. *Id.*

30. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 370-372 (2014).

for greater judicial supervision of administrative action. Hamburger's commitment to greater judicial intervention has driven him to lead the charge against both *Chevron* and bureaucratic independence. Regarding *Chevron* deference, Hamburger has argued that it violates judges' "constitutional duty, under Article III, to exercise their own independent judgment."[31] Notably, in his concurrence in *Perez*, Justice Thomas cited Hamburger for the argument that *Chevron* deference is incompatible with the constitutional presumption that "Article III judges would exercise independent judgment."[32] A number of other current Justices have made similar statements suggesting they are drawn to rolling back deference to agency statutory interpretation in order to strengthen judicial review.[33] Hamburger has also taken aim at the use of ALJs in administrative adjudications, referring to them as biased, inexpert, and "generally lack[ing] the intellectual breadth traditionally expected of judges."[34] This opposition grounded his support of the petitioner in *Lucia v. SEC*,[35] the case in which the Court held that the politically accountable Commission itself must appoint its ALJs, not a central bureaucracy.[36]

Although Hamburger's arguments reflect a more aggressive skepticism than is the mainstream,[37] versions of these positions have long been building support and are now being taken seriously by the Court.[38] Indeed, each part of the dual-pronged program characterizing attacks on the administrative state today can be directly connected to critiques that have been present in the literature for decades. Consider, for example, Lawson's 1994 essay, *The Rise and Rise of the Administrative State*, which is often viewed as a foundational statement of modern

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31. Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016).

32. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217-18 (2015) (Thomas, J., concurring) (citing PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 507, 508 (2008)).

33. *See* SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348 (2018); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); Brett Kavanaugh, *The Role of the Judiciary in Maintaining the Separation of Powers*, HERITAGE FOUND. (Feb. 1, 2018), http://www.heritage.org/courts/report/the-role-the-judiciary-maintaining-the-separation-powers [https://perma.cc/9DVY-ERVH].

34. Philip Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J.L. & LIBERTY 915, 931 (2018).

35. *See* Brief for the New Civil Liberties Alliance as Amicus Curiae Supporting Petitioners, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

36. Lucia v. SEC, 138 S. Ct. 2044 (2018).

37. Nielson, *supra* note 26, at 3 (referring to Hamburger and Justice Thomas as "the two most aggressive critics" discussed in Metzger's foreword).

38. Metzger, *supra* note 11, at 33.

administrative skepticism.[39] Lawson's account of the administrative state's infirmities is multifaceted, but the core claim is that modern administrative law doctrine has undermined important structural constraints imposed on the federal government by the Constitution. Two of Lawson's observations manifesting this concern are of particular relevance in how they inform the present debate.

First, Lawson argues that the administrative state's delegation of executive authority to federal officials who are partially insulated from presidential control violates Article II's Vesting Clause, which vests the "executive Power" in the "President of the United States."[40] Reflecting the views of "unitary executive" theorists, Lawson claims that by vesting such authority exclusively in the office of the President, the Constitution requires that all discretionary authority wielded by those within executive agencies be subject to presidential control.[41] This creates a clear line of accountability for actions taken by the executive branch—a line that is undercut when authority is divided among officials who themselves are statutorily sealed off from the President's reach.

This line of critique, emerging from the unitary-executive scholarship, has had a positive reception by the Court in recent years. For example, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, a five-Justice majority found unconstitutional a statutory provision limiting the authority of the SEC to remove directors of the Public Company Accounting Oversight Board.[42] Noting that the SEC Commissioners are themselves partially insulated from the President's removal authority, the Court concluded that the "dual for-cause limitation" on the removal power "contravene[d] the Constitution's separation of powers," citing to the Article II Vesting Clause.[43] The decision—authored by

39. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); *see also* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1632 (2018) (describing "broad agreement . . . among administrative state skeptics" on Lawson's critiques).

40. Lawson, *supra* note 39, at 1241 (quoting U.S. CONST. art. II, § 1, cl. 1).

41. *Id.* at 1242.

42. 561 U.S. 477, 492 (2010).

43. *Id.*

Chief Justice Roberts, who is often characterized as particularly sensitive to "institutionalist" considerations[44]—reflects the way in which the arguments of administrative-law skeptics have been successful in pushing for real, if modest, constraints on agency independence imposed by way of judicial intervention.[45]

Second, Lawson argues that the modern administrative state undermines constitutional separation of powers by allowing for agencies that "routinely combine all three governmental functions," legislative, executive, and judiciary, "in the same body."[46] Lawson outlines the enforcement activities of the Federal Trade Commission (FTC) to illustrate the way in which the typical agency combines these different functions: the FTC promulgates the substantive rules of conduct, carries out the investigations into alleged violations of these rules, and then adjudicates the complaints emerging from those investigations—with judicial review by an Article III court coming only at the end and characterized by heavy deference to the agency.[47] With these different functions rolled into one, the checks built into the Constitution in order "to safeguard the liberty of the people" are circumvented, threatening to usher in the "tyranny" the Madisonian separation of powers sought to prevent.[48]

The concern that agencies can carry out these multiple functions with only minimal checks by competing branches has had an important influence on administrative-law skeptics' thinking about statutory and regulatory interpretation deference regimes, such as *Chevron* and *Auer*. The core critique of these doctrines is that they functionally give the agency the final word over the interpretation of the law—an authority typically understood to reside in the judiciary. This erosion of the separation of powers is thought to give rise to a number of bad incentives that are in tension with constitutional structure. For example, *Chevron*, it has been argued, encourages Congress to pass vague laws, delegating broad authority to agencies rather than undertaking the important but difficult work

44. *See, e.g.*, Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 84 (2012) (characterizing the Chief Justice's opinion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), as "a consummate act of institutional diplomacy" in that it avoided "invalidat[ing] President Obama's signature achievement in the midst of a close reelection campaign by a 5-4 vote that would have mapped the Justices' ideological leanings").

45. Notably, more monumental changes have thus far been resisted. For example, in a more recent Term, the Court declined to revive the long-dormant nondelegation doctrine to strike down a portion of the Sex Offender Registration and Notification Act. *See* Gundy v. United States, 139 S. Ct. 2116 (2019).

46. Lawson, *supra* note 39, at 1248.

47. *Id.* at 1248-49.

48. *Id.* at 1248.

of crafting consensus.[49] Similarly, *Auer*—which states that an agency's interpretation of its own regulations is "controlling" so long as it is not "plainly erroneous"[50]—has been criticized for potentially allowing agencies to circumvent important procedural requirements, including notice and comment, by manipulatively promulgating vague regulations and then infusing them with meaning through "interpretations."[51] The critiques have proven highly influential among at least some of the Justices. In its most recent Term, the Court upheld *Auer* in a narrow opinion joined by only five of the Justices.[52] The four other Justices wrote separately in order to call for the abrogation of the doctrine on the ground that *Auer* deference violates the basic constitutional principle that courts say what the law is.[53]

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49. *See* Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1520 (2015).

50. Auer v. Robbins, 519 U.S. 452, 461 (1997) (citing Robertson v. Methow Valley Citizens Council, 490 U. S. 332, 359 (1989)).

51. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 662 (1996).

52. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019). Notably, the *Kisor* majority is very narrow. The opinion, written by Justice Kagan, is joined by Justices Ginsburg, Breyer, and Sotomayor, as well as Chief Justice Roberts. However, the Chief Justice only joins for the portions of the opinion that discuss the limitations of *Auer* and the importance of stare decisis, conspicuously not signing on to the portion of the opinion that substantively defends the doctrine as a presumption of congressional intent.

53. Specifically, Justice Gorsuch wrote a separate opinion joined by Justices Thomas, Kavanaugh, and Alito, *id.* at 2425 (Gorsuch, J., concurring), while Justice Kavanaugh also wrote a brief opinion joined by Justice Alito, *id.* at 2448 (Kavanaugh, J., concurring). Notably, none of the Justices calling for the end of *Auer* invoke Manning's well-known critique of the doctrine, instead relying on broader arguments regarding the proper role of the courts. However, Justice Kagan's opinion does discuss the critical scholarly response to Manning's argument. *See id.* at 2421 (majority opinion).

The opinions in *Kisor* largely did not address *Chevron*. *See id.* at 2425 (Roberts, C.J., concurring) (noting that he does "not regard the Court's decision today to touch upon the . . . question" of *Chevron* deference). For Justices' expressions of reservation toward *Chevron* deference in recent Court opinions, see *SAS Institute, Inc. v. Iancu*, 138 S.Ct. 1348, 1358 (2018); *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1217-18 (2015) (Thomas, J., concurring); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). Justices Gorsuch and Kavanaugh have also suggested, prior to joining the Court, an affinity toward rolling back deference to agency statutory interpretation in order to strengthen judicial review. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); Kavanaugh, *supra* note 33. Although it is difficult to determine the Court's current appetite for drastically overhauling *Chevron*, a majority of the current Justices have expressed at least some apprehension about the doctrine. *See* Daniel B. Listwa, *Deference Conservation and the World After* Chevron, YALE J. ON

Although each of these critiques contends a deficiency of constraints on the federal agencies within the current framework of administrative law, they are conceptually quite different. The concern generated by agency independence is that the insulation from the President afforded to certain executive actors weakens the effectiveness of the democratic check provided by popular elections. In contrast, the separation-of-powers critique is grounded in the worry that the bundling of multiple functions in a single entity undermines the Madisonian "checks and balances" accomplished by the Constitution's tripartite structure. Reflecting this distinction, efforts to assess particular doctrinal structures tend to focus on just one of these lines of argument: the "democratic checks" effectuated through a unitary executive or the "Madisonian checks" accomplished through the separation of powers.

Focusing only on democratic checks, the Trump Administration's efforts to deconstruct ALJ protections illustrate this phenomenon and — as we will argue — reveal its limitations. The Office of the Solicitor General pressed the Court in *Lucia* to strike down the removal protections provided to ALJs because of their "implications for the exercise of executive power," alluding to the obstacles they impose on the President's ability to wield full control over discretionary authority.[54] Although the Court declined to reach the issue, the administration adopted an aggressive interpretation of the *Lucia* decision, essentially arguing that it rendered invalid a different protection on ALJ independence: the requirement that agencies select ALJs from the top scorers on a civil-service examination administered by the Office of Personnel Management (OPM). The administration accordingly released an executive order in July 2018 reclassifying ALJ positions so that agency heads could circumvent this apolitical, centralized process and instead directly appoint ALJs who meet agency-specific qualifications.[55] In line with this strong reading of *Lucia*, the Solicitor General also issued a guidance memorandum arguing that the removal protections are only constitutional if the MSPB is "suitably deferential" to the agency heads.[56]

REG.: NOTICE & COMMENT (Sept. 18, 2018), http://yalejreg.com/nc/deference-conservation-and-the-world-after-chevron-by-daniel-b-listwa [https://perma.cc/JQC7-NS6Z].

54. Brief for Respondent SEC Supporting Petitioners, *supra* note 7, at 14.

55. Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,755 (July 10, 2018). The executive order accomplished this shift by reclassifying ALJ positions from the Competitive Civil Service to the Excepted Service. Under the Competitive Service system, OPM screened all applicants for ALJ positions on fixed criteria, including performance on a centrally administered civil-service exam. OPM then provided agencies with a curated list of eligible candidates from which they could choose. *See* Thomas C. Rossidis, *Article II Complications Surrounding SEC-Employed Administrative Law Judges*, 90 ST. JOHN'S L. REV. 773, 779 & n.40 (2016).

56. Memorandum from the Solicitor Gen., U.S. Dep't of Justice, to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) 9 (July 2018).

In pressing for the minimization or elimination of the protections insulating ALJs from the influence of agencies' political appointees, the President and his administration appear to have fully embraced a vision of the unitary executive. This would be consistent with a broader view, expressed by many in the current administration, that career bureaucrats threaten to undermine the President's ability to carry out his policy goals.[57] Further, the administration has resisted arguments that these changes in the status of ALJs negatively impact their impartiality.[58] Although many have argued that separation from their more politically responsive coworkers is crucial in order for ALJs to carry out their duties fairly and in line with due process values,[59] one might respond that from the anti-administrativist perspective, such bureaucratic mechanisms are no substitute for the democratic accountability provided by ensuring that executive officials are responsive to the President.

But in focusing on democratic accountability and its tension with impartiality, the debate over ALJ independence has wholly ignored its implications for the effectiveness of the Constitution's Madisonian constraints—particularly, judicial review. As this Note demonstrates, that is not because those implications do not exist; rather, it is because the current movement of administrative skepticism has failed to attend to what we refer to as the system-level effects of potential reforms to the administrative state. It is to those effects that the next Section turns.

B. Judge Winter and the System-Level View

Taking as a given the need to further constrain the administrative agencies, it does not necessarily follow that the proper course of action is to overturn *Chevron* and hold unconstitutional the current ALJ system—two priorities of the "anti-administrativists." Rather, any effort to reform the modern bureaucracy must look beyond individual doctrines or particular facets of administrative law and instead take a broader, system-level view. As Jerry Mashaw has described, administrative law can only shift policy discretion between actors, not

57. *See* Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653-54 (2018) (noting that the Trump Administration has portrayed bureaucrats "as disloyal and undemocratic forces within and around government").

58. *See* Eric Yoder, *Trump Moves to Shield Administrative Law Judge Decisions in Wake of High Court Ruling*, WASH. POST (July 10, 2018), http://www.washingtonpost.com/news/powerpost/wp/2018/07/10/trump-moves-to-shield-administrative-law-judge-decisions-in-wake-of-high-court-ruling [https://perma.cc/7CBH-WASR].

59. *See, e.g.*, Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 801 (2013).

"squeez[e]" it out entirely.[60] This "Law of Conservation of Administrative Discretion"[61] reflects that whenever one tries to constrain agency discretion in one aspect of litigation—such as by tightening review of statutory interpretation—one must be wary of the effects it will have elsewhere. As a result, an effort to constrain agency action by enhancing judicial review in one respect might reduce the effectiveness of judicial review overall.

In this Note, we focus on such shifts of discretion between two hemispheres of agency decision-making: conclusions of law and findings of fact. Given the institutional dynamics suggested by the "Law of Conservation," one ought to be cautious of the assumption that, by denying agency discretion with regard to its legal conclusions, the courts will necessarily succeed in wresting greater control from the agencies. Instead, the agencies may simply shift their exercise of discretion elsewhere—to a stage of the decision-making process in which the courts will be less equipped to impose restraints.

One attractive receiving ground for this discretion is agency fact-finding. Agencies may frame their policy-making as case-specific factual findings on an adjudicatory record, rather than as legal interpretations of their governing statutes or their own precedent. In this manner, agencies can shape their analyses in a way that reaches their desired result in a less judicially reviewable fashion. As we explain in Part II, whereas courts approach agencies' legal conclusions with a relatively small degree of deference and large degree of confidence in the courts' ability to substitute their legal reasoning for that of the agencies, the opposite is true of judicial review of fact-finding. In this latter hemisphere of agency decision-making, courts find their expertise lacking relative to the agency's subject-matter experts. As a result, they default to a more deferential stance.

This phenomenon of deference shifting has been observed in the context of Freedom of Information Act (FOIA) litigation.[62] FOIA was enacted by Congress in order to break from the status quo, which gave the government total control over its documents, and to replace the old regime with a "strong presumption in favor of disclosure."[63] To do so, FOIA "gives 'any person' the right to any government information upon request, subject to nine 'narrowly construe[d]' exemptions, which are the 'exclusive' avenues through which the government can

60. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 97 (1985).

61. *Id.*

62. John C. Brinkerhoff Jr. & Daniel B. Listwa, *Deference Conservation—FOIA's Lessons for a* Chevron*-less World*, 71 STAN. L. REV. ONLINE 146 (2018).

63. U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991).

withhold information."[64] And in order to ensure that these exceptions remain narrow, the statute mandates de novo review—that is, the denial of deference.[65] But while the statutory mandate has tightened the tourniquet around review of questions of law—namely, the question of how broadly the statutory exceptions should be interpreted—it has done nothing to prevent government agencies from manipulating their factual findings in order to fit into those narrow exceptions. Agencies have accomplished this primarily through the submission of "threadbare" affidavits, which make conclusionary statements that facts exist to support the necessary legal finding.[66] Faced with institutional pressures borne of differences in expertise and political accountability, the courts granted deference to the agencies' assertions of fact and, as a result, enabled the government to prevail ninety percent of the time.[67] Because agencies were able to shift their policy making into a more deferential zone of judicial review—fact-finding—the impact of FOIA on governmental transparency was severely dampened.

As the experience with FOIA suggests, it is a mistake to discuss review of statutory interpretation without also attending to review of facts. This is a lesson supported by history as well. In *NLRB v. Hearst Publications, Inc.*, a well-known case decided before the enactment of the APA, the NLRB skirted around judicial scrutiny of its interpretation of the statutory word "employee" by straining to frame the issue of whether the National Labor Relations Act applied to newsboys largely in factual terms—a framing the Court then accepted.[68] As these examples show, agencies can circumvent judicial constraint on legal conclusions by folding their exercise of discretion into the fact-finding sphere. The problems this imposes for the Madisonian system of checks and balances is further compounded when institutional structures limit courts' ability to meet such manipulation with more biting review of the facts.

Hearst and the more recent example of FOIA reflect the fact that courts may undercut the effectiveness of their own review of executive decision-making by giving greater deference to fact-finding and thus incentivizing manipulative behavior by the agencies. Of course, courts need not necessarily surrender to this

64. Brinkerhoff & Listwa, *supra* note 62, at 148-49 (quoting Milner v. U.S. Dep't of Navy, 562 U.S. 562, 565 (2011)).

65. 5 U.S.C. § 552(a)(4)(B) (2018).

66. Brinkerhoff & Listwa, *supra* note 62, at 150.

67. *Id.* at 147.

68. 322 U.S. 111, 124-31 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); *see also* Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2243 (2011) (describing *NLRB v. Hearst* as exhibiting one of the ways in which the "Supreme Court has experimented" with "different means" of "allocating policy choice to agencies or to courts").

causal chain. A proactive judiciary could maintain active guards against such machinations by carefully scrutinizing agencies' fact-finding. But herein lies the problem. Under the APA, courts only review agency fact-finding for "substantial evidence," a type of review that restricts the court to looking at the record produced by the agency itself—a record that cannot be augmented by the court.[69] The strength of judicial review therefore depends on the strength of the record or, more specifically, on the record's comprehensiveness as developed through initial hearings before an agency adjudicator who receives documentary evidence and both live and written testimony. The more comprehensive the ground-level record, the clearer later logical leaps and inconsistencies in the agency's "findings" based on that record, as the case progresses up from the initial hearing examiner to the agency's political appointees, become.

Such logical leaps and inconsistences—what this Note refers to as "red flags"—provide grounds upon which the court might, despite its generally deferential stance, declare an agency's "facts" to be unsupported. One critical factor determining the comprehensiveness of the record is *who* creates that record. ALJs are particularly well situated to conduct a thorough review of the events giving rise to the administrative adjudication and to document factual findings. Such thorough documentation limits agency boards' plausible deniability in later fact-finding manipulation; it is harder for them to obscure policy-making as "fact-finding" when the record suggests such "facts" are not facts at all. In the reverse, then, the removal of ALJs or other record-building devices from an agency's adjudicatory process widens the field of discretion that can be exercised in subsequent "fact-finding." In other words, ALJs can provide a check on bad-faith actions by the agency that would otherwise prevent effective judicial intervention.

The role of ALJs in facilitating judicial review of agency policy-making has parallels in the role of whistleblowers in uncovering organizational fraud and corruption. A whistleblower is a person who exposes bad behavior by members of their organization by bringing it to the attention of either other people within the organization or third parties, like the media or law enforcement.[70] By implementing systems that protect close-to-the-facts employees who report problems up to management, companies have been able to strengthen their corporate gov-

69. The "substantial evidence" standard differs from the more scrutinizing "de novo" standard that applies to legal conclusions. *See infra* note 123 and accompanying text.

70. Janet P. Near & Marcia P. Miceli, *After the Wrongdoing: What Managers Should Know About Whistleblowing*, 59 BUS. HORIZONS 105, 108 (2016). Near and Miceli first developed this definition in 1984 and noted in their 2016 article that "[w]histleblowing has subsequently been conceptually defined and operationally measured fairly consistently" using this "standard definition." *Id.*

ernance and identify problems before they cascade into lawsuits and large settlements.[71] Whistleblowers could be said to expand the scope of information in the "corporate record," helping create a record complete with ground-level data that might otherwise be overlooked by top-floor board rooms. In doing so, whistleblowers are not acting as adjudicators or evaluators. Rather, they are making it easier for external parties evaluating the company to detect crucial facts, and thus harder for company leaders to deny internal mistakes or wrongdoing. In a similar way, ALJs can be understood as valuable not only for their role as first-line adjudicators, but also, and perhaps even primarily, for the part they play in enabling subsequent review by external parties—namely the appellate courts.

Effective judicial review of agency decision-making exists within a complex web of facts, fact-finders, and decision-makers. Insofar as the ultimate decision-makers are also fact-finders, they have discretion over which facts to "find"—that is, discretion to manipulate the record in a way that evades review. In the agency adjudicatory context, such manipulation can result in determinations that are apparently legally sound—and thus pass judicial review on grounds of statutory or regulatory interpretation—but are undetectably defective on the "facts." Analyzing the strength of agency oversight therefore requires understanding the full landscape of decision-making and review: legal conclusions, factual findings, and the records in which they are developed.

This interconnectivity between adjudicatory records, fact-finding, and legal interpretation, and the large potential for transfers of agency discretion between them, are all-too-often ignored in debates over agency constraint. The skeptics, in criticizing *Chevron*, tend to look with tunnel vision at the issue of interpretive deference without considering review of facts. As a result, the modern conservative critique fails to consider the system-level effects that the changes it seeks are likely to have on the operation of the administrative state as a whole.

In contrast to this modern myopia, an earlier generation of conservative thinkers took a broader view. Writing in 1968, then-professor Ralph Winter exhibited a particular sensitivity to the interrelationship between law and fact and the implications for judicial review that follow.[72] As part of a broader examination of the Supreme Court's review of the NLRB, Judge Winter suggested that the judicial stance articulated by the Court in *Universal Camera Corp. v. NLRB*—the then-leading case on judicial review of the NLRB which set out a version of the substantial evidence test—would produce a peculiar dynamic, pushing the

71. Stephen R. Stubben & Kyle T. Welch, Evidence on the Use and Efficacy of Internal Whistleblowing Systems 1 (Apr. 29, 2019) (unpublished manuscript), https://ssrn.com/abstract=3273589 [https://perma.cc/5SPK-QSDJ].

72. Winter, *supra* note 12.

Board to retreat into the facts of cases in order to elude the more scrutinizing judicial review applied to conclusions of law.[73] Such a shift, Judge Winter explained, disserves the goals of judicial review.

Judicial review, Judge Winter argued, should respect the fact that Congress delegated to the Board—not the courts—the role of developing labor policy.[74] Thus, the Court must "permit the Board sufficient discretion in statutory interpretation and in doctrinal change over time"—something he suggested it had failed to do.[75] At the same time, the Court should ensure that the Board develops its legal interpretation in a "coherent" manner, based on "principles of general application."[76] Finally, it must ensure that the Board "behaves in an even-handed fashion," and that it does not adjudicate cases "on an ad hoc basis."[77] Were the scope of review structured in this manner, the agency would be given the freedom to develop its policy in an open and politically accountable way, but it would be prevented from treating particular parties unfairly. Such a scheme would uphold the rule of law in a manner consistent with the Madisonian vision of checks and balances, facilitating congressional and executive monitoring of agency policy-making and employing the courts to ensure each individual party's rights are adjudicated in accordance with the law.[78]

The regime set out in *Universal Camera*, however, provided the exact inverse of this ideal structure. By heavily scrutinizing questions of law and providing only light review of issues of fact, the Court's review scheme gave the Board an incentive to evade judicial gaze by burying its policy-making into its fact-finding, rendering executive and legislative monitoring of the Board's labor policy difficult while also hampering courts' ability to ensure that those policies were being applied fairly from one case to the next.[79] This dynamic led Judge Winter to propose a statutory amendment reversing the degrees of scrutiny applied to questions of law and fact, respectively.[80] Notably, he also flagged as relevant the distinction between cases in which the Board affirms the factual findings of "trial

73. *See id.* at 74-75 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)).

74. *See id.* at 73.

75. *Id.*

76. *Id.* at 71.

77. *Id.* at 74.

78. Underlying this view is the idea that the role of the courts under the APA is to ensure that agencies adhere to the statute's procedural requirements, which facilitate executive and legislative monitoring by forcing the agency to provide robust reasons for its actions. *See* McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 184-86 (1999).

79. *See* Winter, *supra* note 12, at 74-75.

80. *Id.* at 75.

examiners," the precursors of the modern ALJ, and those in which it rejects their findings—at least so long as those examiners are "truly independent."[81] Those cases where the Board and the trial examiners disagreed ought to elicit particular scrutiny, Judge Winter suggested, as in such cases there is a greater risk that the agency has relied upon "contrived" facts.[82] Although Judge Winter qualified these proposals as "only partially formulated,"[83] they are remarkable in the way they directly challenge the modern conservative critique. Taking a system-level view, Judge Winter suggested that deference to agency interpretations combined with ALJ independence can facilitate, rather than undermine, judicial supervision of the administrative state.

In the intervening decades, Judge Winter's system-level critique of administrative law has faded from view. In large part, this is likely due to *Chevron*, decided nearly two decades later.[84] *Chevron*, though unremarked upon when it was first decided,[85] has become one of the most cited U.S. judicial opinions of all time, and its stepwise deference regime has come to define administrative law in the eyes of many.[86] In *Chevron*'s shadow, Judge Winter's critiques seem outdated, responding to a system of judicial review that no longer resembles reality. Such a conclusion is apparently reinforced by subsequent decisions of the Court, such as *Allentown Mack Sales & Service, Inc. v. NLRB*,[87] where the Court upheld the Board's legal conclusions even while acknowledging their tensions with the statutory text. Against this background, Judge Winter's comments appear irrelevant at best—making space for the modern conservative critique's deep skepticism of both deference and ALJ independence.

But to leave Judge Winter's observations in the rear-view window would be, we contend, a dire mistake. As we show in the next Part, despite the frequency with which *Chevron* picks up new citations, today's review of agency action looks more like the system Judge Winter criticized than the one the administrative skeptics decry. We suggest that this demands a revival of the system-level view of the administrative state, with due attention to the interaction between review of legal and factual conclusions, respectively, including how such review intersects with questions regarding the independence of ALJs. But in order to build such a system-level vision, one must cease to look microscopically at review of

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81. *Id.*

82. *Id.* at 74-75.

83. *Id.* at 75.

84. Chevron, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

85. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 257 (2014).

86. *See id.* at 254-57.

87. 522 U.S. 359 (1998).

law and turn one's attention to the much-neglected hemisphere of judicial review: review of an agency's adjudicative fact-finding. By building a detailed account of how courts carry out review of agency fact-finding, we reveal the important role played by ALJs in facilitating judicial review. These observations turn the modern conservative critique on its head.

II. A CASE STUDY IN THE MODERN ADMINISTRATIVE STATE: THE NLRB

The central goal of the modern conservative critique of the administrative state is to constrain the bureaucratic regulatory bodies through greater judicial scrutiny. As described in the previous Part, this has rendered the abrogation of *Chevron* a prime objective. But to what extent does hyperdeference truly describe the regime of judicial review today? In this Part, we examine judicial oversight of the NLRB, the agency that was the subject of Judge Winter's analysis half a century ago. The motivation for focusing on the NLRB is twofold. First, it provides continuity with Judge Winter's study, facilitating comparison. Second—and critically—the NLRB is one of the agencies that most frequently and heavily relies on adjudication for the enforcement of its regulatory mandate. This provides an extensive set of cases from which we are able to develop our account of what review of adjudicative fact-finding entails and how it interacts with ALJ independence.

Taking the NLRB as its case study, this Part examines the contours of judicial review of agency adjudication today. As we show in Section II.A, despite what might be suggested by *Chevron* and the NLRB-specific *Allentown Mack*, neither the Supreme Court nor the federal courts of appeals are particularly deferential to the Board on questions of law. Instead, they regularly substitute their own legal conclusions for those of the agency. The Board, however, does receive great deference on questions of fact. Section II.B describes how courts only strike down the agency in the most egregious cases—those in which the Board blatantly failed to reconcile its decision with the evidence appearing on an ALJ-created[88] record. Sections II.B.1 and II.B.2 center, like Section II.A, on detailed qualitative scrutiny of courts' review of NLRB decisions. In Section II.B.3, we pivot our approach to prove quantitatively what we conclude qualitatively. Specifically,

88. We focus in this Note on the role of ALJs, as they are the most common initial adjudicators in NLRB proceedings. The applicability of our findings regarding ALJs, however, likely also extends to non-ALJ hearing officers and regional directors who conduct the initial gathering of evidence for certain disputes that may be appealed directly to the Board, including disputes regarding bargaining-unit definitions and union elections. *See* 29 C.F.R. §§ 102.60-.72 (2019). A question for further study, however, is whether such non-ALJ decisionmakers, who lack the same protections of their independence, are as effective at planting "red flags."

we present an original empirical study of nearly three hundred appellate court holdings from the past five years. By coding each holding involving judicial review of NLRB fact-finding, we quantitatively underscore the crucial function that independent ALJs and thorough administrative records serve in enabling judicial scrutiny of Board fact-finding. Specifically, we show that when reviewing NLRB findings of fact, judges deviate from their deferential stance toward the Board overwhelmingly more frequently when an ALJ has made findings in the record that contradict those of the Board.

With this exposition of judicial review of both law and facts in focus, it becomes clear that the regime that Judge Winter criticized remains very much the state of affairs today—at least with regard to the NLRB. As a result, those concerned with constraining the administrative state ought to be attentive to whether the demand for more vigorous review of legal conclusions will only further undermine the rule of law by motivating agencies to shift their policy-making into their fact-finding. When such shifts toward fact-finding occur, ALJs are critical, as we show both qualitatively and empirically, to the facilitation of meaningful judicial review.

A. Review of Conclusions of Law

To the administrative skeptics, *Chevron* deference—and the approach to judicial review that it typifies—represents "the abdication of the judicial duty."[89] Following *Chevron*, the argument goes, judges have been asked to step aside and allow federal agencies to shape the law as they will. *Allentown Mack*, with its accommodating posture toward the NLRB's conclusions of law,[90] seemed to reflect the spread of this doctrine into the realm of labor policy, threatening to give the Board unrestrained license to interpret that law as it so desired. But while this may be the picture assumed by many, it is anything but the truth.

Despite the deferential language in the *Allentown Mack* opinion, both the Supreme Court and the federal courts of appeals routinely substitute their own reasoning for that of the agency on matters of law. As detailed in this Section, this practice suggests that Judge Winter's concern regarding the substitutability of legal scrutiny and "fact-finding" is highly plausible. Indeed, it is far more likely to be true than the concern that agencies are engaged in unchecked lawmaking.

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89. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

90. 522 U.S. at 364 (stating that courts "must defer" if the Board's interpretation is "rational and consistent with the Act").

1. *Supreme Court Practice Since* Allentown Mack

Since *Allentown Mack*, the Supreme Court has issued decisions in seven cases in which the NLRB was a party, five of which implicated the Court's standard of review for the Board's legal conclusions.[91] Facially, the rhetoric of these cases suggests a general acceptance of agency deference, with two of the cases expressly citing *Chevron*.[92] However, the Court's underlying reasoning in these cases belies any belief that the deferential approach described in *Allentown Mack* is black-letter law. Indeed, the Court overturned the Board's legal holdings in all but one instance.[93] As such, while these five cases are technically compatible with the *Chevron* framework, they reflect a Court eager to find rationales for reversing the NLRB's legal reasoning.

In these cases, the Court generally avoided granting deference to the agency by citing some confounding factor that made *Chevron*—or some other deference regime—inappropriate. For example, in *BE&K Construction Co. v. NLRB*, decided in 2002, the Court reversed the Board's finding that a nonunion employer had engaged in an unfair labor practice by filing an unmeritorious suit against unions.[94] Without referencing any deference regime, the Court said that while the Board's interpretation of the National Labor Relations Act (NLRA) "might be read" in the broad way that the Board interpreted it, "it need not be read so broadly."[95] Citing First Amendment concerns, the Court chose the narrower understanding of the statute.[96] While this decision might be read as inconsistent with *Chevron*, its nondeferential stance can also be explained by the constitutional issues involved. Specifically, the Court's frequent reference to the "difficult constitutional question" raised by the agency's interpretation suggests that it

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91. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010); BE&K Constr. Co. v. NLRB, 536 U.S. 516 (2002); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 142-43 (2002); NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001). The other two involved the validity of appointments to the Board. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929 (2017) (interpreting the Federal Vacancies Reform Act); NLRB v. Noel Canning, 573 U.S. 513 (2014) (interpreting the Recess Appointment Clause).

92. *See Epic Sys.*, 138 S. Ct. at 1629; *Ky. River*, 532 U.S. at 713.

93. The one exception is *Kentucky River*; there, the Court upheld the Board's determination that an employer who contended that nurses were "supervisors" under the NLRA had the burden of proving their supervisory status in an unfair-labor-practice hearing. 532 U.S. at 710-11. However, that win was a limited one.

94. *BE&K Constr.*, 536 U.S. at 536.

95. *Id.*

96. *Id.* at 530-36.

was relying on constitutional avoidance to justify its decision not to defer to the NLRB.[97]

The Court's most recent decision involving the NLRB, *Epic Systems Corp. v. Lewis*, followed a similar pattern, explicitly discussing *Chevron* deference before ultimately holding that it did not apply.[98] In that case, the Court rejected the NLRB's argument that arbitration agreements with individual employees barring them from pursuing work-related claims on a collective basis are prohibited by the NLRA, holding instead that they are enforceable under the Federal Arbitration Act (FAA).[99] At least insofar as the majority approached the question, the key issue was whether the FAA's "saving clause" provided a basis for refusing to enforce such agreements.[100] After noting that neither party "asked [the Court] to reconsider *Chevron* deference," the Court explained that "even under *Chevron*'s terms, no deference is due."[101] The reason, it explained, was that the Board "does not administer" the FAA and thus is not granted deference in its construal.[102] By invoking the case's intersection with a statutory regime other than the NLRA and thus sidestepping *Chevron*, the Court revealed the degree to which the doctrinal deference regimes are anything but a straightjacket on the judiciary's ability to substitute its own judgments for those of the agency.[103]

While these two cases can be generally reconciled with the *Chevron* framework, the Court's opinion in *New Process Steel L.P. v. NLRB* is harder to assimilate.[104] At issue in that case was an amendment to the NLRA made by the Taft-Hartley Act that increased the quorum requirement for the Board from two members to three and allowed the Board to delegate its authority to groups of at least three members. The question was whether, following a delegation of the

97. *Id.* at 535.

98. 138 S. Ct. 1612, 1629 (2018).

99. *Id.* at 1632.

100. *Id.* at 1621.

101. *Id.* at 1629 (citing SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018)).

102. *Id.*

103. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) fits within this pattern as well. The case involved not the Board's interpretive authority, but rather its "discretion to select and fashion remedies for violations of the NLRA." *Id.* at 142. The Court explained that although the Board's discretion in this area is "generally broad, [it] is not unlimited." *Id.* at 142-43. Where "the Board's remedial . . . preferences potentially trench upon federal statutes and policies unrelated to the NLRA," the Court will deny deference. *Id.* at 144. Relying on this reasoning, the Court rejected the Board's award of backpay to an undocumented alien as foreclosed by federal immigration policy as impressed by Congress in the Immigration Reform and Control Act of 1986. *Id.* at 151-52. Like in *Epic Systems*, the Court invoked the relevance of some other statutory scheme in order to excuse the denial of deference.

104. *See* 560 U.S. 674 (2010).

Board's powers to a three-member group, two members may continue to exercise delegated authority when the group's size falls to two. Without citing any deference regime, the Court rejected the Board's interpretation of the statute as allowing the group to operate with only two members. The Court explained that "while the Government's reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible," citing certain provisions in the statute that would be rendered "functionally void."[105] Although it would not be inconsistent with *Chevron* to deny ambiguity at step one on the basis of a structural argument, the way in which the Court acknowledged the plausibility of the NLRB's position suggests tension with the doctrine. This conclusion is reinforced by Justice Kennedy's dissent, which argued that "there is no structural implausibility in reading the statute" as the government did.[106] Indeed, rhetoric aside, the case seems to present clear evidence belying the thought that the sort of relaxed stance toward the Board's legal conclusions evidenced in *Allentown Mack* typifies the Court's approach today.

The general picture presented by the last two decades of Supreme Court opinions involving the NLRB is one in which the Court is highly scrutinizing of the Board and unlikely to grant it broad deference on questions of law. Sometimes this involves simply ignoring the doctrinal deference regimes even when they would seem to apply, but more frequently it involves the Court invoking some other set of legal norms—such as constitutional concerns or an adjacent statutory regime—that excuses the substitution of the Court's legal judgment for that of the agency without explicitly deviating from the *Chevron* doctrine. Far from being an isolated phenomenon, evidence from the last Supreme Court Term suggests that such an approach is becoming the general norm. Indeed, in the Supreme Court's 2017 Term, *Chevron* deference was invoked as a defense of agency interpretations of statutory language in five cases, and in every one of those the Court held that *Chevron* did not apply.[107] Rhetoric aside, it does not seem that the state of the Court's review of agency interpretations is significantly different from that which Judge Winter criticized half a century ago.

2. *Questions of Law in the Appellate Courts*

In contrast to the nuanced picture of the Supreme Court's jurisprudence regarding conclusions of law developed in the previous Section, the sheer volume

105. *Id.* at 681.

106. *Id.* at 691 (Kennedy, J., dissenting).

107. *See* Jonathan H. Adler, *Shunting Aside* Chevron *Deference*, REG. REV. (Aug. 7, 2018), http://www.theregreview.org/2018/08/07/adler-shunting-aside-chevron-deference [https://perma.cc/7CBS-ZPNX].

of circuit court cases involving the NLRB makes a similar overview difficult to construct. However, an analysis of recent cases suggests that courts of appeals have adopted an approach to the Board's conclusions of law that is similar to that of the Supreme Court. Specifically, the standard of review adopted by the circuits facially requires a deferential stance, but in practice provides the courts substantial means to strike down the Board's legal holdings.

A typical doctrinal statement of the treatment of questions of law appears in the Seventh Circuit's recent opinion in *Columbia College Chicago v. NLRB*[108]: "[L]egal conclusions" must "have a reasonable basis in law."[109] The court "defer[s] to the Board's interpretation of the [NLRA] unless its legal conclusions are 'irrational or inconsistent with the Act.'"[110] The locution that the interpretation must be "rational and consistent with the Act" is used broadly across the circuits[111] and echoes various Supreme Court opinions.[112] The courts of appeals have explained that this gives the Board some freedom to adopt interpretations that, while consistent with the statute, may differ from what the court itself would have chosen. For example, the Sixth Circuit has said that it "need not agree that the Board's construction is the '*best* way' to read the NLRA, but rather leave[s] it to the Board to balance 'conflicting legitimate interests in pursuit of the national policy of promoting labor peace through strengthened collective bargaining.'"[113] Similarly, the Second Circuit has written that the applicable standard of review "afford[s] the [NLRB] a degree of legal leeway."[114] Notably, as these cases reflect, the circuit courts do not regularly cite to *Chevron*;[115] they

108. 847 F.3d 547 (7th Cir. 2017).

109. *Id.* at 552 (quoting Roundy's Inc. v. NLRB, 674 F.3d 638, 645-46 (7th Cir. 2012)).

110. *Id.* (quoting *Roundy's*, 674 F.3d at 646).

111. *See, e.g.*, Adams & Assocs., Inc. v. NLRB, 871 F.3d 358, 369 (5th Cir. 2017) (quoting Valmont Indus., Inc. v. NLRB, 244 F.3d 454, 464 (5th Cir. 2001)); Local Union 36, Int'l Bhd. of Elec. Workers v. NLRB, 706 F.3d 73, 82 (2d Cir. 2013) (quoting Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 201 (1991)); Mail Contractors of Am. v. NLRB, 514 F.3d 27, 31 (D.C. Cir. 2008) (quoting Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987)).

112. *See, e.g.*, *Fall River Dyeing*, 482 U.S. at 42 ("If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts.").

113. Kellogg Co. v. NLRB, 840 F.3d 322, 327 (6th Cir. 2016) (quoting Montague v. NLRB, 698 F.3d 307, 314 (6th Cir. 2012)).

114. NLRB v. Long Island Ass'n for AIDS Care, Inc., 870 F.3d 82, 87 (2d Cir. 2017) (quoting Cibao Meat Prods., Inc. v. NLRB, 547 F.3d 336, 339 (2d Cir. 2008)).

115. Occasionally, however, the circuit courts' opinions do cite *Chevron*. *See, e.g.*, NLRB v. Alt. Entm't, Inc., 858 F.3d 393, 404 (6th Cir. 2017), *abrogated by* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Morris v. Ernst & Young, LLP, 834 F.3d 975, 980-81 (9th Cir. 2016), *rev'd sub nom.* Epic Sys. Corp v. Lewis., 138 S. Ct. 1612 (2018), *vacated*, 894 F.3d 1093 (9th Cir. 2018).

instead refer to older, pre-*Chevron* cases that are specific to labor law but largely reconcilable with *Chevron*.[116]

These verbal formulations give rise to an expectation that the courts will largely uphold the Board's interpretations of the law so long as they are reasonable. But, as with the Supreme Court, the courts of appeals frequently avoid deference by finding that the typical "rational" and "consistent" criteria do not apply. Indeed, because of the various means by which courts substitute their own judgment for that of the agency, the overall standard of review for conclusions of law is frequently characterized by the circuit courts as "de novo."[117] For example, in *Civil Service Employees Association*, the Second Circuit held that the NLRB wrongly interpreted the Act when it concluded that "picketing for the purpose of collective bargaining that does not accord with the [statute's] notice" provisions exposes participating employees to discharge.[118] The court gave no deference to the agency's interpretation, saying that "statutory analysis necessarily begins with the plain meaning of the Act and, absent ambiguity, generally ends there."[119]

Another means by which the courts avoid giving deference to the Board is by scrutinizing whether the agency departed from its precedent. As the Sixth Circuit explained, "this court must not stand back and 'rubber-stamp' Board decisions that controvert the NLRA; instead it must carefully scrutinize accusations that the Board failed to abide by precedent."[120] This can be a very powerful tool for reversing the Board, as the court may determine that the agency failed to adhere sufficiently to its precedent even when one might reasonably conclude

116. William Eskridge and Lauren Baer made a similar observation about the Supreme Court's opinions issued between 1983 and 2005. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008). As they explain, a large number of opinions cited older tests that were developed in the labor law context but were rhetorically similar to *Chevron*. *Id.* at 1107. They speculate that this may be because specialized practices, such as labor, "prefer their particular deference precedents and continue to cite them, often leading the Court to follow suit." *Id.* at 1108. A recent study supports this hypothesis, finding that in most cases where the Supreme Court did not cite *Chevron*, it was because neither of the parties did so in their briefs. *See* Natalie Salmanowitz & Holger Spamann, Does the Supreme Court Really Not Apply Chevron When It Should? (Sept. 2, 2018) (unpublished manuscript), https://ssrn.com/abstract=3243095 [https://perma.cc/RVG8-HBA2].

117. *See, e.g.*, Adams & Assocs., Inc. v. NLRB, 871 F.3d 358, 369 (5th Cir. 2017) (quoting El Paso Elec. Co. v. NLRB, 681 F.3d 651, 656 (5th Cir. 2012)); Flex Frac Logistics, L.L.C. v. NLRB, 746 F.3d 205, 207 (5th Cir. 2014).

118. Civil Serv. Emps. Ass'n v. NLRB, 569 F.3d 88, 91 (2d Cir. 2009).

119. *Id.* at 91-92.

120. Kellogg Co. v. NLRB, 840 F.3d 322, 327 (6th Cir. 2016) (citing Vokas Provision Co. v. NLRB, 796 F.2d 864, 869 (6th Cir. 1986)).

that it had. Thus, for example, the Sixth Circuit has cited mere tensions with principles articulated in a previous adjudication as grounds for reversal.[121] The D.C. Circuit has also used this high standard of scrutiny quite aggressively. In one recent case, it held that the Board departed from past precedent by failing to provide a sufficient "pragmatic justification" for finding that the case before it triggered an exception to a general rule, despite the fact that the agency cited to one of its own precedents providing for such an exception.[122]

The general fact made clear by these cases is that—as with the Supreme Court—it is a mistake to focus too intently on judicial locutions of deference. The courts have numerous tools at their disposal by which they can find a reason to substitute their own legal reasoning for that of the agency if they so choose. While statistical evidence suggests that the courts of appeals make such substitutions to a lesser extent than the Supreme Court, there is strong reason to believe that the courts are not simply "rubber stamping" agency conclusions of law, as the anti-administrativists seem to suggest.[123]

Further, from the system-level perspective exemplified by Judge Winter's critique, it is not merely the degree of scrutiny applied by the courts to legal conclusions that matters, but the comparative level of scrutiny applied to legal conclusions as opposed to factual findings. And indeed, as the Fifth Circuit has explained, the "de novo" review of legal conclusions applied by the courts is far more scrutinizing than the lenient "substantial evidence standard" applied to factual findings.[124] We turn now to this other hemisphere of judicial review: review of fact-finding.

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121. *Id.* at 333.

122. *See* Mail Contractors of Am. v. NLRB, 514 F.3d 27, 35 (D.C. Cir. 2008).

123. One study found that only fifty-two percent of the Board's statutory interpretations were upheld by the Supreme Court. James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 509 tbl.2 (2014). Another study found that just sixty-two percent of the Board's legal conclusions (a set of holdings broader than just statutory interpretations) were upheld by the courts of appeal. Amy Semet, Predicting Deference in Appellate Court Decisions (unpublished manuscript) (manuscript at 28), https://scholar.princeton.edu/sites/default/files/amysemet/files/semet_deference.pdf [https://perma.cc/L9QS-VPGA].

124. *See* Adams & Assocs., Inc. v. NLRB, 871 F.3d 358, 369 (5th Cir. 2017) (quoting Valmont Indus., Inc. v. NLRB, 244 F.3d 454, 464 (5th Cir. 2001); Flex Frac Logistics, L.L.C. v. NLRB, 746 F.3d 205, 207-08 (5th Cir. 2014).

B. Review of Findings of Fact

Whereas, as established in the previous Section, courts afford the NLRB at best a limited form of deference in reviewing its legal interpretations, the opposite is true regarding questions of fact. Modern courts defer to the NLRB far more on its findings of fact than on its conclusions of law. This deference is derived directly from courts' definition and application of the "substantial evidence" standard of review—a standard that applies when courts review any agency's findings of fact on an adjudicatory record, not just the NLRB's.

This Section provides a detailed analysis of the courts' substantial evidence review of NLRB fact-finding: an area of agency decision-making and judicial oversight that, as discussed above, has been severely ignored in modern administrative law scholarship and critiques of the administrative state. The U.S. Supreme Court has not discussed "substantial evidence" review of agency fact-finding in the context of the NLRB since *Allentown Mack* in 1998;[125] therefore, this Section focuses on a survey of federal circuit court cases. In order to present a timely account, it focuses on cases decided during the past five U.S. Government fiscal years, i.e., since October 1, 2013.[126]

1. Circuit Courts' Articulation of "Substantial Evidence" Review

"Substantial evidence" review is a standard deriving from the APA's provisions governing judicial review of agency action. Specifically, Section 706 of the APA provides, inter alia, that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence."[127] This "substantial evidence" provision specifically governs judicial review of on-the-record agency fact-finding (i.e., facts compiled at a hearing).[128] This stands in contrast to the more general grounds provided by

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125. We conducted a Westlaw search of Supreme Court cases containing the words "substantial evidence" and "National Labor Relations Board" since 1998.

126. These cases were identified by searching for federal circuit court decisions citing either *Allentown Mack* or *Universal Camera* and applying substantial-evidence review. The survey of cases did not reveal any systematic differences between cases that were identified because they cited *Allentown Mack* and those identified for citations to *Universal Camera*. In total, the research presented here spans all circuits except the Federal Circuit, which returned no search results under the applied criteria.

127. 5 U.S.C. § 706(2)(E) (2018).

128. Sections 556 and 557 of the APA set forth required processes for on-the-record agency rulemaking or adjudication, including, inter alia, the submission of evidence, composition of a closed record, and opportunities for in-person hearings. 5 U.S.C. §§ 556, 557 (2018); *see also*

Section 706 for setting aside *any* agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" unconstitutional; an overreach of the agency's statutory authority; or taken without following legally mandated procedures.[129] As the Supreme Court summarized in *Allentown Mack*, substantial-evidence review is a "very specific requirement" that applies to on-the-record agency fact-finding *in addition to* these more general requirements for all agency decision-making.[130] Essentially, when faced with factual conclusions made by an agency in the course of on-the-record rulemaking or adjudicatory proceedings, the APA charges a reviewing court to consider, in addition to general constitutional, procedural, and reasonableness considerations, whether there is sufficient data in that record to support such conclusions.

The courts of appeals in recent years have consistently articulated the substantial-evidence standard in terms of objective reasonableness, adhering to the Supreme Court's rhetoric in *Allentown Mack* and, before that, in *Universal Camera* in 1951, just five years after the passage of the APA. Drawing from *Allentown Mack*, for example, substantial evidence exists if "on [the] record it would have been possible for a reasonable jury to reach the Board's conclusion."[131] Many courts also continue to cite *Universal Camera*'s instruction that substantial evidence requires "more than a mere scintilla" of support and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[132] At least two circuits have further clarified that the "more than a mere scintilla"

Thomas W. Merrill, *Judicial Deference to Agency Action*, 9 J. FEDERALIST SOC'Y PRAC. GROUPS 16, 16 (2008).

129. 5 U.S.C. § 706(a)-(d) (2018). Section 706 additionally provides that a reviewing court shall set aside actions found to be "unwarranted by the facts" in cases in which the facts are subject to de novo review by the reviewing court; such cases arise when an agency adjudication being reviewed failed to follow adequate proceedings or when an enforcement proceeding in federal court raises new issues that the agency did not address in its rulemaking process. 5 U.S.C. § 706(f) (2018).

130. Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 377 (1998).

131. *Id.* at 366-67; *see, e.g.*, Allied Aviation Serv. Co. of N.J. v. NLRB, 854 F.3d 55, 65 (D.C. Cir. 2017) (quoting *Allentown Mack*, 522 U.S. at 366-67); *see also, e.g.*, Arc Bridges, Inc. v. NLRB, 861 F.3d 193, 196 (D.C. Cir. 2017) (saying it is not necessary for the court to subjectively agree that the Board reached the "best" outcome in its fact-finding).

132. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (citing Consol. Edison Co. of N.Y. v. Labor Bd., 305 U.S. 197, 229 (1938)); *see, e.g.*, Franks v. NLRB, No. 16-10644, No. 16-10788, 2018 WL 3640818, at *4 (11th Cir. July 31, 2018); HealthBridge Mgmt., LLC v. NLRB, 902 F.3d 37, 43 (2d Cir. 2018); Good Samaritan Med. Ctr. v. NLRB, 858 F.3d 617, 628 (1st Cir. 2017); Southcoast Hosps. Grp., Inc. v. NLRB, 846 F.3d 448, 453 (1st Cir. 2017); Fred Meyer Stores, Inc. v. NLRB, 865 F.3d 630, 636 (D.C. Cir. 2017); Tri-State Wholesale Bldg. Supplies, Inc. v. NLRB, 657 F. App'x 421, 424 (6th Cir. 2016).

standard sets a low bar, below that required to establish a "preponderance of the evidence."[133]

Notably, "reasonableness" under these definitions of "substantial evidence" is an objective term, determined from the perspective of a cognizable juror, not of the reviewing court. In other words, substantial-evidence review does not require the court's own satisfaction with the Board's factual finding. For example, the D.C. Circuit stated in a 2017 case that "[i]t is not necessary that we agree that the Board reached the best outcome in order to sustain its decisions."[134] In a separate case that same year, the D.C. Circuit observed, quoting *Allentown Mack*, that the substantial-evidence standard "requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder."[135] The Ninth Circuit, quoting *Universal Camera*, noted that "[a]s to factual findings, [a] court may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'"[136] A significant degree of deference, as further elaborated in Section II.B.2, is thus involved in substantial-evidence review, despite the substantial evidence standard appearing in the APA as an *additional* requirement governing certain forms of agency decision-making.

Courts afford an even higher degree of deference to one subset of fact-finding: credibility determinations. The prevailing standard of review for credibility

133. *Fred Meyer Stores*, 865 F.3d at 636; Adams & Assocs., Inc. v. NLRB, 871 F.3d 358, 369 (5th Cir. 2017).

134. *Arc Bridges*, 861 F.3d at 196 (D.C. Cir. 2017) (quoting *HealthBridge Mgmt.*, 798 F.3d at 1067).

135. *Fred Meyer Stores*, 865 F.3d at 636 (quoting *Allentown Mack*, 522 U.S. at 377); *see also* Alden Leeds, Inc. v. NLRB, 812 F.3d 159, 165 (D.C. Cir. 2016).

136. NLRB. v. Remington Lodging & Hosp., LLC, 708 F. App'x 425, 426 (9th Cir. 2017) (quoting *Universal Camera Corp.*, 340 U.S. at 488); *see also Southcoast Hosps. Grp.*, 846 F.3d at 453 ("We may not displace the Board's choice between two fairly conflicting views, even though we justifiably would have made a different choice had the matter been before us *de novo*.") (internal quotation marks omitted); *Franks*, 2018 WL 3640818, at *5.

determinations is that courts will reverse "only in the most extraordinary circumstances"[137]—i.e., when the credibility determination is "inherently incredible or patently unreasonable;"[138] "patently insupportable;"[139] or "hopelessly incredible [or] self-contradictory."[140]

In explaining their deferential stance toward NLRB fact-finding, courts commonly cite the agency's unique expertise—a rationale that could explain why courts are less deferential to the agency on legal determinations, where they are better positioned to claim an authoritative vantage point.[141] In one D.C. Circuit case, for example, the court recognized that it was "obliged to recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship."[142] In another opinion, the D.C. Circuit expressly connected expertise with deference: "Given the Board's expertise, it enjoys a large measure of discretion on the question. The Board's findings of fact are conclusive so long as they are supported by substantial evidence on the record considered as a whole."[143]

The limits that courts do place on deference to the NLRB under the substantial evidence standard are phrased as simple principles of reasoned decision-making. Specifically, the Board "may not distort the fair import of the record by ignoring whole segments of uncontroverted evidence," and "is not free to prescribe what inferences from the record it will accept and reject, but must draw

137. Raymond Interior Sys. v. NLRB, 812 F.3d 168, 178 (D.C. Cir. 2016) (internal quotation marks omitted).

138. *Remington Lodging & Hosp.*, 708 F. App'x at 426.

139. *Alden Leeds*, 812 F.3d at 165.

140. *Raymond Interior Sys.*, 812 F.3d at 178; *see also Franks*, 2018 WL 3640818, at *6 (declining to reverse credibility determination because it "was not inherently unreasonable or self-contradictory"). This highly deferential standard is influenced by whether the agency adopted credibility determinations made by the ALJ; case law suggests that courts may not afford this degree of deference to an agency that deviates from an ALJ on a credibility determination. This dynamic is discussed *infra* Section II.B.2.c.

141. *See, e.g.*, Merrill, *supra* note 128, at 17 ("Where agency findings concern scientific or technical questions as to which agencies presumably have greater expertise than courts, courts probably give agencies more deference than they would give to a trial judge on review of fact findings in a bench trial.").

142. *Raymond Interior Sys.*, 812 F.3d at 179 (internal quotations omitted).

143. Allied Aviation Serv. Co. v. NLRB, 854 F.3d 55, 65 (D.C. Cir. 2017) (internal quotations omitted).

all those inferences that the evidence fairly demands."[144] In line with these principles of reasoned decision-making, the D.C. Circuit has further stated that it will not defer to NLRB fact-finding if the Board "fails adequately to explain why it has rejected the arguments for a different understanding of the evidence."[145] In doing so, it clarified that the "Board's discretion does not give it license to rely on an oversimplified view of the facts or to 'refuse to credit probative circumstantial evidence.'"[146]

2. *Circuit Courts' Application of "Substantial Evidence" Review*

Appellate courts' practical application of the substantial evidence standard generally comports with their articulated rules. When courts do overturn NLRB findings of fact, they offer compelling reasons for why the findings fail the stated standard of substantial-evidence review—that is, why overturned findings are indeed objectively unreasonable and plagued with deficiencies that any "reasonable mind" would find unsatisfactory. By contrast to the realm of legal interpretation, courts rarely substitute their own factual reasoning for that of the NLRB.

The next two subsections provide an overview of courts' explanations for upholding and reversing, respectively, NLRB findings of fact. They thereby shed light on the practical operation of substantial-evidence review of agency fact-finding. This concrete examination of judicial review of agency fact-finding establishes that courts, adhering to the deferential nature of substantial evidence review, generally reverse agencies only where the record raises "red flags" that signal either illogical reasoning or covert attempts at policy-making.

These observations give rise to the third subsection below, which draws from the tactical operation of substantial-evidence review to highlight the role of ALJs in judicial oversight of the NLRB. Specifically, we observe that the strength of courts' oversight through substantial-evidence review is strongly positively correlated with the thoroughness of the record available to them. Judicial oversight is accordingly bolstered by the presence of an independent ALJ, who can develop a thorough record by both scrutinizing each party's representation of relevant facts and making ground-level credibility determinations.

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144. Good Samaritan Med. Ctr. v. NLRB, 858 F.3d 617, 628 (1st Cir. 2017); *see also, e.g.*, Southcoast Hosps. Grp. v. NLRB, 846 F.3d 448, 453 (1st Cir. 2017); Newark Portfolio JV, LLC v. NLRB, 658 F. App'x 649, 652-53 (3d Cir. 2016).

145. Arc Bridges, Inc. v. NLRB, 861 F.3d 193, 196 (D.C. Cir. 2017).

146. Aggregate Indus. v. NLRB, 824 F.3d 1095, 1100 (D.C. Cir. 2016) (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 368 (1998) (internal alterations omitted)).

a. Tactical Grounds for Upholding Findings of Fact

In the opinions analyzed for this Note in which courts upheld NLRB findings of fact, review of those findings varies from short, conclusory statements that the Board was justifiably "not persuaded" by opposing arguments to thorough examinations of specific witness testimony.[147] Across approaches, courts display a high degree of deference that comports with their pledge to uphold the Board's fact-finding unless such findings are impossible for any reasonable mind to accept.

For example, courts commonly cite a lack of convincing countervailing evidence as probative to a "supported by substantial evidence" holding. In *MikLin Enterprises, Inc. v. NLRB*, for example, the Eighth Circuit upheld one factual finding after observing that the employer had "introduced no evidence supporting its implausible contention" that a removal of union flyers was necessary to maintain management authority.[148] The Second Circuit similarly noted in *HealthBridge Management, LLC v. NLRB* that the employer "failed to proffer evidence of a legitimate business purpose for its temporary payroll arrangement" at issue in the case.[149] A Sixth Circuit case, *Tri-State Wholesale Building Supplies, Inc. v. NLRB*, referred to the employer petitioner as having "misse[d] the mark" in its argument opposing the NLRB's ruling.[150] However, although a lack of countervailing evidence operates in favor of upholding the NLRB's fact-finding, the reverse is not necessarily true. In line with the stated substantial-evidence standard presented in Section II.B.1, courts uphold the Board's determinations against testimony and other evidence to the contrary on the record as long as the Board's conclusion is a reasonable alternative.[151]

Similarly, courts' review of credibility determinations comports with the professed higher degree of deference accorded to this subset of fact -finding. The Eleventh Circuit, for example, upheld a credibility determination in *Franks v. NLRB* after merely reciting the testimony at issue and conclusively observing

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147. *E.g.*, NLRB. v. Remington Lodging & Hosp., LLC, 708 F. App'x 425, 426 (9th Cir. 2017) (upholding a factual finding after noting simply that the "Board was not persuaded" by the employer's opposing argument, and that there was no ground to displace the Board's choice between "two fairly conflicting views"); Allied Aviation Serv. Co. v. NLRB, 854 F.3d 55, 65-67 (D.C. Cir. 2017) (thoroughly reviewing specific witnesses' testimony on the record and discussing the burden of proof before concluding that substantial evidence supported the Board's factual finding).

148. 861 F.3d 812, 828-29 (8th Cir. 2017).

149. 902 F.3d 37, 45 (2d Cir. 2018).

150. 657 F. App'x 421, 425 (6th Cir. 2016).

151. *See, e.g.*, *Remington Lodging & Hosp.*, 708 F. App'x at 426.

that "[b]ased on the entire record, this credibility determination was not inherently unreasonable or self-contradictory."[152] The Ninth Circuit upheld two credibility determinations in *NLRB v. Remington Lodging & Hospitality, LLC* on the simple observation that the employer had "fail[ed] to show the Board's credibility determination was inherently incredible or patently unreasonable."[153] One D.C. Circuit case, *Raymond Interior Systems v. NLRB*, cited as "substantial evidence" the ALJ's conclusory statement that "it was 'unmistakably clear' that [a key witness] believed that the company was 'utterly serious' in telling the employees that they had to join the union."[154] In sum, then, courts indeed appear to view themselves as ill-suited to question credibility determinations made by agency fact-finders with significantly greater proximity to the facts and the witnesses. Moreover, they are largely willing to uphold other forms of fact-finding as long as some objectively reasonable basis for the finding exists.

b. Tactical Grounds for Reversing Findings of Fact

Across all the opinions analyzed for this Note, courts never reversed NLRB fact-findings absent objectively clear signs of unreasonableness. In other words, courts do not overturn the Board simply because they view an alternate outcome as optimal or relatively more reasonable. Instead, courts overturn the NLRB only after pointing to errors in the record that genuinely—and in most cases starkly—undermine the objective reasonableness of the Board's findings, such as wholly ignoring testimony and other crucial evidence, or failing altogether to connect individual findings to broader conclusions. This practice is in line with the professed standard of substantial-evidence review.

In general, logical shortcomings warrant reversal of NLRB fact-finding only where they signal to courts gross abdications of the Board's responsibility to reason. In *Fred Meyer Stores, Inc. v. NLRB*, for example, the D.C. Circuit called the Board's opinion "more disingenuous than dispositive" and charged that "it evidence[d] a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decision-making. The Board totally ignore[d] facts in the record and misconstrue[d] findings of the ALJ."[155] The Court proceeded to highlight two "particularly outrageous instances" of this abdication of reasoned decision-making: one in which the Board attributed a finding to the ALJ where "the ALJ

152. 742 F. App'x 463, 470 (11th Cir. 2018).

153. 708 F. App'x at 426.

154. 812 F.3d 168, 178 (D.C. Cir. 2016).

155. 865 F.3d 630, 638 (D.C. Cir. 2017).

made no such finding on this central issue," and indeed wrote in his ruling, "I have made no findings [on this issue];" and one in which the Board found the occurrence of a "pivotal exchange" that had appeared nowhere in the ALJ's opinion.[156]

Although *Fred Meyer* may be an extreme example, other circuits have also pointed to stark omissions when reversing the NLRB under substantial-evidence review. In *Newark Portfolio JV, LLC v. NLRB*, for instance, the Third Circuit overturned an NLRB factual finding based on the Board's total disregard of a key witness's testimony, which "strongly support[ed] the inference" opposite that which the Board made.[157] In *Good Samaritan Medical Center v. NLRB*, the First Circuit highlighted a series of conversations in the record that the NLRB had altogether ignored and that contradicted the Board's conclusion. The court concluded that "in a case such as this where there is significant contradictory evidence that goes unaddressed by the NLRB's decision, we simply cannot uphold that decision as based on substantial evidence on the record considered as a whole."[158]

Another extreme logical shortcoming leading courts to reverse NLRB fact-finding is the Board's failure to explain why the facts that the Board chose to focus on were at all relevant to its ultimate conclusions. These cases might be read as courts imposing a duty upon the Board to provide *some* reasonable reasons—but again, not a duty to provide the best reasons, or the reasons that a court would itself choose. In *Southcoast Hospitals Group, Inc. v. NLRB*, for example, the First Circuit did not dispute minor findings by the Board regarding (1) the number of positions covered by union versus nonunion hiring policies or (2) a hiring preference, facilitated by the employer's hiring policy, for nonunion workers at two facilities.[159] However, the Board failed to take the necessary next step in its analysis to establish an NLRA violation: "disclos[ing] its reasoning" on how these two findings dictated the further, more determinative factual conclusion that the union workers were on a whole "disproportionately harmed" by the employer's policy.[160] Similarly, the D.C. Circuit in *Aggregate Industries v. NLRB* criticized the Board for jumping to the alleged "final result" of the employer's labor practices—the number of truck drivers who had transferred out of the union—without first considering and disclosing its reasoning on the unfair labor practices themselves: "the company's initial proposal to the union" and

156. *Id.* at 638-39.

157. 658 F. App'x 649, 653 (3d Cir. 2016).

158. 858 F.3d 617, 638 (1st Cir. 2017).

159. 846 F.3d 448, 451-52, 456 (1st Cir. 2017).

160. *Id.* at 455-56 (1st Cir. 2017).

subsequent conversations.[161] In another case, *Arc Bridges, Inc. v. NLRB*, the D.C. Circuit overturned the NLRB's findings in part because it had "failed adequately to explain" why the employer's actions were "indicative of antiunion animus."[162]

Unlike courts' review of the NLRB's legal interpretations, courts' criticisms of the NLRB's fact-finding do not generally charge that the Board considered facts in the *wrong way* or drew the *wrong inferences* from credible testimony. Instead, courts reverse the Board's fact-finding due to gaping holes in the record, such as failing to consider relevant contradictory evidence *at all* or failing to connect evidence to factual conclusions in *any* reasonable way. Courts' ability to detect these "red flags" depends, of course, on the strength of the record before them—on courts' ability to read through contradictory findings and see the full range of facts that do or do not support the Board's ultimate conclusions. We now turn to the development of such judicial-review-facilitating records, and the role of ALJs therein.

c. Role of the Administrative Law Judge's Findings

In *Universal Camera* in 1951, the Supreme Court introduced the notion that judicial review of the NLRB's factual findings might require heightened scrutiny when the NLRB had disagreed with the ALJ below. Largely in passing, the Court pondered that "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."[163] Since that statement almost seventy years ago, courts and commentators have debated whether judges must apply a stricter version of substantial-evidence review where agencies disagree with their ALJs.[164] Consensus on such a formula, however, which would explicitly heighten judicial scrutiny and create a less deferential version of substantial-evidence review based upon ALJ findings, has been elusive.

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161. 824 F.3d 1095, 1100-01 (D.C. Cir. 2016).

162. 861 F.3d 193, 198 (D.C. Cir. 2017).

163. Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

164. *E.g.*, *Aggregate Indus.*, 824 F.3d at 1100 (stating that when the Board reverses an ALJ on factual matters, such reversal must be examined with a "gimlet eye"); NLRB v. Galicks, Inc., 671 F.3d 602, 607 (6th Cir. 2012) (doubting the need for more searching review where the NLRB reversed the ALJ); Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 827 (2013) (citing two cases decided in the Second and Ninth Circuits in 1967 for the proposition that "courts review with a more careful eye agency findings that are contrary to ALJs' factual findings").

In the context of credibility determinations, for example, the highly deferential standard of judicial review discussed above—overturning determinations only when they are "inherently or patently unreasonable;" "patently insupportable;" or "hopelessly incredible [or] self-contradictory"[165]—was most frequently stated without reference to whether the Board's credibility determination aligned with that of the ALJ. Closer examination, however, complicates this picture. On the one hand, in all of the cases analyzed in this Note, courts invoked the highly deferential standard only when the NLRB adopted the ALJ's credibility determinations.[166] On the other hand, only the D.C. Circuit, and only in one case, declared explicitly that the degree of deference owed to the Board depended upon whether the Board adopted the ALJ's determinations.[167]

Courts are similarly unclear regarding ALJs' impact on the doctrinal standard of review for noncredibility fact-finding. Courts sometimes acknowledge an explicit standard-setting role of ALJs: the D.C. Circuit, for example, stated in one recent case, "We defer to the Board's conclusions if they are supported by substantial evidence, but when the Board reverses an ALJ on factual matters, we examine the disagreement with a gimlet eye."[168] Elsewhere, the D.C. Circuit has imposed a sort of heightened duty on the Board when it deviates from ALJ findings: "Of course '[t]he Board is free to disagree with the ALJ,' but under our case law it 'must explain the basis of its disagreement.'"[169] The Sixth Circuit has occasionally corroborated the existence of some altered standard when the Board disagrees with an ALJ, but most recently has questioned whether such a doctrinal formula exists requiring more searching review where the Board reversed the ALJ.[170]

Asking whether substantial-evidence review is doctrinally altered depending on an ALJ's findings, however, focuses courts' and administrative law scholars' attention on the wrong question. An ALJ's role in judicial review of agency fact-finding does not hinge on *modifying* the relevant standard of judicial review. ALJs' importance in agency oversight is not subject to the answer of the yet-

165. *See* sources and discussion *supra* notes 137-140.

166. *E.g.*, Franks v. NLRB, 742 F. App'x 463, 470 (11th Cir. 2018); NLRB. v. Remington Lodging & Hosp., LLC, 708 F. App'x 425, 426 (9th Cir. 2017); Raymond Interior Sys. v. NLRB, 812 F.3d 168, 178 (D.C. Cir. 2016); Alden Leeds, Inc. v. NLRB, 812 F.3d 159, 165 (D.C. Cir. 2016).

167. *Alden Leeds*, 812 F.3d at 165 ("Credibility determinations made by the ALJ, as adopted by the Board, are accepted unless they are patently insupportable.").

168. *Aggregate Indus.*, 824 F.3d at 1100 (citations omitted).

169. Arc Bridges, Inc. v. NLRB, 861 F.3d 193, 200 (D.C. Cir. 2017) (quoting Fort Dearborn Co. v. NLRB, 827 F.3d 1067, 1073 (D.C. Cir. 2016)).

170. *E.g.*, Jolliff v. NLRB, 513 F.3d 600, 607 (6th Cir. 2008). *But see* NLRB v. Galicks, Inc., 671 F.3d 602, 607 (6th Cir. 2012) (questioning the standard requiring more searching review where the NLRB reversed the ALJ).

unsettled debate over whether "substantial evidence" review has two variations, one to be applied where the Board affirms the ALJ's findings, and another to be applied where it reverses the ALJ. Instead, ALJs' role in judicial review of agency fact-finding is inherent in the substantial-evidence standard itself.

The grounds for reversals of fact-finding noted in Section II.B.2.b rely, quite simply, on the existence of a thorough record from which a court may discern logical leaps and inconsistencies. As established there, when courts overturn the Board's findings of fact, they generally articulate clear shortcomings in the record that exemplify the Board's abdication of its fact-finding duties. This is true even when courts are simply following the "traditional" standard of substantial evidence review, unmodified by considerations of whether the Board affirmed or reversed the ALJ. Such shortcomings include blatantly disregarding a witness's testimony that had previously been deemed credible, completely ignoring crucial facts in the record, or altogether failing to connect individual facts to the agency's broader conclusions.

Without previous credibility determinations or independent factual development, such shortcomings would be impossible to detect. In other words, if no ALJ develops a detailed, ground-level factual record and makes in-person credibility findings, a court has very little information with which to assess rigorously an agency's subsequent handling of "fact-finding." A sparse record leaves an agency-wide breadth to disguise poorly reasoned policy-making as first-instance fact-finding. A detailed record developed by an independent ALJ, by contrast, constrains the maneuvers that an agency can subsequently make. If the agency deviates from the ALJ's ground-level findings, it raises "red flags" to the court. These red flags, in turn, enable the court to reverse an agency's fact-finding as failing to satisfy even the highly deferential substantial-evidence standard, and to thereby act as an effective check on an agency's policy-making through adjudication.

The D.C. Circuit in *Fred Meyer Stores*, for example, would have been unable to call out the NLRB for its "failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence"[171] if there had been no previous record established by an ALJ. Had there been no ALJ, there would have been no such information in the record for the NLRB to *ignore*; instead, the Board could have simply *omitted* such information from the record, thereby shielding its unsound reasoning from judicial review. In *Aggregate Industries*, the D.C. Circuit was able to detect the Board's logical leaps because the record contained probative facts (most notably, testimony about conversations between the union and the employer) that the Board had failed to consider.[172] Had there been

171. Fred Meyer Stores, Inc. v. NLRB, 865 F.3d 630, 638 (D.C. Cir. 2017).

172. 824 F.3d at 1100–01.

no ALJ, the Board's fact-finding might well have appeared to be reasonable inferences from a smaller universe of available information. The circuit court would have had no notice of the additional important facts that rendered the Board's reasoning grossly inadequate.

More broadly, in each of the cases analyzed for this Note in which the NLRB reversed the ALJ and a federal court subsequently reversed the NLRB on substantial evidence review, the court highlighted the ALJ's disagreement with the agency.[173] By contrast, where the NLRB had affirmed the ALJ's findings, courts did not cite consistency between the ALJ and the NLRB as a key element in establishing "substantial evidence."[174] This pattern suggests that the relationship between an ALJ's findings and those of the NLRB is not in itself a necessary element of substantial evidence review. Rather, specific areas of disagreement provide courts with "red flags" that warrant reversal of the agency *despite* the high level of deference granted in substantial evidence review.[175]

This "red flag" explanation means that the substantial evidence standard need not become less "deferential" where the NLRB and ALJ disagree in order for the presence of an ALJ to significantly strengthen judicial checks on the agency. "Deference"—a court's self-restraint from inserting its own judgment for that of the agency—remains constant regardless of whether the ALJ and the agency disagree. Where the NLRB reverses the ALJ, courts do not view the two bodies as having cancelled each other out to create a blank slate on which the court may reason. Instead, where the agency reverses the ALJ, the court simply

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173. *E.g.*, *Arc Bridges*, 861 F.3d at 200 ("Of course the Board is free to disagree with the ALJ, but under our case law it must explain the basis of its disagreement. Here the Board did not give a rational explanation for rejecting the ALJ's conclusion.") (citations and quotation marks omitted); Newark Portfolio JV, LLC v. NLRB, 658 F. App'x 649, 653 (3d Cir. 2016) (criticizing the NLRB for ignoring witness testimony that the ALJ had considered but that countered the Board's chosen evidentiary inference); *Aggregate Indus.*, 824 F.3d at 1104 (criticizing the NLRB because it "gave no reason for rejecting [the ALJ's] finding of fact, and we see none").

174. *E.g.*, Allied Aviation Serv. Co. v. NLRB, 854 F.3d 55, 65 (D.C. Cir. 2017) (focusing on the Board's discretion and expertise); MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 828-29 (8th Cir. 2017) (focusing on the lack of convincing counterarguments submitted by the parties); Raymond Interior Sys. v. NLRB, 812 F.3d 168, 178-79 (D.C. Cir. 2016) (focusing on the Board's discretion and expertise); NLRB v. FedEx Freight, Inc., 832 F.3d 432, 445-46 (3d Cir. 2016) (focusing on the Board's proper weighing of relevant factors and its expertise); Tri-State Wholesale Bldg. Supplies, Inc. v. NLRB, 657 F. App'x 421, 425 (6th Cir. 2016) (focusing on the lack of convincing counterarguments submitted by the parties).

175. *Cf.* Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) ("The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues . . . . Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making.").

has a more complicated factual record to review, with more contrary factual findings that might signal objective unreasonableness in the agency's conclusions.

In other words, the theoretical question regarding the technical degree of deference when the agency reverses versus upholds an ALJ's findings is inapposite. The true question is a practical one: how ALJ findings serve as a check on agencies through courts' application of substantial-evidence review as it is standardly defined and applied. This latter question reveals a much clearer answer than the former, one that illuminates the importance of independent ALJs in checking agencies by building a thorough and objective record. This conclusion is underscored only more conspicuously by an empirical analysis that we conducted on nearly 300 circuit court holdings involving substantial evidence review of NLRB fact-finding. This empirical analysis is presented next.

3. Empirical Evidence of Courts' Deference Toward NLRB Fact-Finding and ALJs' Role in Facilitating Judicial Review

a. Methodology

In order to rigorously assess the strength of the above conclusions regarding judicial review of NLRB fact-finding, we designed and conducted an empirical analysis of substantial-evidence review and the role of ALJs therein. Our analysis captured data from 185 circuit court opinions issued between October 1, 2013 and September 30, 2018, which constituted the past five U.S. Government fiscal years.[176] The opinions spanned every federal appellate court except the Federal

176. We identified applicable cases using Bloomberg Law's court opinions search feature. We conducted a keyword search for "substantial evidence," and filtered results to cases in which the "National Labor Relations Board" was a party. We further filtered results to the past five complete fiscal years, designating a starting date of October 1, 2013 and an ending date of September 30, 2018. We conducted this search on April 1, 2019 and returned 251 results. In subsequently reviewing each of these 251 opinions, we removed 37 from our data set in which the court merely recited the substantial-evidence standard but proceeded to decide the case under an alternate standard of review. We removed an additional 29 cases that appeared first before a regional director or hearing officer and not an ALJ. We made this latter methodology decision in order to preserve this Note's focus on the role that centralized, specialized ALJs serve in an agency's policy-making-by-adjudication and subsequent judicial review thereof. However, we hypothesize that the same dynamics that we observe of ALJs may also appear where a hearing officer or regional director forms the ground-level record in a case. *See supra* note 88. Indeed, the 37 holdings in these 29 excluded opinions returned results substantially similar to the cases that began with proceedings before an ALJ: the court upheld the NLRB's finding of fact in 82% (28 of 34) of the instances in which the NLRB had agreed with the regional director or hearing officer, and in 50% (1 of 2) of the instances in which the NLRB disagreed

Circuit. Where opinions included multiple holdings involving substantial-evidence review, we analyzed each holding separately in order to maximize the granularity of our results.[177] In total, we analyzed 294 holdings in which a court of appeals declared a finding of fact by the NLRB either supported or unsupported by substantial evidence.[178]

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with the regional director or hearing officer. (With regard to one holding that originated before a hearing officer, the appellate opinion did not specify whether the NLRB had agreed or disagreed with the hearing officer's findings).

177. We chose to treat each holding in a case as a distinct data point, rather than treating each case as a single data point, in order to adequately capture the complexity of many NLRB cases. These cases often involve lengthy administrative hearings and multiple findings of fact by the ALJ, several of which may be challenged on appeal. Although it is possible that some findings of fact stem from the same or overlapping events and conditions (e.g., particular employer-employee conversations, employee handbooks, or union election procedures), each finding of fact requires the ALJ, the Board, and later the appellate judge to make a unique assessment. For example, even if two questions of fact relate to the same employee handbook, a fact-finder must separately interpret the handbook language relevant to each—asking first, for example, whether employees would construe an employer's "Workplace Conduct" policy to prohibit protected activity and asking second whether employees would construe that same employer's "Acceptable Use" policy to prohibit protected activity. *See* T-Mobile USA, Inc. v. NLRB, 865 F.3d 265 (5th Cir. 2017). The fact-finder may arrive at an employer-advantageous conclusion for one question and an employee-advantageous conclusion for the other. More directly relevant to our analysis, it is likewise possible that an appellate court could affirm the NLRB regarding one question of fact in given case and reverse the NLRB regarding another, or that the NLRB could agree with the ALJ regarding one question of fact in a case and disagree with the ALJ regarding another. Coding such a case with a singular "uphold" versus "overturn" data point and a singular "agree" versus "disagree" data point would present a catch-22 by which it is impossible to capture adequately the dynamics of judicial review with which we are concerned.

178. Because this empirical analysis specifically concerns the operation of substantial-evidence review of agency fact-finding and not review of conclusions of law, our data set excludes holdings in each case that were decided on non-fact grounds such as statutory interpretation or administrative procedure. When we use the term "holding" with regard to this empirical analysis, we therefore refer only to an application of substantial-evidence review to a finding of fact. Brief elaboration is warranted on our means of delineating distinct "applications of substantial evidence review" versus interrelated considerations underlying a single application, as the former were coded as multiple "holdings" and the latter coded as a single "holding." Conceptually speaking, we considered a judicial determination to be a "holding"—a distinct application of substantial-evidence review—if the judge treated it as a punctuated decision point at which to declare a factual finding either supported or unsupported by substantial evidence. By contrast, if an observation or intermediate conclusion about relevant evidence merely informed a broader factual question, the resolution of which in turn depended in part upon that observation or intermediate conclusion, no "holding" was counted until the broader question was finally decided as supported or unsupported by substantial evidence. In other words, in order to avoid double-counting the same fact-finding processes, "holdings" must encompass mutually exclusive sequences of inferences and reasoning. In translating this concept into our dataset, we relied significantly upon the appellate judges' own delineations. For

We coded each holding on two primary dimensions: first, whether the NLRB agreed or disagreed with the ALJ on the factual finding at issue ("Agree"/"Disagree"); and second, whether the reviewing appellate court upheld or overturned the NLRB with regard to that finding ("Uphold"/"Overturn"). In a small number of instances (36 of 294 holdings), the court opinion did not specify the ALJ's findings. These cases were coded "Not Specified" in place of an "Agree"/"Disagree" label. In a few instances (3 of 294 holdings), the court noted explicitly that the ALJ had made no finding on the relevant factual issue; these cases were coded "No Finding" in place of an "Agree"/"Disagree" label.

b. Raw Data Results

As shown in Table 1, the courts of appeals in sum upheld the NLRB's factual findings 81% of the time (238 of 294 opinions). This comports with courts' generally deferential stance, previously described, toward the Board's conclusions of facts as opposed to law. It also comports with Amy Semet's finding in a forthcoming study that judges defer 84% of the time in cases involving substantial evidence review of the NLRB versus 62% of the time in cases involving statutory interpretation or other legal questions reviewed de novo.[179]

Importantly, however, our data offers new granularity into this 80%-plus affirmance rate by examining how this rate differs as a function of the relationship between the ALJ and the Board. Specifically, our data reveals a marked difference in the judicial affirmance rate of the Board's factual findings where the Board had agreed versus disagreed with the ALJ's corresponding factual findings below. As shown in Table 1, where the Board adopted an ALJ's factual finding, the

example, where an appellate opinion included three distinct statements that substantial evidence did or did not support three distinct factual findings made by the NLRB, we coded each of these three statements as a "holding." By contrast, where an appellate judge outlined a series of facts and events in building to a single statement that substantial evidence did or did not support an NLRB finding, we recorded a single holding despite the multitudinous considerations underlying it. We were reserved in counting multiple holdings in the absence of explicit judicial delineations, in order to minimize the risk of double-counting data points that were not in fact independent.

179. Amy Semet, Predicting Deference in Appellate Court Decisions 28 (2017) (unpublished manuscript), https://www.scholar.princeton.edu/sites/default/files/amysemet/files/semet_deference.pdf [https://perma.cc/R7N4-5TKM]. Semet's figures are based on appellate court decisions involving the NLRB between 1994 and 2014, which she reviewed primarily in order to examine a series of political, economic, legal, and sociological factors that might impact judges' choices regarding whether to defer and whether to vote contrary to their ideological leanings. *Id.* at 1. Semet's empirical study does not examine the role of ALJs in judicial review.

appellate courts upheld that finding 84% of the time. By contrast, where the Board made a factual finding that conflicted with the ALJ's determinations on the record, the appellate courts upheld the Board just 43% of the time. This strongly supports the qualitative hypotheses set forth in Section II.B.2.c regarding the importance of ALJs in facilitating judicial review of agency fact-finding.[180]

TABLE 1.
APPELLATE AFFIRMANCE RATE BY AGREEMENT WITH ALJ

		Court Decision (No. Holdings)		
		Uphold	Overturn	**% Upheld**
NLRB v. ALJ	**Agree**	188	37	**84%**
	Disagree	13	17	**43%**
	Not Specified	36	0	**100%**
	No Finding	1	2	**33%**

The magnitude of ALJs' impact on circuit courts' ability to overturn the Board may be even larger than the data in Table 1 suggests. In addition to the primary two dimensions shown in Table 1, we also coded each holding for whether it was best described as a "Mixed Law/Fact" holding. This label captures the nuance that sometimes appears in opinions which courts self-describe as entailing "substantial evidence" review but actually turn on statutory interpretation or an agency's choice of applicable precedent, which are questions of law.[181] Such opinions, for example, might declare an NLRB decision to be "unsupported by substantial evidence," yet elaborate that this deficiency arises not from

180. The data regarding appellate decisions in which the available record either did not specify the ALJ's findings or stated that the ALJ made no finding regarding the fact at issue might be interpreted as additional support for this conclusion. Insufficient detail is available to make reliable generalizations regarding these 39 holdings. It is perhaps noteworthy, however, that where the court opinion altogether omitted any reference to an ALJ, it upheld the Board 100% of the time (36 of 36 cases). Additionally, it is perhaps noteworthy that where the court noted the lack of any ALJ ground-level findings on an issue, it was less deferential toward the Board's subsequent conclusions of fact and upheld the Board just 33% of the time (1 of 3 cases).

181. *Cf.* Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2283 (2019) (distinguishing cases in which the question is which legal standard to apply from those in which the question is which standard is factually satisfied).

the Board "finding" facts that lacked support in the record, but rather from the Board applying the wrong statutory standard or the wrong line of precedent to facts that it properly found.[182] In sum, we coded 29 holdings as such "Mixed Law/Fact" holdings. Notably, 22 of these were holdings in which the Board had agreed with the ALJ and yet the court nonetheless overturned the Board ("Agree/Overturn" holdings). This constitutes 59% of the total number of "Agree/Overturn" holdings in our data set.[183] By contrast, just 18% (3 of 17) of the "Disagree/Overturn" holdings were coded as involving mixed issues of law and fact.[184] These figures directionally suggest that the appellate courts are, in the absence of contrary ALJ findings, even more deferential toward the Board's fact-finding than Table 1 shows. When the courts overturn the Board on "substantial evidence" review despite agreement between the Board and the ALJ below, they more often than not are actually overturning the Board on a legal deficiency imprecisely described as a "lack of substantial evidence." By contrast, when the courts are faced with a record in which the ALJ made factual findings contrary to those of the Board, their decisions to overturn are most often driven by genuine deficiencies in the Board's ascertainment of witness credibility, series of events, contents of communications, and the like.

Table 2 presents a view of our results after removing the Mixed Law/Fact holdings from the data set. As shown in Table 2, this modification magnified the disparity between the rate of appellate court affirmance when the Board agreed with the ALJ versus when the Board disagreed with the ALJ. The 84% affirmance rate shown in Table 1 where the Board and ALJ agreed increased to 93% when Mixed Law/Fact holdings were removed. By contrast, the rate of appellate court affirmance where the Board and ALJ disagreed changed only slightly, by one percentage point.

182. *See, e.g.*, NLRB v. New Vista Nursing & Rehab., 870 F.3d 113, 133 (3d Cir. 2017) (reversing the Board under a "substantial evidence" standard because both its and the Regional Director's "findings [were] addressed to the wrong test [and] largely inapplicable to the correct test"); MikLin Enterprises, Inc. v. NLRB, 861 F.3d 812, 815, 826 (8th Cir. 2017) (holding that "substantial evidence does not support the Board's decision" because the court concluded that certain employee posters "were not protected Section 7 activity"—a conclusion involving the reach of Section 7 of the NLRA "as construed in a controlling Supreme Court precedent" that the Board had misapplied, and not involving fact-finding about the posters' content).

183. Interestingly, we found only one Mixed Law/Fact holding among instances where the ALJ and Board agreed and the appellate court upheld the Board (i.e., among "Agree/Uphold" holdings).

184. We also coded 3 of the 13 "Disagree/Uphold" holdings as involving mixed questions of law and fact.

TABLE 2.
RESULTS AFTER REMOVING MIXED LAW/FACT HOLDINGS

NLRB v. ALJ	Court Decision (No. Holdings)		
	Uphold	Overturn	**% Upheld**
Agree	187	15	**93%**
Disagree	13	14	**42%**

c. Chi-Squared Test for Statistical Significance

In order to interpret more rigorously the seemingly large difference shown in our raw data between judicial affirmance rates when the NLRB and the ALJ agreed versus disagreed, we conducted a chi-squared test for statistical significance on this data. We conducted two chi-squared tests: one on the data before removing Mixed Law/Fact holdings, and one after removing those 29 holdings.

A chi-squared test is a statistical method that assesses whether two categorical variables are independent in some population of data.[185] It is the appropriate statistical test for our analysis, which seeks to assess the relationship between two categorical variables: first, whether the NLRB and the ALJ agreed or disagreed regarding a given factual finding; and second, whether the appellate court upheld or overturned the NLRB with regard to that finding. A chi-squared test thus provides a means by which to evaluate whether the "Agree/Disagree" variable is independent from the "Uphold/Overturn" variable. We hypothesized, as suggested by the foregoing discussion, that these variables are not in fact independent, but rather that an "Agree" result on the first variable makes an "Uphold" result on the second variable more likely, and that a "Disagree" result on the first variable makes an "Overturn" result on the second variable more likely. Therefore, we hypothesized that the "Agree/Disagree" and "Uphold/Overturn" variables are not independent, but rather that the "Uphold/Overturn" variable exhibits statistically significant dependence on the "Agree/Disagree" variable.

A chi-squared test is conducted against a "null hypothesis" that the two variables at issue are wholly independent. In essence, the test asks whether a data

185. For additional context on chi-square testing, see *Chi-Square Independence Test—What and Why?*, SPSS TUTORIALS, https://www.spss-tutorials.com/chi-square-independence-test [https://perma.cc/UG8H-J5NT].

set supports disproving this null hypothesis and concluding that the two variables are dependent upon each other. The test first calculates expected frequencies, which are the frequencies that would be expected in a sample if the null hypothesis is true. Expected frequencies are calculated as follows, where E_{ij} refers to expected frequency; T_i refers to the total number of observations in the ith row; T_j refers to the total number of observations in the jth column; and N refers to the total number of observations across the data set:

$$E_{ij} = \frac{T_i \times T_j}{N}$$

Using the above equation, the expected frequencies for our full data set (before removing Mixed Law/Fact holdings) are shown in Table 3, and the expected frequencies after removing Mixed Law/Fact holdings are shown in Table 4.

TABLE 3.
EXPECTED FREQUENCIES FOR FULL DATA SET

		Court Decision (No. Holdings)	
		Uphold	Overturn
NLRB v. ALJ	**Agree**	177.35	47.65
	Disagree	23.65	6.35

TABLE 4.
EXPECTED FREQUENCIES AFTER REMOVING MIXED LAW/FACT HOLDINGS

		Court Decision (No. Holdings)	
		Uphold	Overturn
NLRB v. ALJ	**Agree**	176.08	25.92
	Disagree	20.92	3.08

The chi-squared test then compares these expected frequencies ("E_{ij}") to the observed frequencies ("O_{ij}") in the sample, and calculates the chi-squared test statistic as follows:

$$\chi^2 = \sum \frac{(O_{ij} - E_{ij})^2}{E_{ij}}$$

Using the above equation, the chi-squared test statistic for the full data set is 25.656, and the chi-squared test statistic for the data set after removing Mixed Law/Fact holdings is 49.702.[186]

The final step of a chi-squared test is to determine whether the results are statistically significant. If "statistical significance" is found, the data set can be said to refute the null hypothesis that the two tested variables are independent from one another. Here, the results for both data sets were statistically significant at a $p<0.001$ level.[187] This suggests that the null hypothesis is indeed refuted, and correspondingly that the "Uphold/Overturn" variable indeed depends significantly upon the "Agree/Disagree" variable.

In sum, this empirical study offers strong quantitative support for the dynamics described in the foregoing sections of this Note. The appellate courts are highly unlikely to overturn the Board's factual findings where there are no "red flags" in the record—i.e., where the findings comport with the earlier record generated by the ALJ. The raw magnitude of this deference, according to our data, lies somewhere between 84% and 93% affirmance, depending upon whether courts are taken at their word when they reverse using "substantial evidence"

186. Because the expected value of the Disagree/Overturn frequency is less than 5 after Mixed Law/Fact holdings are removed, the resulting chi-squared test statistic is subject to error due to violation of the assumption that all expected frequencies in a two-by-two table are greater than 5. However, this sample size problem is not fatal to the conclusion of statistically significant dependence between the Agree/Disagree and Uphold/Overturn variables; the chi-squared test for the full data set complied with this assumption and returned a statistically significant chi-squared value. Because the removal of Mixed Law/Fact holdings, as explained in the previous subsection, only increased the magnitude of the observed raw effect of the Agree/Disagree variable on the Uphold/Overturn variable, it is reasonable to conclude that both data sets reveal statistically significant dependence between the variables.

187. The statistical significance of a chi-squared test result is determined by comparing the test statistic of a chi-squared test to a chi-squared distribution table. The values in a distribution table show the minimum chi-squared values that must be found in order to declare statistical significance at a given probability level ("*p*-value" or "alpha"). In general, statistical significance is reported where $p<0.05$, i.e., where there is less than a five percent likelihood that results as extreme as the observed data would occur in a world in which the null hypothesis is true. The applicable values in the chi-squared distribution table depend upon the degrees of freedom in a sample. The degrees of freedom in a data set are calculated as (number of rows − 1) x (number of columns − 1). Therefore, a two-by-two table such as that in our analysis has one degree of freedom. *See* SPSS TUTORIALS, *supra* note 185. For data sets with one degree of freedom, the chi-squared distribution table provides the following values: $p<0.05$: 3.841; $p<0.01$: 6.635; $p<0.001$: 10.828. *See Values of the Chi-Squared Distribution*, MEDCALC, https://www.medcalc.org/manual/chi-square-table.php [https://perma.cc/9VTN-YU73].

language but reasoning that resonates more with statutory interpretation. By contrast, when the record exposes disagreement between the ALJ and the Board, this deference almost entirely disappears; the Board is just as likely to be overturned as affirmed. Moreover, and even more convincingly, statistical analysis of this raw data strongly supports the conclusion that whether the NLRB agrees or disagrees with the ALJ impacts whether a court subsequently upholds or overturns the Board. These findings underscore both the attractiveness of "fact-finding" for agencies seeking deference and the import of ALJs in facilitating meaningful judicial review when agencies make policy through fact-intensive adjudication.

III. IMPLICATIONS

A. The Continued Relevance of Judge Winter's Warning

By concretely exploring both hemispheres of judicial oversight over the administrative state, Part II of this Note demonstrated that courts afford the NLRB far more deference on its findings of fact than on its interpretations of law. This renders Judge Winter's fifty-year-old warning relevant today: insofar as courts defer to agencies more on fact-finding than on legal conclusions, agencies are incentivized to retreat into the facts of cases in order to elude judicial scrutiny.[188] In doing so, policy-making becomes disguised as "fact-finding." Courts are poorly equipped to review the merits of such "fact-finding;" they are, after all, legal experts, not subject-matter experts. Moreover, policy-making disguised as "fact-finding" becomes shielded not just from judicial scrutiny but also from the political eye. Instead of issuing open policy statements that explain their legal positions and interpretations, agencies incentivized to make policy through "fact" will adjudicate cases on an individualized basis, developing ad hoc records that blur the lines between selection of "relevant" facts or "credible" witnesses on the one hand and conclusory policy decisions on the other.[189] Such records are far inferior bases for presidential and congressional oversight than open statements of agency policy.

Judge Winter and the preceding Sections of this Note focused on judicial review of the NLRB, but the phenomena observed and the implications thereof extend beyond that agency. The necessity of a system-level view of administrative policy-making and judicial oversight thereof, and the implications of the relative standards of review for conclusions of law versus findings of fact, apply across the administrative state. They apply particularly strongly to agencies that

188. Winter, *supra* note 12, at 74-75.

189. *See id*.

make a large portion of their policy through adjudications, which involve individualized, and often less public, fact-finding and testimonial proceedings. Notably, this includes many agencies with significant influence over the financial sector, such as the SEC, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and the Office of Foreign Assets Control (OFAC).[190] Other agencies that might be added to these ranks include the FTC, which, like the NLRB, was originally envisioned as a primarily adjudicatory agency,[191] and the Social Security Administration (SSA).[192]

Moreover, Judge Winter's warning regarding the result of a harsher standard of review for law than for fact (pushing agencies toward disguising policy-mak-

190. The Dodd-Frank Act expanded the SEC's adjudicatory powers, enabling it to initiate administrative proceedings against a broader range of actors (including entities not registered with the agency) and to levy a broader range of penalties, including disgorgement of profits and bans from the securities industry, through those proceedings. Elizabeth Wang, Lucia v. SEC*: The Debate and Decision Concerning the Constitutionality of SEC Administrative Proceedings*, 50 LOY. L.A. L. REV. 867, 870-71 (2017). There is evidence that the SEC has correspondingly increased its level of internal adjudication, shifting some cases previously filed in the first instance in Article III courts to administrative actions heard first by ALJs. *See, e.g.*, Stephen Choi & Adam C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1 (2017). Moreover, this increased power in internal adjudication appears to be accompanied by decreased power in rulemaking: scholars have noted that the judiciary has become increasingly stringent in its interpretations of the SEC's statutory obligations regarding the extent of cost-benefit analyses underlying rulemaking, resulting in a string of losses for the SEC when it has tried to promulgate recent rules. *E.g.*, Rachel A. Benedict, *Judicial Review of SEC Rules: Managing the Costs of Cost-Benefit Analysis*, 97 MINN. L. REV. 278, 279, 283-87 (2012).

191. *See, e.g.*, Jack M. Beermann, Administrative Adjudication and Adjudicators (Oct. 9, 2018) (unpublished manuscript), https://ssrn.com/abstract=3240189 [https://perma.cc/YVE4-UB38].

192. The SSA has significantly more ALJs than any other agency, accounting for 1,655 of the 1,931 ALJs across the entire federal administrative state. *Administrative Law Judges: ALJs by Agency*, U.S. OFF. PERSONNEL MGMT. (Mar. 2017), http://www.opm.gov/services-for-agencies/administrative-law-judges [https://perma.cc/8ZTY-8QNF]. The list presented here is not intended to be dispositive, and we note that many agencies engage in a mix of adjudication, formal rulemaking, and informal guidance promulgation in order to enact and implement administrative policies, given their doctrinal freedom to choose among these modes of policymaking. *See* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947). We note only those agencies that may, by our analysis, use a relatively higher ratio of adjudication to rulemaking, and thus may be most exhibitive of the dynamics that we observe with regard to the NLRB. We also note that the NLRB is particularly extreme in its ratio of adjudication to rulemaking, having issued just two rules in its eighty-plus-year history: "a rather trivial one in 1989 and another in 2011 that was struck down by two circuits and abandoned by the Board in 2013." Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 508 (2016).

ing as "fact-finding") rings the loudest for agencies that receive the least deference on their conclusions of law. Several of the agencies noted above for their reliance on adjudication also fit this description. One of us has noted, for example, that the U.S. Supreme Court has long "exhibited concern with the SEC's efforts to expand the reach of securities law—a concern that has arguably resulted in the agency losing its claim to deference a number of times in the past."[193] The SSA is similarly frequently denied deference. In appellate court reviews of the SSA's statutory interpretations between 2003 and 2013, one empirical study found that courts applied the *Chevron* doctrine just 69% of the time—placing the SSA in the bottom third of agencies regarding its ability to invoke *Chevron*. By contrast, the top five agencies in the sample received *Chevron* deference in between 89% and 100% of applicable cases. Even when the SSA successfully invoked *Chevron*, it won just 67% of those cases.[194] Other labor-related agencies join the NLRB's low-deference ranks here: the same study found that circuit courts applied *Chevron* to just 59% and 43% of statutory interpretation cases involving the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC), respectively.[195] The FTC ranked last of all agencies on its receipt of deference under the *Chevron* doctrine, at 36%.[196]

These two features of agency action and judicial review—relatively frequent use of fact-intensive adjudication and relatively infrequent receipt of *Chevron* deference—are the sort of dynamics discernible only when one adopts the system-level view. They are also precisely the kind of dynamics, we posit, that push an agency from one frequently studied hemisphere of administrative policymaking and judicial review—conclusions of law, including attendant legal deference doctrines—to a second, less understood and thus potentially more dangerous hemisphere—findings of fact and the "substantial evidence" review thereof.[197]

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193. Daniel B. Listwa & Charles Seidell, Note, *Penalties in Equity: Disgorgement After* Kokesh v. SEC, 35 YALE J. ON REG. 667, 697-98 (2018); *see also, e.g.*, Noam Gidron & Yotam Kaplan, *Institutional Gardening: The Supreme Court in Economic Liberalization*, 21 LEWIS & CLARK L. REV. 685, 714-20 (2017).

194. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 54 tbl.3 (2017).

195. *Id.*

196. *Id.*

197. Because we posit that these two features—frequent adjudication and infrequent receipt of *Chevron* deference—render an agency more likely to dodge judicial review by retreating into "fact-finding," it is worth noting that the opposite may also be true. Agencies that rely relatively more on rulemaking than on adjudication, and that more often receive *Chevron* deference from appellate courts, may respond differently to a decline in legal deference doctrines

In sum, the foregoing observations give rise to two major implications for administrative-law theory writ large. First, modern critiques of the administrative state remain blaringly incomplete, in that they generally neglect the hemisphere of agency policy-making effectuated by findings of fact. Second and relatedly, modern movements to check and constrain the administrative state hamstring their own projects by ignoring judicial review of agency fact-finding. Denying agencies deference on their conclusions of law does not necessarily constrain their ability to make policies with which courts or the public are uncomfortable. It may instead have the counterproductive effect of pushing them — both the NLRB and others — to make the same policies, but to disguise them in opaque terms. It may push them, in other words, to shift from clear and general statements of legal interpretation to less verifiable, individualized adjudicatory holdings based on context-specific "factual" findings. The next Section discusses practical suggestions for reform that these theoretical insights prompt.

B. New Strategies for Administrative Constraint: Bolstering the Role of Independent Administrative Law Judges

The implications summarized in Section III.A. present anti-administrativists with a practical quandary in their reform efforts. The anti-administrativists' requested reforms — eliminating deference on questions of law by eliminating doctrines such as *Chevron* and *Auer*, and undermining ALJ independence — are illuminated as not only ineffective due to deference conservation,[198] but actually

and/or an increased emphasis on independent factual record-building across the administrative state. The EPA and the FCC are two such examples. The EPA's regulatory activities rely heavily on notice-and-comment rulemaking under authorizing statutes such as the Clean Air Act, and even its deregulatory efforts under the Trump Administration may require judicial deference to agency "reinterpretations" of statutory mandates. *See, e.g.*, Phillip Dane Warren, *The Impact of Weakening* Chevron *Deference on Environmental Deregulation*, 118 COLUM. L. REV. ONLINE 62, 74-78 (2018). The FCC also relies heavily on rulemaking: one study attempting to analyze ALJs within the FCC found just 104 agency adjudications in the thirty years from 1975 to 2005. Benjamin Kapnik, *Affirming the Status Quo?: The FCC, ALJs, and Agency Adjudications*, 80 GEO. WASH. L. REV. 1527, 1537 (2012). (By contrast, the NLRB issued 327 adjudicatory decisions in FY2018 alone. *Board Decisions Issued*, NAT'L LAB. REL. BOARD, http://www.nlrb.gov/news-outreach/graphs-data/decisions/board-decisions-issued [https://perma.cc/ET88-9CZW]). Moreover, according to Kent Barnett and Christopher Walker's 2017 study, appellate courts apply *Chevron* in nearly 90% of cases involving the EPA's statutory interpretations. Barnett & Walker, *supra* note 194, at 54 tbl.3. This statistic is similar for the FCC, *id.*, and the FCC also goes on to win 89% of the cases in which *Chevron* deference is applied, *id.* For additional agencies whose statutory interpretations are empirically more likely to be analyzed under the deferential *Chevron* doctrine, and that are more likely to prevail when *Chevron* is applied, see *id.*

198. *See* Mashaw, *supra* note 60.

counterproductive. When agencies are incentivized to make policies through adjudicatory "fact-finding," and when independent ALJs' involvement in those adjudicatory processes declines, effective judicial review of the administrative state becomes even more elusive.

From a practical perspective, then, in order to successfully constrain the administrative state, anti-administrativists ought to focus holistically on institutional structures and processes that bear on the efficacy of judicial review. These include those structures and processes that influence the forms in which agencies choose to promulgate policies (for instance, general legal interpretations versus fact-driven adjudications), as well as those that dictate the quality of the administrative record (for instance, thorough contemporaneous reasoning versus cursory ex post justifications). These holistic structures and processes, not individual deference regimes, ultimately increase or decrease the strength of judicial oversight over the administrative state. This does not mean, however, that efforts to limit the deference regimes are necessarily counterproductive. But we do suggest that such modifications are unlikely to have, in the long run, the effects sought by those calling for reform. Tweaking deference regimes will only shift discretion from one area to another.[199] By contrast, reforming administrative structures and processes will, if done correctly, create channels of judicial review by which courts serve as more capable checks on agencies.[200] Therefore, it is to strengthening the independence of ALJs, along with related reforms, that those skeptical of the current state of affairs should turn.

A crucial component of such reforms must be the creation of administrative records that honestly account for agencies' decision-making and thereby facilitate judicial checks for internal consistency and objective reasonableness. In this Note, we do not attempt to exhaust the range of measures that might create such records and thereby facilitate more thorough judicial oversight. Such reforms

199. *See id.* at 97.

200. The central observation of this Note, namely that ALJ independence contributes to the effectiveness of judicial review of agency adjudication, is primarily a directional one. This allows us to conclude that the success of any effort to strengthen judicial constraints on administrative agencies by weakening deference regimes would be undercut if joined by the abrogation of protections for ALJ independence. This does not mean that the weakening of deference regimes alone could not have the desired effect. However, we are skeptical of the general efficacy of such efforts. *See* Brinkerhoff & Listwa, *supra* note 62. Further still, it is possible that restricting deference given in the statutory realm would be effective if joined with a further strengthening of those mechanisms designed to allow for scrutinizing agency fact-finding. But at the very least this means that efforts to eliminate or declaw ALJs ought to be dropped from the reformist agenda.

might touch on procedural considerations including hearing procedures,[201] evidentiary rules,[202] the solicitation of expert testimony, and agency adjudicators' subpoena power.[203] Rather, we aim broadly to pivot the conversation from attacking specific deference doctrines or political insulation devices to creating more effective opportunities for judicial review, writ large.

This Note does, however, emphasize one of the most evident elements of this project: bolstering the role of independent ALJs in agencies' adjudicatory processes. Section II.B.2.c demonstrated how ALJ findings on an administrative record enable a court to reverse the NLRB on "substantial evidence" review. By

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201. This Note focuses on formal adjudicatory proceedings that are presided over by administrative law judges and that result in closed records that define the universe of facts and reasoning that appellate courts may review. We invite future study, however, of how the phenomena explored here apply to less formal forms of agency adjudication, such as those governed by "administrative judges" (AJs), immigration judges, or other non-ALJ agency personnel. For a general discussion of such adjudications, see, for example, Kent Barnett, *Against Administrative Judges*, 49:5 U.C. DAVIS L. REV. 1643, 1652-62 (2016); and Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153-57 (2019).

202. Agency evidentiary rules garnered extensive debate among administrative law scholars in the decades following the APA's passage, and for good reason: the APA allows ALJs to admit any evidence that they deem appropriate, suggesting only that they reject "irrelevant, immaterial, or unduly repetitious evidence," 5 U.S.C. § 556(d) (2018), and one study in 1987 found that there were 280 different sets of evidentiary rules governing various federal agencies' ALJs, 243 of which made no reference to the Federal Rules of Evidence, Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 2-3 (1987); *see also* Walter J. Kendall III, *Agency Fact Finding*, 8 J. NAT'L ASS'N ADMIN. L. JUDGES 25, 34-37 (1988). Since the late 1980s, however, very little scholarly attention has been given to the question of how evidentiary rules influence the thoroughness of administrative records and their corresponding utility to reviewing courts.

203. *See, e.g.*, R. Terrence Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 10-11 (1999) ("The extent to which there is an orderly and even-handed discovery process allows the administrative law judge to have as much reliable evidence as is feasible for an administrative proceeding. Similarly, it must be clear whether the administrative law judge has subpoena power in any real sense. Not only the issuance of subpoenas but also their enforcement must be efficient and effective. . . . [W]hen nonparties are involved, most often neither the money amounts at stake, the parties involved, nor the perceived gravity of administrative adjudication is sufficient to induce police or prosecutors to enforce an administrative law judge's subpoena. To have authority to issue subpoenas is of questionable value, if there is no mechanism to enforce them."). Scholars have noted, for example, that the SEC's uniquely expansive subpoena power allows it to "conduct numerous depositions and collect a huge volume of documents," and thus to "effectively conduct its pre-hearing discovery before the proceeding commences." Gideon Mark, *SEC Enforcement Discretion*, 94 TEX. L. Rev. 261, 265 (2016); *see also* Adam L. Sisitsky, *Fear Is Not Sufficient Grounds to Duck SEC Subpoena*, LAW360 (Sept. 3, 2015, 10:57 AM EDT), http://www.law360.com/articles/698673/fear-is-not-sufficient-grounds-to-duck-sec-subpoena [https://perma.cc/3ZEH-H6R8].

evaluating witness credibility and ascertaining the sequence of events and nature of circumstances, ALJs provide a backdrop of ground-level observations against which the NLRB must reason. Where the NLRB's reasoning is unsupported by on-the-ground realities, the ALJ's backdrop casts such faulty reasoning into sharp relief. It exposes the agency's logical leaps and inconsistences — what this Note has referred to as "red flags" — to a reviewing court. The independent ALJ's preliminary findings thus enable a court, despite its generally deferential stance, to declare an agency's "facts" to be unsupported. They thus push back on the incentive otherwise present, in a landscape of limited judicial deference on questions of law,[204] to retreat to making policy through adjudicatory "fact-finding."[205]

The logic by which independent ALJs serve as constraints on agency fact-finding and, correspondingly, as facilitators of judicial review is not limited to NLRB adjudications. Independent ALJs can substantially strengthen judicial oversight of other agencies that engage in policy-making through adjudication. As discussed above,[206] these agencies include, among others, financial regulators that work to stave off the next financial crisis, discipline money laundering, and curtail financial support of terrorism and other national-security threats.

These financial regulators have indeed taken actions that received extensive public criticism, and that would likely have been subject to more effective judicial review had an independent ALJ taken the first pass at fact-finding and record generation. In *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*, for example, the Director of the Office of Thrift Supervision (OTS, an agency since merged with the OCC) was the first-instance decision-maker in placing Franklin Savings, a quickly growing Kansas bank, into conservatorship.[207] There was no hearing before an independent ALJ; the Director himself compiled the entire administrative record of reasons why Franklin Savings was purportedly operating "in an unsafe and unsound condition."[208] When Franklin Savings filed an action to remove the conservator, the district court addressed the one-sided nature of the record by essentially conducting an investigation of its own — despite its lack of expertise in banking activities and balance sheets. The district court conducted an eighteen-day bench trial involving live and written testimony from forty-

204. *See supra* Section II.A.

205. *See supra* Section II.B.

206. *See supra* Section III.A.

207. 934 F.2d 1127 (10th Cir. 1991).

208. *Id.* at 1135.

three witnesses, over 650 trial exhibits, and numerous credibility determinations.[209] On appeal, the Tenth Circuit justifiably found that the district court had far exceeded its proper scope of review, but to remedy this overreach, fell back on the OTS's one-sided findings. Recognizing the sparsity of the record but unsatisfied with the only available alternative — an investigation conducted by a trial judge — the Tenth Circuit essentially placed exclusive decision-making authority with the agency. The Director, the court concluded, "need review only such information as he deems necessary or desirable."[210] The Tenth Circuit thus reversed the district court and reinstated Franklin Savings's conservatorship.

Twenty years later, in 2011, Franklin Savings's shareholders finally convinced regulators that its conservatorship was a faulty decision from the beginning. The FDIC stipulated — in the course of bankruptcy proceedings — that Franklin Savings had always been in full capital compliance. Franklin Savings's assets actually had a book value of an estimated $380 million when seized in 1990; it had indeed grown quickly and engaged in untraditional activities for the time such as futures investments and interest-rate swaps, but was always safe, sound, and well-capitalized.[211]

Had an independent ALJ made factual findings regarding Franklin Savings's financial health prior to the OTS Director's determination that it should be placed in conservatorship, the district court would have been aided by a closed record generated by an experienced and unbiased examiner. *Franklin Savings* was essentially a debate between two extremes: on the one end, the district court's far-reaching, unbounded, inexpert consideration of new evidence, and on the other end, the circuit court's extreme deference to the agency's discretionarily constructed, one-sided record. A closed record compiled by an ALJ would have provided a healthy in-between. The district court would have been tasked with conducting substantial-evidence review of the Director's factual findings in light of those made by the ALJ. Had the ALJ observed and recorded Franklin Savings's actual assets and capitalization status, the district court would have had sufficient information from which to ascertain whether the OTS's policy decision to place the bank into conservatorship comported with operational realities. In other words, findings by an independent ALJ would have allowed the district court to reverse the OTS not on the basis of its own substitute findings, but on the basis that the existing record was lacking in substantial evidence due to inconsistencies between the ALJ and the agency. Such grounds for reversal, comporting entirely with the established substantial-evidence standard of review, would have been

209. *Id.* at 1140.

210. *Id.* at 1139.

211. Stipulation by and Between Franklin Savings Corp. and Claimant United States of America, *In re* Franklin Sav. Corp., No. 91-41518 (Bankr. D. Kan. Dec. 21, 2011), Dkt. No. 1628.

much more difficult for the Tenth Circuit to condemn, and the bank's shareholders (and the courts) may have been spared two decades of litigation and massive expense.

Indeed, the value of independent ALJs in judicial review of the OTS was evident in a 1994 case in the Ninth Circuit, *Kim v. Office of Thrift Supervision*. Kim, a former bank president and CEO, challenged a prohibition order by which the Acting Director of the OTS had permanently banned him from working in the American banking industry. In issuing this order, the Acting Director had expressly rejected an ALJ's recommendation that no sanctions were warranted. After reviewing the full record, the Ninth Circuit reversed the ban, drawing particular attention to the ALJ's contrary recommendation as well as materials in the record showing "only that Kim was one of several officers and directors who approved a few questionable loans—from none of which he personally profited—out of literally hundreds of good loans."[212]

The potential utility of independent ALJs can also be observed in national-security-related supervision of financial institutions. In 2004, for example, the Treasury Department's Office of Foreign Assets Control (OFAC), based on its own information and no prior findings by an independent ALJ, froze the assets of an Oregon branch of a Saudi Arabian-based charity, AHIF-Oregon, and designated it a "specially designated global terrorist."[213] AHIF-Oregon described itself as "an Oregon non-profit charitable organization that seeks to promote greater understanding of the Islamic religion through operating prayer houses, distributing religious publications, and engaging in other charitable activities."[214] The district court agreed with the charity that the administrative record forming the basis for the asset-freeze was one-sided, but determined that a sufficient cure was the inclusion of correspondence from the charity's counsel related to the legal proceedings[215]—an arguably inadequate fix that was far inferior to thorough findings by an independent ALJ. Despite holding that OFAC had violated the charity's due-process rights by providing inadequate notice of the existence of and reasons for its investigation, both the District of Oregon and the Ninth Circuit upheld OFAC's factual finding that AHIF-Oregon was a "specially designated global terrorist" and therefore subject to an asset freeze under the

212. 40 F.3d 1050, 1052, 1055 (9th Cir. 1994).

213. Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 970 (9th Cir. 2012).

214. *Id.* at 971.

215. Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1258 (D. Or. 2008).

International Emergency Economic Powers Act.[216] Moreover, the Ninth Circuit determined that this factual finding was robust to any defense that AHIF-Oregon might have mounted with proper notice, and thus declared the due process violation "harmless."[217]

Al Haramain Islamic Foundation, Inc. ultimately involved a difficult factual line between "mere association" with AHIF-Oregon's Saudi Arabian counterpart and "conduct that goes beyond membership" to support acts of terrorism.[218] AHIF-Oregon argued vehemently that it sent funds overseas exclusively for humanitarian purposes,[219] but the Ninth Circuit gave OFAC significant benefit of the doubt under the substantial-evidence review standard and the "unique deference" owed to the government in the realm of national security.[220] A more thorough and two-sided administrative record created by an ALJ would not have removed this deferential stance. However, it could have leveled the playing field between the government and the charity, and given the courts more material with which to check OFAC's heavy-handed national security determinations.

Independent ALJs are no panacea for agency overreach and improperly-calibrated oversight. Nonetheless, *Franklin Savings*, *Kim*, and *Al Haramain Islamic Foundation, Inc.*, exemplify how ALJs can play a constructive role. After all, as explained in Section II.B above, substantial evidence review struggles to restrain agencies absent red flags in the administrative record. And because agency boards themselves have a strong incentive to obscure these red flags, their visibility to reviewing courts depends on the involvement of dedicated, independent ALJs.

For this reason, administrative skeptics would be well-served to embrace, rather than attack, the use of independent ALJs in administrative adjudications. To the extent that anti-administrativists are serious about constraining agency discretion and validating agency policy-making, energy should be expended on bolstering the role of ALJs and ensuring ALJ independence, and not on merely shrinking the administrative state at all costs.

This refocused effort might include several prongs to both entrench the features of ALJs that currently render them "independent" and resist reforms that threaten to take away this neutrality. We began this Note with a discussion of

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216. *Al Haramain Islamic Found., Inc.*, 686 F.3d at 970, 984-88; *Al Haramain Islamic Found., Inc.*, 585 F. Supp. 2d at 1254-57, 1272.

217. *Al Haramain Islamic Found., Inc.*, 686 F.3d at 988-90.

218. 585 F. Supp. 2d at 1267.

219. *Id.* at 1244.

220. *Al Haramain Islamic Found., Inc.*, 686 F.3d at 980; *see also Al Haramin Islamic Found., Inc.*, 585 F. Supp. 2d at 1249, 1251-53.

Lucia v. SEC and the Trump Administration's subsequent executive order, two recent developments that have highlighted both of the fundamental sides of an "independent" role: how ALJs are hired and how they are fired.

Legislative efforts are already underway to push back on the Administration's changes to ALJ hiring procedures, citing concerns about their affront to ALJ independence. Specifically, Republican Senator Susan Collins and Democratic Senator Maria Cantwell introduced a bill last year that would restore ALJs to the Competitive Service.[221] The restoration would take ALJ hiring decisions away from political agencies—where they have sat since the Trump Administration's executive order[222]—and restore them to the purview of the centralized, apolitical Office of Personnel Management (OPM). Instead of being evaluated, as they now are, upon agency-specific criteria by political appointees, applicants for ALJ positions would again be, as they have been historically, screened by OPM on the basis of a centrally administered civil service exam.[223] In a news release following the bill's introduction, Senator Collins explained that the legislation aimed to "ensure that administrative law judges remain well qualified and impartial, while this crucial process remains nonpartisan and fair."[224]

That bill remains under review in the Senate Committee on Homeland Security and Governmental Affairs.[225] In the meantime, Congress included language in its conference report accompanying a 2019 appropriations bill that communicated to agencies an expectation that ALJs be "independent, impartial, and selected based on their qualifications."[226]

Although removal protections, at least for now, continue to protect current ALJs from politically motivated firing,[227] the long-term neutrality of agencies'

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221. S. 3387, 115th Cong. (as introduced in Senate, Aug. 23, 2018); *see also* Jessie Bur, *Bipartisan Bill Would Counter Administrative Law Judge Executive Order*, FED. TIMES (Sept. 4, 2018), http://www.federaltimes.com/federal-oversight/congress/2018/09/04/bipartisan-bill-would-counter-administrative-law-judge-executive-order [https://perma.cc/RBJ2-LDW8]; *supra* note 55.

222. Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,755 (July 10, 2018); *see also supra* note 55.

223. S. 3387.

224. Bur, *supra* note 221.

225. S. 3387 (read twice and referred to the S. Comm. on Homeland Sec. & Governmental Affairs, Aug. 23, 2018).

226. H.R. REP. NO. 115-952, at 547 (2018) (Conf. Rep.); *see also Congress Approves Language Supporting ALJ Independence*, AM. B. ASS'N (Oct. 31, 2018), http://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/october2018/adminlawjudges [https://perma.cc/83RU-S6CM].

227. Lucia v. SEC, 138 S. Ct. 2044 (2018); *see also* Kent Barnett, *Raiding the OPM Den: The New Method of ALJ Hiring*, YALE J. ON REG.: NOTICE & COMMENT (July 11, 2018), http://yalejreg.com/nc/raiding-the-opm-den-the-new-method-of-alj-hiring-by-kent

adjudicatory records depends crucially on the incoming pipeline of those who build them.[228] Efforts to maintain ALJs' removal protections in the face of potential future attacks,[229] as well as efforts to relocate ALJ positions back to the centralized, apolitical hiring apparatus of the Competitive Service, will be crucial to securing ALJ independence from both ends of the job trajectory.

ALJ independence, however, is not defined only by the ends of the job trajectory—appointment and removal. The de facto level of thorough, independent judgment that an ALJ can exercise is influenced day-to-day by the resources provided and the oversight exerted by others in the administrative state.

With regard to resources, one of the key issues is staffing levels of both ALJs and the paraprofessionals who assist with legal research, transcription, and other tasks essential to the record-building process.[230] Keeping caseloads constant, increasing the number of ALJs and other staff allows more time to be spent investigating and analyzing each case. On the other hand, a shrinking staff hampers each ALJ's ability to scrutinize parties' claims and engage in fact-finding, ultimately undermining their ability to plant red flags in the record that would facilitate judicial review.

And yet despite the importance of sufficient staff to effective review, certain agencies have been subject to chronic shortages. In particular, many within the SSA have argued that the agency has far too few ALJs to address the increasing number of disability claims brought by the aging baby boomer generation.[231] Further, a recent audit report by the SSA's inspector general suggested that the documented decrease in ALJ productivity is at least partially due to a deficiency

-barnett [https://perma.cc/GXU5-MZ48] (noting that "ALJs continue to have protections from agency oversight and removal," and that the "protection from removal is granted by statute, giving the Administration less room to maneuver," but also warning that "[i]f the Court does, nonetheless, limit or strike down the removal protections, then the risk of partiality (and potential due process problem) for ALJs becomes much more significant").

228. Kent Barnett, for example, has highlighted the consequence of the executive order moving ALJs from the Competitive Service to the Excepted Service: "This may be just the first (and canny, I must say) move by the Administration to limit ALJs' impartiality." Barnett, *supra* note 227.

229. Justice Breyer, for example, noted in *Lucia* that the decision may open the door to finding removal protections unconstitutional. *Lucia v. SEC*, 138 S. Ct. 2044, 2059-60 (Breyer, J., concurring in part and dissenting in part). For additional commentary on the rising assault on ALJ removal protections, see our discussion *supra* in the Introduction.

230. *See, e.g.*, Harders, *supra* note 203, at 9-10.

231. *See* Joe Davidson, *Short Staffing Leads to Long Waits for Social Security Disability Hearing Decisions*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/04/03/short-staffing-leads-to-long-waits-for-social-security-disability-hearing-decisions [https://perma.cc/93QM-PDYH].

in support staff.[232] Other agencies have similarly been stymied by an understaffing of ALJs, including the Commodity Futures Trading Commission (CFTC). Lacking the budget to hire ALJs of its own, the CFTC must rely on ALJs "borrowed" from other agencies—raising questions of whether such adjudicators have sufficient expertise to scrutinize the agency's claims.[233] Given the impact that staffing levels can have on independence, there is reason to be concerned with the current administration's recent order shifting decisions about how many ALJs agencies hire from OPM to the individual agency heads.[234]

The latter day-to-day question, that of oversight, implicates issues of ALJ performance review and payment incentive systems. Thus far, ALJs have successfully resisted pay-for-performance systems that would impose performance ratings as a prerequisite to higher pay; they have worried that such systems would enable agency heads to interfere with their decision-making.[235] However, ALJs have argued that this necessary absence of pay-for-performance should not equate to systematically lower salaries than GS (General Schedule) or ES (Executive Schedule) peers, who are eligible for performance-based bonuses and other monetary awards.[236] Building a thorough administrative record that facilitates

232. *See* OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-12-18-50289, FACTORS RELATED TO DECREASED ADMINISTRATIVE LAW JUDGE PRODUCTIVITY 3 (2017), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-18-50289.pdf [https://perma.cc/8NCG-69QE].

233. *See* Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 J. CONST. L. 1, 62 (2016).

234. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018); *see also* Alison Frankel, *As Trump Claims Power to Pick Federal Agency Judges, Skeptics Fear Court-Packing*, REUTERS (July 11, 2018, 5:10 PM), http://www.reuters.com/article/us-otc-alj/as-trump-claims-power-to-pick-federal-agency-judges-skeptics-fear-court-packing-idUSKBN1K12YA [https://perma.cc/7REH-CVEL] (describing the contents of the executive order).

235. *See, e.g.*, *Fair and Balanced? The Status of Pay and Benefits for Non-Article III Judges: Hearing Before the Subcomm. on the Fed. Workforce & Agency Org. of the H. Comm. on Gov't Reform*, 109th Cong. 9 (2006) (statement of William Cowan, A.L.J.) ("[T]he APA itself and OPM's own regulations prohibit grading of the performance of ALJs with good reason. ALJ's [sic] need judicial independence to protect the integrity and the legitimacy of the agency hearing process and the rights of claimants and litigants in agency cases."); *id.* at 12 (statement of Anthony McCann, A.L.J.) ("Pay for performance would necessarily affect the process of arriving at, the quality of, the timeliness of, or the outcome of decisions. It would, in fact, diminish or possibly eliminate a judge's independence and his impartiality.").

236. *See id.* at 14 (statement of Denise N. Slavin, A.L.J.) ("[P]ay compression is aggravated by the fact that, for the same reason we are exempted from performance reviews, we cannot receive other types of Federal compensation, such as bonuses or awards. These types of compensations usually are used to augment the salaries of high-level SES or executive schedule employees."); *id.* at 17 (statement of William Cowan, A.L.J.) ("Typically the kind of people that came into ALJ positions were senior-level government employees at the GS-15 level . . . . We are not getting those transfers anymore because it is just not lucrative for them. They can make more money staying where they are."); *id.* at 19 (statement of Rep. Elijah E. Cummings) ("So if

meaningful judicial review does not just require political neutrality; it also requires competence. In addition to standardized minimum hiring criteria—which, as discussed above, are at risk of erosion—ensuring ALJ quality also requires offering sufficient incentives to attract the right people.[237]

Reforms to bolster ALJ independence should keep sight of these intertwined issues of not only appointment and removal, but also quantity and quality. All are crucial elements in building an administrative apparatus that facilitates thorough, impartial, and astute record-building, which in turn facilitates effective judicial oversight over the political actors sitting one level up.

CONCLUSION

This Note has aimed to pivot discussions about agency constraint and judicial oversight of the administrative state in an all-but-forgotten direction. The modern critique of the administrative state, though rhetorically attractive, is both woefully incomplete and inherently counterproductive. By contrast, Judge Winter's alternative account—which adequately addresses questions of both law *and* fact—has considerable staying power. Today, the combination of minimal deference on law and expansive deference on fact pushes agencies to obscure policy-making through fact-finding.

The relationship between these levels of deference has implications for the anti-administrativists' litigation strategy. Insofar as agencies receive more deference on individualized fact-finding than on general legal interpretation, they will gravitate correspondingly toward the former. For this reason, if the anti-administrativists are successful in overturning *Chevron* and *Auer* deference, they risk pushing agencies not away from the exercise of discretion, but rather from one hemisphere of policy-making (generally applicable statements of statutory and regulatory interpretation) into another (individualized fact-finding).

This latter hemisphere of policy-making may well operate beneath the radar of effective judicial review, given courts' discomfort with usurping agency expertise and seeking new facts in the first instance. Indeed, as our empirical study has shown, in the absence of "red flags" planted by ALJs, the appellate courts are highly unlikely to overturn the NLRB's orders on their facts. It follows that strat-

you have someone who is mediocre at best and who may not be too quick on the draw with regard to learning the subject matter, it is kind of hard, I guess, to have a truly fair hearing."); *id.* at 19 (statement of William Cowan, A.L.J.) (agreeing with Rep. Cummings). For a comparison of current pay systems in the federal government, see *Pay & Leave: Salaries & Wages*, OFF. PERSONNEL MGMT., http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages [https://perma.cc/DHC6-A2M3].

237. *See id.*

egies to aid judicial review of fact-finding are a necessary component of any effective effort to constrain the administrative state. We have discussed one major strategy: the enhanced use of independent ALJs in adjudicatory proceedings. Once again, this turns the modern conservative critique, which has argued *against* ALJ independence, on its head.

The twofold misguidance of the modern administrative critique—calling for the elimination of legal deference and expressing skepticism toward independent ALJs—derives from a microscopic focus on doctrinal locutions and a neglect of half of the administrative state: agency fact-finding. By taking a system-level view and elucidating the interaction between courts and agencies on findings of fact, we have been able to expose these defects and suggest more effective methods by which to demand well-reasoned and transparent policy-making from the administrative state.