JUDICIAL DEFERENCE TO AGENCY FACT-FINDING IN INDIANA: A CONSTITUTIONAL CHALLENGE

Alexandra Dunn[*]

INTRODUCTION

Indiana's legislature has delegated rule making and adjudicative authority to administrative agencies to implement technical regulatory schemes.[1] Agencies develop, amend, and promulgate generally applicable rules.[2] Agency adjudication determines the legal rights, duties, privileges, or interests of specific parties.[3] Parties may appeal actions within the administrative agency, and may petition for judicial review of final orders.[4] But this review is limited and deferential.[5] Constitutional challenges to agency rulemaking authority and judicial deference to agency rule interpretation have been a frequent subject of scholarly debate.[6] This Note will focus on challenging judicial deference to agency factual determinations under the Indiana Constitution.

Judicial deference to administrative agency fact-finding has been codified in the Indiana Administrative Orders and Procedures Act ("AOPA").[7] The statute requires that courts not gainsay agency fact-finding that is supported by "substantial evidence."[8] The government has maintained that such deference is necessary because agency expertise is required to determine the effect of technical regulations.[9] Indiana is not the only

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[1] *See* IND. CODE ANN. § 4-21.5 (West 2020).

[2] Lincoln v. Bd. of Comm'rs, 510 N.E.2d 716, 720–21 (Ind. Ct. App. 1987).

[3] *Id.*

[4] *See* § 4-21.5.

[5] *See id.* § 4-21.5-5-11.

[6] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248–49 (1994).

[7] Indiana Code Section 4-21.5 (AOPA) applies to most, but not all, administrative agencies in Indiana. IND. CODE ANN. § 4-21.5-5-11 (West 2020) ("Judicial review of disputed issues of fact must be confined to the agency record for the agency action supplemented by additional evidence taken under section 12 of this chapter. The court may not try the cause de novo or substitute its judgment for that of the agency.").

[8] Ashlin Transp. Servs. v. Ind. Unemployment Ins. Bd., 637 N.E.2d 162, 165 (Ind. Ct. App. 1994).

[9] Ind. Real Est. Comm'n v. Martin, 836 N.E.2d 311, 313 (Ind. Ct. App. 2005) ("The reviewing court

jurisdiction to have adopted the substantial evidence standard for judicial review.[10] It is a canon of administrative law followed in other states and the federal courts.[11]

At least one Indiana Supreme Court justice has expressed unease with the substantial evidence standard.[12] In his concurring opinion for denial of transfer in *Indiana Department of Natural Resources v. Prosser*, Justice Slaughter noted that in Indiana "what qualifies as 'substantial' evidence is not substantial at all—requiring nothing more than a mere 'scintilla' of evidence."[13] He went on to declare he was "open to entertaining legal challenges to this system for adjudicating legal disputes that our legislature assigns agencies to resolve in the first instance, subject only to a highly circumscribed right of judicial review."[14] However, Justice Slaughter's opinion is currently in the minority. The prevailing trend in many jurisdictions is a sense of complacency regarding the constitutional implications of the substantial evidence standard.[15] Even so, the propriety of the doctrine deserves closer inspection as it relates to the principles set forth in the Indiana Constitution.[16]

This Note will begin by examining the history of administrative agencies and the process of administrative adjudication and judicial review. Then, the Note will explain how judicial deference to agency fact-finding under the substantial evidence standard fails to comport with due process, the judicial power of the courts, and separation of powers. The expansive deference courts must give to administrative agencies under the AOPA offends these principles enshrined in the Indiana Constitution. Consequently, Indiana's General Assembly should amend the current statute, or Indiana courts should find it unconstitutional. This Note will suggest an alternative model of judicial review that incorporates independent review of factual

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is to give deference to the expertise of the administrative body."); *see also* Michael B. Rappaport, *Replacing Agency Adjudication with Independent Administrative Courts*, 26 GEO. MASON L. REV. 811, 811 (2019) ("Defenders of the administrative state often argue that these legitimacy concerns must be borne because modern government could not function under a strong separation of powers . . . . a strong separation of powers is thought to be inconsistent with the need for expertise and expeditious decision-making. Thus, it might seem that we currently face a choice between legitimate and efficient decision-making.").

[10] *See, e.g.*, SOC. SEC. ADMIN., HEARINGS, APPEALS, AND LITIGATION LAW MANUAL I-3-3-4 (2017); Gladney v. Mississippi Dep't of Emp. Sec., 146 So.3d 1036, 1039 (Miss. Ct. App. 2014).

[11] *See, e.g.*, SOC. SEC. ADMIN., *supra* note 10; *Gladney*, 146 So.3d at 1039.

[12] Ind. Dep't of Nat. Res. v. Prosser, 139 N.E.3d 702, 702 (Ind. 2020).

[13] *Id*.

[14] *Id*.

[15] *See* Lawson, *supra* note 6.

[16] *See* Turner v. State, 843 N.E.2d 937, 945 (Ind. Ct. App. 2006) ("It is a well-settled pillar of federalism that a state may provide its citizens greater protection than that required by the federal constitution.").

determinations. Independent review allows agency expertise to inform the court, yet also safeguards due process rights and maintains constitutional principles. This change would bring the procedures of administrative law in line with the Indiana Constitution.

I. BACKGROUND

A. The Advent of Administrative Law and Judicial Deference

Since the creation of the Interstate Commerce Commission in 1887, administrative agencies have had an increasing influence in the lives of United States citizens.[17] Administrative agencies have proliferated,[18] and agency regulation has become more complex and technical.[19] Agency actions have increased correspondingly in the federal and state governments.[20]

American jurists have voiced their reservations about the expansion of bureaucratic power since the early days of the administrative state. In 1931 U.S. Supreme Court Chief Justice Hughes commented on America's adolescent bureaucracy, declaring that "the activities of the people are largely controlled by government bureaus in State and Nation," and that "this multiplication of administrative bodies with large powers has raised anew for our law, after three centuries, the problem of 'executive justice.'"[21] He went on to note that "a host of controversies as to private rights are no longer decided in Courts."[22]

During the 1930s, some legislators and bureaucrats began voicing their suspicions that judges lacked "the requisite expertise or specialized knowledge to second-guess expert administrators," and even "undermined

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[17] Mark F. Kightlinger, *Nihilism With A Happy Ending? The Interstate Commerce Commission and the Emergence of the Post-Enlightenment Paradigm*, 113 PENN ST. L. REV. 113, 115 (2008) ("The first independent federal regulatory agency, the Interstate Commerce Commission ('ICC'), was established in 1887, meaning that the administrative government of the United States is largely a creation of the last 120 years.").

[18] *See* JON RICHES & TIMOTHY SANDEFUR, GOLDWATER INST., CONFRONTING THE ADMINISTRATIVE STATE: STATE-BASED SOLUTIONS TO INJECT ACCOUNTABILITY INTO AN UNACCOUNTABLE SYSTEM 7 (Apr. 2020), https://goldwaterinstitute.org/wp-content/uploads/2020/04/Confronting-the-Administrative-State_web.pdf [https://perma.cc/6QAF-SY3B].

[19] James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 363–64 (1976).

[20] *See, e.g.*, Jonathan Turley, Opinion, *The Rise of the Fourth Branch*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html [https://perma.cc/3HK4-TW4Y].

[21] Bernard Schwartz, *The Administrative Agency in Historical Perspective*, 36 IND. L. J. 263, 265–66 (1961) (quoting Chief Justice Hughes, N.Y. TIMES, Feb. 13, 1931, at 18).

[22] *Id.*

expert-based administration."[23] They considered the complex regulatory subject matter too technical for judges to adequately comprehend, the judicial system too slow and burdensome, and judicial interpretations too individualistic.[24] Consequently, proponents of administrative justice accused the courts of interfering with the enforcement of legislative intent.[25] Deferring to the pressure from the other branches of government, the U.S. Supreme Court developed the doctrine of judicial deference to administrative agencies which "significantly diminished the role of the judiciary in the administrative process."[26]

Indiana courts had also begun to defer to agency fact determinations, and by 1934 the Indiana Supreme Court held that a state agency's "determination is conclusive unless the one who questions it can show that such determination was unsupported by any facts which could reasonably call for good-faith exercise of discretion by the department."[27] In 1940, the Indiana Supreme Court decided *Warren v. Indiana Telephone Co.*, where an employee sought judicial review of an Industrial Board decision under the Workmen's Compensation Act.[28] The court described the scope of judicial review of agency determinations:

> Such review is necessary to the end that there may be an adjudication by a court of competent jurisdiction that the agency has acted within the scope of its powers; that substantial evidence supports the factual conclusions; and that its determination comports with the law applicable to the facts found.[29]

Warren established that Indiana courts can only set aside an award when it "does not rest upon a foundation of fact."[30] The Court further described what evidence would not support an award:

> If, however, it should be made to appear that the evidence upon which the agency acted was devoid of probative value; that the quantum of legitimate evidence was so proportionately meagre as to lead to the conviction that the finding does not rest upon a rational basis; or that the result of the hearing must have been substantially influenced by improper considerations, the order will be set aside, not because incompetent evidence was admitted, but

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[23] Islame Hosny, *Interpretations by Treasury and the IRS: Authoritative Weight, Judicial Deference, and the Separation of Powers*, 72 RUTGERS U.L. REV. 281, 290–91 (2020).

[24] *See* Schwartz, *supra* note 21, at 266–68.

[25] *See id.*

[26] Hosny, *supra* note 23, at 290.

[27] Wallace v. Feehan, 190 N.E. 438, 444 (Ind. 1934).

[28] Warren v. Ind. Tel. Co., 26 N.E.2d 399, 402 (Ind. 1940).

[29] *Id.* at 404.

[30] *Id.* at 409–10.

> rather because the proof, taken as a whole, does not support the conclusion reached.[31]

The standard of review in *Warren* was deferential to agencies but still allowed courts to weigh the evidence and decide if overall the evidence was sufficient to support the order. The current interpretation of the "substantial evidence" standard under the AOPA is even more deferential and does not allow the court to consider the weight of the evidence.[32]

B. Indiana Administrative Procedures

1. The AOPA. — In order to update and formalize administrative procedures, the Indiana General Assembly passed the Administrative Orders and Procedures Act (AOPA) in 1986.[33] Mindful of due process rights, the legislature amended the AOPA in 1993 to enshrine procedural safeguards, increase due process protections, and define the qualifications and prohibited conduct for the Administrative Law Judge (ALJ).[34] This suggests the legislature has concern for the protection of due process rights in administrative actions and appeals. Despite the due process concern, the AOPA mandated that a court may not "substitute its judgment for that of the agency,"[35] and case law has interpreted this to mean the court may "may not reweigh the evidence."[36]

2. Cases Agencies Decide. — Administrative agencies regulate many aspects of modern life and decide a variety of controversies, from "the classic agency licensing and ratemaking cases to economic regulation, health care, welfare, disability, and environmental matters."[37] Professional licensing, workers compensation claims, unemployment claims, employment discrimination claims, land development and environmental permits, and rate setting for nursing homes and public utilities, among others, fall under the

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[31] *Id.* at 409.

[32] IND. CODE ANN. § 4-21.5-5-11 (West 2020) ("The court may not try the cause de novo or substitute its judgment for that of the agency."); *see also* Ind. Dep't of Nat. Res. v. Prosser, 132 N.E.3d 397, 401 (Ind. Ct. App. 2019) ("We do not try the case de novo, reweigh the evidence, judge witness credibility, or substitute our judgment for that of the agency.").

[33] *See* Lori Kyle Endris & Wayne E. Penrod, *Judicial Independence in Administrative Adjudication: Indiana's Environmental Solution*, 12 ST. JOHN'S J. LEGAL COMMENT. 125, 130 (1996).

[34] *Id.* at 130–31.

[35] § 4-21.5-5-11.

[36] Comm'r, Ind. Dep't of Ins. v. A.P., 121 N.E.3d 548, 553 (Ind. Ct. App. 2018).

[37] Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 930 (1990).

purview of administrative agencies.[38] Agencies decide benefit or public right disputes, but also controversies concerning private rights such as personal security, liberty, or private property.[39] Indeed, in cases involving private rights, the decision-making power vested in administrative agencies is indistinguishable from the legal and equitable powers vested in the courts.[40] The AOPA's rules for administrative adjudicatory proceedings are extensive, similar to the rules of judicial courts.[41]

3. Administrative Appeals. — Indiana statute defines administrative agencies as "any officer, board, commission, department division, bureau, or committee of state government," excepting certain specified agencies.[42] Agencies have statutorily delegated authority[43] to execute judicial, legislative and executive functions.[44] Agencies use their delegated authority to write regulations, enforce regulations, and rule on appeals to administrative actions.[45] Indiana Code § 4-21.5-1-4 defines "agency action" as an order or "failure to issue an order," performance "or failure to perform" a duty or function.[46] Petitioners must exhaust administrative remedies prior to seeking judicial review.[47] Agencies review administrative appeals internally and, in most agencies, forward them to an ALJ. The ALJ presides over discovery, mediation, and ultimately a hearing where the ALJ exercises his quasi-judicial power to make findings of facts and conclusions of law.[48] Depending on the agency, the ALJ's order may be final, or the agency authority may

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[38] *See generally Find an Agency*, IN.GOV, https://www.in.gov/core/find_agency.html [https://perma.cc/9WSA-U3HR].

[39] *See* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J. L. & PUB. POL'Y 27, 31–32 (2018).

[40] *See* Schwartz, *supra* note 21, at 266.

[41] *See* IND. CODE ANN. § 4-21.5-3 (West 2020).

[42] *Id.* § 4-21.5-1-3 (West 2020) ("'Agency' means any officer, board, commission, department division, bureau, or committee of state government that is responsible for any stage of a proceeding under this article. Except as provided in IC 4-21.5-7, the term does not include the judicial department of state government, the legislative department of state government, or a political subdivision.").

[43] *See* Vehslage v. Rose Acre Farms, Inc., 474 N.E.2d 1029, 1033 (Ind. Ct. App. 1985) ("[A]dministrative agencies are creatures of statute, and only the legislature has the broad power to provide for their creation.").

[44] Tabitha L. Balzer & Manuel "Manny" Herceg, *Survey of Indiana Administrative Law*, 49 IND. L. REV. 929, 929 (2016) ("Because administrative agencies have such a wide reach, and because they perform quasi-judicial, legislative, and executive tasks, varied and complex legal issues often arise. Although Indiana courts have established principles for addressing issues related to the functions of administrative agencies, courts are still called upon to decide whether those principles have been properly applied.").

[45] *See id.*

[46] § 4-21.5-1-4.

[47] *Id.* § 4-21.5-5-4.

[48] CHELSEA E. SMITH, IND. DEP'T OF HOMELAND SEC., GUIDE TO IDHS ADMINISTRATIVE APPEALS 3 (2018), https://www.in.gov/dhs/files/Administrative-Appeals-Manual-2018.pdf [https://perma.cc/76KR-BRA3].

need to accept or reject the ALJ findings and issue the final order.[49] This exhausts the administrative appeal.[50]

4. Judicial Review of Agency Actions. —

a. Procedure and Burden of Proof. — Parties may petition for judicial review after the administrative appeal is exhausted.[51] In some circumstances, parties may also petition for judicial review prior to exhausting administrative appeals if they can establish irreparable harm and that no remedy exists at law.[52] The venue for judicial proceedings is the trial court in the judicial district of the petitioner, the agency office, or the district where the agency action is enforced.[53] The petitioner has the burden to prove the invalidity of agency action.[54] If the reviewing court finds that agency action has prejudiced a party, then the court may compel agency action or remand for further administrative proceedings.[55] The resulting trial court decisions are appealable in the same manner as civil appeals.[56]

b. Standard of Review. — The standard for judicial review of agency action is the same for the trial and appellate courts.[57] The court reviews whether agency action is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.[58]

Indiana courts have explained that the scope of review is restricted to determining if (1) substantial evidence supports the order and (2) the order "constitutes an abuse of discretion, is arbitrary, capricious, or in excess of statutory authority as revealed by the uncontradicted facts."[59]

c. Review of Agency Factual Determinations. — The AOPA decrees that a reviewing court "may not re-try the facts de novo nor substitute its own judgement for that of the agency; instead, a court must defer to an agency's

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[49] *Id.* at 7.
[50] *Id.*
[51] IND. CODE. ANN. § 4-21.5-5-4 (West 2020).
[52] *Id.* § 4-21.5-5-2.
[53] *Id.* § 4-21.5-5-6.
[54] *Id.* § 4-21.5-5-14.
[55] *Id.* § 4-21.5-5-15.
[56] *See id.* § 4-21.5-5-16.
[57] *See, e.g.*, Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 844 (Ind. 2009).
[58] § 4-21.5-5-14.
[59] Ind. Dep't of Env't Mgmt. v. Conard, 614 N.E.2d 916, 919 (Ind. 1993).

findings if they are supported by substantial evidence."[60] Substantial evidence "is more than a scintilla, but something less than a preponderance of the evidence."[61] The standard is similar to the review of jury fact-finding by appellate courts.[62] Indiana courts have explained that where the evidence is "adequate to support a conclusion by a reasonable mind,"[63] the court may not contravene the administrative agency findings. The court may only decide "whether the administrative record contains substantial evidence to sustain the ALJ's finding."[64] Indiana courts have explained that though a court may arrive at a different conclusion from the facts, as long as there is some evidence to support the agency's determination, the court must defer to the agency.[65]

As Justice Slaughter observed, this judicial definition of "substantial" is at odds with the ordinary English meaning of "substantial,"[66] which Webster's defines as "ample" or "considerable in quantity," although an alternative meaning is "consisting of substance."[67] Professor Martin Redish has questioned whether there is "meaningful review under the highly deferential substantial evidence test."[68] Indeed, when "substantial evidence" in fact means any evidence that could reasonably support a finding, without weighing the other evidence presented, the depth of review is not considerable.[69] Professor Redish describes how deferential review came in force in the U.S. Supreme Court's *Crowell v. Benson*, finding a similarity between a jury and an agency.[70] Redish explains that juries have independence from government control, much like judges who cannot be easily removed by government officials who dislike their decisions, which administrative agencies lack.[71] Because agencies are not independent from government control, Redish argues the U.S. Constitution requires greater care in reviewing agency factual determinations than is allowed under the substantial evidence standard.[72]

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[60] Ind. Family and Social Servs. Admin. v. Patterson, 119 N.E.3d 99 (Ind. Ct. App. 2019).

[61] Ind. Dep't of Nat. Res. v. Prosser, 132 N.E.3d 397 (Ind. Ct. App. 2019).

[62] *See* Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 24 (1994).

[63] 1 IND. LAW ENCYC. ADMINISTRATIVE LAW AND PROCEDURE § 81 (2020).

[64] *Prosser*, 132 N.E.3d at 401–02.

[65] Ind. Dep't of Env't Mgmt. v. Conard, 614 N.E.2d 916, 919 (Ind. 1993).

[66] *See Prosser*, 139 N.E.3d 702, 702 (Ind. 2020).

[67] *Substantial*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/substantial [https://perma.cc/BJ9P-Z9B8].

[68] Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 227 (1983).

[69] *See id.*

[70] *Id.* (discussing Crowell v. Benson, 285 U.S. 22, 51 (1932)).

[71] *Id.*

[72] *Id.* at 228.

The Indiana Supreme Court discussed the substantial evidence standard in *Indiana High Sch. Athletic Ass'n, Inc. v. Watson*.[73] The Indiana High School Athletic Association (IHSAA) had ruled a student ineligible to play basketball, determining the student's move to a new school district was because of undue influence and not other familial concerns.[74] The trial court determined the IHSAA acted arbitrarily and capriciously and entered an injunction in the student's favor.[75] The Court of Appeals affirmed the trial court.[76] The Indiana Supreme Court reversed, explaining where factual determinations "are supported by substantial evidence, we will not find them to be arbitrary and capricious."[77] Under this standard, substantial evidence exists when "reasonable minds might accept it as adequate to support the conclusion."[78] The court elaborated that administrative factual determinations supported by "any substantial evidence" must not be disturbed.[79] The court also explained that agencies may use hearsay evidence to support administrative decisions.[80] The Indiana Supreme Court found the trial court inappropriately reweighed the evidence, noting that "while courts must consider whether contradictory evidence completely invalidates evidence supporting the IHSAA's conclusions, they must not find the existence of contradictory evidence allowing for a reasonable debate to constitute a lack of substantial evidence."[81]

But, Justice Dickson's dissent observed that the court had been "extremely deferential" to the IHSAA for years, and had "refused to invalidate its decisions as arbitrary or capricious."[82] He asserted that such deference "virtually immunize[d] IHSAA decisions from meaningful judicial review."[83] The dissent also chastised the majority for falling behind the legislature in protecting due process rights.[84] Specifically, Justice Dickson pointed out that during the pendency of the case, the General Assembly countered the court's unwavering deference to questionable IHSAA

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[73] Ind. High Sch. Athletic Ass'n, Inc. v. Watson, 938 N.E.2d 672, 673 (Ind. 2010); *see also id.* at 680 (stating that while IHSAA is not a state agency, "Indiana courts have reviewed the IHSAA's regulation of student-athletes in a manner analogous to the review of administrative agencies.").

[74] Ind. High Sch. Athletic Ass'n, Inc. v. Watson, 913 N.E.2d 741, 743 (Ind. Ct. App. 2009).

[75] *Id.* at 758.

[76] *Id.*

[77] *Watson*, 938 N.E.2d at 680.

[78] *Id.* at 680–81.

[79] *Id.* at 681.

[80] *Id.*

[81] *Id.* at 682.

[82] *Id.* at 683 (Dickson, J., dissenting).

[83] *Id.* (Dickson, J., dissenting).

[84] *See id.* at 683–84.

decisions by imposing an independent review panel to provide *de novo* review of the agency's actions.[85]

This decision illustrates the harm that can arise from overly broad application of the substantial evidence standard. The students who were damaged by the IHSAA decisions had no recourse in the courts.[86] When courts circumscribe their review they are required to approve IHSAA actions in nearly all circumstances. This effectively delegates the courts' judicial powers to another adjudicative body with the ability to vindicate Hoosiers' rights. This arrangement violates the Indiana constitution, and Indiana courts should cease abdicating the judicial role when reviewing agency actions.

II. DEFERENTIAL REVIEW VIOLATES CONSTITUTIONAL PRINCIPLES

Judicial deference to agency fact-finding, as mandated in the AOPA,[87] conflicts with the constitutional principles of due process, separation of powers, and the judicial power of the courts in Indiana. Professor Lawson has opined "the modern administrative state openly flouts almost every important structural precept of the . . . constitutional order."[88] The stated purpose of the AOPA was to ensure that administrative procedures better comply with due process of law.[89] However, the solutions provided by the statute are not sufficient to fully protect the constitutional rights afforded to Hoosiers under the Indiana Constitution because it still requires great deference to agency tribunals. Though each constitutional principle will be discussed separately, due process, separation of powers, and the judicial power intertwine and are influenced by each other. These principles are the foundation of the U.S. and Indiana constitutions.[90] Despite the U.S. Supreme Court finding many administrative procedures comply with due process,[91] state courts are free to interpret constitutional provisions to provide more generous protection to their citizens.[92] Additionally, the U.S. Supreme Court itself has questioned

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[85] *Id.*

[86] *See id.* at 683.

[87] IND. CODE ANN. § 4-21.5-5-11 (West 2020).

[88] Lawson, *supra* note 6, at 1233.

[89] *See* Endris & Penrod, *supra* note 33, at 130–31.

[90] *See generally* U.S. CONST.; IND. CONST.

[91] *See, e.g.*, Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1348–51 (1992).

[92] Clint Bolick, *State Constitutions: Freedom's Frontier*, *in* CATO SUPREME COURT REVIEW 9 (Nov./Dec. 2016), https://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2017/9/2017-supreme-court-review-simon-lecture.pdf [https://perma.cc/TCK9-RZ3R].

the deference afforded to administrative agencies by creating the constitutional fact doctrine, which is still good law.[93]

A. Due Process

Courts have found due process is satisfied when judicial review is available for a bureaucratic agency's decision.[94] However, when performed under the substantial evidence standard, such review is often not meaningful.[95] Due process of law is enshrined in the U.S Constitution.[96] It is also guaranteed in the Indiana Constitution under the term of "due course of law."[97] Indiana Constitution Article I § 12 states: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."[98]

Indiana courts have analogized this provision to the Due Process Clause of the U.S. Constitution,[99] such that "[i]n the context of a procedural right to 'remedy by due course of law' in a civil proceeding . . . the Indiana Constitution has developed a body of law essentially identical to federal due process doctrine."[100]

Federal due process of law has been defined as the "process and proceedings of the common law."[101] Procedural due process is a guarantee that the government may deprive an individual of life, liberty, or property "only if certain procedural requirements have first been satisfied."[102] Due process is not a precisely defined requirement, but it protects "the individual

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[93] Morris D. Forkkosch, *Judicial De Novo Review of Administrative Quasi-Judicial Fact Determinations*, 25 HASTINGS L.J. 963, 972 (1974).

[94] Warren v. Ind. Tel. Co., 26 N.E.2d 399, 404 (Ind. 1940).

[95] *See* Ind. Dep't of Nat. Res. v. Prosser, 139 N.E.3d 702, 702 (Ind. 2020) ("[W]hat qualifies as 'substantial' evidence is not substantial at all."); *see also* Redish, *supra* note 68.

[96] *See* U.S. CONST. amends. V, XIV.

[97] IND. CONST. art. I, § 12.

[98] *Id*.

[99] Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95, 104 (Ind. Ct. App. 1995); *see also* McIntosh v. Melroe Co., 729 N.E.2d 972, 974 (Ind. 2000) ("By 1986, this Court could correctly observe that there was a 'substantial line of cases treating the 'due process' clause of the federal constitution and the 'due course' clause of the Indiana Constitution as interchangeable.'") (quoting White v. State, 497 N.E.2d 893, 897 n.4 (Ind. 1986)).

[100] McIntosh v. Melroe Co., 729 N.E.2d 972, 976 (Ind. 2000).

[101] *See* Bernick, *supra* note 39, at 53.

[102] Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 297 (2018).

against arbitrary action by the government."[103] Due process has been described as "[t]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction."[104] Indeed, scholars have noted that "the imposition of a civil penalty or fine is very hard to distinguish from the imposition of a criminal sentence."[105] When the government seeks to deprive an individual of property, due process "demands that government provide the citizen with a full and fair opportunity to challenge the allegations of legal wrongdoing."[106]

Indiana courts and the U.S. Supreme Court have held that due process does not require that proceedings occur in a court of law.[107] In *Warren v. Indiana Tel. Co.*, the Indiana Supreme Court found "[i]t is not necessary to the exercise of due process that the facts be determined by a court, so long as there is provided or exists an opportunity for a judicial review."[108] The court went on to explain that when a court reviews an agency decision and determines the "agency has acted within the scope of its powers; that substantial evidence supports the factual conclusions; and that its determination comports with the law applicable to the facts found," then "every essential element of due process has been met and the complaining party has had his day in court."[109]

Due process was evaluated in *Richardson v. Pereles*, and the U.S. Supreme Court determined that a Social Security hearing examiner's decision satisfied due process even though it was based on questionable evidence.[110] The *Richardson* Court found due process satisfied because a contrary result "would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity."[111] In other words, the main consideration was not whether the petitioner received all of the process due her under the Constitution, but whether the hearing provided a veneer of due process with the most important consideration being the government's ability to enforce its ever-growing regulatory scheme.

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[103] Perdue v. Gargano, 964 N.E.2d 825, 835 (Ind. 2012) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

[104] Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotations omitted).

[105] Lawson, *supra* note 6, at 1247.

[106] Redish & McCall, *supra* note 102.

[107] Bernick, *supra* note 39, at 50.

[108] Warren v. Ind. Tel. Co., 26 N.E.2d 399, 404 (Ind. 1940).

[109] *Id.*

[110] Richardson v. Perales, 402 U.S. 389, 410 (1971).

[111] *Id.*

Towards that end, in *Matthews v. Eldridge*, the U.S. Supreme Court found that due process allows administrative agencies to hear cases, and set out a balancing test to determine whether agency procedures comply with due process.[112] The *Matthews* balancing test considers three factors: (1) the private interest involved, (2) the procedural risk of false deprivation of this interest, and (3) the government's interest which is balanced against the cost of additional safeguards.[113] Though facts need not be determined by a court to comply with due process,[114] "impartial adjudication" is a necessary component of due process.[115]

The *Matthews* court purported to provide constitutional protections in this test, but the due process requirement of fair and impartial proceedings is compromised by judicial deference to administrative fact-finding.[116] Indeed, administrative adjudication was originally taken from the courts precisely because the courts were too prone to rule for petitioners and against the regulatory agency, allegedly harming the legislative intent.[117] This indicates administrative agency tribunals are designed to give the government agency an edge in controversies and therefore were designed to not afford the fair and impartial tribunal that due process requires. This advantage is somewhat understandable and perhaps even necessary when it comes to public benefits that the government may choose to confer upon individuals at its discretion. However, it is unconstitutional when it implicates private rights, such as property rights, protected by the due course of law requirement.

The purpose and structure of administrative agency adjudication inherently incentivizes an agency to rule for itself in a controversy to advance its regulatory purpose. Even when ALJs preside over a hearing to decide the facts and the law, partiality, or at least the perception of bias, is still a problem.[118] ALJs have traditionally been employed by the agencies they work under.[119] This creates a perception of bias, as well as an actual threat of bias as agency supervisors have authority over ALJs.[120] More recently, Indiana created a centralized pool of ALJs for many agencies in order to

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[112] Matthews v. Eldridge, 424 U.S. 319, 348 (1976).

[113] *Id.* at 335.

[114] *Warren*, 26 N.E.2d at 404.

[115] *See* Bernick, *supra* note 39, at 54.

[116] *Id.*

[117] *See* Schwartz, *supra* note 21, at 267–68.

[118] *See* Marilyn Odendahl, *After Years, Administrative Law Reform Clears Statehouse*, IND. LAW. (June 25, 2019), https://www.theindianalawyer.com/articles/50666-after-years-administrative-law-reform-clears-statehouse [https://perma.cc/9QJY-DMHZ].

[119] *See id.*

[120] Bernick, *supra* note 39, at 55.

"alleviate the concerns about bias."[121] This reform was a needed, if insufficient, improvement because data indicates ALJs are subject to greater external pressures to rule in the government's favor than the judiciary or juries.[122] It is not yet clear whether this centralized office has succeeded in relieving the pressure on ALJs, or the perception of bias. The U.S. Supreme Court has indicated that "the appearance of bias can deprive individuals of due process."[123] If the agency fact-finder is not, or is not perceived as, impartial, then "judges that treat [agency] determinations as presumptively valid effectively tilt the scales of justice in favor" of state power.[124] Because "state courts provide greater procedural safeguards and institutional independence than the typical agency,"[125] it is crucial that citizens have the protection of these safeguards when they are afforded judicial review. The substantial evidence standard denies citizens these protections even when they are afforded judicial review.

B. The Judicial Power of the Courts

The Indiana Constitution vests the state judicial power exclusively in the courts.[126] Article VII, § 1 states: "The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish."[127] Indiana courts have understood this provision to "make it incontrovertibly plain that the courts possess the entire body of the intrinsic judicial power of the state, and that the other departments are prohibited from assuming to exercise any part of that judicial power."[128] Indiana courts have long held this constitutional provision "requires that the persons to whom the people have entrusted the judicial power shall themselves exercise it, and not entrust its exercise to others."[129] However, increasing regulation has led Indiana courts to surrender these principles in service to bureaucratic efficiency.[130]

The need to compromise has created a certain amount of tension in the way Indiana courts view judicial power.[131] For example, the Indiana Supreme

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[121] *Id.*
[122] *See id.* at 48–49.
[123] *Id.* at 56 (discussing Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)).
[124] *Id.* at 55.
[125] *Id.*
[126] IND. CONST. art. VII, § 1.
[127] *Id.*
[128] State v. Noble, 21 N.E. 244, 246 (Ind. 1889).
[129] *Id.* at 249.
[130] Lawson, *supra* note 6, at 1247.
[131] See *Noble*, 21 N.E. at 248; cf. Ind. Univ. v. Hartwell, 367 N.E.2d 1090, 1093 (Ind. 1977).

Court has defined judicial power as "the power which the people understood to be vested in judges, for no other power is judicial."[132] This includes the power to determine what the law is, and determining rights of parties.[133] But when administrative agencies decide the law and apply it to the facts of a case, scholars contend they "are endowed with true judicial power," and "the vesting of judicial power in agencies, rather than courts, does some violence to our basic conceptions."[134] On the other hand, the Indiana Court of Appeals has explained that "administrative agencies, as part of the executive branch, may have conferred upon them by statute certain legislative functions and quasi-judicial power, without doing violence to the Indiana Constitution."[135] Yet bureaucratic officials determining individuals' rights "has been traditionally felt to be inconsistent with the supremacy of law."[136]

Courts have acquiesced in giving administrative agencies "quasi-judicial" power on the theory that this does not divest the judicial power of the courts.[137] Yet, when courts automatically defer to agencies' factual determinations in cases concerning private rights that "lie at the core of the historically recognized judicial power," [138] they abdicate their constitutional duty to exercise the judicial power and instead impermissibly delegate[139] this power to the administrative agencies. Professor Lawson has noted, if courts were statutorily required to defer to agencies in all circumstances, it would be an unconstitutional usurpation of the judicial power.[140] In other words, if the legislature directed the courts to always affirm agency actions, that "would effectively vest the judicial power" in the agency.[141] Yet, the practical effect of the AOPA is to require Indiana courts to defer to agency fact determinations by demanding that they follow the substantial evidence standard, which prohibits meaningful review because it is structurally slanted towards the agency determination and to affirming agency actions.[142] In effect, the statute bars courts from exercising the judicial power which the Indiana Constitution and case law provide is solely held by the courts.

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[132] *Noble*, 21 N.E. at 248.

[133] 16 C.J.S. CONSTITUTIONAL LAW § 381 (February 2021 Update).

[134] Schwartz, *supra* note 21, at 266.

[135] *Hartwell*, 367 N.E.2d at 1093.

[136] Schwartz, *supra* note 21, at 266.

[137] Bernick, *supra* note 39, at 45.

[138] Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1573 (2013).

[139] State v. Noble, 21 N.E. 244, 249 (Ind. 1889).

[140] Lawson, *supra* note 6, at 1247.

[141] *Id.*

[142] *Id.*

C. Separation of Powers

Administrative agencies wield legislative, executive, and judicial powers, implicating the separation of powers principle undergirding the U.S. Constitution.[143] Separation of powers is mandated to "rid each separate department of government from any influence or control by the other department."[144] The U.S. Constitution was structurally rooted in this principle in order to prevent a tyrannical exercise of government power.[145] The Indiana Constitution enshrines this principle in Article III.[146] Indiana courts have declared "the principle of separation of powers is as much a part of the Indiana Constitution as the principle of freedom of conscience."[147] Indeed, courts have said this principle "is the keystone of our form of government and to maintain the division of powers as provided therein, its provisions will be strictly construed."[148] Indiana courts have held the separation of powers principle mandates the availability of judicial review of administrative decisions. [149]

Administrative agencies inherently corrupt the separation of powers principle by performing executive, judicial, and legislative functions.[150] Nevertheless, courts and legislative bodies have chosen to ignore or deny this constitutional problem.[151] The AOPA sanctioned the quasi-judicial powers of administrative agencies, and Indiana courts have found this comingling of functions in administrative agencies does not violate the Constitution.[152] This is troubling because it leads to the very consolidation of government functions that the separation of powers principle is designed to prevent. Agencies cannot be impartial when the agency that has instituted the action against the private party is both the adversary and the judge in the

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[143] THE FEDERALIST NO. 47 (James Madison).

[144] 1 IND. LAW ENCYC. ADMINISTRATIVE LAW AND PROCEDURE, § 5 (Sept. 2020 Update); *see also* IND. CONST. art. III, § 1.

[145] Lawson, *supra* note 6, at 1248.

[146] IND. CONST. art. III, § 1 ("The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."); *see also* State v. Monfort, 723 N.E.2d 407, 414 (Ind. 2000) (noting that "the separation of powers doctrine applies only to state government and its officers, not municipal or local governments.").

[147] Pence v. State, 652 N.E.2d 486, 488 (Ind. 1995).

[148] Book v. State Off. Bldg. Comm'n, 149 N.E.2d 273, 293 (Ind. 1958).

[149] Mathis v. Coop. Vendors, Inc., 354 N.E.2d 269, 274 (Ind. App. 1976) ("However, it is well-established under Indiana law that due process and the separation of powers doctrine demand that judicial review of administrative decisions be available.").

[150] *See* THE FEDERALIST NO. 47 (James Madison).

[151] *See, e.g.*, Ind. Univ. v. Hartwell, 367 N.E.2d 1090, 1093 (Ind. Ct. App. 1977).

[152] *Id.*

proceeding.[153] Indeed, "the purpose of securing truly independent judicial determinations is subverted by the possession by the agencies of the executive functions."[154] Even when ALJs decide the facts and the law in an administrative hearing, the agency's executive body often has the authority to approve or change the final order.[155] This practice can lead to the perception of bias, as the authority for the agency could be motivated to rule in his own interest.[156] But, the same dangers lurk even when an ALJ from a centralized panel is deciding the facts and applying the law. Many agencies allow for internal agency review of the ALJ's decision.[157] Moreover, the substantial evidence standard still prevents meaningful review and allocates the judicial role to an agency with intermingled power.[158] As Professor Lawson has noted, the "destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution" and "is probably the most jarring way in which the administrative state departs from the Constitution."[159] Professor Lawson claims that this is such a profound violation that, in the federal government, "one cannot have allegiance both to the administrative state and to the Constitution."[160] Likewise, the supremacy of the Indiana Constitution suffers when separated powers are commingled in one body, and the judicial branch is precluded from carrying out its balancing function.

Thus far, Indiana courts have chosen to gloss over the constitutional infringements to due process, separation of powers, and the judicial power of the courts resulting from judicial deference to administrative fact-finding.[161] Indiana has codified this deference in the AOPA.[162] Yet the lack of meaningful judicial review of administrative controversies concerning private rights is an abdication of the judicial branch's constitutional duties.[163] As the dissent in *Richardson v. Perales* noted, "when a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is

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[153] *Id.*

[154] Schwartz, *supra* note 21, at 275.

[155] *See* IND. CODE ANN. § 4-21.5-3-28 (West 2020).

[156] *See* Bernick, *supra* note 39, at 55.

[157] § 4-21.5-3-28.

[158] *See, e.g.*, Lawson, *supra* note 6, at 1246–48 ("[Substantial evidence review] arguably fails to satisfy Article III . . . [which] requires de novo review, of both fact and law, of all agency adjudication that is classified as 'judicial" activity.'")

[159] Lawson, *supra* note 6, at 1248–49.

[160] *Id.* at 1253; *see also* Michigan v. E.P.A., 576 U.S. 743, 763 (2015) (Thomas, J., concurring) ("As in other areas of our jurisprudence concerning administrative agencies we seem to be straying further and further from the Constitution without so much as pausing to ask why.") (internal citations omitted).

[161] *See, e.g.*, Ind. Univ. v. Hartwell, 367 N.E.2d 1090, 1093 (Ind. Ct. App. 1977).

[162] IND. CODE ANN. § 4-21.5-5-11 (West 2020).

[163] *See* Bernick, *supra* note 39, at 38–39.

a matter of concern to everyone, for these days the average man can say: 'There but for the grace of God go I.'"[164] The same is true when a state agency visits such an injustice on citizens.

One way Indiana courts can maintain their judicial power is by looking to the constitutional fact doctrine. The U.S. Supreme Court developed the doctrine in response to the nascent administrative state in the 1920s and 30s.[165] Indiana courts can look to this doctrine to develop an approach to judicial review that accords with constitutional principles.

D. Constitutional Fact Doctrine

Under the doctrine of constitutional fact, courts have "an independent constitutional duty to review factual findings where constitutional rights are at stake."[166] Constitutional facts are those "factual issues whose resolution will be determinative of constitutional challenges."[167] The constitutional fact doctrine was first developed in response to administrative actions in the 1920 decision of *Ohio Valley Water Co. v. Borough of Ben-Avon*.[168] In *Ben-Avon*, the U.S. Supreme Court found that due process required a court's independent review of a state agency's rate making determination.[169] The Court found that when a party claims a taking of property, courts must use "independent judgment as to both law and facts; otherwise the order is void because [it is] in conflict with the due process clause [of the] Fourteenth Amendment."[170]

Later, in *Ng Fung Ho v. White*,[171] the Court examined a deportation order by the Bureau of Immigration and held that the Constitution required *de novo* judicial review of agency determinations of facts that determine constitutional rights.[172] Because determination of citizenship is a constitutional question, the Court found that courts must independently

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[164] Richardson v. Perales, 402 U.S. 389, 413 (1971) (Douglas, J., dissenting).

[165] *See* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); *see also* Crowell v. Benson, 285 U.S. 22, 60 (1932); see *also* Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055, 1067–72 (1932).

[166] Gonzalez v. Carhart, 550 U.S. 124, 165 (2007).

[167] Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 290 (2017).

[168] Ohio Valley Water Co. v. Borough of Ben-Avon, 253 U.S. 287 (1920).

[169] *Id*. at 291; *see also* Redish & Gohl, *supra* note 167, at 296–97.

[170] *Ben Avon*, 253 U.S. at 289.

[171] Ng Fung Ho v. White, 259 U.S. 276 (1922).

[172] *See* Redish & Gohl, *supra* note 167, at 297; *see also* Forkkosch, *supra* note 93, at 975 ("Whether or not person is born or naturalized is a question of fact, and the established fact, found in the Constitution as an objective basis for citizenship, may now be termed a constitutional fact. This type of fact is not an orphan; there are other objective facts in the Constitution upon which a person may claim constitutional rights.").

review the facts used to determine citizenship.[173] Likewise, in *Crowell v. Benson*, the Court again affirmed that the Constitution requires the courts to independently determine facts implicating constitutional rights.[174] The Court noted that courts must determine facts "wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."[175] The courts must have final independent review of factual determinations.[176]

In *St. Joseph Stock Yards Co. v. U.S.*, the Court reinforced the doctrine of constitutional fact and the requirement for independent review of administrative orders.[177] The Court noted that judicial scrutiny was necessary where the Constitution has placed limits on government action.[178] The Court persuasively explained:

> Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded.[179]

Thus, the doctrine of constitutional fact provides that where factual determinations implicate constitutional rights, independent judicial review is required. The U.S. Supreme Court has articulated both due process and the judicial power as the principles necessitating independent review.[180] Separation of powers is also implicated.[181] Reviving this doctrine in Indiana would serve to correct the constitutional violations produced by judicial deference to administrative determinations under the AOPA.

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[173] *Ng Fung Ho*, 259 US. at 284.

[174] Crowell v. Benson, 285 U.S. 22, 60 (1932).

[175] *Id.* at 57.

[176] The Court states that courts must independently determine jurisdictional facts, that is, facts which determine the scope of agency authority. *Id.* at 57–63.

[177] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1936).

[178] *Id.*

[179] *Id.* at 52.

[180] Judah A. Shechter, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483, 1487 (1988).

[181] Redish & Gohl, *supra* note 167, at 318.

III. REMEDY FOR DEFERENTIAL REVIEW'S CONSTITUTIONAL PROBLEMS

Indiana lawmakers have the power to cure the constitutional violations stemming from the courts' delegation of their judicial power to administrative agencies.[182] The most expedient way to fix this issue would be to amend the AOPA to allow *de novo* judicial review of factual determinations. However, both Indiana state courts and the federal judiciary have indicated that there is no appetite for such an increase in the workload of the courts.[183] Yet, the Indiana legislature and courts should not perpetuate "the notion that government may violate core notions of constitutional democracy in the name of efficiency."[184] Due process and separation of powers are important foundations of our constitutional republic, and necessary to prevent the accumulation of power in one government body.[185] Allowing administrative agencies to write the regulations, enforce the regulations, and adjudicate controversies without meaningful judicial review is just the type of overreach that the founders sought to protect against.[186]

At least one state has found a way to avoid such constitutional pitfalls. California has long used constitutional fact doctrine to mandate meaningful review of administrative fact determinations.[187] Utilizing this method would allow Indiana courts to provide independent review when facts implicating constitutional rights are adjudicated by administrative agencies.

A. Judicial Review of Agency Fact Determinations in California

The California Code of Civil Procedure provides two standards for a trial court to review final administrative decisions.[188] The trial court may perform substantial evidence review, much like in Indiana, or may exercise

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[182] *See* Sohoni, *supra* note 138, at 1594–99 (discussing a judicial nondelegation canon).

[183] *See* Forkkosch, *supra* note 93, at 982 ("For example, if the courts were to grant de novo reviews in all these situations there would be a mountain of case lava erupting, descending upon, and burying the judiciary.").

[184] Redish & McCall, *supra* note 102, at 320.

[185] *See generally* THE FEDERALIST NO. 47 (James Madison).

[186] *See* Redish & McCall, *supra* note 102, at 320.

[187] Drummey v. State Bd. of Funeral Dirs. & Embalmers, 87 P.2d 848, 853–54 (Cal. 1939).

[188] Saraswati v. City of San Diego, 135 Cal. Rptr. 3d 671, 678 (Cal. Ct. App. 2011) (internal citations omitted); *see* CAL. CIV. PROC. CODE § 1094.5 (West 2020) ("(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.").

independent judgment.[189] The trial court is authorized to exercise independent judgment and weigh the evidence where administrative decisions substantially affect a vested fundamental right.[190] In California, a fundamental right is one found in the Due Process and Equal Protection clause of the Constitution, as well as "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[191] The right is vested when it is already possessed.[192] Where vested fundamental rights are concerned, the trial court must "conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings."[193] When administrative decisions do not affect vested fundamental rights, judicial review is limited to substantial evidence review.[194] In California, courts "decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judicial review."[195] Administrative decisions involving "public employment rights, licensing decisions, public assistance benefits and land use" have been found to affect vested fundamental rights.[196]

This bifurcated procedure for judicial review was inspired by the constitutional fact doctrine.[197] The California system was developed in 1939 in *Drummey v. State Board of Funeral Directors*, where the California Supreme Court reviewed the suspension of two embalmers' licenses.[198] *Drummey* held that the courts must exercise independent judgment on the facts when reviewing administrative decisions, approvingly citing the U.S. Supreme Court in *St. Joseph Stock Yards Co.*[199] The *Drummey* court further explained that in weighing the evidence, courts may be assisted by the agency's findings.[200] Such findings "come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence."[201]

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[189] *See* CAL. CIV. PROC. CODE § 1094.5 (West 2020).
[190] *Saraswati*, 135 Cal. Rptr. 3d at 678.
[191] *Id.* at 680 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
[192] *Saraswati*, 135 Cal. Rptr. 3d at 679.
[193] *Id.* at 678–79.
[194] *Id.* at 679.
[195] Bixby v. Pierno, 481 P.2d 242, 252 (Cal. 1971).
[196] *Saraswati*, 135 Cal. Rptr. 3d at 679.
[197] *See* Drummey v. State Bd. of Funeral Dirs. & Embalmers, 87 P.2d 848, 850 (Cal. 1939).
[198] *Id.*
[199] *Id.* at 853–54.
[200] *Id.* at 854.
[201] *Id.*

Some California practitioners complain that this doctrine allows petitioners two chances to contest agency decisions, and find the determination of fundamental and vested rights unpredictable.[202] California also makes different determinations on when to apply independent review based on whether an agency is state or local, which also causes confusion.[203] However, despite these criticisms, California has utilized this system for over 80 years without causing the state's regulatory schemes to grind to a halt or drowning the courts in administrative review.[204]

B. Implementing Independent Review of Administrative Decisions Implicating Fundamental Rights in Indiana

Independent judicial review of administrative decisions implicating vested fundamental rights could be implemented in Indiana following the California model. Because substantial evidence review is mandated by statute,[205] this evolution in administrative procedure would require the General Assembly to amend the AOPA.

Indiana could amend the AOPA to allow courts to weigh the evidence during their review of agency decisions on constitutional facts. In so doing, Indiana would have the opportunity to innovate while preserving the fundamental rights of its citizens. One criticism of the California model is that it is unclear what rights are "fundamental" and require independent review.[206] However, the General Assembly could tackle that issue by explicitly defining the class of administrative decisions that require independent review. The General Assembly could also follow the California model and allow courts to make these determinations on a case-by-case basis.[207] The latter model would allow more flexibility, but also introduces uncertainty for litigants. Constitutional protections would apply, as the Supreme Court constitutional fact doctrine has demonstrated, to administrative decisions affecting speech, liberty, property rights, religion, takings, navigable waters, and privileges and immunities such as the right to

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[202] Michael Asimow, *Your Top Ten List of California Administrative Law Reforms*, 38 PUB. L.J. 15, 17 (Summer 2015), https://law.stanford.edu/wp-content/uploads/2015/09/M.Asimow-public-law-journal_vol-38_no-3_summer-2015.pdf [https://perma.cc/L9N8-878K].

[203] *Id*.

[204] California has the most regulations of any state. *See* Kofi Ampabeng et al., *A Policymaker's Guide to State RegData 2.0*, MERCATUS CTR. (Oct. 2020), https://www.mercatus.org/publications/regulation/policymaker%E2%80%99s-guide-state-regdata-20 [https://perma.cc/3986-PRZ4].

[205] IND. CODE ANN. § 4-21.5-5-11 (West 2020).

[206] Bixby v. Pierno, 481 P.2d 242, 253 (Cal. 1971).

[207] *Id*. at 252.

engage in a profession.[208] However, that list is not exhaustive, and a careful review of the rights protected in the Indiana constitution is needed to fully determine the fundamental rights that would require independent review. Worries about overburdening the courts would be allayed by affording independent review only when rights are vested, and by subjecting administrative decisions implicating discretionary privileges to the substantial evidence standard.

C. Difficulties with Implementing Independent Review in Indiana Courts

Indiana faces several obstacles on the path to reforming the procedures for judicial review of administrative actions. First, amending the AOPA would require a careful drafting process and cooperation in the General Assembly. Second, determining what is a constitutional fact meriting independent review will be uncertain, as it must be done on a case-by-case basis in the trial courts. Third, adopting the California independent review doctrine would place a heavier burden on a state court system that is already overcrowded and beset with delays. Fourth, skeptics may argue that many states and the federal courts are content to rely on the substantial evidence standard, and therefore Indiana need not change its review practices. This Note will attempt to refute these contentions.

First, repealing the current AOPA and drafting a more flexible standard would involve the legislative process, which is often costly and time consuming. However, California's independent review statutes[209] could provide a model which would guide Indiana legislators in crafting new statutes. California rules of civil procedure[210] would also direct Indiana in forming an effective system for judicial review, designed to safeguard the liberties and rights of citizens. Researching, writing, and campaigning for new legislation takes time. However, that is the General Assembly's role in the state, and few of its responsibilities are more important than safeguarding the rights of the citizenry.

Second, examining the U.S. and Indiana constitutions to identify constitutional rights that are implicated by administrative decisions would require careful study. However, examples found in California case law and

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[208] Bolick, *supra* note 92, at 973–81.
[209] CAL. CIV. PROC. CODE § 1094.5 (West 2020).
[210] *Id.*

U.S. Supreme Court constitutional fact doctrine could guide this process.[211] It would be worth the effort to overcome these obstacles to assert proper control over the growing power of the administrative state. As the number of regulations and regulatory agencies increase and their sway over ordinary citizens grows, it is important to guarantee the liberty of citizens against the oppression from the administrative bureaucracy. Separation of powers is the constitutional method to protect citizens from the domination of the government.[212] Courts should not shirk their duty to maintain this constitutional principle.

Third, introducing independent review would require more of Indiana trial courts than current substantial evidence review. Yet independent review would likely not disrupt current practice as much as it would seem. Even under substantial evidence review, the trial court reviews the record from the administrative agency to decide if the decision was supported by substantial evidence.[213] Though the trial court does not weigh the evidence under this standard, it still examines the evidence to ensure there is at least some evidence to support the decision.[214] Often, the trial judge will weigh in on whether the evidence supports the administrative decision as dicta.[215] Providing statutory support for the trial court judge to weigh the evidence will likely add only a small amount of extra work. Under the California model of independent review, administrative fact-finding is still given a presumption of correctness.[216] This presumption could also be given in Indiana courts, and trial court judges would not need to look beyond the administrative record for extrinsic evidence unless necessary, much like what is currently provided for in the AOPA.[217] Allowing the trial judge to weigh the evidence and defend constitutional rights when they may be compromised by administrative decisions would not overburden the courts. But, it will ensure that the courts uphold the supremacy of the constitution.

Fourth, the federal government and many other states may be content to rely on the substantial evidence standard, but as the U.S. Supreme Court has noted in the constitutional fact doctrine, and as Indiana courts have recognized in the past, due process, the judicial power of the courts and

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[211] *See* Saraswati v. City of San Diego, 135 Cal. Rptr. 3d 671, 678 (Cal. Ct. App. 2011).; Meyer v. Nebraska, 262 U.S. 390, 399 (1923).; Drummey v. State Bd. of Funeral Directors & Embalmers, 87 P.2d 848, 853–54 (Cal. 1939).

[212] Lawson, *supra* note 6, at 1248.

[213] *Saraswati*, 135 Cal. Rptr. 3d at 678–79.

[214] Warren v. Ind. Tel. Co., 26 N.E.2d 399, 402 (Ind. 1940).

[215] Asimow, *supra* note 202, at 18.

[216] *Drummey*, 87 P.2d at 854.

[217] *See* IND. CODE ANN. § 4-21.5-5-12 (West 2020).

separation of powers considerations require meaningful judicial review.[218] The judicial role is to say what the law requires and ensure that constitutional rights are vindicated.[219] Indiana is not bound to interpret state administrative law in the same manner as the federal government and is free to provide greater constitutional safeguards for its citizens. As the administrative state continues to expand, the courts have a role to play in guarding citizens from an overweening, politically motivated, and largely unaccountable bureaucracy.

The Indiana legislature has recognized a need for a disinterested party to hear administrative disputes, by creating central panels of ALJs. The legislature has demonstrated a desire to ensure that administrative procedure comports with due process and constitutional considerations. While further innovation of independent review may increase judicial workloads, it is necessary to protect Hoosiers from the expanding reach of an unelected bureaucracy. This is the price that must be paid to ensure that constitutional rights are not infringed by the growing regulations of the fourth branch of government. It is necessary to maintain the constitutional principle of separation of power and adhere to the constitutional requirement that the judicial power of the state be vested in the courts.

CONCLUSION

The substantial evidence standard is overly deferential because it bars courts from vindicating private rights and in so doing violates the due process, judicial power, and separation of powers provisions of the U.S. and Indiana constitutions. To continue to honor the Indiana constitution's principles, Indiana courts and the General Assembly must work together to modify the AOPA and allow the judiciary to exercise independent fact review in administrative decisions implicating constitutional rights.

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[218] *See* Ind. Dep't of Nat. Res. v. Prosser, 139 N.E.3d 702, 702 (Ind. 2020).

[219] Lawson, *supra* note 6, at 1233.