The State-Law Origins of the Appellate Review Model

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Modern administrative law owes much to the appellate model of judicial review. Adherence to this model dictates what courts review (the administrative record), what questions courts decide for themselves (questions of law), and what questions courts defer on (questions of fact). Current literature traces the origins of this "foundational" approach to a series of early-twentieth-century Supreme Court decisions re-interpreting the federal injunctive power. But this account is incomplete. This Article shows that the true origins of the appellate review model lie not in federal equity practice, but in state common law decisions. Over the course of the nineteenth century, judicial review on the common law writ of certiorari—the primary instrument of judicial review in the states—gradually shed its English-law-inspired focus on "jurisdictional" error. Through this selective departure from English precedent, certiorari came to approximate appellate review: confined to the record, de novo on questions of law, and deferential on questions of fact.

By documenting the emergence of this earlier, certiorari-based appellate review model, this Article offers an answer to an enduring mystery at the heart of federal administrative law: where did the Supreme Court get the appellate review model from? This Article argues that, in the early twentieth century, the Court lifted the model from state certiorari practice. In so doing, the Court certiorari-ized the federal injunction. The implications for our understanding of modern judicial review are several, but this Article focuses on one particularly salient issue: the availability of universal relief. The debate on universal relief has thus far focused almost exclusively on federal equity practice. But, as this Article shows, the modern federal injunction has much more in common with state certiorari practice than with nineteenth-century federal equity practice. Looking to state certiorari practice—where courts routinely "set aside," "annulled," "vacated," and "suspended" administrative action universally—offers new support for universal relief.

After tracing the state-law origins of the appellate review model, this Article turns to the debate over the meaning of "set aside" in § 706 of the Administrative Procedure Act (APA). Commentators and judges disagree on whether the APA's "set aside" language empowers federal courts to vacate agency action universally, or only to ignore the agency action as to the plaintiffs in a particular case. This Article sheds new light on the original meaning of this vague language by demonstrating that, when Congress first introduced the "set aside" term into federal law via the Hepburn Act of 1906, it was transplanting the language from earlier state codes. By documenting how nineteenth-century state statutes used the "set aside" language to describe judicial review, this Article strengthens the case that "set aside" in § 706 is synonymous with "vacate."

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Introduction

The appellate model of judicial review sits at the center of modern administrative law.[1] It is adherence to this model that dictates what courts review (the administrative record), what questions courts decide for themselves (questions of law), and what questions courts defer on (questions of fact).

But for all its impact, the model is a relatively recent innovation in federal law. Through the nineteenth century, judicial review operated on a "bi-polar" model: "[r]eview was either de novo or nonexistent."[2] When reviewing agency action de novo, courts would retry issues of both fact and law, on a record created in the court.[3] When agency action was not reviewed de novo, it was generally not reviewed at all.[4]

It was not until the early twentieth century that this bi-polar model began to lose ground to the modern appellate review system.[5] The shift was spurred on by a political frustration with a system of review that "allowed the judiciary to check the will of the people's representatives."[6] Congressional irritation at judicial declawing of the Interstate Commerce Commission (ICC) led to the enactment of the Hepburn Act of 1906[7]—the first step in the development of the appellate model.[8] Abrogating the Supreme Court's 1896 decision that the ICC did not have the authority to set maximum rates,[9] the Hepburn Act conferred broad ratemaking power on the ICC.[10]

Conscious of where the wind was blowing, the Court charted a "strategic retreat" from its strict de-novo review.[11] In a series of decisions in the early twentieth century on the power of the ICC,

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[1] Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011) ("Modern administrative law is built on the appellate review model of the relationship between reviewing courts and agencies.").

[2] Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1399-1400 (2010) [hereinafter Mashaw, *Gilded Age*]; *see also* Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2248 (2011) [hereinafter Mashaw, *Rethinking Judicial Review*] ("Courts either decided questions de novo on records made in court, or they effectively declined jurisdiction.").

[3] Mashaw, *Gilded Age*, *supra* note 1, at 1400; *see also* James W. Ely Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 MARQ. L. REV. 1131, 1132 (2012) ("[F]ederal courts from the outset refused to defer to agency findings of fact. Instead, the federal courts decided that factual matters should be reviewed de novo, and permitted the introduction of further evidence by either party.").

[4] KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4 (6th ed. 2020) ("Most agency decisions in the nineteenth century were not subject to judicial review.").

[5] Merrill, *supra* note 1, at 939.

[6] STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF ADMINISTRATIVE CAPACITIES 1877-1920, 253 (1982).

[7] Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

[8] *See* Mashaw, *Rethinking Judicial Review*, *supra* note 2, at 2245 ("[T]he appellate model's ascendency originate[d] with the Hepburn Act of 1906.").

[9] ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 511 (1897).

[10] Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906).

[11] Merrill, *supra* note 1, at 959; *see also* Linda Jellum, *The Appellate Review Model of Agency Adjudications*, ADMIN. L. JOTWELL (December 14, 2011), https://adlaw.jotwell.com/the-appellate-review-model-of-agency-adjudications [https://perma.cc/6BUU-LBLF] ("[T]he Court adopted the appellate review model to address and resolve concerns regarding judicial encroachment into the legislative arena generally and to curtail aggressive judicial oversight of the Interstate Commerce Commission specifically."); Merrill, *supra* note 1, at 959 ("[T]he implied threat [was] that if the

the Court curtailed its review of agency action.[12] The judiciary, the Court emphasized, should not "usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative order has been wisely exercised."[13] And on questions of fact, the Court introduced a "substantial evidence" standard[14]—the same deferential standard used to review jury verdicts.[15] In the years that followed, the appellate model that the Court had sketched out "quickly became ubiquitous."[16] With the help of some legislative intervention, the model emerged as the dominant system of judicial review—a status cemented by the model's incorporation into the Administrative Procedure Act (APA) in 1946.[17]

It is widely accepted that the genealogy of the appellate review model can be traced back to the Supreme Court's ICC ratemaking decisions in the early twentieth century—and no further.[18] The "appellate-review model of controlling executive action simply did not exist until the beginning of the twentieth century."[19]

This Article shows otherwise. The appellate model of judicial review did not first emerge in a series of Supreme Court decisions in the twentieth century. It was developed in state courts over the course of the nineteenth century. By analyzing the diverging models of judicial review in federal and state law, this Article demonstrates that state courts were reviewing early administrative action on an appellate model long before the same model took root in the federal system. Through judicial innovation, review on the common law writ of certiorari—dominant in the states but unused in the federal system—came to approximate appellate review.

Court did not back off . . . more drastic action would be in the offing."); Reuel Schiller, *A Trip to the Border: Legal History and APA Originalism*, 97 CHI.-KENT L. REV. 53, 58 (2022) ("[T]he Hepburn Act . . . was seen by courts as a tacit threat . . . .").

[12] *See* Ill. Cent. R.R. Co. v. ICC (*Illinois Central I*), 206 U.S. 441 (1907); ICC v. Ill. Cent. R.R. Co. (*Illinois Central II*), 215 U.S. 452 (1910); ICC v. Union Pacific R.R. Co., 222 U.S. 541 (1912); *see also* E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 89 U. PA. L. REV. 1026, 1030 (1941) ("In the earlier years administrative law was evolved in large part by the federal courts under the Interstate Commerce Act.").

[13] *Illinois Central II*, 215 U.S. at 470.

[14] *Union Pacific*, 222 U.S. at 548.

[15] Notably, the Court did not cite authority for this "substantial evidence" standard. *See* Merrill, *supra* note 1, at 962.

[16] Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 398 (2024)

[17] *See* 5 U.S.C. § 706(2)(E) (empowering courts to "hold unlawful and set aside agency action, findings, and conclusions . . . unsupported by substantial evidence . . . ."); Merrill, *supra* note 1, at 942-43 ("The appellate review model was . . . incorporated into the Administrative Procedure Act . . . ."); Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 258 (2017) ("When the APA was enacted in 1946, [its] instruction reflected a consensus that judicial review of agency action should be modeled on appellate review of trial court judgments . . . . Just as a district court judgment infected with error should be invalidated and returned for reconsideration, so too with agency action."); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 636 (2017) ("[T]he APA embraces an appellate model of judicial review.").

[18] Merrill, *supra* note 1, at 962; Mashaw, *Rethinking Judicial Review*, *supra* note 2, at 2245 ("[T]he appellate model's ascendency originates with the Hepburn Act of 1906"); JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 160 ("It was the Hepburn Act of 1906 which finally turned the scale."); *Cf.* Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 74 (1944) (noting that the "substantial evidence" standard "is a judge-made rule, with its principal development in cases involving the ICC"). A handful of scholars trace the model back to the tail end of the nineteenth century. For a discussion of these views, see *infra* note 218.

[19] Schiller, *supra* note 11, at 58; *see also* Merrill, *supra* note 1, at 939 ("[T]he appellate review model emerged after 1906 as an improvised response by the U.S. Supreme Court . . . ."); Cox, *supra* note 16, at 399 (noting that the "invention" of the appellate review model took place in the early twentieth century).

On the writ of certiorari, the record of a lower tribunal was "sent up" to be affirmed or to be quashed. The writ was, by its very nature, limited to review on the record developed by the administrative body. But the writ was also, both in England and in the early states, originally only available to review "jurisdictional" errors and errors on the face of the record. State courts began to drop this limitation over the course of the nineteenth century. This Article shows that, based on a misreading of English precedent, state courts began using certiorari to review not only jurisdictional errors, but *all questions of law*—a key step in the development of the appellate review model. But while the writ came to serve as an all-purpose tool for reviewing errors of *law*, the writ did not empower courts to substitute their own view on administrative findings of *fact*. Instead, questions of fact were reviewed on a variety of more deferential standards, including on the now-famous "substantial evidence" test.[20]

Review on certiorari thus exhibited the three key features of appellate review:[21] review confined to the record; de novo review of questions of law; and deferential review of questions of fact. That review of administrative decision-making on certiorari largely approximated appellate review was not lost on state courts. In the latter half of the nineteenth century, state courts were frequently and explicitly analogizing review on certiorari to judicial review of jury verdicts and to review of lower courts decisions. Two states codified this analogy between review of administrative action and the review of jury verdicts into their codes of civil procedure.[22]

By documenting the evolution of state certiorari practice, this historical account pushes back the emergence of the appellate review model well into the nineteenth century. And, in so doing, this Article draws attention to the role of state courts as the originators of a core feature of modern administrative law.[23] The state-law origins of the appellate review model also offer an answer to an enduring "mystery"[24] at the heart of federal law: where did the Supreme Court get the appellate review model from? This Article argues that, in the early twentieth century, the Court imported the model from state law. When Congress signalled its discontent with the bi-polar model of review, the Supreme Court was on the lookout for a more deferential standard. The Court found its standard in state certiorari practice. Since federal courts had turned to the injunction as the principal tool for reviewing agency action, the Supreme Court imported certiorari's standard of review into this equitable remedy.

The state-law origins of the federal appellate review model has significant practical implications; the appellate review model is, after all, "responsible for many . . . foundational administrative

[20] The various standards that state courts employed when reviewing administrative determinations of fact are discussed further in Section II.A.2 *infra*.

[21] For discussion of the defining features of the appellate review mode, see Merrill, *supra* note 1, at 941, and Mashaw, *Rethinking Judicial Review*, *supra* note 2, at 2243.

[22] *See infra* Section II.A.3.

[23] State administrative law has historically been sidelined in the administrative-law literature. This unfortunate trend seems to be gradually reversing. *See, e.g.*, Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 128-31 (2018); Kurt X. Metzmeier, *The Short and Troubled History of the Printed State Administrative Codes and Why They Should Be Preserved*, 116 LAW LIBR. J. 5 (2024); Anthony B. Derron, *Unwritten Administrative Law and the Regulatory Last Mile in Cooperative Federalism*, 173 U. PA. L. REV. (forthcoming June 2025).

[24] Merrill, *supra* note 1, at 963 (noting that the origins of the appellate model of judicial review "remain[s] something of a mystery").

common law doctrines."[25] This Article focuses on one particularly salient issue: the availability of universal relief.[26] To date, scholars analyzing the scope of federal injunctive relief have largely focused their historical research on the equitable powers of the federal courts.[27] But, as this Article shows, this misses a central point: the modern federal injunction has much more in common with state certiorari practice than it does with nineteenth-century federal equity practice. To look only at federal review in equity is to ignore the most relevant historical analog.

Broadening our historical perspective to encompass certiorari sheds important light on the reach of the federal injunction. Successful review on certiorari operated to quash the *challenged administrative action*. As such, the effect of a ruling adverse to the administrative body was not limited to the parties: the challenged action was "set aside," "annulled," "vacated," and "suspended" *universally*.[28] By revealing the connection between state certiorari practice and modern federal equitable review, this Article bolsters the historical case for universal relief.

A closer look at the evolution of administrative remedies in the states also sheds new light on the ongoing debate over the meaning of the APA's "set aside" provision. APA § 706(2) instructs courts to "hold unlawful and *set aside* agency action . . . found to be . . . not in accordance with law."[29] Scholars and judges disagree about whether the "set aside" language in § 706(2) empowers reviewing courts to "vacate" unlawful agency action universally;[30] several Supreme Court justices have recently taken the opportunity to weigh in.[31] To shed light on the original meaning of this vague language, existing literature has traced the "set aside" term back to the Hepburn Act of

[25] John C. Brinkerhoff, Jr., *FOIA's Common Law*, 36 YALE J. ON REGUL. 575, 598-99 (2019); *see also* Cox, *supra* note 16, at 398 (noting that the appellate review model "constitute[s] the familiar framework of judicial oversight that remains central to administrative law today").

[26] The Supreme Court recently heard oral arguments in *Trump v. New Jersey* on whether the Court should stay the non-plaintiff-specific relief granted by three district judges in challenges to President Trump's Executive Order on birthright citizenship. *See* Transcript of Oral Argument, Trump v. New Jersey (No. 24A886). The Supreme Court's decision to hear the issue has already sparked significant academic interest and discussion. *Compare* Steve Vladeck, *Birthright Citizenship (Sort of) Reaches the Court*, ONE FIRST (Mar. 17, 2025), stevevladeck.com/p/133-birthright-citizenship-sort-of [https://perma.cc/W2RJ-BZW3], *with* Samuel Bray, Universal Relief and the Birthright Citizenship Cases, DIVIDED ARG. (Mar. 13, 2025), https://blog.dividedargument.com/p/universal-relief-and-the-birthright [https://perma.cc/D723-489L].

[27] *See, e.g.*, Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037, 2046 (2023) [Bamzai, *The Path*] (analyzing federal bills in equity to understand the scope of the federal injunctive power under the APA); *id.* at 2043 (arguing that "[t]he form of proceeding that was most clearly on the mind of the drafters of the APA in 1946 was the 'bill in equity' . . . ."); Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 YALE L.J. 2305, 2327 (2024) [hereinafter Sohoni, *Past and Future*] (focusing on "Equity and 'Set Aside' in the Pre-APA Period"); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 426 (2017). The notable exception here is Professor Pfander's work. *See* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 STAN. L. REV. 1269, 1311 (2020); James E. Pfander & Mary Zakowski, *Non-Party Protective Relief in the Early Republic: Judicial Power to Annul Letters Patent*, 120 NW. U. L. REV. (forthcoming 2026).

[28] *See infra* Section III.C.

[29] 5 U.S.C. § 706(2)(A) (emphasis added).

[30] *Compare* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REG. BULL. 37 (2020) [hereinafter Harrison, *Section 706*], *with* Sohoni, *Past and Future*, *supra* note 27.

[31] *Compare* United States v. Texas, 599 U.S. 670, 693 (2023) (Gorsuch, J., concurring), *with* Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 827 (2024) (Kavanaugh, J., concurring).

1906.[32] But this historical account is incomplete. States had started legislatively empowering their courts to "set aside" agency action decades before the same language was incorporated into federal law. And, indeed, when Congress was drafting the Hepburn Act, it turned to earlier state railroad statutes using the "set aside" term for inspiration. Congress, it seems, transplanted the "set aside" language—along with similar terms, such as "annul" and "suspend"—directly from state into federal law. By tracing the state-law origins of the "set aside" language, this Part demonstrates that the term has more robust historical foundations than has previously been understood. Examining the use of the term in state law offers new historical context for the existing debate and reinforces the view that "set aside" means "vacate."

The rest of this Article proceeds in four parts. Part I documents the diverging use of the prerogative writs as a means of judicial review in state and federal law. The prerogative writs of certiorari, mandamus, and prohibition developed as the primary means of reviewing administrative action in sixteenth-century England. The writs were used to similar effect in the colonies and then in the states. Of the three writs, certiorari took center stage. Part I analyzes the two ways in which state courts fashioned the writ of certiorari into a broader tool of review. First, in parallel with their English counterparts, state courts expanded certiorari from a writ used exclusively to review "judicial" proceedings to one used to review administrative decision-making that was "quasi-judicial" in character. Second, breaking with English practice, state courts began using certiorari to review not only "jurisdictional" errors of the lower tribunal, but to review *all* errors of law. But even as the writ of certiorari was broadened in the states, the writ never took hold in federal law as a means of reviewing administrative action. In the federal courts, the function that was performed by the writ of certiorari in the states came instead to be performed by actions in equity.

Part II demonstrates that, over the course of the nineteenth century, review on the writ of certiorari came to approximate an appellate model of judicial review. Review on certiorari was limited—just as in an appellate proceeding—to the record brought up from the inferior body. And as the writ shed its focus on jurisdictional error over the course of the nineteenth century, it came to be used to review all errors of law. But given certiorari's historical origins as a means of reviewing courts of record, courts refused to employ the writ to engage in any de novo review of the facts. Instead, courts would *defer* to administrative bodies on questions of fact, while reserving to themselves the power to correct the most egregious errors. In other words, courts were—again just as in an appellate proceeding—reviewing questions of law de novo but deferring to the administrative body on questions of fact. Well before the turn of the twentieth century, state courts were explicitly analogizing judicial review of agency action on the writ of certiorari to review of jury verdicts.

This Part closes out by explaining *why* the appellate model developed in the states before it took root in the federal system. The unique features of the writ of certiorari were, of course, central to the development. But the development was also helped along by the state-law conception of separation of powers and the greater democratic accountability of (elected) state judges. Meanwhile, the remedies that sat at the center of judicial review in the federal system—mandamus, common law tort actions against officials, and (towards the end of the nineteenth century) actions in equity—all demanded de novo review of administrative fact-finding. Federal administrative law

[32] Bamzai, *The Path*, *supra* note 27, at 2046.

was therefore naturally averse to the development of an appellate review model in a way that state administrative law was not.

Part III builds on these findings by arguing that the Supreme Court drew on state certiorari practice when fashioning the federal appellate model of review in the early twentieth century. The similarities between the appellate review model that the Supreme Court developed in the early twentieth century and the established state certiorari practice were immediately apparent to both courts and commentators. In the words of one early-twentieth-century academic: the "principles of review appear to be practically the same."[33] The similarities are so conspicuous that it seems likely that the Supreme Court was drawing on, or at least influenced by, state certiorari practice in developing its new model of review. In short: the federal injunction was being "certiorari-zed." Part III demonstrates that this certiorari-zation has important consequences for the current debate on universal remedies.

Part IV takes a closer look at the two words at the center of the ongoing debate on the scope of judicial review under the APA: "set aside." This Part demonstrates that, long before this term found its way into federal law, states were empowering their courts to "set aside" administrative action. In granting (or recognizing) a judicial power to "set aside" administrative action, state legislatures drew on their appellate procedures—borrowing terminology from the system of appellate review and transplanting it into the administrative-law context. More often than not, the "set aside" language was found alongside, and used interchangeably with, terms like "vacate"—a term that sounds in universal, rather than party-confined, relief. When Congress was considering conferring rate-making powers on the ICC in 1906, it had before it as templates many earlier state railway statutes using the "set aside" terminology to describe judicial review. It seems that Congress lifted the "set aside" language directly from these earlier state statutes. By charting this undocumented history, this Part offers new insights for the modern debate.

I. Early Judicial Review and the Writ of Certiorari

This Part charts the diverging use of the prerogative writs in state and federal law. It starts by briefly outlining the development of the prerogative writs in English law from the late sixteenth century onwards. The three main prerogative writs—certiorari, mandamus, and prohibition—evolved in the King's Bench in piece-meal fashion as a means of supervising an expanding administrative state. Each of the writs played an important role in the supervision of administrative activity. But the writ of certiorari is of particular interest. Originally employed as a means of reviewing the decision-making of justices of the peace, the writ was broadened to allow judicial review from administrative bodies that were less overtly judicial in nature. However, just as English courts began using certiorari to review administrative action, they also saddled the writ with an important limitation: certiorari could only be used to review "jurisdictional" errors and errors "on the face of the record."

In the years following the American Revolution, state courts followed the lead of their English counterparts in expanding the writ of certiorari to reach a growing body of quasi-judicial (and, in some states, also quasi-legislative) action. But, importantly, over the course of the nineteenth

[33] FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 268 (1928) [hereinafter FREUND, ADMINISTRATIVE POWERS].

century, state courts began to depart from the English position that certiorari could only be used to review "jurisdictional" errors. By the turn of the twentieth century, the vast majority of states had broken with English precedent and were using certiorari to review all errors of law.

The story of administrative-law remedies played out very differently at the federal level. From the earliest days of the Republic, the prerogative writs were sidelined as a means of reviewing administrative action. Mandamus was only available in the District of Columbia, where some aspects of Maryland's state law continued to have effect. Review on certiorari was not attempted at all until the early twentieth century; when it finally was attempted, the Supreme Court rejected the use of the writ as an instrument of judicial review. Without these common law remedies to fall back on, federal courts increasingly turned to their inherent equitable powers to check agency action.

A. Certiorari in English Law

English administrative law developed first very slowly, and then very fast. Between the signing of the Magna Carta and the early 1500s, the role of government in the life of the average Englishman changed little.[34] During this period, the development of public law was so slow that courts had little difficulty keeping up.[35] This changed in the mid-sixteenth century. A series of societal developments, including the enclosure movement and an influx of people into the cities, pushed Parliament to become more invested in the regulation of public life.[36] Through significant new legislative intervention—most notably the so-called "poor laws"[37]—Parliament began empowering new statutory bodies to apply and enforce the law. Primary among these "intermediaries between central and local government"[38] were the "justices of the peace" and the "sewers commissions," charged with carrying out a variety of functions: overseeing poor relief, planning public works, managing repairs, and collecting taxes to fund each of these activities.[39]

To supervise these new creatures of statute, the King's Bench began to "shap[e] and transform[]" several of the old common law writs.[40] Three prerogative writs in particular emerged as the central means of reviewing administrative action: mandamus, prohibition, and certiorari.[41] This Section

[34] EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY 9 (1963) ("From about the thirteenth to the early sixteenth century, the role of government in English society grew only slowly. Henry VII's officials spent much of their time enforcing the legislation of Edward I and Edward III."). For an excellent more recent accounting, see Pfander & Wentzel, *supra* note 27, at 1293-96.
[35] HENDERSON, *supra* note 34, at 9.
[36] *Id.* at 9-10.
[37] HENDERSON, *supra* note 34, at 143 ("There are many oddities in the history of law, but nothing odder than the fact that so much of the early development of modern administrative law is to be found in the cases on the poor law.").
[38] *Id.* at 11.
[39] Pfander & Wentzel, *supra* note 27, at 1293.
[40] PAUL CRAIG, ENGLISH ADMINISTRATIVE LAW FROM 1550: CONTINUITY AND CHANGE 569 (2024) [hereinafter CRAIG, CONTINUITY AND CHANGE] ("The reality is that the courts played a major role in shaping and transforming the writs to render them fit for purpose and capable of addressing the remedial needs of administrative law in the 17th century and thereafter.").
[41] Also classified as prerogative writs were the writs of quo warranto and habeas corpus. However, an analysis of the development of these two writs is omitted from this recounting, since it played a comparatively minor role in the development of judicial review.

offers a brief introduction to each of the three prerogative writs, before elaborating on the evolution of the writ of certiorari as a mechanism to quash administrative action for jurisdictional error.

1. An Introduction to the Prerogative Writs

Hints of the modern writ of mandamus as a command to an executive official begin to surface in the late sixteenth century.[42] But it was not until *Bagg's Case*[43] in 1615 that "for practical purposes its history can be said to have begun."[44] Bagg was the unlucky capital burgess of Plymouth who had been removed from his post by the mayor. But when Bagg challenged his removal, the mayor was unable to point to any authority in the "express words of the charter," or any other source, for the removal. Lord Chief Justice Coke therefore commanded that Bagg be restored to his post.[45] Coke's assertion that the King's Bench could command the reappointment of officials to safeguard against "any manner of misgovernment"[46] served repeatedly as the basis for restitution to office.[47] The gradual evolution of the writ from a writ of restitution to a more universal writ to command continued throughout the eighteenth century. In a series of cases in the early 1700s, the King's Bench went beyond restitution and commanded the holding of an election,[48] compelled admission of an alderman,[49] and—most importantly—ordered an inferior tribunal to exercise jurisdiction.[50] In Blackstone's words, this full-fledged writ of mandamus could be put to "an infinite variety of other purposes."[51] Through this piecemeal expansion, the King's Bench thus carved out a general power to command executive officials or bodies to perform their duties.

The origins of the writ of prohibition can be traced back further.[52] The writ originated as a means of keeping the ecclesiastical courts within their jurisdiction and as a means of asserting the primacy of the Crown:[53] prohibition demonstrated that "[t]he King is the indifferent arbitrator in all jurisdictions" and that it was the "right of his Crown to . . . declare their bounds."[54] From these ecclesiastical origins, the writ came to be used as a check on all lower courts to prohibit them from exceeding their jurisdiction.[55]

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[42] IVAN HARE, CATHERINE DONNELLY, JOANNA BELL & ROBERT CARNWATH, DE SMITH'S JUDICIAL REVIEW § 15-035 (9th ed.) [hereinafter DE SMITH].
[43] James Bagg's Case, (1615) 77 Eng. Rep. 1271.
[44] DE SMITH, *supra* note 42, § 15-035.
[45] Bagg's Case, 77 Eng. Rep. at 1277.
[46] *Id.* at 1277-78.
[47] DE SMITH, *supra* note 42, § 15-035 ("In the 17th century the writ [of mandamus] was often called a writ of restitution.").
[48] R. v. Evesham (Mayor), 7 Mod. 166.
[49] R. v. Norwich (Mayor), 2 Ld. Raym. 1244.
[50] Groenvelt v. Burwell, 1 Ld. Raym. 454.
[51] 3 William Blackstone, Commentaries 110.
[52] De Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 48 (1951) [hereinafter De Smith, *Prerogative Writs*] ("Prohibition is one of the oldest writs known to the law.").
[53] E. Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 528 (1923) ("The Prohibition was the special weapon of the King's courts against the ecclesiastical tribunals.").
[54] Doctor James's Case (1621) Hobart 17, 80 E.R. 168.
[55] De Smith, *Prerogative Writs*, *supra* note 52, at 48.

Like the writ of prohibition, the writ of certiorari has medieval origins and was in common use since at least the 1280s.[56] The writ originally served as a royal demand for information: the King, looking to be certified on an issue, would order that relevant material be sent up for his review.[57] This demand for information was put to use on a broad range of issues: to review the records of common-law courts, to review the proceedings of specialized courts, to obtain information on administrative issues, and to bring inquisitions and indictments into the King's Bench.[58] But it was not until the seventeenth century that certiorari "to quash" began to appear in the law reports.[59] The 1643 decision in *Commins v. Massam*[60] was the catalyst for the development of this new formulation.[61] A lessee sought to challenge an order by the Commissioners for Sewers that had charged the lessee of a parcel of land with the cost of repairing a sea wall. The court split on whether certiorari would issue, but it was the opinion of Justice Heath that came to represent the law.[62] In a sweeping statement, Justice Heath concluded that the "cause is well removed by the certiorari," because "there is no Court whatsoever but is to be corrected by this Court."[63]

This new writ of "certiorari to quash" came to play a central role in supervising the various new administrative duties that Parliament conferred on Justices of the Peace.[64] By 1700, Chief Justice Holt in the *Cardiff Bridge* Case[65] was prepared to state, in famously broad language, that the King's Bench would issue the writ of certiorari to "examine the proceedings of all jurisdictions erected by Act of Parliament."[66] This point was reiterated that same year in *Groenwelt v. Burwell*, where Holt emphasized that no "inferior jurisdiction" was "exempt from the superintendency of . . . this Court."[67]

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[56] *Id.* at 46; *see also* R. v. Titchmarsh (1915) 22 D.L.E. 272, 277-78 ("The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him by an inferior court; whereupon the Sovereign, saying that he wishes to be certified—certiorari—of the matter, orders that the record, etc., be transmitted into a court in which he is sitting.").

[57] *Id.*

[58] *Id.*

[59] CRAIG, CONTINUITY AND CHANGE, *supra* note 40, at 582 ("The modern development of certiorari to quash began in the mid-17th century."); S.A. de Smith, *Wrongs and Remedies in Administrative Law*, 15 MODERN L. REV. 189, 191 (1952) [hereinafter de Smith, *Wrongs and Remedies*] ("From 1600 onward we find reports of cases in which certiorari issued for a purpose relevant to the present inquiry: the King's Bench awarded certiorari to quash convictions made by justices out of sessions.").

[60] Commins v Massam (1643) March NC 196.

[61] *See* Paul Craig, *Ultra Vires and the Foundations of Judicial Review*, 57 CAMBRIDGE L.J. 63, 84 (1998) (describing *Commins* as of "central importance" in the development of certiorari).

[62] CRAIG, CONTINUITY AND CHANGE, *supra* note 40, at 583 ("Heath J's view prevailed, and the removal procedure via certiorari to quash became popular . . . .").

[63] *Commins*, (1643) March NC at 197-98.

[64] De Smith, *Prerogative Writs*, *supra* note 52, at 48 ("With the vast increase in the duties of the Justices out of Sessions after 1660, certiorari acquired a new importance.").

[65] Cardiff Bridge Case, 1 Salk. 146, 1 Ld. Raym. 580 (1699). *See* FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 250 (1928) (referring to the *Cardiff Bridge* case as "a landmark in remedial administrative law"). At issue was an order by justices of the peace for the payment of money for the repair of a bridge. It was argued that, because the jurisdiction of the justices had been established by an Act of Parliament, certiorari was not available; it was argued that, if the justices exceeded the jurisdiction conferred by Parliament, then their action would be void and could therefore be challenged collaterally in a tort suit, or in enforcement proceedings. Chief Justice Holt disagreed.

[66] *Id.* at 580.

[67] (1700) 91 Eng. Rep. 134, 134.

2. The Evolution of Certiorari

By the dawning of the eighteenth century, the writ of certiorari—which had "started its career as a nominal writ for bringing up a record on review"—had become the chief means of reviewing administrative action.[68] This Section charts the development of certiorari on two important points that would come to define English administrative law for more than two centuries. First, the writ, although originally confined in scope to "courts of the record" and "judicial" proceedings, gradually came to encompass a broader range of less overtly judicial proceedings. In this respect, the writ was broadened. Second, while the writ was originally available to review all errors of law, the writ was gradually confined to the review jurisdictional errors. In this respect, the writ was narrowed. As we will see, it was state courts' embrace of the former and rejection of the latter that allowed for the emergence of an appellate model of judicial review.[69]

(i) A Broadening of "Judicial" Proceedings

While certiorari was originally cabined to "courts of record,"[70] this "distinction between courts of record and courts not of record was tacitly dropped and gradually forgotten."[71] But "doctrinal residue"[72] of the court-of-the-record requirement continued to linger in the form of a new limitation: that the writ would only issue to "judicial," as distinct from "ministerial," proceedings.[73] The gradual loosening of this limitation was central to the emergence of certiorari as a general writ of review.

During the infancy of English administrative law, certiorari was most commonly issued to control the decision-making of "justices of the peace."[74] In the late seventeenth century, the non-judicial duties of these justices were dramatically expanded, such that "most administrative powers were in the hands of justices of the peace."[75] The King's Bench, long accustomed to reviewing the orders of these justices on certiorari, was slow to surrender this control. To ensure that the justices of the peace remained within their statutorily conferred jurisdiction, the new "administrative functions were treated as judicial [and thus subject to review on certiorari], largely because they were

[68] Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 516 (1963).
[69] *See infra* Part II.
[70] CRAIG, CONTINUITY AND CHANGE, *supra* note 40, 583 ("The newly created remedy of certiorari to quash was . . . originally only available against courts of record."). Both justices of the peace and the commissioners of sewers were considered "courts of record." *Id.*
[71] AMNON RUBINSTEIN, JURISDICTION AND ILLEGALITY 76 (1965).
[72] CRAIG, CONTINUITY AND CHANGE, *supra* note 40, 589.
[73] *See, e.g.*, R. v Churchwardens, Overseers of the Poor of Hatfield Peverel (1849) 14 QB 298 (noting that the certificate was "not of such a judicial nature as to be removable by certiorari"); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 332 (1965) (noting that a "series of [English] cases in the years 1700-1740 developed the principle that mandamus would not lie when the respondent's function was 'judicial' but only when it was 'ministerial'" and characterizing this distinction as meaning that there was "an area of 'discretion' free from control by the King's Bench").
[74] Frank J. Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 505 (1891) ("[T]he justices of the peace were the officers to whom certiorari was most frequently issued.").
[75] H.W.R. Wade, *The Future of Certiorari*, 16 CAMBRIDGE L.J. 218, 225 (1958) [hereinafter Wade, *Future of Certiorari*].

discharged by officers who had come to be recognized as judges."[76] This meant stretching the meaning of the term "judicial" well beyond its ordinary definition: "[a]ll those functions of the justices which were not purely ministerial were regarded for this purpose as being judicial."[77]

By allowing certiorari to review the now not-so-judicial-functions of the justices of the peace, the King's Bench opened the door to a general broadening of the writ.[78] As the same administrative functions being performed by justices of the peace came to be performed by statutory boards and commissions that were not themselves courts of record, English (and, later, American) courts had precedent to draw on in extending certiorari.[79] The genie, once out of the bottle, could not be put back again.

"Quasi-judicial" was the convenient (if wholly unhelpful) label that emerged to describe functions that, while not strictly "judicial" in the ordinary sense of the term, were nevertheless not purely "ministerial" in character either.[80] As we will see, state courts built on this early expansion of certiorari and—in parallel with King's Bench—extended the writ to encompass a wide range of new statutory jurisdictions over the course of the nineteenth century.[81]

(ii) From Error of Law to Jurisdictional Error

But even as courts broadened the *kind* of decisions reviewable on certiorari,[82] certiorari's *scope* of review was narrowed in an important respect. Just as certiorari was coming into its own at the turn of the eighteenth century, courts began introducing a limitation that would come to define certiorari in England well into the twentieth century: the writ would only issue to quash "jurisdictional" errors and errors "on the face of the record."[83]

Throughout the seventeenth century, the King's Bench regarded a failure to comply with *any* statutory requirement as reviewable on certiorari—"whether or not the objection [was] properly

[76] *Id.*; *see also* DE SMITH, supra note 42, § 15-022 ("It was assumed that the writs of certiorari and prohibition, by which they were controlled in their capacity as courts of summary jurisdiction, were equally appropriate devices for superintending the exercise of their multifarious governmental functions. All those functions of the justices which were not purely ministerial were regarded for this purpose as being judicial: no separate category of discretionary 'administrative' acts, immune from the reach of certiorari and prohibition, was yet recognised.").

[77] DE SMITH, *supra* note 42, § 15-022. A similarly broad understanding of "judicial" functions was invoked in challenges to orders of the Commissioners of Sewers. *Id.*

[78] *See* Goodnow, *supra* note 74, at 505 ("[The justices of the peace's] administrative functions were treated as judicial, largely because they were discharged by officers who had come to be recognized as judges.").

[79] *Id.* at 505-06 (noting that, among many other administrative bodies, certiorari was used to review the action of "supervisors, county commissioners, commissioners to assess damages, assessors, commissioners of highways in many cases, and municipal councils and departments"); Wade, *Future of Certiorari*, *supra* note 75, at 225 ("When in the nineteenth century there was a general sorting out of functions and administrative powers were mostly transferred to new authorities, the judges were not in the least daunted and continued to describe administrative functions as judicial, granting certiorari to review them.").

[80] *See generally* H.W.R. Wade, *Quasi-Judicial and its Background*, 10 CAMBRIDGE L.J. 216 (1949) [hereinafter Wade, *Quasi-Judicial*] (discussing the evolution of the terminology of the "quasi-judicial" terminology in English administrative law).

[81] *See infra* Section I.B.2(i).

[82] Leaving behind the limitation to "courts of record" and adopting a generous interpretation of "judicial" orders.

[83] For a brief discussion of the 1969 House of Lords decision in *Anisminic*, where this focus on "jurisdictional" error was abandoned, *see infra* note 102.

'jurisdictional,' and whether or not the objection appear[ed] 'on the face' of the order."[84] Courts expressed no hesitation quashing orders on the basis that the orders had failed to comply with an Act of Parliament, without asking whether the particular statutory requirement went to the body's "jurisdiction."[85] Put simply, the King's Bench of the seventeenth century allowed "certiorari . . . to quash *any error of law* perpetrated by an inferior statutory tribunal."[86]

This began to change at the close of the seventeenth century. Just as the American colonies were beginning to find their footing, the courts back in Westminster were beginning to shift from using certiorari to quash orders "not within the statute"[87] to quash orders "not within the statutory *jurisdiction*."[88] By 1695, it was clear that courts were at least beginning to think of certiorari in "jurisdictional" terms,[89] and by 1720 the courts had successfully separated notions of "jurisdiction" from a mere "statutory requirement."[90] In 1732—the same year that King George II granted the

[84] HENDERSON, *supra* note 34, at 147; S.A. de Smith, Book Review, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, 77 HARV. L. REV. 198, 200 (1963) (emphasis added) [hereinafter de Smith, *Foundations*] ("[T]he concept that errors which neither went to jurisdiction nor were apparent on the record lay beyond the reach of supervisory control was slow to emerge.").

[85] *Id.* ("Many orders . . . were quashed because 'it does not appear' that a statutory requirement had been followed, whether or not that requirement was properly jurisdictional by modern criteria."). For example, while Justice Heath in *Commins* emphasized that the court's role was to review "jurisdiction" rather than "justice," he then construed the term so broadly "as to embrace in effect any error of law." Craig, *Ultra Vires*, *supra* note 61, at 85.

[86] De Smith, *Foundations*, *supra* note 84, at 200 (emphasis added); *see also* HENDERSON, *supra* note 34, at 150 (noting that in the seventeenth century, courts considered "every statutory requirement [to be] a matter of jurisdiction, in some sense"); HENDERSON, *supra* note 34, at 157 ("The truth of the matter appears to be that it was not until about 1720 that the notion of jurisdiction was fully separated from that of statutory authority, that is, that the doctrine became clear that not every requirement of statute need be treated as jurisdictional."); D.E.C. Yale, Book Review, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, CAMBRIDGE L.J. 139, 140-41 (1964) ("The rule does not appear clearly till the earlier part of the eighteenth century, for throughout the seventeenth century the courts were slow to work free from the notion that the 'jurisdiction' of an inferior court included its statutory authority in both substantive and procedural terms. At that stage they never refused to review by certiorari where the objection was based on the applicable statutory language, and the objection was decided on its merits whether or not that objection was based on the language of the inferior court's order."). To be sure, English courts had drawn a distinction between reviewable "jurisdictional" errors and non-reviewable "non-jurisdictional" errors during the seventeenth century. *See, e.g.*, Case of the Marshalsea, 77 Eng. Rep. 1027, 1038-39 (C.P. 1612); Terry v. Huntington (1668) 145 Eng. Rep. 557, 558-60 (Ex.). These were not certiorari cases, but they may well have helped to lay the foundation for the later "jurisdictional" error principle in certiorari.

[87] *See Anonymous*, Style 207 (Hil. 1649/50) (quashing an order as "not within the statute").

[88] The Queen v. Dunn, 10 Mod. 221 (1714) (noting that "only the act enables the justices"; failure to comply with the act was therefore reviewable); The King v. Sheringbrook, 2 Ld. Raym. 1394 (1724) (noting that failure to comply with a requirement "which is expressly required by the words of the act" was reviewable); The King v. Occupiers of Land in Burough-Fen, 1 Barnard. K.B. 2 (1726) (quashing an order for failure to "pursue[] the authority given . . . by the statute"); Dom. Rex v. Thomas, 2 Show. K.B. 129 (Mich., 32 Car. 2, 1680) (noting that "[t]he justices had no power by the statute"). Henderson describes these cases as illustrating the "uncertain relationship between statutes and jurisdiction in the eighteenth century." HENDERSON, *supra* note 34, at 155.

[89] Henderson identifies *Wooton Rivers v. St. Peter's Marlborough*, 3 Salk. 254 (1695/96), as an important landmark in the development towards "jurisdictional" error. HENDERSON, *supra* note 34, at 157 (noting that the "distinction [between jurisdictional and non-jurisdictional error] was implicit in *Wooton Rivers*").

[90] HENDERSON, *supra* note 34, at 157 ("The truth of the matter appears to be that it was not until about 1720 that the notion of jurisdiction was fully separated from that of statutory authority.").

royal charter for the last of the Thirteen Colonies[91]—the King's Bench declined for the first time to issue a writ of certiorari based on an unambiguous application of the "face of the record" rule.[92]

Explaining the drift towards an exclusive focus on jurisdictional error caused the English legal historians of the mid-twentieth century much headache.[93] But the drift is likely connected to the judicial treatment of "no-certiorari" clauses. As the name suggests, "no-certiorari" clauses purported to preclude the use of the writ of certiorari to challenge administrative action. Since certiorari was often the *only* available remedy to challenge unlawful administrative action, these clauses would generally—if literally applied—preclude judicial review entirely. Much like its modern counterparts,[94] the King's Bench of the seventeenth century was highly skeptical of any legislative effort to oust judicial review.[95] But the courts could not well simply ignore a clear Act of Parliament. The solution was a compromise: courts interpreted the statutory "no-certiorari" clauses to exclude *only* non-jurisdictional errors; Parliament, the courts held, could not have meant to exclude judicial review of jurisdictional defects.[96]

The large number of no-certiorari clauses[97] meant that, when the King's Bench was hearing a petition on certiorari, it was increasingly focused exclusively on whether the lower tribunal had exceeded its jurisdiction—since, per the no-certiorari clause, this was all that the court *could* still review. Gradually, this focus on jurisdictional error came to influence the judicial conception of certiorari more generally. Even in those cases where no "no-certiorari" clause was engaged, the court would limit its review to questions of jurisdiction.[98] The exception, in short, became the rule.[99]

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[91] *Establishing the Georgia Colony, 1732-1750*, LIB. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/colonial-settlement-1600-1763/georgia-colony-1732-1750 [https://perma.cc/ME6S-XRMR].

[92] Henderson identifies the 1732 decision in *The King v. Inhabitants of Woodsterton* as the first instance in which a court unambiguously applied the "face of the record" rule. HENDERSON, *supra* note 34, at 149; *id.* at 157 ("[I]t was not until 1732 that the 'face of the record' rule was applied squarely so as to allow the justices to ignore a statutory requirement.").

[93] *Cf.* De Smith, *Foundations*, *supra* note 84, at 199 ("The lines of development [towards the focus on 'jurisdictional' error] are indeed tangled and confused; the judges groped their way fitfully, even absent-mindedly, towards the formulation of general principles.").

[94] The presumption against ouster of judicial review remains a hallmark principle in both English and federal law today. For a clear expression of this principle in England, see R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22. The same is true of U.S. federal law. *See* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 908 (6th ed. 2009) (highlighting the "judicial skepticism of preclusion in any form").

[95] *See, e.g.*, R. v. Wood, 5 El. & Bl. 49; De Smith, *Foundations*, *supra* note 84, at 199 ("The King's Bench was disinclined to take privative clauses at their face value . . . .").

[96] De Smith, *Foundations*, *supra* note 84, at 199 ("[T]o narrow the scope of review to jurisdictional and analogous defects seemed a sensible compromise.").

[97] CRAIG, CONTINUITY AND CHANGE, *supra* note 40, 592 ("'No certiorari' clauses were commonplace.").

[98] De Smith, *Foundations*, *supra* note 84, at 199 (highlighting the "indirect influence exerted by no-certiorari clauses" on certiorari's shift towards jurisdictional error).

[99] As will be explored below, an analysis of the English cases grappling with no-certiorari clauses also, ironically, influenced the move *away* from jurisdictional error in the American states. *See infra* Section I.B.2(ii).

By the time of the American Revolution, certiorari's focus on jurisdictional error had emerged as a "fundamental characteristic"[100] of English administrative law: courts "refused . . . to consider errors upon points of law except where these affected the question of jurisdiction."[101] Certiorari would not lie to review "mere" errors of law that were not jurisdictional.[102]

B. Certiorari in the States

1. Borrowing from the King's Bench

The prerogative writs had come a long way from their medieval origins by the late eighteenth century. State courts proved themselves no less willing than their English counterparts to tweak the scope of the writs in order to meet the demands of the age. In the years following independence,[103] state courts asserted the power to issue the prerogative writs as the "inheritors of all the powers of the English courts."[104] The conception of the writs as a form of "kingly

[100] De Smith, *Foundations*, *supra* note 84, at 199 ("[T]he immunity of latent non-jurisdictional error from judicial review emerged as a fundamental characteristic of English administrative law."); Craig, *Ultra Vires*, *supra* note 61, at 84 ("The concept of jurisdiction was then to be the touchstone through which King's Bench controlled the inferior bodies which it had bought within its purview.").

[101] Goodnow, *supra* note 74, at 518; *id.* ("Case after case may be cited to indicate how unwilling the courts were to allow any other questions than those pertaining to the matter of jurisdiction to come up before them on certiorari."); de Smith, *Wrongs and Remedies*, supra note 59, at 194 ("Certiorari will *not* go to inferior courts of law for errors of law not apparent on the record and not going to jurisdiction . . . .").

[102] *See, e.g.*, R. v Whitbread (1780) 2 Dougl 549. In England, certiorari was ultimately enlarged to reach all errors of law in the landmark 1969 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 decision, which has been understood as establishing that "all errors of law are jurisdictional." Ivan Hare, *The Separation of Powers and Judicial Review for Error of Law*, *in* THE GOLDEN METWAND AND THE CROOKED CORD: ESSAYS IN HONOUR OF SIR WILLIAM WADE QC 119 (Christopher Forsyth & Ivan Hare eds., 1998). It is doubtful that the House of Lords intended to do away with the jurisdictional error/error of law distinction when it handed down *Anisminic*. *See, e.g.*, David Feldman, *Error of Law and Flawed Administrative Acts*, 73 CAMBRIDGE L.J. 275, 280 (2014). But this has become the settled understanding of the case. *See* R. v. Lord President of the Privy Council, ex p. Page [1993] AC 682 at 701E-G (Lord Browne-Wilkinson) ("In my judgment the decision in *Anisminic Ltd. v. Foreign Compensation Commission* . . . rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires."); R. (Cart) v. Upper Tribunal, [2011] UKSC 28, [18] (Baroness Hale of Richmond) (noting that *Anisminic* "removed the distinction between error of law and excess of jurisdiction"). For a more general comparison of how judicial review on questions of law are treated in different common-law jurisdictions, see Paul Craig, *Judicial Review of Questions of Law: A Comparative Perspective*, *in* COMPARATIVE ADMINISTRATIVE LAW (Susan Rose Ackerman & Peter Lindseth eds., 2019).

[103] The prerogative writs were also employed in the colonies. Some colonial legislatures conferred on their courts the same powers possessed by the King's Bench. *See, e.g.*, New Hampshire Judiciary Act of 1699, § 4 (granting the New Hampshire Supreme Court "cognizance of all pleas and causes, as well civil . . . as criminal, as fully and amply, to all intents and purposes whatsoever, as the courts of king's bench, common pleas, and exchequer within his majesty's kingdom of England have or ought to have").

[104] JAFFE, *supra* note 73, at 153; *see also* Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 418 (1958) ("Once independence was won, however, the American courts successfully claimed the prerogative-writ jurisdiction of King's Bench."); FRANK JOHNSON GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 437 (1905) [hereinafter GOODNOW, PRINCIPLES] ("In the case of the state courts, the general rule is that the jurisdiction to issue these extraordinary legal remedies is possessed by all those courts which have inherited the jurisdiction of the court of king's bench-and most courts of general common-law jurisdiction have inherited such jurisdiction."); Goodnow, *supra* note 74, at 503 ("[T]he rule in the United States seems to be that certiorari as a means of appeal issues only from these courts which have inherited the jurisdiction of the English court of King's Bench.");

supervision" was of course no longer apt in a country that had so recently rid itself of the shackles of monarchy.[105] The prerogative writs were therefore reconceived simply as ordinary remedies.[106] The prerogative writs (and especially the writs of certiorari and mandamus) came to function as "ordinary action[s]" to challenge administrative action.[107] By recharacterizing the source of the power, "the English system of remedies was transplanted" into the United States[108]—with all the associated quirks of case-by-case evolution discussed above. Relief in equity was rarely available.[109]

2. The Expansion of Certiorari

Over the course of the nineteenth century, state courts took two steps to develop the writ of certiorari into "the chief means [of] . . . review[ing] administrative action."[110] First, in keeping with their English counterparts, state courts expanded certiorari to encompass a broader array of quasi-judicial proceedings. But second, departing from English practice, state courts broadened the writ to reach *all* errors of law—not only jurisdictional errors.

(i) From "Judicial" to "Quasi-Judicial" Proceedings

Just as in England, a growing number of administrative tribunals were "necessitated by the growth and complication of our society and economy" over the course of the nineteenth century.[111] But the writ of certiorari inherited by the states was, as we saw,[112] limited to the review of "judicial" action—a position reaffirmed in the earliest state cases.[113] State courts followed in the footsteps of the King's Bench by broadly construing the kind of "judicial" functions covered by certiorari to reach a wide range of not-so-judicial proceedings.

Pfander & Wentzel, *supra* note 27, at 1311 ("[S]tate supreme courts quickly claimed power to issue the writs to state executive officers.").

[105] JAFFE, *supra* note 73, at 153.

[106] *Id.*

[107] Goodnow, *supra* note 74, at 501.

[108] JAFFE, *supra* note 73, at 153.

[109] Because adequate relief at law precluded relief in equity, the existence of a remedy through one of the prerogative writs "preclude[d] the issuance of an injunction." *Judicial Control of Administrative Agencies in New York*, 33 COLUM. L. REV. 105, 121 (1933); *see also* McNiece v. Sohmer, 29 Misc. 238 (Sup. Ct. 1899).

[110] Goodnow, *supra* note 74, at 493; *id.* at 501 ("[I]n general our only method of appeal from administrative decisions has been by certiorari. . . ."); *id.* at 513 (noting that certiorari "furnishes the chief means of subjecting the acts of a host of administrative authorities to the control of the courts"); *see also* Laisne v. State Bd. of Optometry, 19 Cal. 2d 831, 852 (1942) ("[I]t has long been recognized that, of all the extraordinary common law writs, certiorari is the one best adapted to review the acts of boards, tribunals and officers which exercise quasi-judicial power . . . ."); *cf. Review by Certiorari in Indiana*, 16 IND. L.J. 397, 400 (1941) (recognizing certiorari as "such a valuable writ"); JAFFE, *supra* note 73, at 166 ("Certiorari is more or less the progenitor of the modern statutory review.").

[111] John W. Pelino & C. Richard Owens, *How Broad is Narrow Certiorari?*, 62 DICKINSON L. REV. 243, 243 (1958).

[112] *See supra* Section I.A.2(i).

[113] *See* Goodnow, *supra* note 74, at 506 ("[F]ollowing old traditions, some of our courts early laid down the rule that they would not issue certiorari to review a ministerial or legislative act, but would confine its use to the review of judicial acts.").

To emphasize certiorari's more flexible standard, opinions began substituting the requirement for a "judicial" function with the more relaxed term "quasi-judicial"[114]—a move paralleled across the pond.[115] To be sure, state practice varied on precisely what kind of administrative action fell within this designation: the commissioners of highways, for example, were regarded as wholly non-judicial in one state,[116] but quasi-judicial in another.[117] But the general trend over the course of the nineteenth century was to bring a growing number of administrative bodies within the reach of certiorari:[118] the orders of boards of health,[119] boards of highway commissioners,[120] boards of public works,[121] boards of police,[122] and boards of railroad commissioners,[123] among many others, were all held reviewable on certiorari. By the end of the nineteenth century, it was settled in most jurisdictions that "certiorari [may] be employed to review administrative decisions."[124]

A handful of states went further still and wholly dropped the traditional requirement that certiorari would only issue to quash the decisions of judicial or quasi-judicial proceedings. Most prominent among these was New Jersey, which "took a much more liberal view of [the writ of certiorari] from the beginning."[125] The Garden State did not stand alone. Both North[126] and South Dakota[127] followed in New Jersey's footsteps in allowing certiorari to review the action of quasi-legislative

[114] *See, e.g.*, State v. S. Penn. Oil Co., 42 W. Va. 80 (1896) ("The term [quasi-judicial] implies that the act has some of the marks of a judicial act, and lacks some. The term presupposes both resemblance and difference."); Drainage Commissioners v. Giffin, 25 N.E. 995, 997 (Ill. 1890); State v. Whitford, 54 Wis. 150 (1882).
[115] *See* Wade, *Quasi-Judicial*, *supra* note 80.
[116] Robbins v. Bridgewater, 6 N.H. 524, 525-26 (1834) (holding that the authority lay highways is not necessarily judicial).
[117] People ex rel. Bingham v. Vill. of Brighton, 20 Mich. 57, 69-70 (1870) (holding that the actions of a commissioner of highways can be reviewed on certiorari).
[118] *See* Goodnow, *supra* note 74, at 535 ("In order to meet the demands of a changed administrative system, the number of authorities to which the writ may issue has been greatly increased.").
[119] Belcher v. Farrar, 90 Mass. 325, 327 (1864).
[120] Imhoff v. Commissioners of Highways, 89 Ill. App. 66, 70 (Ill. App. Ct. 1899) ("That the record of the board of highway commissioners would have been vulnerable to certiorari . . . is not seriously questioned.").
[121] Coar v. Jersey City, 35 N.J.L. 404, 405 (Sup. Ct. 1872).
[122] People ex rel. Cook v. Bd. of Police of Metro. Police Dist., 39 N.Y. 506, 506 (1868).
[123] People ex rel. Loughran v. Bd. of R.R. Comm'rs of State of New York, 158 N.Y. 421, 428 (1899) (noting that, [i]n consenting to the discontinuance of the station in question, we think the board of railroad commissioners acted judicially," and that the "the proceedings of the commissioners were [therefore] subject to review by certiorari"); Gulf & S.I.R. Co. v. Adams, 38 So. 348, 349 (1905) ("The State Railroad Commission is an inferior tribunal within the contemplation of section 90 of the Code, and is subject to the supervision and control of the superior courts of the state through the writ of certiorari.").
[124] *Id.* at 513; *see also id.* ("[A]t the present time in the United States the tendency is to . . . confine certiorari to the action of bodies mainly administrative in character."). Indeed, certiorari was often denominated simply the "writ of review." *See, e.g.*, FRANK S. RICE, THE COLORADO CODE OF PROCEDURE 633 (1890) (citing the New York and California codes of civil procedure).
[125] Goodnow, *supra* note 74, at 526; *see* State v. Justices of Middlesex County, 1 N.J.L. 244 (1794) (laying down the rule in New Jersey that certiorari was not limited to quasi-judicial proceedings); *see generally* Norman C. Thomas, *New Jersey Administrative Law: The Nature and Scope of Judicial Review*, 8 VILL. L. REV. 1 (1962) (discussing the broad conception of certiorari in New Jersey state law).
[126] Cofman v. Ousterhous, 40 N.D. 390 (1918) ("The rule generally prevailing is that only acts judicial or quasi judicial in their nature are reviewable by certiorari. But, under the laws of this state, the writ is not confined to a review of judicial or quasi judicial proceedings, but extends to every case where the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction . . . ."); State ex. rel. Johnson v. Clark, 21 ND. 517 (1911).
[127] *See* State ex. rel. Dollord v. Commissioners, 1 S.D. 292 (1890).

as well as quasi-judicial action, and several other states practically adopted much the same position (without acknowledging as much).[128]

(ii) From Jurisdictional Error to Error of Law

The expansion of certiorari to encompass a broader range of administrative bodies ran in parallel with (and, indeed, built off of) the English development of the writ.[129] But state courts also deviated from English practice in an important respect. We saw earlier that, by the late eighteenth century, it was firmly established in English law that certiorari was only available to review "jurisdictional" errors.[130] Certiorari "did not . . . in England reach a 'mere' error of law."[131] It was this version of the writ that the states inherited:

> The legacy handed over to the American Colonies on the eve of the Revolution was such that where any official body acted as a tribunal, . . . the High Court would examine the proceedings by certiorari to ascertain that the law appertaining to *the exercise of its jurisdiction* had been observed.[132]

In the early years of the Republic, therefore, it was accepted that certiorari reached only the "mere naked question of jurisdiction."[133] As in the King's Bench, the writ would not issue to correct all errors of law.[134]

However, state judges soon discovered the difficulty of applying a workable distinction between jurisdictional and non-jurisdictional error. In the mid-to-late nineteenth century, state courts throughout the country began to abandon strict adherence to the jurisdictional-error model of certiorari.[135] Judge Campbell's influential opinion for the Michigan Supreme Court in *Jackson v. People*[136] played an important role in this development. Campbell noted that a series of New York

[128] Goodnow, *supra* note 74, at 511-12 ("The New Jersey rule has been practically adopted in several other commonwealths . . . ." (citing Swann v. Mayor of Cumberland, 8 Gill 150 (Md. 1849); City of St. Charles v. Rogers, 49 Mo. 530 (1872); Preble v. City of Portland, 45 Me. 241 (1858); and State ex rel. Flint v. Common Council of Fond du Lac, 42 Wis. 287 (1877))).
[129] *See supra* Section I.A.2(i).
[130] *See supra* Section I.A.2(ii).
[131] JAFFE, *supra* note 73, at 167; *id.* ("Certiorari, as it finally developed in the English system, was limited to 'jurisdictional' error.").
[132] Weintraub, *supra* note 68, at 516 (emphasis added).
[133] Birdsall v. Phillips, 17 Wend. 464 (N.Y. Sup. Ct. 1837).
[134] Julien T. Davies, *The Remedy by "Certiorari" in the State of New York for Illegal, Erroneous or Unequal Assessments*, 1 COLUM. L. REV. 419, 419 (1901) ("The writ [of certiorari], both in England and in this State, at first on brought into question the jurisdiction of the lower court tribunal, and did not present to the upper Court any question of law or fact upon the merits of the case . . . .").
[135] Davies suggests that the transition began in New York State around 1840. *Id.* at 419 ("Until about the year 1840 the decisions appear to have been fairly consistent in applying the old rule that a certiorari could not review anything but the jurisdiction of the lower court or tribunal.").
[136] 9 Mich. 111 (1860). Campbell's opinion found its way into much of the late-nineteenth and early-twentieth-century commentary on certiorari as marking an important departure from the old focus on "jurisdictional" error. *See, e.g.*, *Certiorari: Scope of Review of Administrative Decisions on Common-Law Writ; "Jurisdictional Facts" Must Appear in Record*, 14 U. CHI. L. REV. 270, 271 n.6 (1947) ("To refute this mistaken notion that the writ [of certiorari] would lie to correct only jurisdictional errors, Judge Campbell wrote an opinion in *Jackson v. People* . . . ."); FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 261 (1928) ("The incorrectness of this doctrine was clearly exposed in a scholarly opinion written by Judge Campbell of the Supreme Court of Michigan.").

decisions had suggested that common law certiorari served "only [to] review the jurisdiction of the court below," not to correct all errors of law.[137] But Campbell also held that, after examining "with much care all the English authorities," he was unable to find support for such a limitation.[138] Judge Campbell suggested that the New York decisions limiting certiorari to jurisdictional error stemmed from a misapprehension of English cases.[139] Campbell correctly pointed out that, Parliament had, over the course of the seventeenth and eighteenth centuries, enacted many statutes that "t[ook] away, in express terms or by acknowledged implication, the right to a certiorari, which otherwise existed."[140] And that, when interpreting these statutes, English courts concluded that Parliament had not intended to deprive a party of the right to challenge the inferior tribunal's decision for want of jurisdiction.[141] Campbell reasoned that if the writ of certiorari could still be used to review for jurisdictional error in cases where a "no-certiorari" clause was engaged, then surely the writ had a broader scope where there was no such clause:

> If certiorari will lie for want of jurisdiction in cases where the common law remedy of certiorari, in its usual acceptation, is expressly or confessedly taken away, it follows, as an unavoidable conclusion, that the usual office of the common law writ is to inquire into *something more than jurisdiction*.[142]

That "something more," Judge Campbell concluded, was all "questions of law."[143] As we saw in the exposition of the English law drift towards jurisdictional error above,[144] there is some merit to Campbell's conclusion. It does indeed seem that certiorari's "jurisdictional-error" requirement grew out of the limiting judicial interpretation of no-certiorari clauses.[145] But this development occurred in the late seventeenth and early eighteenth centuries. By the time of the American

[137] *Jackson*, 9 Mich. at 118. Unhelpfully to modern researchers, Judge Campbell stated that "[i]t [wa]s unnecessary to refer particularly to these authorities." *Id.* Some early New York cases which had clearly limited the reach of certiorari to jurisdictional errors include *Johnson v. Moss*, 1838 WL 3065 (N.Y. Sup. Ct. 1838) ("This is a common law certiorari, and we cannot look beyond those questions which go to the jurisdiction of the justice."); and *Birdsall v. Phillips*, 1837 WL 2802 (N.Y. Sup. Ct. 1837) ("On a return to a common law certiorari, no other questions can be raised than those relating to the jurisdiction of the officer or court before whom the proceedings are had . . . ."). Judge Campbell's opinion omits to mention that it had been the consensus across state courts, not just the courts in New York, that certiorari could only be used to correct jurisdictional errors.
[138] *Jackson*, 9 Mich. at 118.
[139] *Id.* at 118-19.
[140] *Id.* at 118.
[141] *Id.* at 119 (citing Regina v. Manchester & Leeds Railway Co., 8 Ad. and El., 413; Reg. v. Sheffield Railway Co., 11 Ad. and El., 194; Rex v. Justices of Somersetshire, 5 B. and C., 816; Rex v. Justices of Kent, 10 B. and C., 477; Rex v. Justices of Middlesex, 5 Ad. and El., 626; Ex parte Carruthers, 2 Man. and Ry., 397; Regina v. South Wales Railway Co., 13 Q. B., 988; Ex parte Hopwood, 15 Q. B., 121; Ex parte Hyde, 5 Eng. L. and Eq., 368; Reg. v. Justices of St. Albans, 18 Eng. L. and Eq., 244; Regina v. Justices of Staffordshire, 30 Eng. L. and Eq., 402; In re Edmondson, 24 Eng. L. and Eq., 169; Regina v. Leeds & Bradford Railway Co., 11 Eng. L. and Eq., 484.).
[142] *Id.* at 119 (emphasis added).
[143] *Id.* at 120; *see also id.* at 123 (Manning, J., concurring) ("I concur with the majority of the court, that on a common law certiorari, this court will not only inquire into the jurisdiction of the inferior tribunal, but also into errors of law occurring on the trial, and affecting the merits of the case . . . .").
[144] *See supra* Section I.A.2(ii).
[145] *See supra* notes 98-99.

Revolution, certiorari's limitation to jurisdictional error was well-settled;[146] and certainly by the time that Campbell was writing in the 1860s, the position in England was beyond doubt.[147]

Judge Campbell's suggestion that in England, absent a no-certiorari clause, "certiorari lies to examine errors generally"[148] was therefore simply a misstatement of English law.[149] But irrespective of its merits,[150] it was Judge Campbell's conclusion—that the writ of certiorari was not limited to jurisdictional errors—that quickly became the prevailing view in the states.[151] "[B]y

[146] *See supra* notes 89-92.

[147] *See, e.g.*, R. v. Justices of Monmouthshire, 8 Barn. & Cress. 137 (K.B. 1828) ("[W]e cannot assume to ourselves the jurisdiction of a court of error and revise the judgments of the court of Quarter Sessions.").

[148] 9 Mich. at 118.

[149] *See Certiorari: Scope of Review*, *supra* note 136, at 271 n.6 (noting that Judge Campbell's decision "g[ave] rise to another misapprehension" when Campbell suggested that certiorari lay to review all errors of law). As Goodnow notes, almost all of the English cases that Judge Campbell cites for the proposition that the writ of certiorari issued to correct errors of law dealt with summary convictions by justices of the peace. *See* Goodnow, *supra* note 74, at 527-28 (noting that most of the cases cited by Judge Campbell "turn out to be cases in which summary convictions were being examined" and that "[t]he only cases cited by Judge [Campbell] which do not relate to summary convictions and which are in point simply prove that on certiorari jurisdictional facts should be returned and considered"). This was a special case in which the writ of certiorari was put to a broader use than in the typical administrative context. *Id.* at 519. (Goodnow mistakenly refers to Judge "Cooley" as the author of *People v. Jackson*, rather than to Judge "Campbell." Goodnow, *supra* note 74, at 527-28. Judge Cooley would not join the Michigan Supreme Court until 1964, four years after *Jackson* was decided. *Thomas Cooley*, MICH. SUP. CT. HIST. SOC'Y (2022), https://www.micourthistory.org/justices/thomas-cooley [https://perma.cc/5QS8-S7BJ].)

[150] Judge Campbell's analysis continued to be cited as the authoritative treatment of the matter in the early twentieth century. *See* FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 260 ("The frequency with which the writ was used to remove summary convictions into the Court of King's Bench led Parliament to insert into many statutes clauses forbidding such removal; but it was held that the statutory prohibition did not apply where the proceeding was vitiated by some defect of jurisdiction . . . . From this arose in America a very widespread misapprehension that the writ would not lie to correct other than jurisdictional errors.").

[151] *E.g.*, Illinois. People ex rel. Loomis v. Wilkinson, 13 Ill. 660, 663 (1852) ("We hold, then, that the circuit courts have power to award a writ of certiorari, at common law, to all inferior tribunals and jurisdictions, wherever it is shown either that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed, and no other mode of directly reviewing their proceedings is provided."); People v. Board of Assessors, 39 N.Y. 81 (1868); Matter of Lauterjung, 48 N. Y. Super. Ct. 308. (1882) ("Until the decision of the Court of Appeals in the year 1868, in the case of *People ex rel. Cook v. Board of Police*, 39 N. Y. 506, the tendency of the courts in certiorari cases was to refuse to examine into the evidence or to determine any question beyond that of jurisdiction. This permitted inferior tribunals and magistrates to exercise their powers in an arbitrary, high-handed and unjustifiable manner, and made them more absolute than any court of original jurisdiction. The case above cited brought to the attention of the court an illustration of the despotic action that such boards may take when beyond the reach of review."); Gilbert v. Bd. of Police & Fire Comm'rs of Salt Lake City, 40 P. 264, 266 (1895) ("The office of the common–law writ has been much enlarged by statute and decision in cases where there is no other proper remedy, and, in addition to determining questions of jurisdiction, errors in law affecting the substantial rights of the parties may now be corrected, and the testimony may be included in the return, and examined to determine whether there is competent evidence"); State v. Senft, 20 S.C.L. 367, 369 (S.C. App. L. & Eq. 1834) ("The writ of certiorari is a common law remedy, to correct the errors in law of inferior jurisdictions."). It was not uniformly accepted in all states that certiorari could be used to review all errors of law. California, for example, continued to recognize a distinction between errors of law and errors of jurisdiction—with certiorari only going to the latter. But California was an outlier state in this respect. See the sources cited in note 153 *infra*. It is for this reason that Professor Dickinson's statement in 1927 that "In many states the effectiveness of certiorari is impaired by the fact that the scope of the writ has been shaped to the 'jurisdictional' theory of review" is misleading. DICKINSON, *supra* note 18, at 257 (1927). Professor Dickinson cites only two California cases for the proposition. *Id.* (citing Valentine v. Police Court, 141 Cal. 615 (1904); Wittam v. Police Court, 145 Cal. 474 (1904)). California was an outlier jurisdiction in this respect, not a representative one.

small degrees," state courts charted a "departure . . . from the old English rule."[152] By the end of the nineteenth century, it was largely settled across the states that certiorari would lie to correct *all* errors of law.[153]

The irony, then, is that Judge Campbell misinterpreted English authority to correct what he perceived to be a misinterpretation of English authority. But in so doing, Campbell had brought the scope of the writ full circle back to its seventeenth-century roots.[154] As this Article demonstrates in Part II, it was this enlargement of the writ to encompass all errors of law—rather than merely "jurisdictional" errors—that sits at the center of the development of the appellate model of judicial review.[155]

C. Certiorari Is Sidelined in Federal Law

Judicial review evolved very differently at the federal level. In *Marbury v. Madison*, the Supreme Court made clear that the Constitution had not empowered the Court to issue original writs of mandamus.[156] The lower courts were similarly powerless because they had not been granted the authority to issue the writ under the Judiciary Act.[157] The lone exception was federal courts in the District of Columbia. By virtue of the fact that Maryland's common law continued to be in force in the part of the District ceded by Maryland, the federal courts of the District retained the power to issue writs of mandamus.[158] Parties seeking mandamus relief against federal administrative

[152] Davies, *supra* note 134, at 420.

[153] JAFFE, *supra* note 73, at 167 ("[F]or the most part the American common law, if it ever accepted so limited an office for the writ [i.e., a limitation on the writ to only review jurisdictional errors], outgrew the limitation in the Nineteenth Century."); Merrill, *supra* note 1, at 949 ("Originally certiorari was used only to test the jurisdiction of an inferior tribunal. But this broadened during the nineteenth century to include questions of law and eventually the sufficiency of the evidence to support conclusions of law."); *Recent Important Decisions*, 24 MICH. L. REV. 844 (1926) (noting that "the use of the writ [of certiorari] has been extended so that it will lie where the inferior court or tribunal has proceeded illegally (question of law) and no appeal or writ of error is available"); FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 289 ("Doctrines that apparently stand in the way [of broader review] (as for example, that certiorari reviews only questions of jurisdiction, or that in mandamus proceedings the interpretation of a statute presents a question of discretion) are of very doubtful soundness and validity.").

[154] *See supra* Section I.A.2(ii). As far as I have been able to tell, no state judge was actively aware of the fact that, by extending certiorari to cover all errors of law, they were bringing the writ back in line with seventeenth-century English precedents.

[155] *See infra* Part II.

[156] Marbury v. Madison, 5 U.S. 137, 138 (1803).

[157] McIntire v. Wood, 11 U.S. 504 (1813); *see also* ELIZABETH GLENDOWER EVANS, JURISDICTION IN MANDAMUS CASES IN UNITED STATES COURTS 514-46 (1885).

[158] Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 522 (1838) (interpreting the Act of February 27, 1801, ch. 15, § 1, 2 Stat. 103). Congress empowered all federal district courts to issue writs of mandamus in the Mandamus and Venue Act of 1962. By the same rationale, Court of Appeals for the District of Columbia could also issue original writs of certiorari. *Cf.* GOODNOW, PRINCIPLES, *supra* note 104, at 438 ("[P]robably as a result of the application of the same principle, the writ of certiorari also."). But given the limits that the Supreme Court placed on the writ of certiorari in *Degge v. Hitchcock*, the theoretical availability of this writ proved quite irrelevant to the review of administrative action.

action "were forced to bring suit in the District of Columbia."[159] The only original mandamus power was derivative of state law.[160]

Certiorari fared no better.[161] Just as with mandamus, neither the Constitution nor the Judiciary Acts empowered federal courts to issue original writs of certiorari.[162] Late-nineteenth-century academics assumed—reasoning from the Supreme Court's rulings on mandamus—that the federal courts of the District of Columbia would also have the power to issue a writ of certiorari to quash administrative action.[163] The "first instance" in which this assumption was tested came in 1913 in *Degge v. Hitchcock*.[164] At issue was whether a quasi-judicial decision of the Postmaster General could be challenged on a writ certiorari. In state courts this would have seemed a relatively routine application of certiorari. But a unanimous Supreme Court refused to issue the writ. Writing for the Court, Justice Lamar started by emphasizing the complete absence of past practice supporting the use of certiorari to quash administrative action in federal law.[165] This, in Lamar's view, "at once suggest[ed] that the failure to make such application [for certiorari relief] has been due to the conceded want of power to issue the writ to [executive] officers."[166] While acknowledging that in the states the writ of certiorari was "issue[d] not only to inferior tribunals, boards, assessors, and administrative officers, but even to the chief executive of a state in proceedings where a quasi judicial order has been made,"[167] the Court denied the writ any similar reach at the federal level.[168] The Postmaster General may have "acted in a quasi judicial capacity," but there was "an

[159] *Mandamus in Administrative Actions: Current Approaches*, 1973 DUKE L.J. 207, 208.
[160] Congress changed this in 1962 with the enactment of the Mandamus and Venue Act, which provides that "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.
[161] Merrill, *supra* note 1, at 949 ("[C]ertiorari was never used in the nineteenth century to review federal executive branch actions."); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 4 (1975) ("[I]n the federal courts, common law certiorari was essentially unavailable."); FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 255 (1928) ("[I]n the federal administration mandamus has found a place, but not certiorari . . . ."); Goodnow, *supra* note 74, at 503 ("As far as the United States courts are concerned, it may further be laid down, as a general principle, that they have not the power to issue certiorari to review a determination.").
[162] Goodnow, *supra* note 74, at 503 ("[T]he same reasons which forbid the higher courts to issue the writ—viz. the absence of the grant of such jurisdiction in the constitution or in the judiciary act—would seem to preclude its issue by the district courts.").
[163] *Id.* ("There seems . . . to be no reason why the Supreme Court of the District of Columbia should not have the power to issue the writ of certiorari; for it is well settled that it has the power to issue the mandamus, and this latter power is derived from the fact that it has inherited for the territory of the District of Columbia the jurisdiction of the King's Bench."); GOODNOW, PRINCIPLES, *supra* note 104, at 438 ("The supreme court of the District of Columbia may, however, as a result of the fact that it has inherited for the territory of the District of Columbia the jurisdiction of the court of king's bench, issue the mandamus and, probably as a result of the application of the same principle, the writ of certiorari also.").
[164] Degge v. Hitchcock, 229 U.S. 162, 169-70 (1913) ("This case is the first instance, so far as we can find, in which a Federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States government.").
[165] *Id.*
[166] *Id.*; *see also id.* ("For, since the adoption of the Constitution, there have been countless rulings by heads of Departments that directly affected personal and property rights, and where the writ of certiorari, if available, would have furnished an effective method by which to test the validity of quasi judicial orders under attack.").
[167] *Id.* For discussion of state certiorari practice, see *supra* Section I.B.
[168] *Id.* ("[N]one of these decisions are in point in a Federal jurisdiction where no statute has been passed to enlarge the scope of the writ at common law.").

administrative quality to the hearing and to the order" that was "sufficient to prevent it from being subject to review by writ of certiorari."[169]

Justice Lamar's reasoning is difficult to parse.[170] But the Court was clearly influenced by the fact that the Postmaster General's "determination could be attacked in equity and was thus subject to an adequate remedy."[171] Flipping the "adequate alternative remedy" requirement on its head,[172] the Court seemed to suggest that certiorari was unavailable because the plaintiffs "had the right to apply for and obtain appropriate relief in a court of equity."[173]

While not ruling out the availability of certiorari on "exceptional facts," the Court so significantly cabined the reach of the writ as a means of reviewing administrative action that it was effectively unavailable. In the words of the Court of Appeals for the District of Columbia: "the Supreme Court has said so unmistakably that the writ [of certiorari] will not issue to review an administrative order made by an executive officer of the government. To this rule there are *no exceptions*."[174]

Why the writ of certiorari was not invoked as a means of reviewing administrative action at the federal level before the early twentieth century remains something of an open question. The most likely explanation seems to be that the federal courts "simply ignore[d] the resemblance of executive action to adjudication."[175] But for all the confusion surrounding the Court's ruling in *Degge*, the implications of the decision were clear: the common law writs would be allowed to "languish[] in the wings of the federal system."[176] Instead, federal courts would turn to their inherent equitable powers to review administrative action.[177]

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[169] *Id.*; *see also id.* ("The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or certiorari.").

[170] Stefan A. Riesenfeld, John A. Bauman & Richard C. Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota*, 33 MINN. L. REV. 685, 702 (1949) (describing *Degge* as a "nebulous decision"). The Supreme Court's conclusion that certiorari would only lie against a true court-like tribunal is often regarded as a simple misstatement of the law. *See, e.g.*, Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 410 (1958) (describing the Supreme Court's ruling in *Degge* as a "curiously myopic decision" that "tore up certiorari by its historical roots and tossed it out of the system"); Bernard Schwartz, *Forms of Review Action in English Administrative Law*, 56 COLUM. L. REV. 203, 213 (1956) ("[T]he Supreme Court was clearly mistaken as a matter of law in its answer to the question of whether certiorari was available against the judicial-type decisions of administrative agencies.").

[171] Riesenfeld, Bauman & Maxwell, *supra* note 170, at 702.

[172] JAFFE, *supra* note 73, at 167.

[173] *Degge*, 229 U.S. at 171 (citing Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 96 (1902)).

[174] Mickadiet v. Payne, 269 F. 194, 197 (D.C. Cir. 1920) (emphasis added).

[175] Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 802 (1986); *id.* ("[W]ith few exceptions, starting around 1840, the courts deemphasized the judicial nature of the executive-action cases.").

[176] Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019, 2035 (2022); *see also* PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS 25 (1939) (noting that "[t]he courts have constantly declined to permit judicial review of the [Interstate Commerce] Commission's orders by mandamus, certiorari, or prohibition in lieu of the procedure established by the Urgent Deficiencies Act").

[177] *See, e.g.*, Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedural Manipulation*, 38 COLUM. L. REV. 903 (1938). Federal administrative law's turn to equity is discussed further in Part II.

II. The State-Law Origins of the Appellate Review Model

Modern federal administrative law operates on an "appellate review model."[178] The relationship between reviewing courts and agencies mirrors that between appellate and trial courts, which itself mirrors the relationship between judge and jury.[179] As Thomas Merrill's outlined in his seminal recounting,[180] an "appellate model" is characterized by three core features:

> (1) The reviewing court decides the case based exclusively on the evidentiary record generated by the trial court. . . .
>
> (2) The standard of review applied by the reviewing court varies depending on whether the issue falls within the area of superior competence of the reviewing court or the trial court.
>
> (3) The key variable in determining the division of competence is the law-fact distinction. The trial court, which hears the witnesses and makes the record, is assumed to have superior competence to resolve questions of fact; the reviewing court is presumed to have superior competence to resolve questions of law.[181]

In other words, our system of review is characterized by an important division of responsibilities that tracks the relative competence of agencies and the courts. Agencies create the record, find the facts, and apply the law to the facts; courts supervise agencies to ensure that they've gotten the law right, but courts will only intervene on fact-finding where the agency's determinations are egregiously wrong.[182]

But this federal appellate model, today universally recognized as "responsible for many . . . foundational administrative common law doctrines,"[183] is of relatively recent origin. Throughout the nineteenth century, judicial review of federal administrative agencies operated on

[178] *See, e.g.*, Merrill, *supra* note 1, at 940; Mashaw, *Gilded Age*, *supra* note 2, at 1399 ("Contemporary administrative lawyers are accustomed to what Thomas Merrill has called the 'appellate review model' of judicial review of administrative action.")

[179] *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993-94 (1986); *see also* Merrill, *supra* note 1, at 940.

[180] *See* Merrill, *supra* note 1. Merrill's work is regarded as the leading authority on the development of the appellate review model. *See* Cox, *supra* note 16, at 415 (describing Merrill's work as "the most comprehensive account of the appellate model"); Samuel L. Bray, *The Truth of The Truth of Erasure*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 7, 2024), https://www.yalejreg.com/nc/the-truth-of-the-truth-of-erasure-by-samuel-l-bray [https://perma.cc/QC64-EG6D] (describing Merrill's piece as the "foundational work" on the subject); Mashaw, *Gilded Age*, *supra* note 2, at 1399 (crediting Merrill as the originator of the term "appellate review model").

[181] *Id.* at 940; *see also* Ann Woolhandler & Michael G. Collins, *The Public/Private Rights Critics*, 99 Notre Dame L. Rev. 1779, 1785 (2024) ("By the appellate review model, Merrill means that the federal courts review agencies' decisions on the record developed by the agency, with deference to the agency's fact-findings, but with judicial primacy on questions of law.").

[182] Mashaw, *Rethinking Judicial Review*, *supra* note 2, at 2244.

[183] Brinkerhoff, *supra* note 25, at 598-99.

what Jerry Mashaw has termed a "bi-polar" model of review:[184] "Courts either decided questions de novo on records made in court, or they effectively declined jurisdiction."[185]

The development from this bi-polar model to the current appellate model in the federal system is well understood,[186] but it merits a brief recounting. The story begins in 1887, when Congress passed the Interstate Commerce Act (ICA) and created the ICC[187]—the "first major national regulatory agency."[188] The ICA provided that the findings of the ICC were, in judicial proceedings, to be "deemed prima facie evidence as to each and every fact found."[189] To modern eyes, this language might suggest that courts should afford deference to the ICC's fact-finding. But in 1897—in keeping with the nineteenth-century norm—the Supreme Court reaffirmed a unanimous lower-court consensus to the opposite effect, holding instead that "the provision as to prima facie evidence made it clear that the findings of the Commission might be rebutted by new evidence."[190] The Court had no difficulty concluding that it "was not bound by the conclusions of the commission" and that it "could admit additional evidence" where it deemed necessary.[191] That same year, in *ICC v. Cincinnati, New Orleans & Texas Pacific Railroad Co.*, the Court ruled that the ICC did not have the power to prescribe maximum rates.[192] The Court emphasized that "[t]he power to prescribe a tariff of rates for carriage" affects "large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried."[193] In language reminiscent of today's major questions doctrine, the Court refused to "presume[]" that "congress has transferred such a power to any administrative body."[194] By the turn of the twentieth century, "the powers of the Commission were so sharply

[184] Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 Yale L.J. 1636, 1736 (2007) ("'Judicial review' in the Jeffersonian-Republican era seemed to be crystallizing into bipolar modalities.").
[185] Mashaw, *Rethinking Judicial Review*, *supra* note 2, at 2248; Merrill, *supra* note 1, at 947 (noting that forms of action in federal law "dictated full blown trials, in which the court would develop its own record and apply independent judgment in resolving all issues of law and fact, in effect reviewing the agent's action de novo"). The scope of review under the prevailing federal remedies is discussed further in Section II.C.1 *infra*.
[186] In addition to Merrill's seminal work, Merrill, *supra* note 1, see also JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW (2012); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2016).
[187] Interstate Commerce Act, ch. 104, 24 Stat. 384 (1887).
[188] Merrill, *supra* note 1, at 950.
[189] Interstate Commerce Act, ch. 104, § 16, 24 Stat. 384, 384 (1887).
[190] FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 280-81 (citing ICC v. Ala. Midland Ry. Co., 168 U.S. 144 (1897)); *id.* at 293 ("If the administrative finding is made prima facie evidence, the court may receive new evidence in rebuttal."); *see also* Ala. Midland Ry. Co., 168 U.S. at 175 ("It has been uniformly held by the several Circuit Courts of Appeals . . . that they are not restricted to the evidence adduced before the Commission . . . but that additional evidence may be put in by either party . . . ."); Meeker v. Lehigh Valley R. Co., 236 U. S. 412, 430-31 (1915) (noting that the prima facie standard "cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury").
[191] SKOWRONEK, *supra* note 6, at 154-55.
[192] ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 511 (1897).
[193] *Id.* at 507.
[194] *Id.*

restricted by judicial interpretation" that the ICC lacked much meaningful ability to regulate the national railroads.[195]

Congress did not take kindly to what it perceived to be an undemocratic judicial gutting of the ICC. To Congress, the Court looked increasingly like an "opponent of democracy" determined to undermine meaningful efforts to curb corporate power.[196] Representatives favoring more stringent railroad regulation—motivated by what a contemporary writer identified as an "impatience with judicial interference"[197]—began to clamor for legislative reform to re-empower the de-clawed ICC.[198]

That reform came in 1906 with the Hepburn Act.[199] Abrogating the Court's holding in *Alabama Midland*, the Act provided that the ICC's orders would be self-executing thirty days post-promulgation unless they were "suspended or set aside by a court of competent jurisdiction."[200] The Act also largely scrapped the "prima facie evidence" standard that had proved so ineffective in reserving the fact-finding power to the agency.[201] The message to the Court was clear: Congress was unhappy with the Supreme Court's strict review of the ICC's orders, and Congress was prepared to push back.[202]

The Supreme Court took the hint.[203] In a series of decisions in the early twentieth century, the Court retreated from its strict review of ICC orders. In 1907 the Court handed down *Illinois Central v. ICC (Illinois Central I)*[204]—its first decision on the ICC since the enactment of the Hepburn Act. Although the Hepburn Act was not itself engaged, the Court took the opportunity to sketch out the law-fact distinction that would come to define judicial review. As the Court noted, "[w]hether the Commission gave too much weight to some parts of [the testimony] and too little weight to other parts of it is a question of fact and not of law."[205] The weight to be afforded to the testimony was

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[195] *See* Ely, *supra* note 3, at 1132 ("[T]he ICC had difficulty making its orders effective."); Elmer A. Smith, *The Interstate Commerce Commission, the Department of Justice, and the Supreme Court*, 36 AM. ECON. REV. 479, 480 (1946) ("[Supreme] Court decisions . . . rendered the Commission impotent to regulate rates.").

[196] SKOWRONEK, *supra* note 6, at 255; *see also* Merrill, *supra* note 1, at 959 ("[T]he public and the politicians were deeply unhappy with the Court's existing practices regarding judicial review of ICC rate orders.").

[197] Ernst Freund & F.J. Goodnow, *Discussion*, 6 PROC. AM. POL. SCI. ASSOC. 58, 59 (1909).

[198] Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 34 (2018) ("Populist and progressive congressional representatives in the West and South aligned with small shippers and identified the judiciary generally—and the Supreme Court in particular—as an impediment to much-needed regulation.").

[199] Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

[200] *Id.* § 4. The Act did not codify any particular standard of review, but did acknowledge that courts had to power to "enjoin, set aside, annul, or suspend any order or requirement of the Commission." *Id.* § 5. This Article considers the origins of the now-famous "set aside" language in Part IV *infra*.

[201] Stason, *supra* note 12, at 1040 ("Only as to reparations orders was the former prima facie evidence rule retained.").

[202] *See* Merrill, *supra* note 1, at 950 (describing the Hepburn Act as an "the implied threat that if the Court did not back off . . . more drastic action would be in the offing"); Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 200 (2023) (Thomas, J., concurring).

[203] Bernick, *supra* note 198, at 34 ("The Supreme Court would indeed back off—and promptly."); SKOWRONEK, *supra* note 6, at 260 (noting that the Supreme Court the Supreme Court "understood the volatile political nature of the question at hand and the growing precariousness of its own political position").

[204] Ill. Cent. R.R. Co. v. ICC (*Illinois Central I*), 206 U.S. 441, 464 (1907).

[205] *Id.* at 466. For a late nineteenth-century Supreme Court decision echoing this idea, see Cincinnati, N.O. & T.P. Ry. Co. v. ICC, 162 U.S. 184, 194 (1896) ("It has been forcibly argued that in the present case the commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify

for the ICC to determine, not for the reviewing court. In 1910, the Court decided another ICC case by the same name, *Illinois Central v. ICC (Illinois Central II)*,[206] which concerned the ICC's power to allocate railroad cars in times of shortage under the Hepburn Act.[207] For the first time, the Court articulated the "essence of judicial authority" that the courts would exercise in reviewing administrative action.[208] It was "[b]eyond controversy" that courts had the power to review: (a) "all relevant questions of constitutional power or right"; (b) "all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made"; and (c) "whether . . . [the order] must be treated as not embraced" within the agency's delegated authority "because the exertion of authority which is questioned has been manifested in such an unreasonable manner."[209] But just as important as the articulation of these grounds of review, the Court emphasized the limits of its review. Judges should not, the Supreme Court emphasized, "usurp merely administrative functions by setting aside a lawful administrative order upon [the judge's] conception as to whether the administrative order has been wisely exercised."[210]

Finally, and perhaps most famously, the Court in *ICC v. Union Pacific Railroad Co.*[211] broke with the bi-polar model's all or nothing approach to review of administrative fact-finding by laying out the now-famous "substantial evidence" test: "the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."[212] The Court lifted this "substantial evidence" standard (without citation) from the standard that judges employed to review jury verdicts.[213] The "final touches" on the appellate review model were applied when the Court decided that "a federal court reviewing administrative agency actions would review the agency's factual findings under the same standard of review as if the findings had been made by a duly impaneled civil jury."[214]

In just a few decisions, the Court had revolutionized the field of judicial review. And in the years following the Court's ICC cases, the "'appellate-review model' . . . quickly became ubiquitous."[215] To be sure, system-wide change did not occur overnight,[216] and Congress would

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the rates charged. But the question was one of fact, peculiarly within the province of the commission, whose conclusions have been accepted and approved by the circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion.")

[206] ICC v. Ill. Cent. R.R. Co. (*Illinois Central II*), 215 U.S. 452 (1910).

[207] *Id.* at 452-58.

[208] *Id.* at 470.

[209] *Id.*

[210] *Id.*

[211] ICC v. Union Pac. R.R. Co., 222 U.S. 541 (1912).

[212] *Id.* at 548. The "substantial evidence" test is discussed further in Section III.B *infra*.

[213] Merrill, *supra* note 1, at 962 ("The [substantial evidence] standard was borrowed—without citation of authority—from the established understanding of the standard of review that an appeals court applies in reviewing a jury verdict.").

[214] John Gibbons, *Why Judicial Deference to Administrative Fact-Finding Is Unconstitutional*, 2016 B.Y.U. L. REV. 1485, 1507 (2016).

[215] Cox, *supra* note 16, at 398.

[216] Merrill, *supra* note 1, at 962-63 ("It would be misleading to suggest that all decisions after the Hepburn Act deferred to the policy judgments of the ICC, just as it would be an exaggeration to say that all review before the Hepburn Act applied pure independent judgment some backsliding.").

help along the proliferation of the appellate review model.[217] But it is widely accepted that the origins of the appellate model lie in the Supreme Court's decisions following the enactment of the Hepburn Act in the early twentieth century.[218] The "appellate-review model of controlling executive action simply did not exist until the beginning of the twentieth century";[219] it was "invented" by the Supreme Court in the ICC ratemaking cases.[220]

This Part shows otherwise. The appellate model of judicial review was not first created by the Supreme Court in a series of ICC cases in the early twentieth century; the model was developed gradually in the nineteenth century by state courts applying the writ of certiorari.[221]

A. The Mechanics of Certiorari

Understanding how the appellate review model developed in the states requires a closer look at the mechanics of certiorari. First, from its inception as a tool of judicial review, review on certiorari was limited to the record created by the administrative body; the court could not supplement that

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[217] *See* Stason, *supra* note 12, at 1027 (identify, in 1941, "eighteen . . . federal statutes [that] have set up the substantial evidence standard for judicial review of fact decisions of the administrative agencies in charge").

[218] Merrill, *supra* note 1, at 962; John Gibbons, *Why Judicial Deference to Administrative Fact-Finding Is Unconstitutional*, 2016 B.Y.U. L. REV. 1485, 1506 (2016) ("The appellate review model began at the creation of the Interstate Commerce Commission (ICC) in 1887 . . . ."); Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2158 (2023) ("The Interstate Commerce Commission (ICC) and other rate-setting agencies were particularly important in generating the legal disagreements that led to the [appellate] model's continued elaboration."); Mashaw, *Rethinking Judicial Review*, *supra* note 2, at 2245 ("[T]he appellate model's ascendency originates with the Hepburn Act of 1906"); DICKINSON, *supra* note 18, at 160 ("It was the Hepburn Act of 1906 which finally turned the scale."); *cf.* Stern, *supra* note 18, at 74 (noting that the "substantial evidence" standard is a "is a judge-made rule, with its principal development in cases involving the ICC"). A handful of scholars have pushed back on Merrill's traditional recounting of the rise of the appellate review model. Ann Woolhandler and Michael G. Collins, for example, argue that Merrill is "too intent on tying the appellate review model to the Hepburn Act" and that his account minimizes some earlier examples where the Supreme Court seems to defer to administrative fact-finding. Woolhandler & Collins, *supra* note 181, at 1787; *see also* Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 227 (1991) ("The reviewing court, in more freely reviewing errors of law, thus treats the agency more like an inferior tribunal over which it exercises appellate review . . . ."). Adam B. Cox has argued that Merrill's account ignores the role of immigration law in the shaping of the appellate model. Cox, *supra* note 16, at 415 (arguing that an "immigration law lacuna exists in contemporary accounts of the appellate model's crystallization"). However, none of the critics suggest that the appellate review model began to develop before the end of the nineteenth century and none recognize the possibility that the appellate model might have developed in the states.

[219] Schiller, *supra* note 11, at 58; *see also* Merrill, *supra* note 1, at 939 ("[T]he appellate review model emerged after 1906 as an improvised response by the U.S. Supreme Court . . . ."); Merrill, *supra* note 1, at 942 ("Not until the early decades of the twentieth century did courts embrace the salient features of the appellate review model, which allowed decisional authority to be shared between agencies and courts."); Michael S. Greve, *Why We Need Federal Administrative Courts*, 28 GEO. MASON L. REV. 765, 766 (2021) ("This 'appellate review' regime originated . . . in the battle over administrative determinations of railroad rates.").

[220] Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 Yale L.J. 329, 416 (2024) (noting that, on the standard accounting, "the Court invented the appellate-review model in ICC cases in response to a backlash against its earlier practice of reviewing ICC decisions de novo").

[221] Merrill acknowledged that this was a possibility. *See* Merrill, *supra* note 1, at 942 n.7 ("I have not systematically examined state court decisions of the later nineteenth and early twentieth centuries to determine whether the adoption of the appellate review model occurred in state law before federal law. This is a nontrivial possibility, given that many state systems, unlike the federal system, used the writ of certiorari to review agency action. Certiorari entailed calling for the record generated by a subordinate tribunal, and thus would entail a potential precursor to the appellate review model.").

record on its own accord. State courts stringently adhered to this requirement. Second, review on certiorari developed a clear law-fact distinction. As we saw, over the course of the nineteenth century, state courts dropped the "jurisdictional error" requirement and began to use the writ of certiorari to review all questions of law.[222] However, courts remained slow to disturb administrative findings of fact. Rather than wholly abdicating review on all issues of fact, courts deferred to administrative findings but still reserved the right to overturn the most egregious errors. In so doing, state courts broke from the bi-polar model of review that dominated judicial review in federal law.[223] Judicial review on questions of fact was neither de novo nor non-existent; it was deferential.[224] The bottom line is simple: building on the common law writ of certiorari, state courts fashioned an appellate review model long before the model emerged in federal law.

This Part concludes by asking "Why?": Why did the appellate model emerge in the states before it emerged in the federal system? Central to the explanation is, of course, that the writ of certiorari was available as a means of review in the states, but not in the federal system. But other factors also spurred on the development of an appellate system of review at the state level.

1. The Administrative Record

At the heart of the appellate review model is the notion that "courts limit their review to the record that was originally before an agency and the reasoning that the agency used when making its decision."[225] From its inception, and at each stage of its development,[226] certiorari was preoccupied with a review of the lower tribunal's "record." This is apparent from the original purpose of certiorari as a royal demand for information:[227] the King would order that the "record" from the lower tribunal be sent up to a court in which he is sitting so as to be "certified" of the proceedings.[228] When the writ of certiorari to quash developed in the early seventeenth century, it was again originally only available against courts of record.[229] And even as this limitation was

[222] *See supra* Section I.B.2(ii).
[223] *See infra* Section II.A.2.
[224] In the nineteenth century, judicial review at the federal level had "little rhetoric of deference, and even less evidence of it in practice." Merrill, *supra* note 1, at 951; *see also* Young, *supra* note 175, at 802 ("[C]ertiorari . . . entailed great deference to factual conclusions drawn by that body . . . .").
[225] Brinkerhoff, *supra* note 25, at 598.
[226] For a brief recounting the evolution of the writ of certiorari in England, *see supra* Section I.A. For the seminal historical recounting, see HENDERSON, *supra* note 34. For a more modern perspective, see CRAIG, CONTINUITY AND CHANGE, *supra* note 40.
[227] Craig, *supra* note 61, at 84 ("Certiorari certainly existed during the medieval period, and was used for many purposes, most notably as a means for calling up the record on a particular matter.").
[228] R. v Titchmarsh (1914) 22 DLR 272 [277]-[278] ("The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him by an inferior court; whereupon the Sovereign, saying that he wishes to be certified—certiorari—of the matter, orders that the record, etc., be transmitted into a court in which he is sitting."); *cf.* Jenks, *supra* note 53, at 528 ("The numerous writs of Certiorari given in the Register make it difficult to summarize the purposes for which the procedure was originally designed. It was largely concerned with documents, and especially those very important documents which were known as 'records.'"). Indeed, as Edith Henderson has demonstrated, the language of early writs of certiorari can be traced to the older writ of *recordari facias and accedas ad curiam* by which a "record" was created and reported orally by four knights. *See* HENDERSON, *supra* note 34, at 84.
[229] Craig, *supra* note 61, at 84 ("[T]his newly created remedy of certiorari to quash was originally only available against courts of record."); HENDERSON, *supra* note 34, at 112.

dropped,[230] the exclusive focus on the review of the "record" of proceedings remained "sacrosanct."[231]

That review on certiorari was limited to the record produced by the lower tribunal was reaffirmed without hesitation by the earliest American authorities invoking the writ.[232] Over the course of the nineteenth century, courts "time and time again refused to look beyond the record."[233] Writing in the mid-nineteenth century, the Massachusetts Supreme Court noted that it could identify "no instance" where a party seeking review on certiorari had "ever been permitted to prove facts dehors the record."[234] Quite simply: the writ of certiorari did now allow the reviewing court to supplement the record by holding a trial de novo.

2. The Law-Fact Distinction

The second "central feature" of the appellate review model is the law-fact distinction.[235] The court will review questions of law de novo,[236] but it will afford the administrative body significant deference on questions of fact.[237]

Review on certiorari fit this model. We saw in Part I that, over the course of the nineteenth century, state courts dropped the limitation that certiorari could only be used to review "jurisdictional" error.[238] Instead, the writ came to be used to review all errors of law.[239] This development was

[230] RUBINSTEIN, *supra* note 71, at 76.
[231] CRAIG, CONTINUITY AND CHANGE, *supra* note 39, at 591.
[232] *See, e.g.*, Wood v. Tallman's Ex'rs, 1 N.J.L. 153, 155 (1793) ("That this court upon the certiorari cannot go out of the record before them; that the facts stated in the proceedings of the court below were finally and decisively settled, this court being to declare the law alone arising from them.").
[233] Goodnow, *supra* note 74, at 518; *see also* Fore v. Fore, 24 Ala. 478, 484 (1870) ("A certiorari only brings up the record of the proceedings in the inferior court to the superior court and the cause must be heard in the superior court on the record alone. There can be no trial de novo . . . ."); Ex parte Madison Tpk. Co., 62 Ala. 93, 94 (1878) ("The [review on certiorari] in the higher court, to which the proceedings are thus removed, is not de novo, but upon the record certified from the inferior court.").
[234] Mendon v. Worcester Cnty. Comm'rs, 87 Mass. 13, 16 (1862).
[235] Mashaw, *Gilded Age*, *supra* note 2, at 1399; *id.* (noting that "the reviewing court accepts the record as provided by the lower court or agency and modulates the intensity of its review depending upon whether the issue is one of fact or policy—for the agency—or one of law—for the reviewing court . . . ."); *see also* Jellum, *supra* note 11 ("[T]he law-fact distinction is the key variable for dividing judicial competence."); Bernick, *supra* note 198, at 35 ("The relationship . . . created between the Court and agencies—one according to which the Court broadly deferred to the factual records created by agencies but independently resolved questions of law—resembled the relationship between appellate and trial courts."). For discussion of the distinction between law and fact more generally, see Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003); James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147 (1890); Jabez Fox, *Law and Fact*, 12 HARV. L. REV. 545 (1899); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942); and Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899 (1943).
[236] *Chevron* deference was criticized by some as inconsistent with the appellate model that the APA had codified. *See, e.g.*, Alexander MacDonald, *The Labor Law Enigma: Article III, Judicial Power, and the National Labor Relations Board*, 24 FEDERALIST SOC'Y REV. 304, 316 (2023). Others regarded *Chevron* deference as wholly compatible with an elastic understanding of the appellate review model. *See, e.g.*, Mary Hoopes, *Judicial Deference and Agency Competence*, 39 BERKELEY J. INT'L L. 161, 171, 200 (2021) ("[F]ederal appellate review of agency decisions has long been guided by the Supreme Court's decision in *Chevron* . . . .").
[237] *See* Merrill, *supra* note 1, at 940.
[238] *See supra* Section I.B.2(ii).
[239] *See supra* Section I.B.2(ii).

central to the development of an appellate model of review. Appellate review "confers general authority on reviewing courts to decide *all* questions of law," and is not limited to the question "whether the agency was acting within the scope of its jurisdiction."[240] Therefore, it was only by shifting their attention from jurisdictional error to errors of law that courts could usher in a true appellate model. English common law—attached, as it was, to notions of jurisdictional error throughout much of the twentieth century[241]—witnessed no similar emergence of an appellate review model.[242] But even as certiorari was being relaxed to encompass all questions of law, courts declined to extend the writ to encompass questions of facts. The result: a law-fact distinction at the heart of the writ.

That certiorari did not empower reviewing courts to decide questions of fact de novo was the established rule in England,[243] was settled in the earliest certiorari cases in the states,[244] and was continuously reaffirmed over the course of the nineteenth century.[245] As one New York court succinctly put it at the turn of the twentieth century, reviewing questions of fact de novo was "utterly foreign in function to the writ of certiorari as known in the history of the law."[246] In keeping with this rule, courts would not review the weight to be afforded to evidence,[247] pass on the credibility of witnesses,[248] or take new testimony.[249]

But, recognizing that errors of fact could cause meaningful injustice, courts did not *wholly* abdicate their review of fact-finding. While courts refused to "retry the facts" for themselves,[250] certain

[240] Merrill, *supra* note 1, at 944 (emphasis added).
[241] The House of Lords did not fold all errors of law into the category of "jurisdictional errors" of law until 1969. *See supra* note 102for a discussion of the *Anisminic* decision.
[242] *Cf.* Merrill, *supra* note 1, at 944 ("Significantly, English administrative law, and by extension the administrative law in most commonwealth countries, continued to evolve in the twentieth century from the ultra vires model. Only in the United States did administrative law embrace the appellate review model . . . .").
[243] *See, e.g.*, R. v. Cheshire JJ. (1838) 8 Ad. & E. 398; R. v. Bucks JJ. (1843) 3 Q.B. 800; Ez p. Ho wood (1850) 15 Q.B. 121.
[244] *See, e.g.*, Starr v. Trustees of Rochester, 6 Wend. 564 (N.Y. Sup. Ct. 1831) ("Wherever a simple question of fact has been decided by an inferior tribunal authorized by law to decide such question, this court will not review such decision unless directed so to do by statute."); Andrews v. Andrews, 14 N.J.L. 141 (N.J. Sup. Ct. 1833) ("We cannot, upon certiorari, determine matters of fact.").
[245] *See, e.g.*, State v. Buckham, 108 Minn. 8, 9 (1909) (referring to this principle as "simple and well-settled").
[246] People ex rel. Manhattan Ry. Co. v. Barker, 152 N.Y. 417, 432 (1897).
[247] Sheldon v. Stewart, 43 Mich. 574, 576 (1880) ("It is not our province to inquire into the accuracy of the commissioner's deductions from the testimony, or the justness of his conclusions in weighing evidence."); State v. Block, 64 N.J.L. 508 (N.J. Sup. Ct. 1899) ("[T]his court will not consider the weight to be given to testimony . . . ."); People v. Vermilyea, 7 Cow. 108, 136 (N.Y. Sup. Ct. 1827) ("The testimony is no part of the record in the court below. It is not therefore removable either by writ of error or certiorari."); State v. Ohl, 58 N.J.L. 557 (N.J. Sup. Ct. 1896) ("It is not the province of this court on certiorari, to determine disputed questions of fact or consider the weight of evidence.").
[248] Carver v. Chapell, 70 Mich. 49, 51 (1888) ("We cannot review questions of fact upon certiorari, or pass upon the weight of testimony or the credibility of witnesses.").
[249] Smith v. Bd. of Sup'rs of Jones Cnty., 30 Iowa 531, 535 (1871) ("To allow witnesses to be examined in certiorari proceedings would be to convert the proceedings into a trial de novo on the merits, as on appeal, which is not the office of the writ.").
[250] Minneapolis & St. L.R. Co. v. Bd. of R.R. Comm'rs of Minnesota, 44 Minn. 336, 339 (1890); City of St. Louis v. Lanigan, 97 Mo. 175 (1889) ("[I]t has been established by a long line of decisions, so numerous as not to require citation, that in law cases, aside from those where mistake, fraud, prejudice, or passion manifest themselves, . . .").

errors of fact were deemed so egregious as to amount to an error of law.[251] With this sleight of hand, courts reserved to themselves the power to use the writ of certiorari to correct the most obvious errors of fact while leaving the bulk of factual matters to the administrative body. Many tests were developed to determine whether an error of fact was *so* egregious as to amount to an error of law. Most deferentially, courts would ask whether there was "any evidence" to support the finding[252] or whether there was an "entire absence of proof"[253]; but courts would also ask whether the conclusions of fact were a "legitimate inference,"[254] whether the finding was "contrary to the clear weight of evidence,"[255] whether a "preponderance of evidence" cut against the finding,[256] whether "competent"[257] or "creditable"[258] evidence supported the conclusion, whether "any reasonable view" of the evidence supported the conclusion,[259] whether the decision was

[251] *Recent Important Decisions*, 24 MICH. L. REV. 844 (1926) ("It is well settled that when a finding is not supported by any evidence, or is supported by such slight evidence as to be arbitrary or capricious, a question of law rather than a question of fact is raised and the court on certiorari may review it.").
[252] Parsons v. Dickinson, 23 Mich. 56, 59 (1871) ("The question in that court was, not whether the conclusion of the justice from the evidence was satisfactory, but whether there was any evidence from which his conclusion might be drawn."); Journeay v. Brown, 26 N.J.L. 111, 117 (Sup. Ct. 1856) ("[I]f there is any evidence which goes to establish these allegations of the petition . . . the court will not, on certiorari, reverse that decision.").
[253] Hyde v. Nelson, 11 Mich. 353, 357 (1863) (asking if there is an "entire absence of proof"); *see also* De Rochebrune v. Southeimer, 12 Minn. 78, 79 (1866) (asking whether "any testimony to sustain the finding on the facts").
[254] Inhabitants of Great Barrington v. Cnty. Comm'rs, 112 Mass. 218, 224 (1873) ("As a general rule the findings of the commissioners upon matters of fact will not be reviewed on certiorari. . . . [T]he inquiry is whether it will justify the finding as a legitimate inference . . . ."); Jackson v. People, 9 Mich. 111, 120 (1860) ("[I]n examining into the evidence the appellate court does so not to determine whether the probabilities preponderate one way or the other but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal.").
[255] People ex rel. Terminal Ry. of Buffalo v. Bd. of R.R. Comm'rs of State of New York, 53 A.D. 61, 63 (App. Div.); In re Amsterdam, J. & G.R. Co., 33 N.Y.S. 1009, 1010 (Gen. Term 1895); Town of Schaghticoke v. Fitchburg R. Co., 53 A.D. 16, 18 (App. Div. 1900), *aff'd*, 169 N.Y. 609 (1902).
[256] People ex rel. Depew & S.W.R. Co. v. Bd. of R.R. Comm'rs, 4 A.D. 259, 270 (App. Div. 1896); People ex rel. McAleer v. French, 119 N.Y. 502, 508 (1890). This standard was employed frequently in New York, where the Civil Practice Act instructed courts to review whether there was "upon all the evidence such a preponderance of proof against the existence of . . . facts." An Act Supplemental to the Code of Civil Procedure, ch. 178, §§ 2140 (1880).
[257] Keenan v. Goodwin, 24 A. 148, 148 (1892) ("The general rules relating to certiorari are that it does not lie to review findings of fact, where any competent evidence is introduced to support them, nor to correct mere irregularities of proceeding . . . ."); State ex rel. Milwaukee Med. Coll. v. Chittenden, 107 N.W. 500, 519 (1906) ("It may be looked into only to see whether there was competent evidence sufficient, in reason, to incline the mind efficiently to the conclusion reached."); Root v. Barnes, 1 Mich. 37, 39 (1848) (noting that certiorari "[l]ies only to review questions of law, including the question whether any competent evidence exists on which to base the action of the court below").
[258] *Chittenden*, 127 Wis. at 519 ("[W]ant of creditable evidence which, in case of the verdict of a jury would be sufficient upon appeal to require a reversal is jurisdictional error.").
[259] State ex rel. City of Augusta v. Losby, 90 N.W. 188, 191 (1902) ("If a board, in reaching a determination . . . acts without evidence, or any evidence warranting the result reached in any reasonable view of it . . . it commits a clear violation of law—a jurisdictional error—and its final determination may be challenged by writ of certiorari . . . ."). The position in England seems to have been that a court could only review an order on a writ of certiorari if "the evidence stated on the face of the conviction, be such as that no reasonable person could draw the conclusion." The King v. Glossop, 106 E.R. 1062 (1821).

"arbitrary" or "capricious,"[260] whether there was a "substantial basis" for the fact-finding,[261] and—in language that mirrors exactly the standard that would later take root at the federal level—whether the finding was supported by "substantial evidence."[262] The same court,[263] and sometimes even the same judge,[264] would invoke several of these formulations. If the decision of the administrative body satisfied the applicable standard, then the reviewing court would defer to the administrative decision-maker, *even if* the court would have come to a different conclusion on the evidence.[265]

The result was that courts would generally defer to the administrative body on questions of fact but would step in to quash determinations that fell below a certain standard. All of this stands in

[260] People ex rel. Edison Elec. Illuminating Co. v. Barker, 139 N.Y. 55, 61 (1893) ("[I]f there can be but one inference resulting therefrom, and there is no reason appearing for doubting the truth of such evidence, a refusal on the part of the assessors to decide in accordance with it would be merely capricious and arbitrary, amounting to a legal error, and it should not be sustained."); *id.* at 60 ("This decision, it need scarcely be said, is not to be capricious, arbitrary, or fanciful."); In re Poughkeepsie & E. Ry. Co., 18 A.D. 627, 628 (App. Div. 1897) ("The general rule is that where a body of assessors have made the assessment, using their judgment, and not capriciously or in an arbitrary manner, the assessment will not be reviewed."); People ex rel. Connolly v. Murray, 38 N.Y.S. 177, 178 (Super. 1895) ("[T]hat discretion not having been abused, the refusal to grant a license to the relator is not arbitrary or capricious."); People v. Detroit Citizens' St. Ry. Co., 116 Mich. 132, 140 (1898) ("We have no doubt, if it was clearly made to appear that the action of the council was capricious and arbitrary . . . that the courts might intervene.").

[261] *See* State ex rel. Hart v. Common Council of City of Duluth, 53 Minn. 238, 242 (1893) (describing the standard as whether there was a "substantial basis" in fact for the decision); Townsend v. Tobey, 71 Minn. 379, 380 (1898) (same); State ex rel. N.C. Foster Lumber Co. v. Williams, 100 N.W. 1048, 1049 (1904) ("We must look into the evidence far enough to see whether in any reasonable view thereof, in the light of correct rules of law, it furnished a substantial basis for the board's action.").

[262] Dryden v. Swinburne, 20 W. Va. 89, 116 (1882) (emphasis added); *see also* State v. Buckham, 108 Minn. 8, 9 (1909) (noting that, "[o]n certiorari to review an order establishing a ditch and directing it to be laid . . . the appellate court will not . . . examine the evidence to determine its preponderance; but where a material finding is held unsupported, or is contrary to all the *substantial evidence*, such finding may be in itself an error of law" (emphasis added)); *cf.* State ex rel. Hart v. Common Council of City of Duluth, 53 Minn. 238, 242 (1893) ("Other courts hold that the evidence may be brought up, not for the purpose of weighing it, to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal, whether it furnished any legal and *substantial basis* for the decision. The latter is the doctrine of this court as to the office of certiorari." (emphasis added)); People ex rel. Ryan v. Dalton, 7 Misc. 558, 559 (Super. 1894) ("[C]ourts are to interfere upon certiorari only where the action of the board is arbitrary and capricious, and without good and substantial reasons."). The emergence of the "substantial evidence" test in federal law is discussed further in Section III.B *infra*.

[263] *Compare* In re Amsterdam, J. & G.R. Co., 33 N.Y.S. 1009, 1010 (Gen. Term 1895), *with* People ex rel. Edison Elec. Illuminating Co. v. Barker, 139 N.Y. 55, 61 (1893); *compare* State ex rel. Hart v. Common Council of City of Duluth, 53 Minn. 238, 242 (1893), *with* State v. Buckham, 108 Minn. 8, 9 (1909).

[264] *See, e.g.*, Gilbert v. Bd. of Police & Fire Comm'rs of Salt Lake City, 40 P. 264, 266 (1895) (noting first that a court could, on certiorari, review for "competent evidence," before stating that the relevant question was whether there was an "entire absence of proof").

[265] Thompson v. Conway, 53 N.H. 622, 625 (1873) ("A brief statement of the law is, the court do not hold that a difference of judgment between themselves and the commissioners upon the force of evidence is one of the good causes comprehended."); People ex rel. Loughran v. Bd. of R.R. Comm's of State of New York, 158 N.Y. 421, 430 (1899) ("While the learned commissioners may not have attached sufficient importance to the public convenience, as compared with the corporate inconvenience, we cannot review their decision in that regard, but must accept it . . . ."); Jackson, 9 Mich. at 120 (noting that if the finding was "legitimate inference" from the facts proved, then that finding could not be overturned on certiorari "whether that inference would or would not have been drawn by the appellate tribunal"); Swan Creek Twp. v. Brown, 130 Mich. 382, 385 (1902) ("Neither the circuit court nor this court is at liberty to substitute its judgment upon this point for the judgment of the special commissioners who were appointed to determine that question."); Thompson v. Conway, 53 N.H. 622, 625 (1873) ("How much evidence it took to satisfy [the commissioners] was for them to say. It might be more, or less, than would satisfy us.").

stark contrast to review at federal law in the nineteenth century, where courts either refused review determinations of fact at all, or would re-do the fact-finding de novo.[266] Federal courts "from the outset refused to defer to agency findings of fact."[267] As the Supreme Court put it in 1854, it would "hear[] the case de novo, upon the papers and testimony which had been used before the board, . . . and also upon such further evidence as either party may see fit to produce."[268] Such a procedure was wholly anathema to the kind of review exercised on certiorari.

Some states did, via statutory intervention, enlarge the reach of certiorari in limited instances to allow a reviewing court to re-examine questions of fact.[269] These were the exceptions that proved the rule. For example, in 1880, New York enacted a statutory certiorari[270] to empower courts to review assessments for general taxation for alleged "inequality or excessiveness."[271] Commenting on the Act, one court noted:

> While the proceeding is called a certiorari, it is not within the lines of that writ as ordinarily used, because it permits a new valuation upon new evidence, which is, for all practical purposes, a new trial.[272]

That a court could, in reviewing a decision on a writ of certiorari, take new evidence, was "wholly unknown" prior to the 1880 statutory intervention.[273]

3. In the Nature of an Appeal

Review of administrative action on the writ of certiorari therefore perfectly maps onto our conception of an appellate review model: review was exclusively on the record generated by the administrative body;[274] and courts would review all questions of law for themselves but would defer substantially on questions of fact.[275] The appellate nature of this review was not lost on state courts.

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[266] *See infra* Section II.C.1.
[267] Ely, *supra* note 3, at 1132.
[268] United States v. Ritchie, 58 U.S. 525, 534 (1854).
[269] *See generally* GOODNOW, PRINCIPLES, *supra* note 104, at 434 ("[I]n several instances special statutes have been passed which expressly give to the courts a control over the discretion of the administration.").
[270] N.Y. Laws of 1880, ch. 269, § 821 ("[A] certiorari to review or correct on the merits any decision or action of the commissioners under either of the two preceding sections shall be allowed by the supreme court or any judge thereof directed to the said commissioners on the petition of the party aggrieved."). For a thorough analysis of this statutory intervention, see Davies, *supra* note 134.
[271] Brooklyn El. R. Co. v. City of Brooklyn, 16 Misc. 416, 417 (Sup. Ct. 1896) (noting that New York "courts have no power to review assessments for general taxation for alleged inequality or excessiveness, except under a writ of certiorari as allowed by chapter 269 of the Laws of 1880 . . . .").
[272] People ex rel. Manhattan Ry. Co. v. Barker, 152 N.Y. 417, 432 (1897).
[273] Davies, *supra* note 134, at 421 ("There is . . . one feature of the proceedings by certiorari under this Act of 1880, which, previous to the passage of that statute, was wholly unknown. . . . The Act of 1880 . . . provides that if, upon the hearing, it shall appear to the Court that testimony is necessary for the proper disposition of the matter, the Court may take evidence, or may appoint a referee to take such evidence as the Court may direct, and such testimony shall constitute a part of the proceedings upon which the determination of the Court shall be made.").
[274] *See supra* Section II.A.1.
[275] *See supra* Section II.A.2.

We saw earlier that when the Supreme Court was developing the appellate review model at the federal level, it borrowed (without citation) from the standard that judges used reviewing jury verdicts.[276] By the time the Supreme Court was hinting[277] at the parallels in the early twentieth century, State courts had been *explicitly* analogizing certiorari review to review of jury verdicts for decades.[278]

[276] *See supra* notes 211-214 and accompanying text.

[277] It was not until 1939 that the Supreme Court explicitly acknowledged that the "substantial evidence" test in the judicial-review context was the same as the "substantial evidence" test in the jury-verdict-review context. *See* NLRB v. Columbian Co., 306 U.S. 292, 300 (1939) (noting that the "substantial evidence" necessary to support an administrative determination "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury").

[278] *See, e.g.*, Thompson v. Conway, 53 N.H. 622, 625 (1873) ("[T]he findings of fact of county commissioners should also be set aside for gross errors and mistakes; and the action of courts in setting aside verdicts of juries is cited as being of analogous character."); Steenerson v. Great N. Ry. Co., 69 Minn. 353, 375 (1897) ("The district court can review the findings of the commission only so far as to determine whether or not the rates fixed are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand."); Swan Creek Twp. v. Brown, 130 Mich. 382, 385 (1902) (noting that, when challenged on a writ of certiorari, "[t]he finding of the special commissioners . . . to determine this is as conclusive upon the courts as is the verdict of a jury upon contested questions of fact."); Jackson v. People, 9 Mich. 111, 120 (1860) ("The same principles which require a conviction to be quashed when upon the facts and the law applicable to them the case is insufficient to justify it, would seem to require that rulings of law upon the admission or exclusion of evidence should be reviewed."); Kirkpatrick v. Cason, 30 N.J.L. 331, 334 (Sup. Ct. 1863) (granting certiorari because "the facts and circumstances disclosed by the evidence were such as would have justified a jury, had the question been submitted to one"); State ex rel. Milwaukee Med. Coll. v. Chittenden, 107 N.W. 500, 519 (1906) ("[W]ant of creditable evidence which, in case of the verdict of a jury would be sufficient upon appeal to require a reversal is jurisdictional error: error committed outside of jurisdiction instead of in the exercise of jurisdiction, where the writ takes hold, performing its function of returning the tribunal to its proper sphere of action."); *cf.* Conely v. McDonald, 40 Mich. 150, 157-58 (1879) (discussing the "province of the jury to decide questions of fact" and noting that review on certiorari on matters of fact is only permissible where there "entire absence of proof upon some material fact found" (citing Hyde v. Nelson, 11 Mich. 353 (1863)); People ex rel. Cook v. Bd. of Police of Metro. Police Dist., 39 N.Y. 506, 518 (1868) (noting that the relevant standard for review on certiorari was whether "the case were such at the close of the trial that it would have been erroneous to submit the question to a jury"). Starting in 1880, New York's Civil Procedure Act instructed courts reviewing administrative action on a writ of certiorari to ask whether the evidence found by the administrative body would be set aside by the court if found by a jury. *See infra* note 279. After 1880, New York courts would consistently compare—with and without citation to the Civil Procedure Act—review on certiorari to review of jury verdicts. *See, e.g.*, People ex rel. O'Callahan v. French, 123 N.Y. 636, 636 (1890); People ex rel. Minchen v. MacLean, 1 Misc. 463, 467 (Super. 1893); People ex rel. Cross v. Greene, 98 A.D. 620, 620 (App. Div. 1904); People ex rel. Graham v. Partridge, 91 A.D. 557, 559 (App. Div.), *aff'd*, 179 N.Y. 531 (1904); People ex rel. Downes v. Greene, 96 A.D. 1, 3 (App. Div. 1904), *aff'd*, 181 N.Y. 550 (1905); People ex rel. Lang v. Martin, 5 A.D. 217, 219 (App. Div. 1896); People ex rel. Brady v. Moss, 38 A.D. 633, 635 (App. Div. 1899); People ex rel. Mallon v. Roosevelt, 16 A.D. 331, 332 (App. Div. 1897); In re Schomaker, 15 Misc. 648, 650 (Com. Pl. 1895); People ex rel. Burby v. Common Council of City of Auburn, 33 N.Y.S. 165, 169 (Gen. Term 1895); People ex rel. Sutliff v. Fulton Cnty. Sup'rs, 26 N.Y.S. 610, 612 (Gen. Term 1893); People ex rel. Donlon v. Bd. of Town Auditors of Pelham, 26 N.Y.S. 122, 125 (Gen. Term 1893); People ex rel. Bohan v. MacLean, 13 N.Y.S. 225, 226 (Gen. Term 1891); People ex rel. Mahoney v. MacLean, 11 N.Y.S. 486, 487 (Gen. Term 1890); People ex rel. Light v. Skinner, 37 A.D. 44, 45 (App. Div.), *aff'd*, 159 N.Y. 162 (1899); People ex rel. Erie R. Co. v. Bd. of R.R. Commissioners, 54 A.D. 615, 615 (App. Div. 1900); People ex rel. Mahoney v. MacLean, 11 N.Y.S. 486, 487 (Gen. Term 1890); People ex rel. McAleer v. French, 119 N.Y. 502, 508 (1890); People ex rel. Wyatt v. Williams, 1885 WL 8990 (N.Y. Gen. Term. 1885); People ex rel. McElearney v. Monroe, 106 A.D. 607, 607 (App. Div. 1905); People ex rel. Am. Contracting & Dredging Co. v. Wemple, 14 N.Y.S. 859, 863 (Gen. Term 1891), *aff'd*, 129 N.Y. 664 (1892); People ex rel. Masterson v. Police Commissioners, 110 N.Y. 494, 498 (1888); People ex rel. Dwyer v. Hogan, 101 A.D. 216, 218 (App. Div. 1905); People ex rel. Town of Preble v. Priest, 90 A.D. 520, 528 (App. Div. 1904), *aff'd*, 180 N.Y. 532 (1905); People ex rel. Reardon v. Partridge, 86 A.D. 310, 313 (App. Div. 1903); People ex rel. Doherty v. Police Comm'rs of City of New York, 32 N.Y.S. 18, 19 (Gen. Term 1895).

In 1880, New York codified the comparison between review on certiorari to review of jury verdicts in its Civil Practice Act.[279] After outlining the procedural requirements associated with issuing the writ of certiorari,[280] the Act laid out the questions that a court should address conducting review on the writ:

> The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:
>
> . . .
>
> 4. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.
>
> 5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, would be set aside by the court, as against the weight of evidence.[281]

As one contemporary commentator noted, "[t]he meaning of this section is . . . identical with the common-law rule adopted before the passage of this section."[282] The State of Washington followed suit and incorporated much the same approach explicitly into its own statutory definition of

[279] An Act Supplemental to the Code of Civil Procedure, ch. 178 (1880). In his seminal analysis on the development of the appellate model of judicial review in federal law, Merrill makes brief reference to this section of the New York Civil Practice Act as "a glimmer of the appellate review model in the midst of what is otherwise a sea of de novo review." Merrill, *supra* note 1, at 949. But the standard of review codified in the NYCPA largely codified the pre-existing common law position. *See infra* note 282. As this Part has sought to demonstrate, both in New York and in other states appellate-style review was the norm.

[280] An Act Supplemental to the Code of Civil Procedure, ch. 178, §§ 2120-2139 (1880).

[281] *Id.* § 2140. Courts had no difficulty applying this provision. *See* the New York cases cited at note 278 *supra*.

[282] Goodnow, *supra* note 74, at 527 (emphasis added); *see also* JAMES NEWTON FIERO, PRACTICE IN SPECIAL PROCEEDINGS IN THE COURTS OF RECORD OF THE STATE OF NEW YORK UNDER THE CODE OF CIVIL PROCEDURE AND STATUTES: WITH FORMS 392 (2d ed. 1899) (quoting Bliss's Annotated Code) ("The section is new, but the commissioners considered, when prepared by them, that it made no change in the law . . . ."). The report of the codifiers of the 1880 Act also noted that "Subdivision 5 is not in conflict with the ruling in [*People v. Smith*, 45 N.Y. 772 (1871)], but it settles a question which was not considered therein, in general accordance with the opinion of Potter, J., in *People v. Eddy*, 57 Barb. 593 . . . ." FIERO, *supra* note 282, at 392. Some courts regarded § 2140 as an expansion of the pre-1880 common law rule because it instructed courts to "pass upon all questions of law *and fact*," People ex rel. Gilon v. Coler, 78 A.D. 248, 258 (App. Div. 1903) (emphasis added), and to determine whether the inferior body's "determination [on a question of fact] . . . was against the preponderating weight of evidence," People v. Hildreth, 126 N.Y. 360, 364 (1891); *see also* People ex rel. McAleer v. French, 119 N.Y. 502, 508 (1890). At common law, courts would generally "not consider the weight of the evidence" on a writ of certiorari. State v. Dist. Ct. of Silverbow Cnty., 56 P. 281, 282 (1899); *see also* Vill. of Bellefontaine v. Vassaux, 55 Ohio St. 323, 324 (1896) (noting that, on a writ of certiorari, "no review upon the weight of the evidence could be had"). In other words, § 2140 allowed for more searching review of the evidence than common-law certiorari generally allowed. However, because review of the facts remained narrowly cabined, New York was not regarded as an outlier jurisdiction on certiorari. *See* FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 255 (noting that New York "may be regarded as a representative American jurisdiction" as regards review on certiorari).

"certiorari" fifteen years later.[283] The writ of certiorari was distinct from other means of reviewing administrative action because only certiorari was "in the nature of an *appeal*";[284] review was "in no sense a trial de novo."[285]

B. The Pull of the Appellate Model

State courts fashioned a *functional justification* for the appellate style of judicial review demanded by certiorari.[286] As one court explained, "[i]t is the settled practice of this court to give great weight to the conclusion of the board upon such question[s of fact]," given the board's "experience, technical knowledge, and means of ascertainment."[287] The courts recognized that it was the administrative body, and not the judiciary, that had expertise in "matters of a purely administrative nature" and "questions of policy affecting the security or convenience of the public."[288] And it was the administrative body, not the judiciary, that had "all the evidence before them."[289] On these

[283] An Act Regulating Special Proceedings of a Civil Nature, ch. 65, § 12, Stat. 114, 116 (1895) (designating the writ of certiorari the "writ of review" and providing that "The questions involving the merits to be determined by the court upon the hearing are . . . If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, would be set aside by the court, as against the weight of evidence.").

[284] Wilder v. Case, 1837 WL 2709 (N.Y. Sup. Ct. 1837) ("All the law will permit by way of opening the judgment or decree of a court of competent jurisdiction, is a review of its decision for error, on appeal, or a proceeding in nature of an appeal by certiorari or writ of error."); State v. Linton, 42 Minn. 32, 32 (1889) ("The office of this writ, which is in the nature of appeal, is to bring up for review the final determinations of an inferior tribunal, which, if unreversed, would stand as a final adjudication of some legal right of the relator."); Morgan v. Ohio River R. Co., 39 W. Va. 17, 19 (1894) (referring to certiorari as an "appellate proceeding"); *see also* Riesenfeld, Bauman & Maxwell, *supra* note 170, at 702 (noting that "certiorari itself is in the nature of an appeal," and noting that "the writ [of certiorari] is strictly a corrective, not a preventive, remedy, in the nature of a writ of error or appeal"); GEORGE EMRICK HARRIS, A TREATISE ON THE LAW OF CERTIORARI AT COMMON LAW AND UNDER THE STATUTES: ITS USE IN PRACTICE § 259, at 187 (1893) (noting that when there was an assessment, and the statute gave the right of appeal, but the affected person had no opportunity to appeal, they could proceed by a writ of certiorari "in the nature of an appeal" governed by the same rules); Goodnow, *supra* note 74, at 514 (noting that certiorari had been specialized "into a means of appeal against the action of administrative officers"); *cf.* Goar v. Jacobson, 26 Minn. 71, 72, 1 N.W. 799, 799 (1879) ("The jurisdiction to proceed by writ of certiorari is in its nature appellate or revising, and not original."). That certiorari operated like an appellate proceeding was apparent to federal courts as well. *See, e.g.*, Taylor v. Louisville & N.R. Co., 88 F. 350, 358 (6th Cir. 1898) ("[C]ertiorari in the state courts . . . is in its nature supervisory and appellate.").

[285] State v. State Bd. of Equalization, 75 Wash. 90, 95 (1913).

[286] When discussing the development of the appellate model of judicial review in federal administrative law, Merrill notes that one of the key ways in which academics (specifically, Professor John Dickinson) contributed to the development of the appellate model was by offering this kind of functional justification. Merrill, *supra* note 1, at 974 ("Dickinson supplied something that was missing from the Supreme Court's foundational decisions construing the post-Hepburn Act ICA: a functional justification for the new appellate review model in terms of what we would today call comparative institutional analysis. . . . One point he made with particular effectiveness was that the old de novo review model failed to achieve a differentiation of functions, produced delay, and was duplicative and wasteful.").

[287] People ex rel. New York, N.H. & H.R. Co. v. Bd. of R. Comm'rs of State of New York, 81 A.D. 242, 249 (App. Div.).

[288] Minneapolis & St. L.R. Co. v. Bd. of R.R. Comm'rs of Minnesota, 44 Minn. 336, 339 (1890); *cf.* San Diego Water Co. v. City of San Diego, 118 Cal. 556, 587, 50 P. 633, 644 (1897) (noting that "[with]hat may be the lowest current rate of interest upon an investment depends upon so many circumstances" that the court was not equipped to assess).

[289] Manchester Mills v. City of Manchester, 57 N.H. 309, 314 (1876) ("It is not the province of this court to determine these matters of fact, neither is it apparent to me how, without all the evidence before them which was before the commissioners, we can determine how much weight is due to the affidavits appended to the case . . . .").

issues, therefore, "much importance should be attached to the opinions of the commissioners."[290] The requirements of the writ did not demand this functionalist justification: the functional justification was offered as a policy rationale for why the law *should* employ this appellate-style review.

At the federal level, the traditions surrounding de-novo review "exerted a strong gravitational pull on the nineteenth-century judiciary" that colored their analysis of other review mechanisms.[291] This played out in reverse at the state level. State courts, accustomed to reviewing administrative action on an appellate model—and with clear justifications for this style for review—were highly suspicious of any legislative intervention that appeared to introduce de-novo review.

Consider, for example, the statutory right to review in an 1892 New York law. The law provided that, if the state board of railroad commissioners could refuse to grant a mandatory certificate (certifying that "public convenience and necessity required the construction of the proposed railroad") to a railroad, then the directors of the railroad could seek review from the Supreme Court "to order said board, . . . to issue said certificate, and it shall be issued accordingly."[292] The statute made no mention of the standard of review. But the courts had no doubt about which standard they should employ.[293] As the New York Supreme Court explained, the "railroad commissioners are vested with the supervision of the railroads of the state."[294] It is these commissioners who had the "special and peculiar duty to investigate and inform themselves as to the condition of existing roads, and as to the needs of the various parts of the state for transportation facilities."[295] Because "proper discharge of their official duty requires them to be specially informed," their "opinion upon these matters [of fact] . . . is entitled to respect and consideration."[296] As another court

[290] People ex rel. Terminal Ry. of Buffalo v. Bd. of R.R. Comm'rs of State of New York, 53 A.D. 61, 63 (App. Div. 1900) ("In reviewing the proceedings of railroad commissioners, courts recognize the fact that much importance should be attached to the opinions of the commissioners."); City of St. Louis v. Lanigan, 97 Mo. 175, 175 (1889) ("Besides, in cases of the sort now under consideration, it is to be observed that the judgment of the commissioners is not formed exclusively upon evidence submitted to them. They are required to view the premises, and they have the advantage of an actual personal inspection, and they are to be guided to some extent by that . . . .").

[291] Merrill, *supra* note 1, at 949-50; *id.* at 949 ("The traditions surrounding these forms of action exerted a strong gravitational pull on the nineteenth-century judiciary."). For example, when Congress provided a right to "appeal" to the California district court from a special commission deciding land disputes, the Supreme Court cautioned courts not to be "misled by a name" and insisted that on this "appeal" all issues of fact and law would be reviewed de novo. *Id.* at 950. There are other examples, including the narrow construction of the provision in the Interstate Commerce Act of 1887 that orders of the ICC were "prima facie evidence of the matters therein stated." *Id.*

[292] LAWS OF 1892, ch. 676, § 59

[293] A practice developed to the effect that "[u]nless the statute itself ma[de] some other provision with respect to judicial review, an administrative determination made after a hearing prescribed by statute (expressly or by implication) will be reviewable by a proceeding in the nature of certiorari . . . ." ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK: REPORT TO HONORABLE HERBERT LEHMAN 91 (1942); this presumption of certiorari-style review was also engaged "where a hearing, though not prescribed by statute, [was] required by due process." *Id.* at 91 n.12.

[294] In re Amsterdam, J. & G.R. Co., 33 N.Y.S. 1009, 1010 (Gen. Term 1895).

[295] *Id.*; *see also id.* (noting that the commissioners' "discretion enlightened and guided by their experience in the affairs of railroads, the problems of transportation, the needs of the people, together with the special facts brought before them in each particular case").

[296] *Id.*

explained more bluntly: the "board is much better able to pass upon [questions of fact] than this court is."[297]

The same logic governed in other states and in other contexts. An 1867 New Hampshire law concerning the laying of highways provided that "Any report of the commissioners may, for good cause, be recommitted, or the same may be accepted, and judgment rendered thereon, establishing the highway, the alterations, or other matter reported upon."[298] The Superior Court was tasked with determining whether an error of fact amounted to good cause. The court answered in the negative:

> The statute makes the commissioners the tribunal to judge of the necessity of the highway. In this respect, the court has no power to revise the judgment of the commissioners. It may be that, in judging of the necessity of the highway, or in receiving or rejecting testimony, they erred. They probably frequently do. But they are a tribunal taken from among the people, elected with reference to their supposed fitness for the duties of the place, and are probably as capable of judging of the necessities of the public in this particular as any other tribunal that could be selected.[299]

Rather than reviewing the commissioners' fact-finding de novo, the court analogized the standard of review to that applicable to the review of jury verdicts.[300]

Finally, consider the position of a state railroad commission analogous to the federal ICC. An 1887 Minnesota statute established judicial review of orders of the Minnesota's Railroad and Warehouse Commission.[301] Section 15 provided:

> Upon . . . appeal, . . . the district court shall have jurisdiction to, and it shall, examine the whole matter in controversy, including matters of fact as well as questions of law, and to affirm, modify or reverse such order in whole or in part, as justice may require . . . .[302]

The Supreme Court of Minnesota in *Steenerson v. Great N. Ry. Co.* held that the statutory command for courts to "examine the whole matter in controversy, including matters of fact" did not permit the court—as the language might seem to suggest—to review matters of fact de novo.[303] Rather, it meant only that "[t]he district court can review the findings of the commission . . . so far

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[297] People ex rel. New York City & W.R. Co. v. Bd. of R. Comm'rs, 81 A.D. 237, 240 (App. Div.), *aff'd sub nom.* People ex rel. New York City & W. Ry. Co. v. Bd. of R. R. Comm'rs, 176 N.Y. 577 (1903); *see also* In re New Hamburg & P.C.R. Co., 27 N.Y.S. 664, 665 (Gen. Term 1894) ("[T]he commissioners should be credited with some technical knowledge which this court is not presumed to possess."); People ex rel. Loughran v. Bd. of R.R. Comm'rs of State of New York, 32 A.D. 158, 165-66 (App. Div. 1898), *aff'd*, 158 N.Y. 421 (1899) ("We should also remember that the members of the board of railroad commissioners, before passing upon the question submitted to them, had the benefit of a personal inspection of the line of the railroad, of the existing depots, and of the city of Kingston . . . .").
[298] Thompson v. Conway, 53 N.H. 622, 626 (1873).
[299] *Id.*
[300] *Id.*
[301] 1887 Minn. Laws 46.
[302] *Id.* at 63.
[303] Steenerson v. Great N. Ry. Co., 69 Minn. 353, 375 (1897).

as to determine whether or not the rates fixed are so unreasonable as to be confiscatory."[304] In this way, the review of the commission functioned "just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand."[305]

C. Explaining the State-Law Origins

This Part has demonstrated that an appellate model of judicial review *did* develop in the states before the model developed in the federal system.[306] This Section asks *why* the appellate model developed in the states.

The primary explanation lies with the mechanics of the writ of certiorari. After shedding its strict focus on jurisdictional error,[307] the mechanics of the writ naturally came to demand an appellate style of review.[308] And because certiorari was available to review administrative action in state but not federal law,[309] the certiorari-based appellate model could *only* develop in the states.

But this explanation is incomplete without an understanding of how the mechanics of judicial review differed for the available federal means of review. This Section demonstrates why none of the three principal federal judicial review remedies—the writ of mandamus, officer suits, and actions in equity—were conducive to the development of an appellate model. It then demonstrates that important constitutional and political factors may have also played a role in furthering the development of the appellate review model in the states but not in the federal system.

1. The Available Federal Remedies

Just as with judicial review in the states, it is misleading to speak of any *general* system of judicial review in nineteenth-century federal administrative law.[310] Through the early twentieth century, federal administrative law relied principally on three different means of challenges administrative decision-making: (1) the writ of mandamus to compel an official within the District of Columbia[311] to act, (2) state-law tort suits against officials, and, starting in the late nineteenth century, (3) actions in equity. Unlike certiorari, the mechanics of review for all three of these remedies were inimical to an appellate style of review.

First, consider the writ of mandamus—which, although cabined to D.C., was nevertheless "central to judicial review in the early Republic."[312] Unlike certiorari, mandamus called for original judicial proceedings: review of administrative determinations was "not limited to the record developed in

[304] *Id.*
[305] *Id.*
[306] *See supra* Section II.A, II.B.
[307] *See supra* Section I.B.2(ii).
[308] *See supra* Section II.A.
[309] *See supra* Section I.C.
[310] *See* Cox, *supra* note 16, at 399 n.241 ("Given the nineteenth-century approach, it is somewhat anachronistic to describe judicial involvement within that traditional framework as 'judicial review,' as courts did not think of themselves as sitting in 'review' in the sense that that term is typically invoked today.").
[311] For an analysis of why the writ of mandamus was cabined to suits in the District of Columbia, see *supra* notes 158-160 and accompanying text.
[312] Bamzai, *Origins*, *supra* note 186, at 908.

the administrative proceedings."[313] The general rule in mandamus proceedings was that courts would deal with any factual disputes in a suit traversing the return, triable to a jury.[314] This was the approach adopted in the Statute of Anne in England in 1710[315] and generally followed in the United States.[316] Review on mandamus therefore took the form of a trial de novo,[317] with all issues of fact tried "on new evidence before a court, a referee or a jury."[318] In the words of Judge Marshall in *Marbury v. Madison*: "The writ of mandamus is in the nature of an appeal as to fact as well as law."[319]

Why was administrative fact-finding reviewed de novo in mandamus proceedings but not in certiorari proceedings? The answer lies in the fact that the duty being enforced by mandamus was, definitionally, "ministerial" rather than discretionary; this, it was thought, generally meant that the legislature had not intended to empower the official "to pass even with prima facie effect on controverted issues of fact."[320] Not so on the writ of certiorari. Since "[t]he very purpose" of an order-issuing tribunal was to "pass[] on facts that may be controversial," it was presumed that the legislature's objective in establishing the tribunal was "to recognize the administrative authority as an appropriate fact-trying tribunal, providing for a judicial check only to see that this function is properly performed."[321]

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[313] BENJAMIN, *supra* note 293, at 353-54.

[314] SAMUEL SLAUGHTER MERRILL, LAW OF MANDAMUS § 290, at 353 (1892).

[315] Statute of 9 Anne, Ch. 20. The statute of Anne originally only made the return traversable in cases involving municipal corporations. This rule was extended in 1730 to apply in all cases of mandamus. Statute of 1 Will. IV. Ch. 21.

[316] *Mandamus - Proceedings - Traverse of Return to Alternative Writ*, 31 HARV. L. REV. 310 (1917) ("The statute of Anne or similar legislation forms a component part of the law of most of the United States."). The Statute of Anne also represented the law in the District of Columbia and therefore governed federal mandamus proceedings. *See* U.S. ex rel. W. v. Hitchcock, 19 App. D.C. 333, 346 (D.C. Cir. 1902) (noting that the "substance" of "the provisions of the Statute of 9 Anne, Ch. 20, regulating the proceedings in mandamus, . . . ha[ve] been embodied in the new code for this District, Secs. 1273-1282."). In the latter half of the nineteenth century, courts in Connecticut and Florida held that the mandamus-issuing court could try disputes of fact itself without the need for a jury. Castle v. Lawlor, 47 Conn. 340 (Conn. 1879); State v. Suwannee Cnty. Comm'rs, 21 Fla. 1 (1884). Texas adopted much the same approach via Constitutional Amendment in 1891. See Lloyd E. Price, *Jurisdiction of Supreme Court in Original Mandamus Involving Determination of Fact Controversy*, 16 TEX. L. REV. 527, 529 (1938) (describing the 1891 amendment and noting that, "[w]hatever the rule may be in other jurisdictions, it seems clear in Texas that it is not the intention of the Constitution that fact issues in original mandamus in the Supreme Court should necessarily be decided by a jury").

[317] Merrill, *supra* note 1, at 948 ("[M]andamus, although it was a very narrow form of review, was also de novo . . . ."); *id.* ("Significantly, mandamus was also an original action, and hence if any factfinding was required, the court would find the facts for itself."); Young, *supra* note 175, at 802; BENJAMIN, *supra* note 293, at 91 ("In a proceeding in the nature of certiorari, review of administrative determinations of fact is limited to the record of the hearing before the administrator; in a proceeding in the nature of mandamus, issues of fact are ordinarily triable on new evidence before a court, a referee or a jury.").

[318] BENJAMIN, *supra* note 293, at 354.

[319] Marbury v. Madison, 5 U.S. 137, 148 (1803); *id.* at 147-48 ("'[A]ppellate' is not to be taken in its technical sense, as used in reference to appeals in the course of the civil law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings of another, either as to law or fact, or both."); FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 260 (noting that on a writ of mandamus, "the judicial review is a trial de novo").

[320] FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 267; *id.* at 259 (noting that transferring questions of fact to the court for trial de novo "may be justified on the ground that the administrative refusal was not preceded by anything in the nature of a legal hearing, incorporated in an appropriate record").

[321] *Id.* (noting that, when reviewing administrative action on certiorari, "the court does not try facts any more than an appellate tribunal does").

But although, when available, review on mandamus was sweeping, it was often simply not available. The writ would not lie outside the District of Columbia,[322] or where the official's exercise of their duty was discretionary.[323] Rather than mandamus, it was common law actions in tort or property against individual administrative officials that became "[t]he principal means of challenging [federal] agency action."[324] As original actions, the record in these cases was necessarily developed by the court rather than by an administrative body.[325] And in reviewing these actions, the court would again be exercising "de novo decision-making power concerning both questions of fact and questions of law."[326] These suits clearly "did not privilege an appellate model of judicial review."[327]

With the expansion of the administrative state over the course of the nineteenth century, the challenges associated with relying on mandamus and common law tort suits to keep agencies in check became increasingly apparent. System-wide change began when Congress granted federal courts general federal question jurisdiction in 1875.[328] From this grant of jurisdiction, courts inferred the power to enjoin unlawful administrative action on the basis that only jurisdiction was necessary for the court to exercise its inherent equitable powers.[329] In 1902 the Court handed down

[322] *See supra* notes 158-160 and accompanying text.
[323] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165 (1803) ("[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."). For discussion of the development of mandamus review, see Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481 (2004).
[324] HICKMAN & PIERCE, *supra* note 4, § 1.4. In the early twentieth century, these common law suits soon lost in importance. *See* Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 229 (1936) ("The theoretical remedy of an action for damages against the officer as an individual is in this country usually hardly more than an academic possibility.").
[325] Merrill, *supra* note 1, at 947-48 ("Because the officer suit was an original action filed in court, the record was necessarily developed by the court. The standard of review of both law and fact was one of independent judgment.").
[326] Mashaw, *Gilded Age*, *supra* note 2, 1399-1400 ("[W]here cases were before the courts exercising original jurisdiction, as in damage actions against government officers or patent infringement suits, the courts exercised de novo decision-making power concerning both questions of fact and questions of law."); Bamzai, *Origins*, *supra* note 186, at 948 (noting that in "tort or contract actions against the responsible executive officer or another party . . . the Court's interpretive role was essentially de novo").
[327] Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2154 (2023); *see also* Bagley, *supra* note 186, at 1299 ("Common law actions against federal officers . . . did not at all resemble presumptive appellate-style oversight of administrative action.").
[328] An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts, and for Other Purposes, ch. 137, § 1, 18 Stat. 470, 470 (1875) (codified as amended at 28 U.S.C. § 1331) (granting federal courts jurisdiction over "all suits of a civil nature at common law or in equity . . . arising under the . . . laws of the United States").
[329] *See* Noble v. Union River Logging Railroad Co., 147 U.S. 165 (1893) (granting, for the first time in federal law, an injunction against a federal agency); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 122 (1998) ("[T]he 1875 grant of jurisdiction is best interpreted as an authorization for federal equity courts to . . . continue applying the preexisting federal equity law . . . ."); Merrill, *supra* note 1, at 949 ("After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action. They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action."); Bamzai, *Origins*, *supra* note 186, at 955 ("[T]he Court inferred the authority to enjoin unlawful executive-branch action from the general grant of 'equity' jurisdiction.").

its seminal ruling in *American School of Magnetic Healing v. McAnnulty*,[330] articulating a "general theory" to justify the use of injunctive relief to constrain federal administrative action.[331]

By the early twentieth century, actions in equity were quickly becoming the "mainstay for review of federal administrative action."[332] But until the Supreme Court's revolutionary ICC cases in the early twentieth century,[333] suits in equity—just like mandamus and officer suits—generally demanded de-novo review of administrative fact-finding, on a record created in the court.[334] In *Alabama Midland Railway*, handed down shortly after Congress had set up the ICC, the Court emphasized that it was "not restricted to the evidence adduced before the Commission, [but] additional evidence may be put in by either party."[335] It was "the duty of the court . . . to decide, as a court of equity, upon the entire body of evidence."[336] Indeed, many railroad companies—unhappy with the rates set by state commissions and unsatisfied with the deferential standard of review in state courts—made every effort to seek injunctive relief in federal court because of its more interventionist approach.[337]

In all its various forms, therefore, "the nature of [federal] review was uniformly what we would now call de novo."[338] Certiorari stood alone in requiring courts to review administrative decisions on the record generated by the administrative body and requiring courts to defer to administrative fact-finding. To federal courts accustomed to reviewing administrative determination of facts de novo, a transition to an appellate model of judicial review required some significant re-wiring. The development towards an appellate review model in the federal system was not the same intuitive evolution of existing remedies that it was in the states.

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[330] Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902) ("The acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction [in equity] to grant relief.").
[331] Duffy, *supra* note 329, at 122.
[332] 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, § 23.04, at 307 (1st ed. 1958).
[333] *See supra* notes 203-214 and accompanying text for a brief discussion of the Supreme Court's revolutionary ICC decisions from the start of the twentieth century.
[334] Goodnow, *supra* note 74, at 514 ("Equitable appellate proceedings . . . brought up before the appellate court the whole matter in controversy, including questions both of law and of fact, to be tried anew as if the case had never been tried before."); Merrill, *supra* note 1, at 949 (noting that equity actions challenging administrative action were "original actions in which the trial court developed the record. So review here was also de novo, both in terms of the record generated and the exercise of independent judgment by the court"). Adam Cox has suggested that the "invention" of the appellate review model in federal administrative law was "abetted by other legal developments—including the emergence of equity jurisdiction as a source of authority to review agency action . . . ." Cox, *supra* note 16, at 399. This may be true insofar as the federal courts' drift towards equity to check administrative decision-making afforded courts greater discretion than mandamus and officer suits to fashion a new standard of review. But it is certainly not the case that suits in equity to challenge administrative action necessarily resembled an appellate review model. Quite the opposite: suits in equity generally demanded judicial review just as intrusive as the traditional common-law suits.
[335] ICC v. Alabama Midland Railway Co., 168 U.S. 144, 175 (1897).
[336] *Id.*; *see also* Shipman v. Fletcher, 91 Va. 473, 476-77 (1895) ("In a suit in equity . . . matters of fact as well as questions of law are by the constitution and immemorial practice of the court determined and adjudicated by it."); *Fletcher*, 91 Va. at 478 ("A court of equity cannot abdicate its authority or powers, nor confide or surrender absolutely to any one the performance of any of its judicial functions.").
[337] *See* Note, *The Federal Injunction and State Commissions: The Rule of the* Prentis *Case*, 1 U. CHI. L. REV. 777 (1934); David E. Lilienthal, *The Federal Courts and State Regulation of Public Utilitie*s, 43 HARV. L. REV. 379 (1930).
[338] Merrill, *supra* note 1, at 951; *see also* BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 341 (1903).

2. State Versus Federal Separation of Powers

Beyond the instruments of review, broader constitutional considerations also inhibited the development of the appellate review model at the federal level but encouraged it in the states. Until the late nineteenth century, it was broadly assumed that an appellate style of judicial review would violate the federal separation of powers.[339] The executive was charged with matters of policy; the role of the courts was just to ensure that the executive branch acted within its jurisdiction.[340] Congress could provide for original actions in the Article III courts if it saw fit, but it could not use an appellate system to render an arm of the executive subservient to the judiciary. Simply put, "the judiciary should have no business in the action of the administration."[341]

The irony to modern eyes is that, if appellate-style review of administrative action was unconstitutional, the alternative was often the more intrusive de-novo analysis. The famous *United States v. Ritchie*[342] decision offers an example. By statute, Congress had provided for an "appeal" from the Board of Commissioners to California's federal district court.[343] Although "[t]he transfer . . . [was] called an appeal," the Court emphasized that it would "not . . . be misled by a name."[344] The Court concluded that this statutory "appeal" demanded de novo review of questions of fact.[345] Concern over judicial overreach into "the action of the administration" paradoxically left the courts exercising more interventionist review.[346]

State courts took a different approach.[347] Where federal courts re-interpreted legislation calling for appeals to demand de-novo review in original actions, state courts re-interpreted legislation calling for de-novo review to demand appellate-style review. Consider again the Minnesota Supreme Court's decision in *Steenerson v. Great N. Ry. Co.*,[348] discussed above.[349] The Minnesota legislature passed a law in 1887 setting up a state Railroad and Warehouse Commission and regulating common carriers. While the law instructed district courts to, on appeal from the

[339] Mashaw, *Rethinking Judicial Review*, *supra* note 2, at 2243 ("The structure of nineteenth century review was meant to maintain a strict separation between judicial and executive power. Courts and commentators doubted the constitutionality of providing appellate judicial review of administrative determinations."); Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568, 1670 (2008) ("The Taney Court took Jacksonian democratic theory seriously, including the old Jeffersonian notion that the separation of powers implied that one branch could not interfere with another by directly invalidating its actions."); WYMAN, *supra* note 338, at 75-80.

[340] *See* Mashaw, *Jackson to Lincoln*, *supra* note 339, at 1670 ("[T]he Jackson/Taney era was one of judicial retreat to 'jurisdictional' or 'res judicata' review that left executive power relatively uninhibited by judicial controls . . . .").

[341] Wyman, *supra* note 338, at 60.

[342] 58 U.S. (17 How.) 525 (1854)

[343] An Act to Ascertain and Settle the Private Land Claims in the State of California, ch. 41, §§ 9-10, 9 Stat. 631, 632-33 (1851).

[344] 58 U.S. at 534.

[345] *Id.*

[346] The Supreme Court's 1899 decision accepting that Congress could create a system of appeals from the Commissioner of Patents to the Court of Appeals of the District of Columbia, United States v. Duell, 172 U.S. 576, 581-82 (1899), is regarded as an important milestone in laying the foundations for the development of a federal appellate review model. *See* Cox, *supra* note 16, at 399.

[347] For an analysis of state separation of powers doctrine and its implications on non-delegation, see Seumas G. Macneil, *The First Nondelegation Doctrine* (2025) (unpublished manuscript).

[348] 69 Minn. 353, 375 (1897).

[349] *See supra* Section II.B.

commission, "examine the whole matter in controversy, including matters of fact as well as questions of law," the Minnesota Supreme Court declined to adopt the most natural reading of this text:

> If by this the legislature intended to provide that the court should put itself in the place of the commission, try the matter de novo, and determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional.[350]

The court explained that, because "[t]he fixing of rates is a legislative or administrative act, not a judicial one,"[351] it would be an unconstitutional delegation of power to the judiciary to require them to review fact-finding on rates de novo. To avoid this separation-of-powers issue, the court interpreted the instruction to "examine the whole matter in controversy, including matters of fact" to mean that the court "may examine matters of fact to ascertain whether there is any evidence reasonably tending to support the findings of fact disputed"—"just as an appellate court reviews the verdict of a jury."[352]

Both federal and state courts adopted implausible statutory readings to avoid constitutional issues. But differences in the understanding of separation-of-powers doctrine led the courts to opposite conclusions on the permissibility of an appellate style of review.

3. The Political Accountability of State-Court Judges

A third factor may also help to explain the early rise of the appellate review model in the states: the political accountability of state-court judges. As we saw earlier, political pressure is central to the explanation for why the appellate review model emerged in the federal system when it did.[353] The same political pressures developed sooner and stronger at the state level.

In the late 1860s and early 1870s, growing frustration with high transportation costs, railroad rate discrimination, and falling crop prices saw increasing agitation among farmers and businessmen for greater state regulation of railroads.[354] In response, several western states (Illinois, Wisconsin, Iowa, and Minnesota) enacted so-called "Granger laws"—setting maximum rates and regulating railroads and grain elevators.[355] These earlier state efforts "raised virtually all of the issues that would subsequently arise in deliberations over the Interstate Commerce Act."[356]

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[350] *Steenerson*, 69 Minn. at 375.
[351] *Id.* (citing State v. Railway Co., 38 Minn. 298, 37 N. W. 782).
[352] *Id.* at 375-76.
[353] *See supra* notes 196-203 and accompanying text.
[354] *See* SVEN D. NORDIN, RICH HARVEST: A HISTORY OF THE GRANGE, 1867-1900, at 3-12 (1974).
[355] Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 861 (1943); *see generally* J. ANDERSON, POLITICS AND THE ECONOMY 12 (1966) (noting that "[t]he Granger movement mark[ed] the beginning of a shift in public policy from promotionalism to regulation").
[356] Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1200-01 (1986); see also Harry N. Scheiber, *Public Policy, Constitutional Principle, and the Granger Laws: A Revised Historical Perspective*, 23 STAN. L. REV. 1029, 1034 (1971) (noting that "Granger politics at the state level" was "in the same tradition as the pluralistic politics of the later movement for federal regulation").

Unlike federal judges, who were appointed for life, state judges had to worry about re-election.[357] Facing down the strong popular demand for increased regulation, the elective judiciary was "soon moulded to the popular purpose"[358] and state court decisions on railroad regulation "smacked of . . . popular influence."[359] As contemporary writers noted, changing "popular sentiment" in the western states on railroads resulted in "new judges [being] elected, and a different decision made."[360]

Popular demand in the states for greater regulation continued to be felt as railroad regulation was handed off from state legislatures to state railroad commissions.[361] As state courts recognized, railroad commissions had been entrusted with broad powers out of an "obedience to a strong popular demand."[362] Elected state judges, conscious of this popular demand, may well have been more hesitant to usurp the role of state boards and commissions with a searching de novo standard of review.[363]

III. The Certiorari-zation of the Federal Injunction

Absent from the current historical account of the federal appellate review model is the answer to a rather simple question: where did the model come from?[364] We know that the standard the Court landed on was that used in the review of jury verdicts: intrusive on the law, deferential on the facts. But how the Court landed on this approach, and why it felt empowered to do so, "remains something of a mystery."[365] This is a meaningful gap in our understanding of "*the* foundational principle of modern administrative law."[366]

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[357] Election of judges became widespread in the states in the 1840s and 50s. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 84-85 (2012).

[358] *The Rule in* Gelpcke v. Dubuque, 9 AM. L. REV. 381, 397 (1875).

[359] Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1406 (1992).

[360] BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 237 (Henry Childs Merwin ed., 2d ed. 1896) (commenting on the judicial treatment of state statutes authorizing municipal bodies to issue bonds in aid of railroad construction).

[361] JOSEPH HENRY BEALE, JR. & BRUCE WYMAN, THE LAW OF RAILROAD LEGISLATION WITH SPECIAL REFERENCE TO AMERICAN LEGISLATION § 877, at 820 ("The regulation of charges by direct legislation was found not to be a convenient or effective method, and the States soon agreed in establishing State commissions, which were given in several States the power to fix maximum rates.").

[362] Caldwell v. Wilson, 28 S.E. 554, 558 (1897) (discussing the North Carolina railroad commission).

[363] Shugerman argues that, counterintuitively, that "[j]udicial elections influenced the spread of judicial review." SHUGERMAN, *supra* note 357, at 95. However, Shugerman's analysis focuses on the judicial review of legislation, not of administrative action. For a view challenging Shugerman's conclusion on the relationship between judicial election and judicial review of statutes, see David M. Gold, *Judicial Elections and Judicial Review: Testing the Shugerman Thesis*, 50 OHIO N. U. L. REV. 39 (2013).

[364] Merrill, *supra* note 1, at 963.

[365] *Id.*; *see also* Cox, *supra* note 16, at 399 ("Today, there is plenty of scholarly disagreement about exactly what caused the transformation" from the bi-polar to appellate model of judicial review). Merrill rules out Congress and the academy as sources of the appellate model. Merrill, *supra* note 1, at 963. This uncertainty was shared by some of the earliest commentators on the appellate model. *See* Stern, *supra* note 18, at 71 (noting that "whatever its cause, the effect of the parallelism between the two reviewing functions of judges [review of lower court decisions and review of administrative decisions] is often to create uncertainty as to just what a reviewing court is supposed to do").

[366] Merrill, *supra* note 1, at 944 (emphasis added).

This Article addresses this mystery by arguing that, when the Supreme Court developed the appellate model, the Court was influenced by state certiorari practice. Comparing the scope of review under the federal injunction following the Supreme Court's ratemaking cases and the scope of review on certiorari in the states reveals striking similarities. These similarities are not just clear now: they were recognized by both the courts and the leading commentators of the period. The same is true of the most famous feature of the modern appellate review model: the "substantial evidence" standard. This standard closely parallels—indeed, in some cases, exactly replicates—earlier state standards for reviewing administrative determinations of fact in certiorari proceedings. This Article argues that, to develop the federal appellate model of review, the Supreme Court "certiorari-zed" the federal injunction.

Understanding the certiorari-zation of the injunction carries several important implications. This Article focuses on one particularly salient issue: the availability of universal relief. Existing historical literature on the remedial scope of judicial review has focused on nineteenth-century equity practice.[367] But as this Article demonstrates, this is not the only—nor, indeed, the most relevant—historical analog for modern judicial review. The modern system of appellate review has much more in common with state review on certiorari than it does with the review associated with federal bills in equity.

A. The Scope of Review

Neither state nor federal courts saw any daylight between the scope of judicial review under the Supreme Court's new appellate model and the scope of review on certiorari. In 1915, five years after the Supreme Court handed down its decision in *Illinois Central II*—laying out the grounds of review under its new appellate review model—the Minnesota Supreme Court handed down its decision in *State v. Great Northern Railway Co*.[368] The case involved a challenge to the Minnesota State Railroad and Warehouse Commission—a statutory certiorari proceeding.[369] After noting that "courts must not usurp legislative or administrative functions by setting aside a legislative or administrative order on their own conception of its wisdom,"[370] the court articulated the grounds on which it would vacate the Commission's order:

> The order may be vacated as unreasonable if it is contrary to some provision of the federal or state Constitution or laws or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment.[371]

[367] *See supra* note 27 and accompanying text.
[368] 130 Minn. 57 (1915).
[369] Duncan H. Baird, *Judicial Review of Administrative Procedures in Minnesota*, 46 MINN. L. REV. 451, 460 n.34 (1962)
[370] *Great Northern*, 130 Minn. at 60 (citing *Illinois Central II*).
[371] *Id.* at 61. The grounds for "vacating" the order articulated by the Minnesota Supreme Court closely parallel those articulated by the Supreme Court in *Illinois Central II*. *See* Interstate Com. Comm'n v. Illinois Cent. R. Co., 215 U.S. 452, 470 (1910).

The court cited just two cases for this proposition: the Supreme Court's recent decision in *Union Pacific* and an 1899 Minnesota statutory certiorari case.[372] The Minnesota Supreme Court, clearly, did not see much difference between the Supreme Court's new appellate model and its own certiorari-style review.

The New York Court of Appeals made the point even clearer in *People ex rel. New York & Queens Gas Co. v. McCall*.[373] Judge Cuddeback, writing for the court, stated simply that he "d[id] not understand that [the New York state certiorari code] extends the power of the court beyond the rules laid down in *State v. Great Northern Ry. Co.* and *Interstate Com. Comm. v. Illinois Central R. R. Co*."[374] The case went up to the Supreme Court. The Court, after noting that the Court of Appeals's interpretation of the New York state law was conclusive, continued:

> [T]he definition, thus announced, of the power of the courts of that state to review the decision of the Public Service Commission [on a writ of certiorari], based as it is in part on the decision in *Interstate Commerce Commission v. Illinois Central R. R. Co.* . . . differs but slightly, if at all, from the definition by this court of its own power to review the decisions of similar administrative bodies, arrived at in many cases in which such decisions have been under examination.[375]

The Court included a string cite to its ICC cases, including *Illinois Central II*.[376] The New York state courts[377] and the Supreme Court were therefore of one mind: there was no meaningful difference between the standard of review on the new appellate-style injunctive relief in federal law and review on certiorari in state law.

The first scholars of the burgeoning field of "administrative law" were also acutely aware of the similarities between the new model of review being developed by the Supreme Court and state review on certiorari. Professor Freund's 1928 treatise on *Administrative Powers over Persons and Propert*y compared judicial review under the federal court's appellate model and New York's review on the writ certiorari.[378] In Freund's assessment, "the substantive principles of review appear to be practically the same":[379]

- Both New York certiorari and the federal injunction after the ICC cases allowed courts to review all errors of law;[380]

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[372] *Id.* (citing I.C.C. v. Union Pac. R. Co., 222 U.S. 541, 547 (1912) and State ex rel. R.R. & Warehouse Comm'n v. Minneapolis & St. L.R. Co., 76 Minn. 469 (1899)).
[373] People ex rel. New York & Queens Gas Co. v. McCall, 219 N.Y. 84 (1916), *aff'd sub nom.* People of State of New York ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917).
[374] *Id.* at 84.
[375] People of State of New York ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345, 348 (1917).
[376] *Id.*
[377] For the avoidance of doubt, it should be noted that New York's certiorari practice was not unusual among the states. It was understood that New York was "a representative American jurisdiction" when it came to the remedies of mandamus and certiorari. FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 255.
[378] FREUND, ADMINISTRATIVE POWERS, *supra* note 33.
[379] *Id.* at 268.
[380] *Id.* at 289 ("In New York certiorari expressly extends to all questions of law, and the Supreme Court has held decisions of the Interstate Commerce Commission to be reviewable for error of law . . . ."). As Freund notes, the proposition that "certiorari reviews only questions of jurisdiction . . . [is] of very doubtful soundness and validity." *Id.* The erosion of certiorari's jurisdictional-error requirement is explored in Section I.B.2(ii) *supra*.

- Neither New York certiorari nor the federal injunction after the ICC cases allowed courts to re-examine administrative findings of fact;[381] and
- Both New York certiorari and the federal injunction after the ICC cases required courts to uphold administrative findings fact where these are supported by evidence.[382]

In the wake of the Supreme Court's ICC cases, therefore, there remained "little substantial difference [between federal and state review], since injunction can be made to serve substantially the same purpose as certiorari, and vice versa."[383]

Professor Dickinson's 1927 treatise, *Administrative Justice and the Supremacy of Law in the United States*—published one year before Professor Freund's treatise—also highlighted the connection between the Supreme Court's new standard of review in the ICC cases and review on certiorari. Dickinson's work is cited by Professor Merrill as the leading academic in helping to develop the appellate model of judicial review at the federal level.[384] On this, Merrill is certainly right. Missing from Merrill's recounting, however, is that—in commenting on this evolving appellate model—Dickinson explicitly recognized the clear parallels between the "essentially new basis of review" that the Supreme Court was fashioning in its ICC cases and the established state review on certiorari. The Court's "new basis of judicial review," Dickinson commented, was "most frequently" analogized to "review by a court of error of the verdict of a jury."[385] For this proposition, Dickinson cites not only *Union Pacific Railroad* (where the Supreme Court first adopted the "substantial evidence" standard), but *also* two state certiorari cases where "the analogy of a jury ha[d] been frankly drawn."[386] True, as Merrill notes, "both these decisions came after the Supreme Court had effectively adopted the analogy for purposes of review of ICC orders."[387] But as this Article has demonstrated,[388] state courts had been analogizing review of administrative action to review of jury verdicts—explicitly as well as implicitly—long before the Supreme drew

[381] *Id.* at 164 ("[N]either the Supreme Court nor the Court of Appeals of New York will permit the enforcing or reviewing court to re-examine facts or substitute its own judgment for that of the commission . . . .").
[382] *Id.* at 165 ("The rule under the Interstate Commerce Act . . . by judicial construction . . . requir[es] the order to be enforced if supported by evidence, while under the law of certiorari as codified in New York, the order may also be reversed under the same conditions which justify a court to set aside the verdict of a jury.")
[383] *Id.* at 246; *see also id.* at 294 ("[T]here is no difference between the certiorari review of the orders of the New York Public Service Commission and the supposedly much narrower review of the orders of the Interstate Commerce Commission." (citing People ex rel. New York & Queens Gas Co. v. McCall, 219 N.Y. 84, 84 (1916)).
[384] *See* Merrill, *supra* note 1, at 974 ("Dickinson clearly perceived that the new conception of judicial review that had emerged was modeled on the judge-jury relationship in civil law.").
[385] DICKINSON, *supra* note 18, at 154. Right before commenting that the "tendency of the courts . . . is in the direction of allowing such conclusiveness in many instances," and that this tendency "marks the recognition of an essentially new basis of review," Dickinson was discussing the limited review of fact that courts exercise when reviewing agency action on a writ of certiorari. *Id.* (discussing *Great Western Power Co. v. Pillsbury*, 170 Cal. 185, and noting that—in light of such decisions—the "way is opened for allowing to expert administrative findings that conclusiveness on matters other than precepts of law which is essential to the effective functioning of administrative regulation").
[386] *Id.* 154 n.81 (1927) (citing In re Savage, 110 N.E. 283 (Mass. 1915) and Papinaw v. Grand Trunk Ry. Co., 155 N.W. 545 (Mich. 1915)). If anything, Dickinson recognized that the state courts were ahead of the curve for acknowledging the analogy to jury cases explicitly while the Supreme Court had only recognized it implicitly. The Supreme Court would come to recognize the analogy to jury cases explicitly in 1939. *See* NLRB v. Columbian Co., 306 U.S. 292, 300 (1939) (noting that the "substantial evidence" necessary to support an administrative determination "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury").
[387] *See* Merrill, *supra* note 1, at 964.
[388] *See supra* Section II.A.3.

the comparison in its ICC cases. And indeed, earlier in his treatise, Dickinson *does* quote from a state certiorari case that explicitly analogized review of administrative decision-making on certiorari to review of a jury verdict from *before* the Supreme Court adopted the same analogy for judicial review of ICC orders.[389]

The similarities between certiorari and the new appellate-style federal injunction were not forgotten in the 1930s. Justice Brandeis, dissenting in *Crowell v. Benson* noted:

> In the review of the quasi judicial decisions of these federal administrative tribunals the bill in equity serves the purpose which at common law, and under the practice of many of the states, is performed by writs of certiorari. It presents to the reviewing court the record of the proceedings before the administrative tribunal in order that determination may be made, among other things, whether the authority conferred has been properly exercised. Neither upon bill in equity in the Federal Courts nor writ of certiorari in the states is it the practice to permit fresh evidence to be offered in the reviewing court.[390]

The point Justice Brandeis was making was not *just* that, in federal law, quasi-judicial decisions were reviewed in equity, while the same decisions would have been reviewed on certiorari in state law. The point he was making was that the *scope of review* was the same under both the federal injunction and certiorari: both means of review were limited to the record of the lower tribunal, and neither means of review permitted de novo review of the facts. Indeed, Justice Brandeis seemed to be using state practice on certiorari to inform his understanding of the federal injunction.[391] As another commentator put it shortly before the APA's enactment, "the equity injunction [was] drawn into use as an effective substitute" for certiorari.[392]

Even the leading administrative-law commentators of the mid-twentieth century continued to emphasize the similarities between state certiorari and the federal injunction. Shortly after the APA's enactment, Professor Jaffe noted that "[certiorari's] place has been taken to some extent by injunction, declaratory judgment, and, since 1946, by a proceeding to review under section 10 of the Administrative Procedure Act."[393] Professor Davis agreed.[394]

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[389] "[W]ant of creditable evidence which, in case of the verdict of a jury would be sufficient upon appeal to require a reversal is jurisdictional error: error committed outside of jurisdiction instead of in the exercise of jurisdiction, where the writ takes hold, performing its function of returning the tribunal to its proper sphere of action." DICKINSON, *supra* note 18, at 257-59 n.13 (quoting State ex rel. Milwaukee Med. Coll. v. Chittenden, 127 Wis. 468 (1906)).

[390] Crowell v. Benson, 285 U.S. 22, 75 (1932) (Brandeis, J., dissenting) (citing People ex rel. New York & Queens Gas Co. v. McCall, 219 N.Y. 84, 88, 113 N.E. 795 (1916)).

[391] *Id.* at 84-91.

[392] *See* E. BLYTHE STASON, THE LAW OF ADMINISTRATIVE TRIBUNALS: A COLLECTION OF JUDICIAL DECISIONS, STATUTES, ADMINISTRATIVE RULES AND ORDERS AND OTHER MATERIALS FOR USE IN COURSES ON ADMINISTRATIVE LAW (1937) 504 n.7; *see also Judicial Control of Administrative Agencies in New York*, 33 COLUM. L. REV. 105, 112 n.27 (1933) (noting that, "[d]espite their differences on the question of the applicable terminology, the substantive law on the subject is the same in both [New York and the federal system]"); cf. ARMIN UHLER, REVIEW OF ADMINISTRATIVE ACTS 183 n.21 (1942) ("The remedy of injunction is of especial importance in the federal courts, which do not have power to grant common-law certiorari.").

[393] Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 410-11 (1958).

[394] Professor Davis, while "doubt[ing] if Section 10 can stand alone as a judicial remedy," fully "agree[d] with [Jaffe's] statement about injunction and declaratory judgment." Kenneth Culp Davis, *"Judicial Control of Administrative Action": A Review*, 66 COLUM. L. REV. 635, 642 (1966).

B. The "Substantial Evidence" Standard

The "substantial evidence" standard is perhaps the most recognizable product of the Supreme Court's transition towards a model of appellate judicial review.[395] A closer look at the standard and at analogs in state certiorari practice further suggest that the Supreme Court was influenced by state law as it developed and refined its appellate-review model.

We saw that the Supreme Court first articulated the "substantial evidence" standard for reviewing findings of fact in *Union Pacific Railway Co.*:

> [The ICC's] conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was *substantial evidence* to sustain the order.[396]

Professor Merrill notes that the Court borrowed this "substantial evidence" standard, without citation, from the standard that courts employed in the review of jury verdicts.[397] But as this Article has demonstrated,[398] the Supreme Court was not the first to employ the "substantial evidence" standard for reviewing administrative findings of fact. State courts were using the same standard decades earlier. For example, in 1882, a West Virginia state court framed the standard of review on certiorari as follows:

> It is not the province of this court or of the circuit court to supervise or overrule on a writ of certiorari the conclusion of the county court on an inference of fact drawn from the evidence, when such inference is sustained by *substantial evidence*, even though we might have drawn a different inference from the evidence.[399]

The similarities between this language, and the language that the Supreme Court would use in *Union Pacific* thirty years later, are hard to miss. This is not to suggest that the Supreme Court lifted the "substantial evidence" language directly from state law. Rather, the fact that the "substantial-evidence" standard, and other similarly deferential standards,[400] had successfully been

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[395] For general discussion of this standard and its evolution, see Stason, *supra* note 12; Louis L. Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951); Victor S. Netterville, *The Substantial Evidence Rule in California Administrative Law*, 8 STAN. L. REV. 563 (1956).

[396] ICC v. Union Pac. R.R. Co., 222 U.S. 541, 547-48 (1912) (emphasis added).

[397] Merrill, *supra* note 1, at 962 ("The ['substantial-evidence'] standard was borrowed—without citation of authority—from the established understanding of the standard of review that an appeals court applies in reviewing a jury verdict."). The Supreme Court did not dispense with the "any evidence" rule for the review of jury verdicts until 1871, in *Schuylkill & Dauphin Imp. Co. v. Munson*, 81 U.S. 442 (1871). There, the Court rejected the suggestion that "some evidence" was sufficient and instead held that there must be evidence "upon which a jury can properly proceed to find a verdict." *Id.* at 448.

[398] *See supra* Section II.A.2.

[399] Dryden v. Swinburne, 20 W. Va. 89, 116 (1882) (emphasis added). Other state certiorari cases using the "substantial evidence" standard (or a closely analogous standard) are cited above. *See supra* note 262.

[400] *See supra* notes 254-262 and accompanying text.

in operation to review agency action in the states suggests that state certiorari practice may well have served as the crucial bridge between the federal bi-polar and appellate models of review.[401]

The Supreme Court's justification for "substantial evidence" review also paralleled state certiorari practice. Just like state courts before it,[402] the Supreme Court justified its review of administrative fact-finding on the fiction that a decision made without substantial evidence amounted to an error of *law*—not just an error of fact.[403] As Professor Dickinson explained:

> [W]hether or not there is evidence reasonably sufficient to support a conclusion of fact is a *question of law* and as such may be reviewed, even though administrative findings of fact are made conclusive and the scope of review is limited to questions of law.[404]

The notion that sufficiently egregious errors of fact were actually errors of law formed the basis of the deferential (but not wholly non-existent) review of administrative fact-finding—first in state certiorari practice and later in the Supreme Court's equity-based appellate model.

C. Putting Things into Context

The analysis above does not definitely rule out the possibility that the Supreme Court "invented"[405] a system of review that happened to look "practically the same"[406] as state certiorari review. But the circumstantial case for concluding that the Court borrowed its approach from state certiorari practice is strong. The Supreme Court's ICC cases outlined a style of review that looked identical to the review in state certiorari cases. State courts knew this; the Supreme Court knew this; and the earliest administrative-law commentators knew this. To academics of the first half of the twentieth century, it was clear that the Supreme Court was doing via the injunction exactly what states had been doing via certiorari. More than that: the Court's famous "substantial evidence" standard for reviewing administrative findings of facts was predated by similar and identical standards in state law. That state courts had long been using the jury-review standard to review administrative findings can only have made the same standard appear more workable in the federal system. In the years following the Hepburn Act, the Supreme Court was on the lookout for a more deferential style of review. The kind of appellate-style review demanded by certiorari fit the bill.

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[401] In 1942, Commissioner Robert M. Benjamin submitted a report to the Governor of New York the so-called "Benjamin Report"). Commissioner Benjamin concluded that the review of facts on certiorari in New York was "the same as the scope of review under the [federal] substantial evidence rule." BENJAMIN, *supra* note 293, at 332. Commissioner Benjamin also considered whether ambiguous language in a recent case, *Matter of Niagara Falls Power Company v. Water Power and Control Commission*, 267 N.Y. 265 (1935), might suggest that review on certiorari is narrower than on the substantial evidence test, but Commissioner Benjamin dismisses this interpretation of the case to be "unlikely [to] . . . be followed at all." *Id.* at 333-34.

[402] *See supra* note 251 and accompanying text.

[403] Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88 (1913) ("The courts will not review the commission's conclusions of fact by passing upon the credibility of witnesses or conflicts in the testimony, but . . . a finding without evidence is beyond the power of the commission. An order based thereon is contrary to law.").

[404] John Dickinson, *The Conclusiveness of Administrative Fact-Determinations Since the* Ben Avon *Case*, 16 PUB. UTILS. FORT. 385, 385-86 (1935) (emphasis added).

[405] Cox, *supra* note 16, at 399.

[406] *See supra* Section III.A.

This view on the origins of the federal appellate review model becomes more compelling still when we take a step back to consider the relationship between state and federal law at the turn of the twentieth century more generally. In this pre-*Erie* era, the Supreme Court was frequently plucking principles, ideas, and standards from state law—with and without citation.[407]

As Pfander and Wentzel have recently demonstrated, the growth of the injunction as the primary means of reviewing administrative decision-making was influenced by an earlier transition towards equity in the states.[408] The "state courts show[ed] the way,"[409] and it was not "until state courts began to make the transition" that federal courts started to "recognize the 'full implications' of equitable remedies for public law."[410] Pfander and Wentzel's work, along with other recent scholarship,[411] also makes clear that common law and equity did not evolve wholly independently: the old common-law writs had a profound effect on the development of the modern injunctive power.[412]

The Supreme Court also borrowed from state law in fashioning the modern nondelegation doctrine. In its 1892 *Field v. Clark* decision, the Court relied on three state supreme court decisions to justify its understanding of nondelegation.[413] Why did the Court turn to state law? The move seems to have been motivated by the "absence of Supreme Court precedent then-able to support the Court's claims";[414] in the absence of federal precedent, state law decisions (even if misinterpreted[415]) served as guidance. The Court of the late-nineteenth century was not shy about drawing inspiration from state law to reach its desired conclusion.

The Supreme Court also borrowed from state law to inform its analysis of substantive due process in the *Lochner* era. As Howard Gillman has documented, the legal doctrines that would come to inform the Supreme Court's articulation of the police powers in the late-nineteenth century "were first articulated by state court judges."[416] Many of the Court's famous contributions from the *Lochner* period merely "adopted the rules and principles that had been devised and refined by [the Court's] antebellum state court counterparts."[417]

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[407] For invaluable discussion of the ideas in this section, I am indebted to Seumas Macneil.
[408] Pfander & Wentzel, *supra* note 27, at 1350.
[409] *Id.* at 1280.
[410] *Id.* at 1327; *id.* (discussing the "influence of state law"); *id.* at 1306 (noting that "[t]he transition from law to equity on which Justice Brandeis remarked nonetheless began in state courts" and federal courts followed suit); *see also* Simpson, *supra* note 324, at 236 ("It was natural, therefore, that there should be increased resort to equity in an effort to secure preventive relief in constitutional cases. Something has already been said as to the partial success of such efforts in the state courts; it remains to consider the development of preventive constitutional adjudication under the federal judicial system . . . .").
[411] *See* Pfander & Zakowski, *supra* note 27 (forthcoming 2026) (describing the way in which "suits for the repeal of patents that had once invoked the common law authority of the federal courts came to sound in equity").
[412] Pfander & Wentzel, *supra* note 27, at 1269 ("[T]he injunction absorbed the lessons of the common law writs . . . .").
[413] Field v. Clark, 143 U.S. 649, 693-94 (1892) (citing Cincinnati, W. & Z.R. Co. v. Clinton County Com'rs, 1 Ohio St. 77, 79 (1852); Moers v. City of Reading, 21 Pa. 188, 200 (1853); and Appeal of Locke, 72 Pa. 491, 501 (1873)).
[414] Macneil, *supra* note 1, at 17.
[415] *Id.* at 17-18.
[416] HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 12 (1993).
[417] *Id.* at 14; *see also* C. Ian Anderson, *Book Review: The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*, 92 MICH. L. REV. 1438 (1994) ("[T]he author's greatest contribution to the reinterpretation of this period lies in his detailed account of the development of police powers jurisprudence in state

These instances of federal borrowing from state-law concepts occurred against the backdrop of a broader pre-*Erie* "general law"[418]—what Professors William Baude, Jud Campbell, and Stephen Sachs have defined as "a shared body of law which American jurisdictions, both state and federal, could properly employ."[419] Most recently, Professors Baude, Campbell, and Sachs have discussed the role of this nineteenth-century "general law" in shaping our understanding the fundamental rights protected by the Fourteenth Amendment.[420] But the notion of a general law that was "cross-jurisdictional character,"[421] and in which both state and federal courts shared, has broader implications—and offers an explanation for why Supreme Court might turn to state administrative practice to inform its development of federal law. By the time that *Erie Railroad Co. v. Tompkins* laid to rest such notions of a "transcendental body of law outside of any particular State" in the late 1930s,[422] the appellate review model had become firmly entrenched in federal law.[423] The federal injunction had, by then, been thoroughly certiorari-ized. In sum: The late nineteenth and early twentieth centuries were defined by significant federal borrowing from state courts. That the federal injunction would therefore come to absorb characteristics of state certiorari practice is perhaps not altogether surprising.[424]

Finally, while the Hepburn Act did not itself set out any particular standard of judicial review, several legislators made known that they felt that the "writ of certiorari might be the most

courts prior to the Lochner decision in 1905 and the manner in which the language and reasoning of the Supreme Court opinions prior to and following *Lochner* reflect this development.").

[418] Literature on the "general law" of the nineteenth and early-twentieth century has been growing rapidly. *See* Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. F. 1010 (2023); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STANFORD L. REV. 1185 (2024); Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023); Jud Campbell, *Tradition, Originalism, and General Fundamental Law*, 47 HARV. J. L. & PUB. POL. 635 (2024).

[419] Baude, Campbell & Sachs, *supra* note 418, at 1195.

[420] *Id.*

[421] *Id.* at 1194.

[422] Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

[423] Merrill, *supra* note 1, at 965 ("By 1930, well before Franklin Roosevelt was elected President, the appellate review model was thoroughly entrenched.").

[424] It bears emphasizing too that several of the Supreme Court justices who presided over the transition from the bi-polar to the appellate model of judicial review had started their judicial careers as state-court judges. Justice Rufus Wheeler Peckham, Jr. served on the New York Court of Appeals from 1886 until 1895. *Rufus Wheeler Peckham*, FED. JUD. CTR., https://www.fjc.gov/history/judges/peckham-rufus-wheeler [https://perma.cc/6STX-ZELC]. Oliver Wendell Holmes, Jr. served on the Supreme Judicial Court of Massachusetts from 1882 until 1902. *Oliver Wendell Holmes, Jr.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/holmes-oliver-wendell-jr [https://perma.cc/G4XZ-AF3G]. Justice David J. Brewer served on the Kansas Supreme Court from 1870 until 1884. *David J. Brewer*, FED. JUD. CTR., https://www.fjc.gov/history/judges/brewer-david-josiah [https://perma.cc/G8NC-PRAX]. Justice Horace Harmon Lurton served on the Tennessee Supreme Court from 1886 until 1893. *Justice Horace Harmon*, FED. JUD. CTR., https://www.fjc.gov/history/judges/lurton-horace-harmon [https://perma.cc/ENH6-JY3C]. In their capacity as state-court judges, these justices would have become well acquainted with the mechanics of the writ. In 1887, then-Judge Peckham noted that the writ of certiorari, when used to review administrative action, was "guided by the rules governing . . . applications to set aside a verdict of a jury." People ex rel. McCabe v. Bd. of Fire Comm'rs, 106 N.Y. 257, 262 (1887). In 1904, then-Judge Lamar noted that certiorari could be used to review an error where "there is no question of fact, and an error of law which must finally govern the case." Wilensky v. Brady, 48 S.E. 687, 687 (1904). In 1900, then-Judge Holmes noted that certiorari only issued to correct a "mistake of law, and not . . . a mistake of fact." Lincoln v. Dore, 176 Mass. 210, 211 (1900). I am indebted to Inbar Pe'er for bringing this point to my attention.

convenient and also the most expeditions method" of reviewing decisions of the ICC.[425] This view seems to have been shared by the ICC itself.[426] This political sanctioning of a certiorari-style of review, even if not formally codified, may well have made the certiorari-zation of the injunction more appealing to a Court concerned about political backlash.[427]

D. The Consequences of Certiorari-zation

Appreciating how the writ of certiorari informed the development of the appellate review model sheds new light on modern administrative law. The appellate review model has been variously described as "crucial and constitutive" of our modern administrative law,[428] as serving an "important legitimating function,"[429] and as "foundational" to our "administrative common law."[430] The appellate model served as the driving force behind our uniform system of judicial

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[425] 59 CONG. REC. 4081 (1906) (statement of Sen. John W. Daniel); *see also id.* (statement of Sen. Joseph W. Bailey) ("As a matter of convenience, I think the Senator is correct . . . ."); *id.* at 6249 (statement of Sen. John W. Daniel) ("The writ of certiorari is another way in which superior courts require the records of inferior ones to be brought before them and the learning on the subject is complete. It is a known system, which is now fully in vogue and practice.").

[426] *See id.* at 6783 (statement of Sen. John W. Daniel) ("In the bill which was prepared by the Interstate Commerce Commission and sent to the Committee on Interstate Commerce, or which, at least, that committee had before it, a process was recommended and put down by the committee after the fashion of the old English bill of certiorari, and in one of its section it was provided that the respondent in such suit should present the record.").

[427] This Article would be incomplete without mentioning one potential alternative source for the appellate review model: a transplantation of English statutory law. As we saw earlier, English judicial review did not operate on an appellate review model because it continued to adhere to notions of "jurisdictional error": courts would only correct jurisdictional errors and errors on the face of the record, not all errors of law. However, for the review of the English Railway Commission, Parliament intervened. Parliament excluded review via the prerogative writs and instead created a statutory right of appeal: on appeal to the High Court, courts could review all "questions of law," but would not intervene on "questions of fact." Railway and Canal Traffic Act 1888 § 17. This English practice was referenced briefly in the ICC's 1897 Annual Report. INTERSTATE COMMERCE COMMISSION, ELEVENTH ANNUAL REPORT 34-35 (1897). It is possible that the Supreme Court copied from the English system: turning English statutory law into American common law by re-writing the rules of the injunction. But this seems unlikely for a few reasons. First, American engagement with the English practice seems to have been largely confined to the brief discussion in the 1897 Annual Report. There was little to no engagement with the 1888 Traffic Act by early administrative law commentators. And unlike state certiorari practice, English procedure under the Traffic Act was clearly statutory; while the Supreme Court was accustomed to lifting principles from state common law, it was not in the habit of plucking ideas from Acts of Partliament. The judicial review of railroad commissions in the states was also in many ways a more relevant analog to the post-Hepburn Act federal law. While many states had empowered their railway commissions to set rates, the English Railway Commission had no similar power. *See* FRANK PARSONS, THE HEART OF THE RAILROAD PROBLEM: THE HISTORY OF RAILWAY DISCRIMINATION IN THE UNITED STATES, THE CHIEF EFFORTS AT CONTROL AND THE REMEDIES PROPOSED, WITH HINTS FROM OTHER COUNTRIES 338 (1906) ("English law never attempted to give the Railway Commission power to fix rates . . . ."). If the 1888 Traffic Act had any influence the Supreme Court's reasoning (and, again, it is doubtful that it did), it was soon forgotten. From shortly after the Supreme Court's seminal cases up until the enactment of the APA, it was state certiorari practice that served as the historical analog for the Supreme Court's injunctive power.

[428] Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1581 n.62 (2013) (describing the "appellate review model" as holding a "crucial and constitutive position . . . in administrative law").

[429] Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 624 (2017) (describing the "appellate review model" as serving an "important legitimating function" in administrative law).

[430] Brinkerhoff, *supra* note 25, at 598; *see also* Merrill, *supra* note 1, at 941 ("[T]he great preponderance of what we today regard as administrative law . . . consists of an elaboration of the implications of the appellate review model."); Merrill, *supra* note 1, at 944 (describing the appellate model as "the foundational principle of modern administrative

review,[431] ushered in our system of arbitrariness review,[432] keeps judicial review confined to a closed record,[433] acts as the theoretical foundation for judicial deference to agency fact-finding,[434] and laid the foundations for the rise[435] (and arguably also the demise[436]) of *Chevron* deference. It is no overstatement to say that the appellate review model "revolutionized the way courts reviewed administrative action."[437]

The role of the writ of certiorari in facilitating this revolution offers an important new perspective on judicial review in the federal system. This Article focuses on how understanding the certiorarization of the federal injunction informs one particularly salient issue: non-party protective relief. Existing historical scholarship on the scope of injunctive relief has focused on judicial review on suits in equity.[438] For example, Aditya Bamzai has argued that it was the "bill in equity" that "provided much of the framework for judicial control of agency action in the early twentieth century."[439] But as this Article has shown, the judicial control of agency action that emerged in the early twentieth century had far more in common with state certiorari practice than it did with nineteenth-century actions in equity.[440] The best historical analog for the modern injunction is not the bill in equity; it is the writ of certiorari.

1. Universal Relief and Certiorari

Certiorari, as a prerogative writ, was originally a royal mandate—"issued in the King's name."[441] After certiorari made the jump across the pond, it took "the form of [an] action[] brought in the name of the State or People as formal complaining party."[442] The focus of the writ of certiorari,

law"); Note, Braden Currey, *Rationalizing the Administrative Record for Equitable Constitutional Claims*, 133 YALE L.J. 2017, 2099 (2024) (describing the appellate model as the "core" of our administrative system).

[431] Merrill, *supra* note 1, at 973-74.

[432] Bagley, *supra* note 186, at 1295-1300.

[433] Sidney A. Shapiro & Richard W. Murphy, A*rbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look"*, 92 NOTRE DAME L. REV. 331, 349 (2016) ("Imposing the contemporaneous rationale principle on a closed rulemaking record enables courts to review agency action using a familiar appellate model that is, at least from the courts' point of view, efficient.").

[434] Merrill, *supra* note 1, at 939-41.

[435] Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 516 (2004) ("The turn to appellate review of agency action therefore laid the groundwork for the *Chevron* revolution that would occur later in the twentieth century.").

[436] MacDonald, *supra* note 236, at 316.

[437] Cox, *supra* note 16, at 398; *see also* Jeffrey A. Pojanowski, *Neoclassical Administrative Common Law*, THE NEW RAMBLER (Sept. 26, 2016) (review of Administrative Justice and the Supremacy of Law in the United States) ("The appellate review model continues to dominate much thinking, argument, and law on the place of courts in the administrative state.").

[438] *See* Bamzai, *The Path*, *supra* note 27, at 2046; Sohoni, *Past and Future*, *supra* note 27, at 2327; Bray, *supra* note 27, at 426; Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 943-954 (2020) [hereinafter Sohoni, *Lost History*].

[439] *See* Bamzai, *The Path*, *supra* note 27, at 2043.

[440] *See supra* Sections III.A-C.

[441] JAFFE, *supra* note 73, at 153; De Smith, *Prerogative Writs*, *supra* note 52, at 40 ("[W]rits of certiorari and mandamus were initially royal mandates . . . .").

[442] ERNST FREUND, ROBERT V. FLETCHER, JOSEPH E. DAVIES, CUTHBERT W. POUND, JOHN A. KURTZ & CHARLES NAGEL, GROWTH OF AMERICAN ADMINISTRATIVE LAW 12 (1923).

unlike an injunction,[443] was not the individual complainant bringing the suit. Rather, it was the administrative action itself. As a consequence, a successful certiorari proceeding operated *universally* in favor of all affected by the challenged action.[444]

State courts employed a variety of terms to describe the effects of a successful petition on certiorari: the administrative action would be "set aside,"[445] "annulled,"[446] or "vacated"[447]—and, more often than not, some combination of these.[448] When brought, certiorari would also "suspend"

[443] *See* Nken v. Holder, 556 U.S. 418, 428 (2009) (noting that an injunction is an in personam remedy that runs against a party).

[444] There has been some academic recognition of the fact that state law remedies—and, specifically, certiorari—allowed for relief that we today would deem "universal." *See* Pfander & Wentzel, *supra* note 27, at 1314. But the immediate relevance of these decisions for the reach of universal relief in federal law has remained limited by the fact that the writ of certiorari was clearly not available in federal law. But if—as this piece has argued—state certiorari practice directly informed the development of the modern system of federal injunctive relief, certiorari decisions take on a new relevance.

[445] Dryden v. Swinburn, 15 W. Va. 234, 235 (1879) ("In all cases of certiorari, when used as an appellate proceeding, the superior court has a right to affirm the judgment of the inferior court, or to set aside and annul it . . . ."); Lorbeer v. Hutchinson, 111 Cal. 272, 273 (1896) ("This appeal is from a judgment of the superior court of Los Angeles county in a proceeding by certiorari to set aside and annul the action of the board of trustees . . . ."); State ex rel. Enderlin State Bank v. Rose, 4 N.D. 319 (1894) ("[T]he writ of certiorari must be a remedy which, like a writ of error or an appeal, will set aside and annul the void proceeding"); Auer v. City of Dubuque, 65 Iowa 650, 22 N.W. 914 (1885) ("This is an action in certiorari, by which the plaintiff seeks to annul and set aside a special tax levied upon his property to pay for paving part of one of the streets of the city."); In re Mt. Morris Square, 1841 WL 3707 (N.Y. Sup. Ct. 1841) ("The motion to set aside the proceedings being denied, it is insisted that we are bound to grant a writ of certiorari, and set them aside in that form."); *see also* FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 267 ("A successful certiorari proceeding merely results in a setting aside of the order as unwarranted by the law or by the facts appearing on the record."); Wood v. Peake, 1811 WL 1272 (N.Y. Sup. Ct. 1811) ("It was held, that the appointment made by the justices was a judicial act; and being within their jurisdiction, was conclusive and valid, until set aside or quashed on certiorari; and could not be questioned in a collateral action.").

[446] Schroeder v. Superior Ct., 70 Cal. 343, 343 (1886) ("This is an action to annul, by certiorari, an order of the superior court appointing a special administrator."); Lorbeer v. Hutchinson, 111 Cal. 272, 273, 43 P. 896, 896 (1896) ("This appeal is from a judgment of the superior court of Los Angeles county in a proceeding by certiorari to set aside and annul the action of the board of trustees."); Woodworth v. Gibbs, 61 Iowa 398 (1883) ("In an action of certiorari, the object of which is to annul the action of an inferior tribunal, board, or officer . . . .").

[447] Vreeland v. Town of Bergen, 34 N.J.L. 438, 441 (Sup. Ct. 1871) ("Let the entire assessment be vacated."); State ex rel. Robinson v. City of Neosho, 57 Mo. App. 192, 194 (1894) ("Relators sued out a writ of certiorari against the appellant to vacate and annul a license, granted by it to one Thomas White as dramshop keeper in the city of Neosho."); Stewart v. Ct. of Cnty. Comm'rs, 82 Ala. 209, 210 (1887) ("In the present proceeding, which is a petition for a certiorari, the effort it made by the appellants to annul and vacate that order, by motion to quash, duly made on the hearing in the circuit court. The ground of the motion is the alleged unconstitutionality of the act of February 23, 1883, under the authority of which the commissioners acted in making the order."); Ex parte Howard-Harrison Iron Co., 130 Ala. 185, 188 (1901) ("[T]he petitioner now seeks by the common-law writ of certiorari to vacate and annul.").

[448] Most of the cases cited in notes 445-447 use several of these terms. *See also* FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 288 ("If the order has been set aside by certiorari, the judgment is merely one vacating this particular order . . . .").

the execution of the order being challenged.[449] The court's quashing order operated on the *action*, not on the person.[450] Relief on a writ of certiorari was therefore inherently universal.[451]

The decision of the New Jersey's Court of Errors and Appeals in *Town of Bergen v. Van Horne*[452] offers a useful illustration of certiorari's universal effect. In 1857, the Town of Bergen appointed three commissioners to make some road improvements on Washington Avenue.[453] To pay for these improvements, the Town authorized the commissioners to assess costs on the landowners benefitting from the improvements.[454] Mrs. Van Horne was one of these landowners. On April 2, 1858, the commissioners assessed the overall expenses at $6,369.44, of which $1,760.33 was charged to Mrs. Van Horne. Six days later, Mrs. Van Horne duly paid her share.

But there were a few problems with this assessment. For one, the expenses assessed ($6,369.44) did not accurately reflect the full expense of improving the whole of the avenue.[455] What's more, the commissioners had not distributed the expenses across all landowners who had benefitted from the improvements to the road (as the Town charter required).[456] Instead, they had charged only those landowners whose property either stood adjacent to the road, or who had petitioned for the improvement.[457] Eight disgruntled landowners—but, crucially, *not* Mrs. Van Horne—challenged the assessment on a writ of certiorari.[458] The New Jersey Supreme Court agreed that the "assessment is illegal" and "must be set aside."[459]

The Town, clearly unsatisfied with its original (less-than-competent) commissioners, appointed three new commissioners to assess the expenses associated with improving Washington Avenue.[460] This time—now properly reflecting the cost of improving the whole relevant stretch of Washington Avenue—the expenses came out to $19,917.77.[461] And Mrs. Van Horne's share of

[449] State v. Burnell, 102 Wis. 232 (1899) ("A writ of certiorari suspends the execution of the judgment or order challenged thereby."); Hunt v. Common Council of City of Lambertville, 46 N.J.L. 59, 59 (Sup. Ct. 1884) ("A certiorari is a supersedeas, and operates to suspend the proceeding removed by it.").
[450] That certiorari operated on the action, rather than the person, is also apparent in the fact that the order that a court would issue on a successful certiorari proceeding is a "quashing order"—"quashing," that is, the unlawful administrative action. *See supra* Section I.A.
[451] *Cf.* John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119, 119-21 (2023) (noting that "[u]nlike remedies that operate with respect to parties and parties' rights, vacatur operates on regulations as such, depriving them of legal force. That feature makes vacatur an inherently universal or nationwide remedy."). This Article is not the first to note that relief on the writ of certiorari could be universal. *See* Pfander & Wentzel, *supra* note 27, at 1349-55.
[452] Town of Bergen v. Van Horne, State, 32 N.J.L. 490 (1865).
[453] Vanhorn v. Town of Bergen, 30 N.J.L. 307, 307 (Sup. Ct. 1863).
[454] Culver v. Town of Bergen in Hudson Cnty., 29 N.J.L. 266, 267 (Sup. Ct. 1861) (citing Pamphlet Laws 1855, § 8, page 442) (noting that "[t]he defendants' charter . . . provides that the assessors shall assess the costs and expenses upon the real estate of said town upon principles of equity and according to the damage or the benefit which the owners may derive therefrom.").
[455] *Vanhorn*, 30 N.J.L. at 308 ("It would seem that the sum so assessed did not include the expense of improving that part of the avenue between the Communipaw road and the Morris canal.").
[456] *Id.*
[457] *Id.*
[458] *Id.*
[459] *Culver*, 29 N.J.L. at 269.
[460] *Vanhorn*, 30 N.J.L. at 308-09. The Town appointed the new commissioners under a supplement to the charter passed in 1859. *Id.*
[461] *Id.* at 307-08.

the expenses jumped from $1,760.33 to $6,369.44.[462] Mrs. Van Horne challenged this new assessment on a writ of certiorari, arguing that the original assessment had only been set aside as to the eight challengers who had successfully petitioned the Supreme Court for relief; and that the original assessment still remained in place as to her (and all other persons) who had not been plaintiffs in that suit.[463]

The relevant question for the New Jersey's Court of Errors and Appeals was: had the assessment, on certiorari, been "set aside, in toto," or "only as to those parties who, as prosecutors of the writ, [brought] it before the court."[464] If the Supreme Court had "set aside" the assessment as to everyone, the new (higher) assessment could now be enforced; if the Supreme Court had only "set aside" the assessment as to the eight challengers, the old (lower) assessment continued to apply for those who had not been parties to the challenge.[465]

Chief Justice Beasley, writing for the court, started by acknowledging that "in cases of assessment of contributions for public purposes against a large number of persons, the usual course pursued by the courts of this state is to vacate them, if erroneous, only as to the parties who are actors in the suit."[466] The reason was simple: "great public inconvenience and loss" could ensue if a challenge by one person always meant that the whole assessment had to be set aside.[467] However, just because this was the *usual* course did not mean that it was the *only* course.[468] It was undeniable, in Chief Justice Beasley's view, that "the power existed in that tribunal to *set aside and entirely annul* the whole of the assessment . . . if it was deemed proper so to do."[469]

So, had the Supreme Court court vacated the assessments as to everyone, or only as to the plaintiffs? Chief Justice Beasley considered that vacating the assessment only as to the plaintiffs in the original suit "would not have effected a just result."[470] The fact that the distribution of the expenses was erroneous, meant that the share allotted to Mrs. Van Horne was, necessarily, also erroneous.[471] Notice that this was not a case of strictly indivisible harm:[472] it would have been quite possible to confine relief to the eight original plaintiffs; it would simply have meant leaving in place an erroneous assessment as to other parties.

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[462] *Id.*
[463] *Id.* at 309 ("Mrs. Vanhorn is now assessed the sum of $6403.97, and the question to be decided is, whether it has been legally imposed on her. In my opinion this assessment was altogether unwarranted and illegal . . . [b]ecause the assessment originally made on her was never, within the meaning of the supplement of 1859, set aside.").
[464] Town of Bergen v. Van Horne, State, 32 N.J.L. 490, 492-93 (1865).
[465] *Id.* at 492 ("It was said that these proceedings were void as against the plaintiff in certiorari, who is the defendant in error, because the previous assessment made for this same improvement had not been set aside as to her, but that, so far as she was concerned, it remained in full force."). In this way, the case flips the usual parties in a suit over universal relief, with the plaintiff seeking a determination that relief in the earlier suit was party-confined and the administrative body seeking a determination that relief in the earlier suit was universal.
[466] *Van Horne*, 32 N.J.L. at 493.
[467] *Id.*
[468] *Id.*
[469] *Id.* The Supreme Court had that power because the "assessment . . . had manifestly been brought up for review by force of the certiorari there pending." *Id.*
[470] *Id.*
[471] *Id.*
[472] *See generally* Bamzai, *The Path*, *supra* note 27, at 2060-61 (discussing indivisible relief).

At the end of the day, however, Chief Justice Beasley thought that the best indication of whether the Supreme Court's relief was confined to the parties to be the actual language used by the Supreme Court itself.[473] The relevant excerpt from the judgment of the Supreme Court read:

> And it appearing to the court that the assessment and proceedings removed by the said certiorari are illegal, erroneous, and void, it is, therefore, ordered, considered, and adjudged by the court here, that the assessment and proceedings be *set aside, reversed, and for nothing holden*.[474]

This language, in Chief Justice Beasley's view, was "entirely unambiguous": the Court had "plainly annul[ed] the assessment as an entirety."[475] Therefore, Beasley concluded that the Supreme Court had "set aside the assessment . . . [as] to Mrs. Van Horne as to all other parties."[476]

Van Horne was not an outlier case,[477] but it does offer a uniquely good exposition of the general principle. The leading nineteenth-century tax treatise cites *Van Horne* for a simple, but sweeping, proposition:

> On certiorari the court will not set aside the whole of a tax proceeding if justice can be done to the party without doing so, *unless*, perhaps, where by law, in case it is

[473] *Van Horne*, 32 N.J.L. at 493.
[474] *Id.* (emphasis added).
[475] *Id.* ("If the court had intended to reverse the whole proceedings, it is not easy to perceive how, to accomplish such purpose, more effective or appropriate terms could have been used.").
[476] *Id.*
[477] *See, e.g.*, Gobisch v. Inhabitants of N. Bergen Twp. in Hudson Cnty., 37 N.J.L. 402, 406 (Sup. Ct. 1875) ("The assessment . . . was made upon an erroneous principle, and, under the power which exists in this court, will be set aside, not only as to the prosecutors, but as to all persons who are assessed, that a new assessment may be made . . . ."); Copeland v. Vill. of Passaic, 36 N.J.L. 382, 388 (Sup. Ct. 1873) ("The proceedings under review in this case are, the application made by Daniel Demarest for a reassessment under the act of 1871. The increased assessment made is for his benefit, and the present prosecutor, and other abutters on Sherman street are assessed to pay his damages on the ground of special benefits. If this increased assessment is set aside, as to one of the persons assessed for a proportional amount of the damages, it is equitable and just that it should be set aside as to all, if there is a provision in either of the charters which can be used for a new assessment."); Hoxsey v. City of Paterson, 37 N.J.L. 409, 411 (Sup. Ct. 1875) ("[T]he entire assessment should be set aside, and commissioners appointed to re-assess."); *see also* State v. Justs. of Middlesex Cnty., 1 N.J.L. 244, 255 (1794) ("[A]ll acts founded on this illegal election must likewise be void, and the assessments . . . are of no validity. No one can be legally compelled to pay them; and if this court, on a certiorari in each case, would be compellable to say so, it is far better that the proceedings should be vacated *in toto* at once, to prevent much unnecessary expense and trouble. We are, therefore, unanimously of opinion that the election is illegal and void, and must be quashed."). It should not be altogether surprising that many of these comments regarding the universal effects of certiorari are found in New Jersey decisions. As we saw earlier, New Jersey was the most prominent of a handful of states that did not confine certiorari to quasi-judicial decisions. *See supra* note 125 and accompanying text. New Jersey courts were therefore accustomed to using certiorari to review, and quash, quasi-legislative decision-making that might affect large groups of people (and not just the parties in the specific case); Floyd v. Gilbreath, 27 Ark. 675, 694 (1872) ("[I]f these appellees had presented a petition for either of the law writs mentioned [certiorari or prohibition], not only their own relief could have been secured, *but also that of all the other tax-payers*."); *Gilbreath*, 27 Ark. at 685 ("[B]y certiorari, the whole proceedings may be quashed, not as it effects the rights of the petitioners merely, but the *whole levy* . . . ."); *Gilbreath*, 27 Ark. at 694 ("[A] suit at law, on the part of any one citizen against the sheriff, . . . would have resulted in relief to all.").

> vacated, there can be a new assessment; in which case vacating the whole may be most likely to accomplish the general purposes of the law for making the levy.[478]

In New Jersey—as the decision in *Van Horne* illustrates—relief on certiorari could be universal, or it could be party-confined. The discretion as to the scope of the relief lay with the court. New York courts, by contrast, seem to have regarded relief on certiorari as *necessarily* universal. Consider the New York Supreme Court's decision in *People v. Allegany County Supervisors*.[479] It was alleged that the Supervisors of Allegany County had laid "improper charges" that had increased taxes across the county.[480] The challenging relator asked that a writ of certiorari be awarded so that "the apportionment of taxes made by the supervisors" would be "vacated, quashed and annulled for irregularity" "so far as they affect the relator or his real or personal property."[481]

Justice Bronson, writing for the court, explained that he could not "perceive how the tax, or the warrants for its collection, can be annuled [sic], so far as they affect the relator, without also declaring them void in relation to all the other taxable inhabitants of the county."[482] Notably, Justice Bronson did not ground this conclusion in the fact that relief was indivisible; it would have been quite possible, as a matter of logic, to quash the decision only as it related to the challenger. Rather, Justice Bronson explained that the reason relief *had* to be universal was because "other persons [were] in the same situation" as the challenger.[483] Simply put: the argument that was being raised applied with equal force to all other taxable inhabitants.[484]

But the fact that relief had to be universal could also cause problems. If apportionment of taxes was quashed as to *all* taxable inhabitants, there would be significant public inconvenience. The supervisors would have to start their work over and the county would be unable to collect taxes from anyone in the meantime. The court's solution was simple. Drawing on earlier certiorari cases, both in England and in the states, the court emphasized that "a writ of certiorari was not a writ of right."[485] The court could refuse to grant the writ in its discretion, including on "ground of public inconvenience."[486] As another court later explained when summarizing Justice Bronson's decision, "the public exigencies required that [the writ of certiorari] should be withholden."[487]

2. Universal Relief and the Certiorari-ized Injunction

If we take seriously, as this Article suggests we must, that the federal injunction "serves the

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[478] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION INCLUDING THE LAW OF LOCAL ASSESSMENTS 535 (1876) (emphasis added).
[479] 15 Wend. 198 (N.Y. Sup. Ct. 1836).
[480] *Id.* at 204.
[481] *Id.*
[482] *Id.*
[483] *Allegany County Supervisors*, 15 Wend. at 204 ("I have not met with any analogous case where the judgment or proceeding was quashed in relation to a particular individual affected by it, while it was left in force in relation to other persons in the same situation.").
[484] *Id.* ("The ground upon which the relator proceeds, is not such as affects his interest alone; but is, in principle, applicable alike to every person who is named in the tax list.").
[485] *Id.* at 207.
[486] *Id.* at 208.
[487] In re Mt. Morris Square, 2 Hill 14, 29 (N.Y. Sup. Ct. 1841).

purpose which . . . under the practice of many of the states, is performed by writs of certiorari,"[488] then there is much to be gleaned from these decisions. States adopted a pragmatic approach to the scope of relief on certiorari. Courts acknowledged that relief on certiorari could be,[489] or necessarily was,[490] universal. And in some cases, granting universal relief would indeed secure the most just result.[491] In other cases, however, universal relief would unduly jeopardize the smooth functioning of administration.[492] Recognizing these concerns, courts exercised discretion in granting relief, reserving the right to cabin relief to the specific parties in the dispute[493] or to grant no relief at all.[494]

This author does not mean to suggest that the above analysis conclusively settles the long-running debate on whether federal courts are empowered to universally enjoin administrative action.[495] But the fact that state courts were vacating administrative action universally on the writ of certiorari offers important historical context for the development of universal injunctions at the federal level. As this Part has shown, state certiorari practice serves as the closest historical analog to the modern federal judicial review.[496] That state courts were vacating administrative action universally on the writ of certiorari therefore lends new credence to the notion that federal courts can use the certiorari-ized injunction to the same effect.[497]

The certiorization of the injunction also offers new context for the relationship between the appellate review model and agency rulemaking. The modern appellate review model emerged in the federal system "during a time when agencies primarily engaged in adjudication and only rarely ventured into rulemaking."[498] As Professor Mashaw has argued, whatever the merits of the appellate review model when it comes to individual adjudications, the "situation is much more awkward when the appellate model comes to be applied to agency rulemaking."[499] This is certainly

[488] Crowell v. Benson, 285 U. S. 22, 75 (1932) (Brandeis, J., dissenting).
[489] *See, e.g.*, Town of Bergen v. Van Horne, State, 32 N.J.L. 490, 493 (1865).
[490] *See, e.g.*, *Allegany County Supervisors*, 15 Wend. at 204.
[491] *Van Horne*, 32 N.J.L. at 493.
[492] *Allegany County Supervisors*, 15 Wend. at 208.
[493] *Van Horne*, 32 N.J.L. at 493.
[494] *Allegany County Supervisors*, 15 Wend. at 208.
[495] Significant ink has been spilled on universal relief generally. For some of the foundational contributions, see Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Sohoni, *Lost History*, *supra* note 438, at 924; Bray, *supra* note 27.
[496] *See supra* Sections III.A-C.
[497] Many others have weighed in on the policy arguments—for and against—of allowing universal relief. This Article takes no position on this ongoing debate. For varying views on the merits of universal relief, see Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023); Bray, *supra* note 28; Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019).
[498] Merrill, *supra* note 1, at 1001; *see also* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 94-97 (2022) (discussing the focus on administrative adjudication at the time of the APA's enactment); Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683 (2021) (discussing the rise of rulemaking in administrative law).
[499] Mashaw, *Rethinking Judicial Review*, *supra* note 2, at 2243. Indeed, the challenge of reconciling the appellate review model with generally applicable administrative orders were already being hinted at shortly after the model took hold in federal law. In 1924, Professor Francis Bohlen penned a short article on how courts dealt with mixed questions of law and fact. Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. OF PA. L. REV. 111 (1924). Bohlen contrasted review of jury verdicts with review of administrative determinations on the basis that "The decision of a

true: the rulemaking context does not lend itself naturally to the notion of a "record," and it further blurs the (already blurry) line between questions of law and questions of fact or policy.[500] And, indeed, some of the oddities associated with universal relief stem from the nature of the action being reviewed. For much of the twentieth century, adjudication was the bread and butter of administrative action. Universal relief in an adjudication-focused administrative system differs little from party-specific relief. But today, following the explosion of administrative rulemaking in the 1960s and 1970s,[501] the effects of universal relief are far more sweeping.

As we saw, review on certiorari in the states was also generally reserved to review judicial or quasi-judicial administrative action.[502] Because certiorari was generally used to challenge individual adjudications, the difference between vacating administrative action universally and vacating the action only as to the parties was generally not particularly meaningful. But appellate-style review of administrative action *other* than adjudication, resulting in universal relief, is not *wholly* without precedent in the early twentieth century. As we saw, several states (most famously, New Jersey) used the writ of certiorari to review quasi-legislative as well as quasi-judicial administrative action.[503] This may mean, counterintuitively, that the most relevant historical analog to the modern style of judicial review lies in New Jersey state certiorari practice.

Finally, the discretionary nature of certiorari also lends support to the prevailing view that courts can remand agency action back to the agency without vacating it.[504] Because the APA uses mandatory language in § 706—providing that the reviewing court "shall . . . hold unlawful and set aside agency action"—some have argued that the APA does not permit remand without vacatur.[505] However, as Professor Levin has noted, the APA would likely, per the Supreme Court's ruling in *Hecht Co. v. Bowles*,[506] be read against prior equitable practice to preserve pre-existing judicial discretion.[507] State practice on certiorari reinforces this conclusion. State courts uniformly held that certiorari was not issued *ex debito justitiae*:[508] courts could—and did—refrain from granting

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jury determines the standard for the one case, and for that case only. It operates only ex post facto. It does not create, as would a decision of the court or a ruling by an administrative board, until changed, a standard to which others must conform in the future." *Id.* at 116.

[500] *Id.*

[501] Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139 (2001) (discussing rulemaking revolution of the 1960s and 1970s).

[502] *See supra* Section I.B.2(i).

[503] *See supra* Section I.B.2(i).

[504] *See generally* Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990)) ("The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'").

[505] Checkosky v. SEC, 23 F.3d 452, 490 (D.C. Cir. 1994) (Randolph, J., separate opinion) ("The remand-only disposition . . . is contrary to law. It rests on thin air. No statute governing judicial review of agency action permits such a disposition and the controlling statute—5 U.S.C. § 706(2)(A)—flatly prohibits it."); *see also* John Harrison, *Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law*, 48 BYU L. REV. 2077 (2023) (arguing that unlawful regulations are void ab initio and, therefore, once a court finds the agency action to be unlawful, the administrative action becomes immediately unenforceable).

[506] 321 U.S. 321, 329-30 (1943).

[507] Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 310 (2003).

[508] *See, e.g.*, People v. Stilwell, 19 N.Y. 531, 533 (1859) ("[T]he writ of certiorari does not issue ex debito justitiae"); Spring Valley Waterworks v. Bryant, 52 Cal. 132, 140 (1877) ("[T]he writ of certiorari does not issue to such inferior

relief on certiorari when, in the court's discretion, granting relief would be contrary to the public interest.[509] Thus, even where the challenged administrative action was contrary to law, courts were not *bound* to "set aside," "vacate," and "annull" the action on certiorari. The decision whether or not to vacate the action lay with the court.

Before concluding this section, it is worth acknowledging a potential objection to the argument that the certiorari-zation of the federal injunction weighs in favor of a power to award universal relief. Professor Samuel Bray has challenged universal relief from a constitutional perspective, arguing that the Article III judicial power is "a power to decide cases for parties, not questions for everyone."[510] The observations in this section do not directly confront this argument: the fact that state courts were universally vacating administrative action on certiorari does not of itself show that Article III empowers courts to issue universal relief, even if this certiorari practice was later incorporated into federal law. This Article is focused instead on contributing to those arguments grounded in late-nineteenth and early-twentieth-century historical practice.

IV. The State-Law Origins of the "Set Aside" Power

This Article has demonstrated that the federal appellate model of judicial review originated in state practice. This final Part concludes by demonstrating that the APA's statutory "set aside" power—the language at the heart of the ongoing debate on universal relief under the APA[511]—likewise finds its roots in state law. By documenting how state administrative law statutes of the nineteenth century used the "set aside" language, and how Congress lifted this language from state law when drafting the Hepburn Act, this Part strengthens the case that "set aside" in APA § 706(2) is synonymous with "vacate."

A. A Primer on the "Set Aside" Debate

Section 706(2) of the APA provides, in deceptively simple language, that a "reviewing court shall . . . hold unlawful and *set aside* agency action, findings, and conclusions . . . not in accordance with law."[512] In the ongoing debate on universal relief under the APA, "much . . . turns on the semantic content of the phrase 'set aside.'"[513] To set the stage for the historical analysis to follow, this Section starts with a brief primer on the academic and judicial analysis of these two words.[514]

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boards as exercise special jurisdiction created by statute ex debito justitiae."); State ex rel. Cameron v. Roberts, 87 Wis. 292, 58 N.W. 409, 410 (1894) ("As a common-law writ of certiorari issues only in the discretion of the court, and not ex debito justitiae").

[509] In re Mt. Morris Square, 2 Hill 14, 28 (N.Y. Sup. Ct. 1841) ("It is scarcely necessary, therefore, to say, that independently of the answers given, we have a discretion to grant or withhold a certiorari in all cases . . . .").

[510] Bray, *supra* note 27, at 421.

[511] *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1121 (2020) [hereinafter Sohoni, *Power to Vacate*] ("If the APA authorizes a federal court deciding such a case to 'set aside' a rule universally—not just to 'set it aside as to the plaintiffs'—then the APA authorizes courts to provide exactly the kind of relief that opponents of universal injunctions say that courts should not be able to give: relief that reaches beyond the plaintiffs to everyone.").

[512] 5 U.S.C. § 706(2) (emphasis added).

[513] Sohoni, *Power to Vacate*, *supra* note 511, at 1169.

[514] This brief restatement is far from an exhaustive treatment of the literature. For the contributions to the debate, see John Harrison, *The Meaning of "Set Aside" in 5 U.S.C. § 706(2)*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 22,

The conventional—and, until recently, largely unchallenged—thinking was that the term "set aside" in APA § 706 "connote[d] total nullification of the unlawful agency action."[515] Professor John Harrison's recent work contested this orthodox understanding.[516] Harrison argues that § 706(2) does not authorize universal vacatur because § 706(2) is not, in fact, a remedial provision.[517] Instead, Harrison argues that the "set aside" language merely instructs courts to disregard agency action when deciding a particular case.[518] To substantiate this argument, Harrison notes that § 706 is not labeled as a remedies provision; instead, it governs the "scope of review."[519] For the remedies available on judicial review, Harrison looks to § 703 (the "form" provision).[520] Harrison's view has been adopted as the official position of both the Trump and Biden DOJ.[521]

Others have pushed back on Harrison's account. Examining pre-APA equitable relief, the APA's legislative history, and the text and structure of the APA, Professor Mila Sohoni has argued that it is "relatively clear" that the APA "authorizes universal vacatur."[522] Courts in the early twentieth century, Sohoni has shown, repeatedly used the language "set aside" to mean "to vacate or to

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2022), https://www.yalejreg.com/nc/the-meaning-of-set-aside-in-5-u-s-c-%C2%A7-7062-by-john-harrison [https://perma.cc/9X2B-LCLX] [hereinafter Harrison, *Meaning of "Set Aside"*]; John Harrison, *Section 706*, *supra* note 30; Harrison, *Vacatur of Rules*, *supra* note 451; Emily Bremer, *Pre-APA Vacatur: One Data Point*, YALE J. ON REGUL. NOTICE & COMMENT (Mar. 21, 2023), yalejreg.com/nc/pre-apa-vacatur-one-data-point; Hon. Kathryn Kimball Mizelle, *To Vacate or Not to Vacate: Some (Still) Unanswered Questions in the APA Vacatur Debate*, 38 HARV. J. OF L. & PUB. POL. PER CURIAM 1 (Sept. 14, 2023); Jonathan Adler, *On Universal Vacatur, the Supreme Court, and the D.C. Circuit*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 1, 2023), https://www.yalejreg.com/nc/on-universal-vacatur-the-supreme-court-and-the-d-c-circuit-by-jonathan-h-adler [https://perma.cc/43F5-43L8]; Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023); Hannah Pugh, Jasmine Wang, & Peter Jacobs, *The Universal Injunction Debate*, REGUL. REV. (Mar. 27, 2021), https://www.theregreview.org/2021/03/27/saturday-seminar-universal-injunction-debate; Bamzai, *The Path*, *supra* note 27; Sohoni, *Past and Future*, *supra* note 27; Sohoni, *Power to Vacate*, *supra* note 511; Comment, William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153 (2023); Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (July 19, 2020), https://www.yalejreg.com/nc/universal-remedies-section-706-and-the-apa-by-ronald-m-levin-mila-sohoni [https://perma.cc/3F2N-BXYK]; Mila Sohoni, *Do You C What I C?*—CIC Services v. IR*S and Remedies Under the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (June 8, 2021), https://www.yalejreg.com/nc/do-you-c-what-i-c-cic-services-v-irs-and-remedies-under-the-apa-by-mila-sohoni [https://perma.cc/QX69-FBVH].

[515] Ronald M. Levin, Opinion, *The National Injunction and the Administrative Procedure Act*, REGUL. REV. (Sept. 18, 2018), https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act [https://perma.cc/ZL3E-FHQM] ("Virtually everyone understands 'set aside' to connote total nullification of the unlawful agency action."); Sohoni, *Power to Vacate*, *supra* note 511, at 1169 ("The conventional thinking on that issue has been that invalid rules are set aside universally, thereby leaving no rule in place to enforce."); Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citing Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated — not that their application to the individual petitioners is proscribed.").

[516] Harrison, *Section* 706, *supra* note 30.

[517] *Id.* at 37.

[518] *Id.* at 45 (arguing that "set aside" empowers the court to "not to decide in accordance with that action").

[519] *Id.*

[520] *Id.*

[521] Sohoni, *Past and Future*, *supra* note 27, at 2024.

[522] Sohoni, *Power to Vacate*, supra note 493, at 1185.

nullify a rule."[523] Ronald M. Levin has echoed Sohoni's critiques, arguing that § 706 was intended to "supply[] a *framework* for decision" and was intended as a flexible, open-ended provision.[524]

Several Supreme Court Justices have also begun weigh in on the developing debate. During oral argument in *United States v. Texas*, Chief Justice Roberts hinted at his doubt regarding Professor Harrison's (and the Solicitor General's) view that the APA's "set aside" provision does not empower courts to vacate administration action universally.[525] As the Chief Justice noted, universal vacatur has, for quite some time now, been a "staple of [the D.C. Circuit's] decision output."[526] Justice Kavanaugh shared the Chief Justice's skepticism, stating bluntly that "no case has ever said what you [i.e., the Solicitor General] [a]re saying anywhere."[527] Concurring in the Court's judgment in *Texas*, Justice Gorsuch was more sympathetic to Harrison's analysis. Highlighting the sweeping effect of decision to vacate universally, Gorsuch doubted that Congress had intended to use the vague "set aside" language in APA § 706 to equip courts with such a "'new and far-reaching' remedial power."[528]

Justice Alito has called for additional scholarship on this issue,[529] and academics have obliged.[530] This Article joins the growing volume of literature to weigh in. It does so from a new perspective: analyzing the historical origins of the "set aside" language in state law.

B. The State-Law Origins of the "Set Aside" Language

The Hepburn Act of 1906 was the first Act of Congress to use the term "set aside" to describe judicial review of agency action.[531] The Act did not explicitly vest the courts with any power to review agency action. But it implicitly—indeed, "almost casually"[532]—recognized that courts had the power to "enjoin, set aside, annul, or suspend" administrative action in its venue provision:

> The venue of suits brought in any of the circuit courts of the United States against the Commission to *enjoin, set aside, annul, or suspend* any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office.[533]

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[523] Sohoni, *Past and Future*, *supra* note 27, at 2325-36.
[524] Levin, *supra* note 514, at 2020 (emphasis added). Levin has also co-authored a piece with Sohoni. *See* Levin & Sohoni, *supra* note 514.
[525] The Chief Justice responded to the Solicitor General's position with "Wow." Transcript of Oral Argument at 36, Texas v. United States, 599 U.S. 670 (2023) (No. 22-58).
[526] *Id.*
[527] *Id.* at 55.
[528] Texas v. United States, 599 U.S. 670, 695 (2023) (Gorsuch, J., concurring) (quoting Arizona v. Biden, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring)).
[529] Transcript of Oral Argument at 119, Texas v. United States, 599 U.S. 670 (No. 22-58).
[530] *See supra* note 514.
[531] Bamzai, *The Path*, *supra* note 27, at 2046; Sohoni, *Past and Future*, *supra* note 27, at 2327; Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1013 n.320 (2018) ("Statutes that authorize reviewing courts to 'set aside' unlawful agency actions go as far back as the Hepburn Act of 1906.").
[532] FREUND, ADMINISTRATIVE POWERS, *supra* note 33, at 281; *see id.* at 345 ("[T]he Rate Act of 1906 recognized by implication the remedy by injunction . . . .").
[533] Hepburn Act, ch. 3591, § 5, 34 Stat. 584, 592 (1906).

As we saw earlier, the Hepburn Act worked a revolutionary change in the treatment of agency action by making the ICC's orders presumptively enforceable; the onus was on the railroad, not the ICC, to initiate action.[534] The term "set aside," along with "enjoin," "annul," and "suspend," was introduced because, "for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable."[535]

Once the term "set aside" entered the legislative vocabulary, it spread quickly. From the Hepburn Act, the term was transplanted into the Urgent Deficiencies Act of 1913, where Congress provided that three-judge district court panels had "venue of any suit . . . brought to enforce, suspend, or set aside, in whole or in part, any order of the [ICC]."[536] From the Urgent Deficiencies Act, the "set aside" language was then transplanted into various other federal statutes that provided for judicial review of federal agency action[537] until, ultimately, the term found its way into the federal APA.[538]

But while current historical accounts have traced the "set aside" language back from the APA to the Hepburn Act,[539] they have traced it no further. Academic attention has, understandably, been directed at the use of the "set aside" language in *federal* statutes. But this Article demonstrates that, by the time the term "set aside" was introduced into federal law in 1906, state legislation had been using the term for decades to describe judicial review of administrative action.

The development of administrative law often involved a give and take between the state and federal systems. In some areas, federal law was the pioneer.[540] In other areas, states led the way. One prominent area of state-led innovation was with the empowerment of railway commissions. A closer look at state railroad statutes offers instructive into state use of the "set aside" language. In 1844, Connecticut authorized railroad "commissioners" appointed by the state's General Assembly to approve empowered to lay the route for the New York and New Haven Railroad Company. The Connecticut legislature recognized, however, that cities may not be satisfied with the route set by the railroad commissioners. It thus resolved to confer a right of challenge on a city aggrieved by the commissioners' decision:

> [The route laid by the railroad commissioners] shall be and remain the route of said railroad, [But that] . . . a judge of the Superior Court, in vacation, . . . upon a hearing of said city and Railroad Company shall have power to *set aside* the aforesaid doings of said commissioners, in case said city is aggrieved thereby.[541]

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[534] *See supra* Part II.
[535] United States v. Los Angeles & Salt Lake R.R. Co., 273 U.S. 299, 309 (1927).
[536] Act of Oct. 22, 1913, ch. 32, 38 Stat. 208, 220.
[537] Both by reference to the Urgent Deficiencies Act and through free-standing provisions. *See* Bamzai, *The Path*, *supra* note 27, at 2047-48.
[538] Bamzai, *The Path*, *supra* note 27, at 2040; Sohoni, *Past and Future*, *supra* note 27, at 2377 ("[T]he APA's 'set aside' language itself traces back to pre-APA special statutory review statutes . . . .").
[539] *See supra* note 531.
[540] The Federal Register Act of 1935, for example, inspired several state laws for filing and publication of administrative rules, regulations, or orders. *See* EDWIN O. STENE, FILING AND PUBLICATION OF ADMINISTRATIVE REGULATIONS 3 (1943).
[541] 1841 Conn. Pub. Acts 65 (emphasis added). The Act continues: "[I]n case said judge shall set aside said doings of said commissioners, the route of said railroad within said city shall be designated and approved anew, in the manner prescribed in this charter, with the same right of appeal as is herein before provided in this section." *Id.* The Act provided for a similar means of review of routes laid for the Middletown Railroad Company. *Id.* at 58.

This is one of the earliest uses of "set aside" to describe judicial review in a railroad statute, but it is far from the only such instance. In 1891, Texas provided that the rates set by its railroad commissioners would be "conclusive until *set aside* by direct action."[542] Kansas, in a 1901 statute, empowered its courts to "set aside" regulations and orders adopted by the Kansas board of railway commissioners:

> Issues shall be formed and the controversy tried and determined as in other civil cases of an equitable nature; and said court may *set aside, vacate or annul* one or more or any part of any of the regulations or orders adopted by the said board which shall be found to be unreasonable, unjust, oppressive or unlawful without disturbing others.[543]

A 1905 Wisconsin statute setting out the powers and duties of the Wisconsin railway commission used similar language:

> Any railroad or other party in interest being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or service, may commence an action in the circuit court against the commission, as defendant, to *vacate and set aside* any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order, is unlawful, or that any such regulation, practice or service, fixed in such order, is unreasonable, in which action the complaint shall be served with the summons.[544]

In April of 1906, two months before the Hepburn Act was signed into law,[545] the General Assembly of Ohio enacted a statute that closely paralleled the earlier Wisconsin law:[546]

> Any railroad or other party in interest being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may, within sixty days, commence an action in the court of common pleas against the commission as defendant to *vacate and set aside* any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order, is unlawful or unreasonable, or that any such regulation, practice or service, fixed in such order,

[542] 1891 Tex. Gen. Laws 55 (emphasis added).
[543] 1901 Kan. Sess. Laws 536 (emphasis added).
[544] 1905 Wis. Sess. Laws 560 (emphasis added).
[545] The Hepburn Act was signed into law on June 29, 1906.
[546] Indeed, as the Supreme Court of Ohio noted, "The . . . section was borrowed from the railroad commission act of the state of Wisconsin . . . and would seem to have been adopted by our Legislature without sufficient consideration having been given to the difference in the judicial systems and in the rules of practice and procedure in the two states." R.R. Comm'n of Ohio v. Hocking Valley R. Co., 79 Ohio St. 419, 424 (1909). Other states also copied the Wisconsin statute in large part. *See, e.g.*, 1907 Mich. Pub. Acts 433-34; 1911 Nev. Stat. 329. The statutes in these other states, however, did not go into effect before the Hepburn Act was passed in 1906.

> is unreasonable, in which action the adverse parties shall be served with the summons.[547]

It was not just state railroad statutes that employed the "set aside" terminology. As states set up a variety of boards and commissions and empowered them to issue orders, rates, rules, and regulations in the latter half of the twentieth century, establishing statutes would often include provisions for judicial review. Often, these provisions recognized or assumed the existence of a pre-existing judicial power to "set aside" the administrative action.

In 1889, Washington created a system of common schools headed by a Superintendent of Public Instruction. The law provided:

> [The Superintendent of Public Instruction] shall decide all points which may be submitted to him in writing by any school officer, teacher or person in this state, on appeal from the decision of the county superintendents of schools, and his decision shall be final unless *set aside* by a court of competent jurisdiction.[548]

In 1893, Michigan empowered the Auditor General and the Commissioner of the State Land Office to make certain determinations regarding land deeds:

> [N]o suit shall be instituted to *vacate, set aside or annul* the said determination of the said Auditor General and the Commissioner of the State Land Office made as aforesaid unless instituted within six months after the determination aforesaid.[549]

This kind of legislation sometimes explicitly linked the "set aside" power with a specific writ, such as the writ of certiorari. For example, an 1875 New Jersey statute provided that:

> [N]o ordinance, assessment or proceeding, of the councilmen of said town shall be *set aside on certiorari*, by reason of tile return to said certiorari, failing to show that all the requirements of the town charter have been complied with . . . .[550]

A final point is worth making on the use of "set aside" in state statutes concerning land assessments. As one commentator noted near the close of the nineteenth century, assessments for purposes of taxation were "[t]he point in the administrative system of the United States where the need of some control over administrative discretion is most keenly felt."[551] The general understanding was that the writ of certiorari would not lie to review the discretion in the valuing of assessments.[552] Some states (most notably, New York) remedied this issue by statutorily

[547] 1906 Ohio Laws 342 (emphasis added).
[548] 1889 Wash. Sess. Laws 360 (emphasis added).
[549] 1893 Mich. Pub. Acts 138 (emphasis added).
[550] 1875 N.J. Laws 617 (emphasis added).
[551] Goodnow, *supra* note 74, at 533.
[552] *Id.* ("[T]he almost universal rule in this country is that administrative discretion in the assessment of property for taxes cannot be controlled on certiorari.").

broadening the scope of certiorari.[553] But also common was a legislative recognition of a judicial power to "set aside" assessments/special assessments by commissioners.[554] There is quite simply an enormous volume of state statutes that recognize a judicial power to "set aside" assessments/special assessments by commissioners or by juries.[555]

While assessments were originally done by individual commissioners or jurors appointed by the court, states began to professionalize the assessments through boards of assessors. The "set aside" language continued to be used. For example, an 1895 statute from New York included a provision for judicial review of an assessment by a state board of assessors:

> In case the principle of apportionment of an assessment be erroneous, the court shall reduce the assessment on the lots the petitioner aggrieved thereby to the lawful and just amount that ought to have been assessed thereon, or in its discretion, the court may *set aside and annul* the entire assessment and the record thereof and direct the assessment list to be returned to the board of assessors for reapportionment according to law.[556]

This account does not purport to be exhaustive of all state statutes using the term "set aside" to describe judicial review of administrative action. Far from it.[557] Rather, it is hoped that this

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[553] 1859 N.Y. Laws 684 ("A certiorari to review and correct on the merits, any decision or action of the said commissioners, under section ten or eleven of this act, shall be allowed by the supreme court or any judge thereof directed to the said commissioners, on the petition of the party aggrieved . . . .").

[554] *See, e.g.*, 1860 Kan. Sess. Laws 388-89 ("The persons appointed [by the judge of the district or probate court] to view and value such lands shall file their report in the office of the clerk of the district or probate court of the county in which the land, or part thereof, is situated; and if no valid objection be made to said report, the court shall enter judgment against said company for the amount of damages so assessed, and shall make an order vesting in said company the fee simple title of the land in such plat and report described. . . . [The judge] may hear testimony, and by judgment confirm said report, or may set aside the same and appoint three other viewers, who shall proceed in the same manner, and make their report, until their report shall be confirmed.").

[555] Sometimes this statutory right to have the assessment "set aside" was cumulative with a right to have the assessment set aside on certiorari. Vanwickle v. Camden & A. R. & Transp. Co., 14 N.J.L. 162, 162 (1833) ("A party dissatisfied with the conduct of the commissioners appointed under the act incorporating the Camden and Amboy Rail Road and transportation Company, or with their report, may have either a certiorari, or may proceed under the act by application to this court to set aside the report. The remedies are cumulative, not inconsistent. . . . [The legislature] ha[s] not substituted this preceding in the place of the common law remedy by certiorari."). This author has not yet systematically reviewed state legislation calling for assessments to be "set aside" to determine whether or how this legislation affected later state statutes.

[556] 1895 N.Y. Laws 1312 (emphasis added); *see also* 1878 N.J. Laws 77 ("[W]henever any such assessment for local improvements has kien or may hereafter be set aside or vacated by any court of this state . . . .").

[557] *See, e.g.*, 1903 Minn. Laws 298 ("The award [of the board of park commissioners] shall be final unless set aside by the court. The motion to set aside shall be made within fifteen days. In case such report is set aside, the court may, in its discretion, recommit the same to the same appraisers, or appoint new appraisers, as it shall deem best."); 1900 Mass. Acts 171 ("Any person or corporation aggrieved by the order of an inspector issued as above provided, and relating to a public building or a schoolhouse in a city or town may, within thirty days from the day of the service thereof, or, in the case of such an order already issued, within thirty days from the date when this act takes effect, apply in writing to the state board of health to set aside or amend the same . . . ."); 1901 Wis. Sess. Laws 374 ("[N]o action or proceeding to set aside, annul, vacate or in any manner to attack the validity of such acts [done in laying out, widening, extending or; vacating any street, alley, water channel, park highway or other public place] shall be brought, had or taken unless the same shall be begun within six months after this act shall take effect."); 1905 Or. Laws 384 ("The State District 1 all appeals from the county inspectors in his district, and his decision shall have full force and effect until set aside by the courts of the State. All appeals from county inspectors to the district commissioners shall

relatively brief overview of the use of the "set aside" language in state statutes illustrates that the term was in widespread use in the state codes before the same language made its way into federal law. As this Article will argue below,[558] this pre-1906 state-court use offers an important new perspective on the ongoing debate surrounding the term's modern meaning in federal law.[559]

C. States Borrow from Their Appellate Structures

It will be readily apparent from the above summary that the term "set aside" was rarely used in isolation in state statutes. More often than not, the term was used alongside, and—as marginal notes and headings make clear—*interchangeably with*, other terms like "vacate" and "annul."[560] In this way, state statutes providing for judicial review of administrative action closely paralleled state statutes describing appellate review. In Wisconsin, for example, courts "vacate[d] and set aside . . . judgment[s]"[561] handed down by courts and they "vacate[d] and set aside . . . order[s]" handed down by the railroad commission.[562] Ohio courts were empowered to "set aside, modify or vacate judgments" of lower courts[563] and to "vacate and set aside . . . order[s]" of Ohio railroad

be under the form and regulations as prescribed by the State Board of Horticulture."); 1893 Conn. Pub. Acts 230 ("In case any person shall apply to the superior court for relief from the doings of selectmen in laying out a highway or private way, as provided in section 2701 of the general statutes, and said court shall set aside such layout, the costs shall be paid by the town."); 1904 Vt. Pub. Acts 95 (concerning the orders of the Building Inspector: "If any person shall violate this act or wilfully disobey any written order of the building inspector as aforesaid, unless the same shall have been set aside or modified by said city court on appeal . . . he shall be guilty of a misdemeanor, and may be punished therefor . . . ."); 1874 Va. Acts 186 (empowering the board of supervisors of any county to adopt a mixed system of contract and labor for working the roads of the county, but that "upon the petition of fifty freeholders of the county or district the county court shall have power to set aside and annul the action of the board of supervisors, after having caused thirty days' notice of the filing of such petition to be given to the clerk of the board"). Sometimes administrative bodies were empowered to "set aside" and "vacate" their own orders. *See* 1887 Ariz. Sess. Laws 566 ("The several boards of supervisors, within the respective counties in this territory, are hereby authorized and empowered, by an order made of record upon the minutes of such board of supervisors, to offer and pay rewards for the destruction [of certain animals] . . . Said board of supervisors may at any time, set aside, vacate and rescind their order offering and paying such rewards . . . .").

[558] *See infra* Section IV.D.

[559] It is interesting to note also that the federal APA was not the first administrative procedure act to use the term "set aside." The Pennsylvania *state* APA—enacted a year before the federal APA—empowered Pennsylvania courts to "set aside or modify [an order], in whole, or in part, or may remand the proceeding to the agency for further disposition in accordance with the order of the court." 1945 Pa. Laws 1391. For an analysis of this statute, see Clark Byse, *Administrative Procedure Reform in Pennsylvania*, 97 U. PENN. L. REV. 22 (1948).

[560] For example, the suit to "vacate, set aside or annul the . . . determination of the . . . Auditor General and the Commissioner of the State Land Office" in the 1893 Michigan statute was labeled in the marginal notes simply as a "suit to vacate." 1893 Mich. Pub. Acts 138. The 1901 Wisconsin act legalizing certain acts taken in "laying out, widening, extending or vacating streets, alleys, highways" discussed actions "to question, set aside, annul, vacate or in any manner to attack the validity" under a heading titled "actions to annul or vacate." 1901 Wis. Sess. Laws 373-74. The marginal notes for the 1874 Virginia statute providing for judicial review of actions of the state board of supervisors labeled the county court's power to "set aside and annul the action of the board of supervisors" as a "[p]ower . . . annul." 1874 Va. Acts 186.

1874 Va. Acts 186

[561] 1877 Wis. Sess. Laws 581.

[562] 1905 Wis. Sess. Laws 560.

[563] 1877 Ohio Laws 151 ("[I]n all actions or proceedings brought to set aside, modify or vacate judgments or decrees, or to impeach the same for fraud . . . .").

commissioners.[564] In Washington, decisions of the superintendent of public instruction were "set aside,"[565] just like judgments of lower courts.[566] Other examples abound.[567]

To be sure, proving any sort of causality here is difficult. It is hard to say, for example, whether Wisconsin's legislators lifted the language for the judicial review of the railroad commission's orders directly from the earlier laws governing appellate proceedings, or if the drafters took inspiration from those laws. But at the very least, the fact that state legislatures were using provisions to describe judicial review that closely resembled provisions pertaining to appellate review clearly suggests that state legislatures were thinking in appellate terms when using the "set aside" terminology to provide for judicial review.

The historical record offers a handful of explanations for why states dipped into their appellate vocabulary to describe judicial review of administrative action. For one, as this Article demonstrated,[568] an appellate model of judicial review had already developed in the states during the nineteenth century via the writ of certiorari. It would therefore not have been unusual to conceive of judicial review in appellate terms. By the end of the nineteenth century, much of the common-law review of administrative action in the states was already occurring on an appellate model; that statutes providing for judicial review would also use an appellate vocabulary is perhaps not surprising.

Another explanation lies in the description of the review of decisions of justices of the peace. Justices of the peace played a prominent role in the application of administrative law in the early states.[569] But their function was also primarily judicial—and, indeed, these justices were originally understood as courts of record.[570] Some of the earliest state judicial review provisions therefore described the role of a court reviewing the order of a justice of the piece in largely appellate terms.[571] This continued throughout the nineteenth century.[572] In the same way that review of justices of the piece on the writ of certiorari helped to empower courts to use the writ to review a broader array of administrative action,[573] state statutes that provided for judicial review of justices of the piece in appellate terms may have served as a model for later statutes describing judicial review of administrative boards and commissions.

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[564] 1906 Ohio Laws 342.
[565] 1889 Wash. Sess. Laws 360.
[566] 1859 Wash. Sess. Laws 76 ("The judgment, or other matter complained of, may be affirmed, or may be reversed or set aside, in whole or in part, or may be modified, or a different judgment or order may be substituted for that complained of, and the cause may be remitted to the district court for such further proceedings as the supreme court by mandate shall direct.").
[567] For example, Kansas's Code of Civil Procedure spoke of judgments being "set aside or reversed" as well as "reverse[d], vacate[d] or modif[ied]." 1862 Kan. Sess. Laws 234. And Kansas provided that the orders of its Railway Commission could be "set aside, vacate[d] or annul[led]." 1901 Kan. Sess. Laws 536.
[568] *See supra* Part II.
[569] *See supra* Section I.B.
[570] *See supra* note 70.
[571] *See, e.g.*, 1830 Ohio Laws 179 ("[I]n all cases where the proceedings of a justice of the peace are carried, by writ of certiorari, to the court of common pleas, in manner aforesaid, and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal . . . .").
[572] *See, e.g.*, 1962 Kan. Sess. Laws 234 ("No proceeding to reverse, vacate or modify any judgment or final order of a justice of the peace shall operate as a stay of execution . . . .").
[573] *See supra* notes 74-79 and accompanying text.

Finally, early state statutes describing judicial review of assessments by jurors and commissioners may have served as inspiration for later statutes. As noted above, several state statutes created a statutory right to have an assessment "set aside."[574] These assessments were often performed by commissioners appointed by the courts. But assessments were also performed by juries. For example, an 1868 Kansas law provided that, if a court was rendering judgment and either party desired a jury to make an assessment, a jury of twelve men to be drawn to "assess the value of all lasting and valuable improvements made."[575] If either party felt aggrieved by the jury's assessment or valuation, they could apply to the court and the court "may, upon good cause shown, set aside such assessment or valuation, and order a new valuation and appoint another jury."[576] This language was almost identical to a Kansas providing for challengers to commissioners' reports.[577] And, indeed, review of the reports of commissioners was analogized to review of jury verdicts.[578] In the latter half of the twentieth century, states increasingly empowered commissioners to make orders on a wide of issues. Ealy judicial review statutes that used language associated with the review of jury verdicts to describe review of commissioners' assessments may help to explain why state legislatures would use similar language to describe the judicial review of commissioners' orders.

In sum, there were clear parallels between state statutes using "set aside" to describe judicial review and state statutes using the same term to describe appellate review. The best way of understanding a judicial power to "set aside" administrative action is in terms analogous to an appellate court "setting aside" a lower court judgment.

D. The "Set Aside" Language Is Transplanted into Federal Law

This Part has shown that state statutes were using "set aside" language to describe judicial review of administrative action throughout the latter half of the nineteenth century—long before the term first appeared in an Act of Congress. This Section goes further by demonstrating that, when the "set aside" language was incorporated into federal law via the Hepburn Act, Congress was aware of this earlier state usage and likely lifted the "set aside" language from state law.

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[574] *See supra* Section II.A.

[575] 1868 Kan. Sess. Laws 750.

[576] 1855 Kan. Sess. Laws 123.

[577] 1855 Kan. Sess. Laws 529 ("Upon good cause shown by any of the parties, the court may set aside the report and appoint new commissioners as often as may be necessary."). Sometimes the same Act refers to "setting aside" a report of commissioners and "setting aside" a jury verdict just a few sections apart. *See, e.g.*, 1864 Conn. Pub. Acts 135 ("[C]ourt may, for cause, set aside report"; the "return of jury may be set aside, for irregularity").

[578] *See, e.g.*, Lucas v. Peters, 45 Ind. 313, 318 (1873) ("The report of the commissioners is to be regarded in the light of a verdict of a jury rendered upon a trial at law; and it should be disturbed or interfered with by the court only upon grounds similar to those on which a verdict would be set aside, and a new trial granted."); Kern v. Maginniss, 55 Ind. 459, 461 (1876) (analogizing power to set aside a commissioner's report to setting aside a jury verdict); Thompson v. Conway, 53 N.H. 622, 626 (1873); Eighme v. Strong, 1 N.Y.S. 502, 503 (Gen. Term 1888) ("While the power is given by the statute, the practice is not prescribed . . . The motion being based upon the report, the only questions brought up for review are the regularity of the proceedings, and whether the conclusions of law are sustained by the findings of fact appearing in the report.").

When Congress was first setting up the ICC in 1887, Congress drew heavily on state law.[579] It is perhaps unsurprising that Congress would turn back to state law for guidance when, less than twenty years later, it looked into strengthening the Commission.[580] But of particular interest is the *content* of the state statutes that Congress turned to for inspiration. We saw earlier that many state railway statutes empowered their courts to "set aside" orders.[581] And indeed, the specific "set aside" provisions of both the Kansas[582] and Wisconsin[583] state railroad statutes were quoted in full in the Senate hearings[584] and introduced as part of a sixteen-state report on state-law judicial review provisions that Congress could look to for inspiration.[585] As Senator Knox, the author of the report, noted: "it is instructive to observe the manner in which some of the States have dealt with the question of court review, as applied to the acts of their own State railroad commissions exercising similar powers."[586] The "set aside" provision of the Ohio state railroad statute was proposed—verbatim—as a template for the federal law (by, unsurprisingly, the Senator from Ohio).[587] These references to the state "set aside" provisions occurred against the backdrop of extended legislative engagement with prior state laws. Dozens of representatives—both in the House[588] and in the

[579] The Cullom Bill that was to become the Interstate Commerce Act was modeled on Illinois's 1873 Granger Law, which had likewise set up an independent regulatory commission. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1207 (1986); *see generally* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 19 (1941) ("Regulatory commissions were not invented in 1887 when the Interstate Commerce Commission was created. That invention was the normal outgrowth of a broader state commission movement which dated back to the early nineteenth century. . . . When Congress approached the difficult task of establishing a federal regulatory commission in 1887, it had before it the diversified experience of more than twenty states in which somewhat similar commissions were then operating."); FREUND ET AL., supra note 442, at 47 ("In framing [the Interstate Commerce Act], Congress had before it the various laws of the several states and legislation in Great Britain on the same subject.").

[580] Indeed, in the years between the ICC's enactment in 1887 and the enactment of the Hepburn Act in 1906, there was a movement across the states towards setting up "strong" railroad commissions with broad ratemaking powers—just as Congress was looking to do for the ICC. Emory R. Johnson, *The Trend of Governmental Regulation of Railroads*, 32 ANNALS AM. ACAD. POL. & SOC. SCI. 120 (1908) ("Shortly before 1890, a movement for more stringent and thorough regulation of the railroads set in, and all the state commissions established from 1890 to 1906, and there were many of them, were what are called 'strong' commissions, those having power not only to supervise railroads, but also to regulate their charges."). Many states had granted their state commissions ratemaking power before Congress got around to granting the ICC the same power. *See Abstract of Laws of Other States Creating Railroad Commissions, Showing Their Powers and Duties*, *in* NINTH REPORT OF THE RAILROAD COMMISSION OF KENTUCKY FOR 1888, at 274-87 (1889). It is not altogether surprising that senators might bring some of that state influence back with them to Washington, D.C.

[581] *See supra* Section IV.B.

[582] 1901 Kan. Sess. Laws 536 (emphasis added).

[583] 1905 Wis. Sess. Laws 560 (emphasis added).

[584] 59 CONG. REG. 6687 (statement of Sen. Chester I. Long) (discussing the provisions for review of the orders of State commissions in several state statutes, and explicitly quoting the Kansas and Wisconsin statutes).

[585] *Id.* at 4381 (statement of Sen. Philander C. Knox).

[586] *Id.* at 4375 (statement of Sen. Philander C. Knox).

[587] *Id.* at 6664, 6687 (discussing a proposed amendment that is an "exact copy" of the "Ohio railway law").

[588] 59 CONG. REC. 1767 ("This power to fix a contested rate is not a new principle, nor is the exercise of the power without precedent. For years many of the States in the Union have had commissions created by legislative authority of the States and invested with full power not only to adjust and establish rates about which complaint has been made, but in some instances to fix entire schedules for the carriers.") (statement of Rep. Edward W. Townsend); *id.* at 1779 (statement of Rep. Edward W. Townsend); *id.* at 1779 (statement of Rep. Carl Hinshaw); *id.* at 1783 (statement of Rep. William Richardson); *id.* at 1957 (statement of Rep. Charles R. Thomas) ("There are thirty-two State railroad commissions, twenty-four of which have power to make rates . . . . So more than half of the States of the Union, for more than a quarter of a century, have had statutes delegating to a commission a rate-making power. . . . [I]n every instance, after full argument and consideration, the courts have held the statutes valid and constitutional, and that such

Senate[589]—turned to earlier state laws for inspiration, guidance, and support for crafting the Hepburn Act. Congress was well aware that it was "not the only legislative body dealing with this subject."[590]

Congress had before it the "set aside" provisions from several state laws, and legislators were drawing on state statutes using the term "set aside" as instructive models for what the federal law could look like. It takes but a small inferential jump to conclude that Congress lifted the "set aside" language—along with other terms like "annul"—from earlier state codes. This inferential jump is particularly easy to make given that there was no prior use of "set aside" to describe judicial review in federal law,[591] but an abundant use in state law.

The implications of this conclusion for the ongoing debate on the scope of relief under APA § 706 are several. Most importantly, the prior state use of "set aside" strengthens the case that the APA's "set aside" language contemplates universal vacatur. Professor Harrison's critique of the current interpretation of § 706 is premised on the notion that when the APA instructs courts to "set aside"

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a commission was an administrative board, exercising valid and legal authority."); *id.* at 1994 (statement of Rep. Henry D. Clayton) (discussing and citing the laws of Indiana, Mississippi, Texas, Wisconsin, Iowa, and Alabama); *id.* at 2007 (statement of Rep. John J. Esch); *id.* at 2020 (statement of Rep. John A. Sterling); *id.* at 2028 (statement of Rep. Herschel M. Hogg); *id.* at 2034-35 (statement of Rep. John W. Gaines) (citing and discussing at length the Iowa and Illinois state codes establishing and empowering their state railroad commissions); *id.* at 2102 (statement of Rep. James H. Davidson) (noting that "[i]n many of the States similar legislation for the control of State commerce has been enacted" and specifically referencing the law in Wisconsin); *id.* at 2106 (statement of Rep. Marion E. Rhodes) (stating that "[t]he truth is the States lead off in an effort at regulation of railways and railway rates," and noting that states were "pioneer[s] in railway-rate regulation"); *id.* at 2151 (statement of Rep. John L. Burnett) ("Thus we see that the power to regulate interstate commerce is taken from the States, and we have the spectacle of sixteen States of the Union having commissioners to regulate rates on commerce within State borders . . . ."); *id.* at 2175 (statement of Rep. David E. Finley) ("In practically all of the States statutes have been passed looking to the control of railroad, and in many States giving to boards or commissioners the power to fix rates . . . ."). This string cite is not comprehensive. But it is hoped that it serves to illustrate the extent to which Congress was turning to state-law precedents when drafting the Hepburn Act.

[589] 59 CONG. REC. 3445 (statement of Sen. Moses E. Clapp) (discussing "the efforts of the States to regulate intrastate commerce" by allowing their railroad commissions to set rates); *id.* at 3728 (statement of Sen. Furnifold M. Simmons) ("Today, and in the case of many of them for many years past, twenty-six States have commissions exercising powers over domestic business far more plenary than those it is now proposed to give to the Commerce Commission over traffic between the States."); *id.* at 3951 (statement of Sen. James B. McCreary) (noting that "[m]ore than half the States of the United States have statutes delegating to commissions rate-making power" and citing and discussing each of the twenty-four state railroad commissions with the power to set rates); *id.* at 4083 (statement of Sen. Weldon B. Heyburn) (discussing the practice in Iowa); *id.* at 4381 (statement of Sen. Philander C. Knox) ("[I]t is instructive to observe the manner in which some of the States have dealt with the question of court review, as applied to the acts of their own State railroad commissions exercising similar powers."); *id.* at 4381 (statement of Sen. Philander C. Knox) (discussing the provisions for judicial review of state railroad commissions across several states); *id.* at 4440 (statement of Sen. Alexander S. Clay) ("More than half of the States in this Union have already passed statutes creating commissions or boards of transportation and providing that such commissions or boards of transportation shall have power to put in operation reasonable and just rates within the States."); *id.* at 4557 (statement of Sen. Charles W. Fulton) ("[T]he suggestion of government control and regulation of rates, fares, and charges of transportation lines . . . is a policy that has obtained in many of the States for a considerable period of time . . . ."); *id.* at 4849 (statement of Sen. Robert J. Gamble) ("Most of the States of the Union have invoked the same power in the fixing of rates and fares, and have exercised it through a commission, as is proposed in this bill."). As with the citation for statements in the House, this string cite is not comprehensive. But again, it should offer a clear-enough picture of the role that state-law precedents played in the drafting of the Hepburn Act.

[590] *Id.* at 5954 (statement of Sen. Joseph B. Foraker).

[591] *See* Bamzai, *The Path*, *supra* note 27, at 2046, and Sohoni, *Past and Future*, *supra* note 27, at 2327.

agency action, it uses the term *differently* than a court does when it "sets aside" a lower court judgment.[592] However, as this Part has endeavored to show, when state legislatures were using the term "set aside" to describe judicial review, they had the "appellate court-lower court" model in mind.[593] That Congress then likely lifted the "set aside" language from state law strengthens the case that the best lens through which to understand "set aside" is in terms analogous to the judicial treatment of a lower tribunal's judgment.[594] The effect of a court "setting aside" administrative action under the APA is the same as a court "setting aside" a lower court judgment: the target action is "entirely destroyed."[595]

The exposition of state statutes also suggests that we should resist attaching too much weight to the fact that the APA uses the term "set aside," rather than, say, "vacate." Several critics of the view that "set aside" calls for universal relief have emphasized that APA § 706 *only* instructs courts to "set aside" the agency action; it does not instruct courts to "vacate" the action.[596] However, as the early state statutes show, "set aside" was used interchangeably with other terms—like "vacate"—that are generally associated with universal relief.[597] The state-law origins of the "set aside" terminology therefore undercut the primary textualist argument against the current understanding of "set aside" in APA § 706: that "the term 'set aside' never meant vacate."[598] As the predecessor state statutes make clear, "set aside" very much *did* mean "vacate."[599] Just as courts "fold[] together vacatur, reversal, and set-asides" when describing appellate review of lower court

[592] Harrison, *Meaning of "Set Aside," supra* note 514 (challenging the view that the APA uses the term "set aside" in "a sense similar to that in which an appellate court vacates the judgment of a lower court"); Harrison, *Section 706*, *supra* note 30, at 42 (challenging the view that when a court "sets aside" agency action under review it is like "[w]hen an appellate tribunal sets aside a lower tribunal's judgment" in that "it renders that judgment inoperative").

[593] *See supra* Section IV.C. These clear parallels between the state use of the "set aside" language to describe judicial review and the same language to describe appellate review lends further credence to Emily Bremer's suggestion that the term "set aside" is "merely [a] synonym . . . to describe an appellate determination that reverses, annuls, or vacates the challenged agency action." Emily Bremer, *We Have Been Looking in the Wrong Place for the Meaning of "Set Aside" Under the APA*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 1, 2024), https://www.yalejreg.com/nc/we-have-been-looking-in-the-wrong-place-for-the-meaning-of-set-aside-under-the-apa [https://perma.cc/MJL3-MCT4].

[594] Although beyond the scope of the present analysis, it bears emphasizing that commentators right at the time of the APA's enactment were also analogizing review of agency action with review of lower court decisions based on the term "set aside." *See* Stern, *supra* note 18, at 70-71 ("This unitary approach to the administrative field makes it now feasible to compare the rules which govern the judicial review of administrative determinations with those applicable to what has only rarely been treated as a related subject — the function of an appellate court in reviewing decisions of subordinate judicial tribunals. . . . In each field a court is determining whether a decision made by another tribunal, judicial or administrative, shall stand or be set aside.").

[595] *See, e.g.*, Lawlor v. Merritt, 81 Conn. 715 (Conn. 1909) ("[W]hen a judgment is set aside it is entirely destroyed, and the rights of the parties as to the issues tried are left as if no such judgment had ever been entered.").

[596] Harrison, *Vacatur of Rules*, *supra* note 451, at 119-21; Baude & Bray, *supra* note 514, at 181.

[597] *Cf.* Harrison, *Vacatur of Rules*, *supra* note 451, at 119 ("[V]acatur [is] an inherently universal or nationwide remedy.").

[598] Mizelle, *supra* note 514, at 17; *see also* John Harrison, Agency Action, Agency Failure to Act, and Universal Relief in *Corner Post v. Board of Governors of the Federal Reserve System*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 25, 2024), https://www.yalejreg.com/nc/agency-action-agency-failure-to-act-and-universal-relief-in-corner-post-v-board-of-governors-of-the-federal-reserve-system-by-john-harrison [https://perma.cc/DDK7-XXMK] (disagreeing with the view that "set aside" in APA§ 706 means "to deprive of binding legal force, or to vacate").

[599] As the excerpts in Section IV.B illustrate, state statutes often used "set aside" alongside, and interchangeably with, terms like "vacate"—in the same way that an appellate court might note that it is "reversing, setting aside, and vacating" a lower court judgment.

decisions,[600] so too did state statutes describing judicial review of administrative action. We should be skeptical of any interpretation that attaches significance to the fact that it was "set aside," rather than "vacate," that ultimately found its way into the APA.[601]

Critics of the current interpretation of APA § 706 might respond with two counterarguments. First, critics might note—correctly—that, while both the Hepburn Act and the predecessor state statutes both use the term "set aside," only the state statutes use the term "vacate." The argument would be that, while Congress may have lifted the "set aside" language from state law, it made a conscious decision to not *also* lift the accompanying "vacate" language; instead, it introduced the term "enjoin."[602] Congress, the argument would go, therefore did not intend that the federal "set aside" term be interchangeable with "vacate" in the way that the state "set aside" term was. This argument is implausible. Nothing in the Hepburn Act's legislative history points to a clear intention to distance the federal statutory language from the state statutory language by dropping the term "vacate." Quite the opposite: during the Congressional debates, legislators *repeatedly* used the term "vacate" interchangeably with the term "set aside" when describing the effect of a decision adverse to the ICC.[603] As one Senator put it when summarizing the judicial power: "[t]he only jurisdiction of the court is to vacate the order."[604]

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[600] Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 U.C.L.A. L. REV. 1471, 1507 (1994).

[601] This point lends further support to the position adopted by Professor Sohoni. *See* Sohoni, *Power to Vacate*, *supra* note 511, at 1173 (arguing, based on federal practice, that "set aside" is largely synonymous with "vacate"); Sohoni, *Past and Future*, supra note 27, at 2313 n.36.

[602] Hepburn Act, ch. 3591, § 5, 34 Stat. 584, 592 (1906).

[603] 59 CONG. REC. 3949 (1906) (statement of Sen. Moses E. Clapp) (describing orders of the ICC as "vacated"); *id.* at 3449 (same); *id.* at 3778 (statement of Sen. Jonathan P. Dolliver) (same); *id.* at 3798 (same); *id.* at 4563 (statement of Albert J. Hopkins) ("[The court] vacates the order or affirms it, as the case may be."); *id.* at 4563 (statement of Sen. Nelson W. Aldrich) (same); *id.* at 4561 (statement of Sen. Jonathan P. Dolliver) ("[T]he jurisdiction of the court is very simple . . . [I]t has the jurisdiction to affirm the order and it has the jurisdiction to vacate it."); *id.* at 6679 (statement of Sen. Jonathan P. Dolliver) (noting that under the bill a suit could be "brought to vacate one of these orders" of the ICC); *id.* at 4381 (statement of Sen. Philander C. Knox) (pointing to earlier state statutes as inspiration for the federal bill and noting that the "Wisconsin law" allows "dissatisfied parties [to] begin an action in the circuit court of the State to vacate the order of the commission"). Indeed, a proposed amendment would have recognized that courts had the power to "set aside and vacate" an order of the ICC. *Id.* at 2227 (statement of Sen. Senator Littlefield) (proposing an amendment that would provide, in part: "Any carrier may, within thirty days from the service upon it of any order . . . begin in the circuit court of the United States for the district in which its principal operating office is situated, proceedings to set aside and vacate such order . . . . If upon hearing such petition the court shall be of opinion that the order of the Commission is not a lawful order, it shall set aside and vacate the same . . . . If the order of the Commission is vacated . . . the Commission may reopen the case . . . ."). Not once, across the more than 1,300 pages of legislative history, does any Congressman suggest that the word "vacate" would not be apt to describe judicial review of the ICC's orders.

[604] These references to courts "vacating" administrative action are, of course, telling in themselves: that members of Congress at the time of the passage of the Hepburn Act seemed to have had no doubt that courts could "vacate" ICC orders sheds important light on how the "set aside" power was understood in the early twentieth century. This point is reinforced by the use of the "set aside" to describe the relief sought from federal agencies in the 1940s. *See* F. THROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW (1942) (describing the "Relief Sought" section of a complaint: "That said order No. 24065 . . . be *vacated, annulled and set aside*, and decreed to be void and of no effect." (emphasis added)). Emily Bremer was the first to make this observation. *See* Emily Bremer, *Pre-APA Vacatur: One Data Point*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 21, 2023), https://www.yalejreg.com/nc/pre-apa-vacatur-one-data-point [https://perma.cc/CM27-3CQD].

A second counterargument may be that, when state statutes used the term "vacate" alongside and interchangeably with the term "set aside," they were not using the term "vacate" in a way that sounded in universal relief. Professor Bamzai has recently hinted at this claim, arguing that "the fact that courts used terms like 'invalidate' or 'vacate' or even 'validity of the regulation as a whole' does not necessarily tell us whether the judgment the court issued could be enforced to protect nonparties."[605] The argument might go: when enacting the Hepburn Act, Congress may have understood "set aside" interchangeably with "vacate," but "vacate" in this context did not mean "vacate universally." This argument is also unconvincing. For one, this reading flies in the face of the ordinary meaning of "vacate." As Professor Harrison himself has noted, "vacatur [is] *inherently* universal or nationwide" because it operates on the challenged agency action itself.[606] Moreover, any argument that "vacate" does not mean "universally vacate" ignores the clear parallels between state statutes describing judicial review and state statutes describing appellate review.[607] When appellate courts "vacate," "annul," and "set aside" lower court decisions, the effect is universal: the ruling of the lower court is "deprived of all conclusive effect,"[608] "as if the case had not been tried and decided."[609] It is stripped of binding force for all—not just for the parties.

Therefore, (1) as used to describe judicial review of state administrative action at the turn of the twentieth century, "set aside" was synonymous with "vacate"; (2) "vacatur" operated universally; and (3) Congress did not have any different understanding of "set aside" in mind when it transplanted the term from state into federal law.

Conclusion

This Article has offered five contributions. First, it traced the development of the writ of certiorari in the United States from its English-law roots. In so doing, this Article demonstrated that the broadening of certiorari to reach all errors of law—largely complete by the end of the nineteenth century—developed in part on a misreading of English precedent. Second, this Article showed that the appellate model of judicial review did not first emerge in the Supreme Court in the early twentieth century; it developed in state courts over the course of the nineteenth century. The unique mechanics of certiorari, the different state-law conception of separation of powers, and the greater judicial accountability to the public all contributed to the earlier development of the state appellate review model. Third, this Article demonstrated that the Supreme Court likely borrowed from this state progenitor when fashioning the appellate review model in federal law. The model of judicial review that sits at the heart of the APA is a consequence of the certiorari-zation of the federal injunction that began in the early twentieth century and continued through enactment of the APA in 1946. Fourth, this Article showed that understanding this certiorari-zation changes how we conceive of the federal injunctive power. On a writ of certiorari, courts would "vacate," "annull," and "set aside" the challenged administrative action universally. As the closest historical analog to modern judicial review, this prior certiorari practice strengthens the modern case for universal relief. Finally, this Article considered the "set aside" power in APA § 706(2). It showed that, long

[605] Bamzai, *The Path*, *supra* note 27, at 2059-60 n.127.
[606] Harrison, *Vacatur of Rules*, *supra* note 451, at 119 (emphasis added).
[607] *See supra* Section IV.C.
[608] 1B JAMES WM. MOORE, JO DESHA LUCAS, & THOMAS S. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.416[2] (2d ed. 1993)).
[609] Brennan v. Berlin Iron-Bridge Co., 47 A. 668, 670 (Conn. 1900).

before the same language found its way into federal law, state statutes used the term "set aside" interchangeably with "vacate" in a manner analogous to appellate court review of lower court judgments. Through the Hepburn Act, Congress imported the "set aside" language from earlier state codes. In light of this history, the APA's "set aside" language is best understood as empowering courts to vacate agency action universally.