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In *Adjudication in the Political Branches*, Professor Caleb Nelson provided an influential account of when federal adjudication might take place outside of the Article III courts.[1] The ability of Congress to place adjudicative matters outside of Article III courts largely depended on whether the matter might be considered one of public or private rights.[2] Nelson also traced changes over time that undermined the coherence of the traditional public/private right distinction, and recommended returning to the traditional model.[3] Later writers have attempted either to qualify or refute the existence of the public/private-rights framework by studying particular areas of law that they claim are out of sync with the model.[4]

According to Nelson, private rights requiring Article III involvement were those that belonged to individuals, and they included interests in life, liberty in the sense of freedom from incarceration, and traditional property interests.[5] For example, a criminal conviction, or a divestiture of title to land, normally required the participation of regular courts. Private rights also included imposition of nontax liabilities.[6] By contrast, public rights were those that belonged to the people

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1 Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 564 (2007).

2 *Id.* at 559, 561–73, 577–82.

3 *See, e.g.*, *id.* at 602–05, 620–24.

4 *See, e.g.*, Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277 (2022); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011); *cf.* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1305, 1313 (2021) (discussing delegation of certain rulemaking powers of taxation as involving private rights).

5 Nelson, *supra* note 1, at 563, 567.

6 *See id.* at 588–90.

as a whole, and included "proprietary rights held by government on behalf of the people, such as title to public lands or the ownership of funds in the public treasury" and "servitudes that every member of the body politic could use . . . such as rights to sail on public waters or to use public roads."[7] For example, the determination of benefits to be paid from the Treasury (such as military pensions) were public rights that did not require Article III court participation.[8] Certain questions involving "privileges" (such as a claim to build a bridge across a public waterway or to import foreign goods) could also be determined without the use of regular courts.[9]

Nelson illustrated the public/private division, inter alia, in the distribution of federal land. Congress established land offices and charged them with applying statutory criteria in the disposition of public lands to individuals.[10] Dispositions by the land offices did not require regular judicial process, and a party complaining that the land office should have awarded him a federal land patent (title) generally could not obtain review of the office's decisions in the courts.[11] Once the land office granted a title to an individual, however, the title was vested property and the government could not seek to divest the title without a court determination.[12] Private-rights determinations in the regular courts, moreover, generally required de novo review of both fact and law.[13]

With the advent of more federal agencies in the late nineteenth century, the public/private distinction continued to hold sway. Leeway to operate with lessened judicial involvement was allowed to the Interstate Commerce Commission (ICC) in making prospective orders, which were on the public-rights side.[14] On the other hand, the Supreme Court held that if a railroad alleged that Commission-set rates were confiscatory in that they failed to provide a reasonable return on property devoted to the public service, de novo judicial review of law and fact was required.[15] Backward-looking claims for monetary relief also required substantial regular court involvement.[16]

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7 *Id.* at 566.

8 *Id.* at 582–83. Nelson characterized pensions as "privileges," *id.* at 584, 583–84, which this discussion folds into public rights.

9 *See id.* at 567–68, 570–71, 580. The legislature could structure privileges to operate like private rights, but "they were not understood to vest in private individuals in the same way as core private rights." *Id.* at 568.

10 *Id.* at 577.

11 *See id.* at 577, 594.

12 *Id.* at 578.

13 *Id.* at 590–91.

14 *See id.* at 594–95.

15 *Id.* at 597.

16 *Id.* at 598.

Matters changed, however, with *Crowell v. Benson*, a case in which a claimant sought compensation under the Longshoremen's and Harbor Workers' Compensation Act[17] from a private employer.[18] The employer asserted a private right to avoid liability under the Act.[19] The Court nevertheless held that—putting aside certain constitutional facts—the agency's fact-findings would be upheld if "supported by evidence [in the administrative record] and within the scope of [its] authority."[20] *Crowell* signified that even matters of private rights might be heard in the first instance in agencies, with deferential review of facts and de novo review of law.[21]

In *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, Professor Gregory Ablavsky sought to qualify Nelson's account by his discussion of "private land" claims—those in which a person claimed to have acquired an interest in land from a sovereign preceding the United States' acquisition of the territory.[22] In *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, Professor Thomas Merrill sought to undermine a public/private-rights distinction by focusing on ICC cases that preceded *Crowell*.[23] Both scholars claimed that private rights had been early subject to non–Article III adjudication.[24]

I. PROFESSOR ABLAVSKY AND THE PRIVATE LAND CLAIMS

Professor Ablavsky's *Getting Public Rights Wrong* contributes to our understanding of an early and important area of law. By "private land claims," Ablavsky refers to claims that arose when the United States acquired sovereignty over lands previously within the territory of another sovereign (such as Spain, France, and Mexico), and private parties claimed interests in land acquired from that government.[25] He distinguishes the private land claims from public land claims, often involving determinations by the federal land offices that Professor Nelson discussed.[26] The land office claims generally involved lands to

17 Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 3(a), 44 Stat. 1424, 1426 (1927).

18 Crowell v. Benson, 285 U.S. 22, 36 (1932).

19 *Id.* at 37.

20 *Crowell*, 285 U.S. at 46; *see also* Nelson, *supra* note 1, at 599–600. Constitutional or jurisdictional facts would receive de novo review. *See Crowell*, 285 U.S. at 56–57. In addition, the district court was directed to determine those facts on its own record. *Id.* at 64.

21 Nelson, *supra* note 1, at 600.

22 Ablavsky, *supra* note 4, at 284–85.

23 *See* Merrill, *supra* note 4, at 986.

24 *See id.* at 987; Ablavsky, *supra* note 4, at 347.

25 Ablavsky, *supra* note 4, at 285.

26 *Id.* at 288, 298–99.

which the United States held title without reference to grants to individuals by a prior sovereign.[27]

Treaties generally obliged the United States to recognize the property rights of inhabitants of the acquired lands,[28] and the government considered itself obliged to do so even apart from such treaties.[29] The law of the prior sovereign generally applied to such claims.[30] Congress set up various ways for existing inhabitants to establish their claims, some of which did not involve Article III courts. Some statutes authorized commissioners to make recommendations to Congress as to titles to real property,[31] some authorized commissioners alone to determine title,[32] and some provided that district courts could make the determinations[33] or review commissioner decisions.[34]

Ablavsky recounts that a large proportion of the claims were by those who had only "imperfect" titles from the foreign governments through which they claimed.[35] Imperfect title means that additional steps or formalities remained before title formally would have passed to the claimant.[36] Analogizing these claims to those originating in the federal land offices (which typically involved claims from the federal domain not involving foreign law), the claimant had not received the equivalent of a federal land patent from the foreign government.

These imperfect claims, Ablavsky tells us, could be subject to final determination by federal commissioners or by Congress.[37] By contrast, claimants who held perfect title under the prior sovereign's law were generally not required to bring their claims before the commissioners nor seek congressional approval.[38] And they could contest a board of commissioners' grant to a rival claimant in a later judicial

27 *See id.* at 290.

28 *Id.* at 285, 290.

29 *Id.* at 311–12, 316.

30 *See id.* at 327.

31 *Id.* at 287, 293–94.

32 *Id.* at 292–94 (indicating that for Louisiana, Indiana, and Michigan, commissions made recommendations to Congress, while commissions made final decisions for Mississippi).

33 *Id.* at 294–95.

34 *Id.* at 287. An 1824 bill with respect to Arkansas and Missouri provided for federal district court resolution without decisions by boards of commissioners. *Id.* at 294–95. The Court in *Murray's Lessee v. Hoboken Land & Improvement Co.* had given as an example of public rights not requiring regular court involvement "[e]quitable claims to land by the inhabitants of ceded territories." *Id.* at 283 (alteration in original) (quoting 59 U.S. (18 How.) 272, 284 (1856)).

35 *See id.* at 315.

36 *Id.* at 289, 324.

37 *See id.* at 293, 315.

38 *See id.* at 316.

proceeding.[39] Ablavsky says that distinction between imperfect and perfect titles explains the mystery of why there was little objection to litigation outside of the regular courts regarding titles in ceded property.[40]

One might suppose at this point that this framework maps reasonably well onto the public/private-rights distinction. With respect to land office claims (distinguished from private land claims), someone arguing that the land office had erroneously failed to grant them a land patent generally could not obtain judicial review as to either fact or law.[41] By contrast, a party to whom the land office had previously granted a land patent was entitled to plenary judicial consideration if the government or a private party tried to divest the patentee of the patent.[42]

Ablavsky, however, sees a difference between the land office cases and the private land claims—a difference he claims undermines a public/private-rights distinction. He says that many judges and commentators in the private land cases referred to imperfect titles as "vested"—although some did not.[43] "[I]t was possible for a right to be *both* imperfect and vested."[44] Thus he says the imperfect title claims that were excluded from a regular court hearing should be seen as "private rights."[45] Professor Ablavsky concludes that "[t]hroughout the nineteenth century, the administrative adjudication of at least one form of vested rights to private property was constitutionally permissible."[46]

Critical to Ablavsky's argument is that some jurists used the term "vested" to include real property claims that had not involved passage of title but that, if proved, might involve such passage.[47] He acknowledges that passage of legal title was quite significant, both as to land office claims and private land claims.[48] And he reports that antebellum courts would reconsider commissioner determinations involving claims to perfect title but not imperfect.[49]

Thus, despite somewhat variant uses of the term "vested," there seems to have been agreement that perfect title was fully "vested" while

39 *See id.* at 327.

40 *See id.* at 310 ("Put simply, Congress was thought to have complete authority over imperfect titles but limited authority over perfect land rights."); *id.* at 313.

41 *See* Nelson, *supra* note 1, at 577.

42 *See id.* at 578.

43 Ablavsky, *supra* note 4, at 289, 321–22.

44 *Id.* at 321.

45 *Id.* at 284.

46 *Id.*

47 *See id.* at 321–22.

48 *Id.* at 313–15.

49 *Id.* at 327.

imperfect title was in a lesser category for interests that could become fully vested.[50] That some jurists used the word "vested" even for imperfect claims did not prevent them from distinguishing perfect rights that obtained greater judicial review. Thus the perfect/imperfect distinction overall reinforces a public/private-rights distinction.

Nor does the fact that the claims undoubtedly involved interests in property undermine the distinction. Claims before the land office to acquire land patents involved real property, but were still on the public-rights side. What is more, the Court's repeated treatment of tax assessments as public rights that did not require regular court involvement shows that some divestitures of previously acquired property could be included as public rights.[51]

Under the 1851 statute governing California claims, Congress clearly provided that even perfect titles had to be submitted to a commission—a change from prior practice.[52] Ablavsky sees Congress as thereby unnecessarily undermining a fairly coherent perfect/imperfect distinction, by requiring even perfect claims to be presented to commissions.[53] But in all events the 1851 Act subjected the commission decisions to "review" or "appeal" in the federal district courts.[54] The Court basically treated such review as de novo as to both fact and

50 Professor Nelson notes some differing views as to whether preemption rights had vested so as to garner more plenary judicial consideration. *See* Nelson, *supra* note 1, at 579–80.

51 *See* Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo*, 84 U. PITT. L. REV. ONLINE 1, 4–5 (2023).

52 Ablavsky, *supra* note 4, at 330.

53 *Id.* at 337–38. The California Supreme Court had avoided the issue of the constitutionality of applying the registration requirement for perfect claims by ruling on alternative grounds, but eventually it held that such presentation could not be required for perfect claims. *Id.* at 336–37. In 1889, however, the United States Supreme Court overruled the California approach, thereby "cast[ing] aside nearly a century's worth of jurisprudence on private land claims." *Id.* at 338, 337; *cf. id.* at 340–42 (discussing the courts' giving preclusive effects with respect to third parties as to titles confirmed by the commissioners, despite statutory language to the contrary). The Court did not see the submission requirement as inconsistent with perfect title and noted that review was available in the regular courts. Botiller v. Dominguez, 130 U.S. 238, 249–50 (1889). Congress in 1891 provided for a Court of Private Land Claims to resolve certain unresolved private land claims under the Treaty of Guadalupe Hidalgo. Ablavsky, *supra* note 4, at 344. The statute made the submission of perfect titles optional and provided that private rights of persons between each other would not be affected. *Id.*

54 Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 227 (1991).

law.[55] This form of review would have been suitable for private as well as public rights.[56]

Professor Ablavsky is to be applauded for his in-depth account of the private land claims. But perhaps he should have left "Getting Public Rights Wrong" out of his title, given that his account seems to confirm a public- and private-rights framework.

II. PROFESSOR MERRILL AND THE EMERGENCE OF THE APPELLATE REVIEW MODEL

Professor Thomas Merrill's *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law* enhances our understanding of the development of the "appellate review model" of administrative action.[57] 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.[58] Merrill is particularly concerned with the development of deference to agency fact-finding and the increased reliance on the record made before the agency.

Merrill dates the emergence of the appellate review model from the passage of the Hepburn Act in 1906.[59] Congress created the ICC in 1887, but the Court in 1897 held that Congress had not granted the agency power to prescribe future rates.[60] Congress passed the Hepburn Act to assure the ICC had ratemaking power.[61] The legislative history also included debates as to whether judicial review under the 1887 Act had been too searching.[62] The courts had treated agency fact-

55 *See id.* (discussing United States v. Ritchie, 58 U.S. (17 How.) 525, 534 (1855)). De novo review of facts was common for "appeals" from a lower to a higher court in equity. *Id.* at 225, 229. Ablavsky reports, however, that the courts frequently followed the boards' decisions. *See* Ablavsky, *supra* note 4, at 335 n.332.

56 Ablavsky disclaims discussion of standards of review. *See* Ablavsky, *supra* note 4, at 285 n.31 ("This Article does not seek to intervene in the large scholarly literature on whether appellate review by an Article III tribunal is required for such Article I determinations.").

57 Merrill, *supra* note 4.

58 *Id.* at 940–41 ("The appellate review model, as developed in the civil litigation context, has three salient 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." *Id.* at 940 (footnote omitted).).

59 *Id.* at 953; Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

60 *See* Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 511 (1897); Merrill, *supra* note 4, at 950, 954.

61 *See* Merrill, *supra* note 4, at 954–55.

62 *See id.* at 955–56.

findings as only prima facie evidence, and they allowed the addition of new evidence in the lower courts—basically de novo review.[63] The wording of the Hepburn Act, however, said little as to standards of review.[64]

It was not long thereafter, however, that the Court—according to Merrill—moved toward an appellate review model. The 1910 decision in *Interstate Commerce Commission v. Illinois Central Railroad Co.*[65] called for deference to agency-found facts.[66] Two years later, in *Interstate Commerce Commission v. Union Pacific Railroad Co.*,[67] the Court said that it "will not examine the facts further than to determine whether there was substantial evidence to sustain the order"—a standard borrowed from review of juries.[68] The Court also increasingly indicated that review should be on the record that was made before the agency.[69] The appellate review model spread quicky, particularly to Federal Trade Commission (FTC) cases.[70] Not only did the ICC and FTC cases use an appellate review model, but—according to Merrill—they employed it for private-rights cases, two decades prior to when *Crowell v. Benson*[71] approved an appellate review model for private rights.[72]

* * *

Merrill has provided an important account of the emergence of the appellate review model, and the model's ties to the Hepburn Act.[73] One may, however, voice a couple of objections to his account. A small

63 *See* Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 813–14 (1986); Merrill, *supra* note 4, at 950.

64 Merrill, *supra* note 4, at 958. As to reparations claims, however, the statute provided that the act "shall proceed in all respects like other civil suits for damages" and retained provisions that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated." Hepburn Act, ch. 3591, sec. 5, § 16, 34 Stat. 584, 590 (1906), *discussed in* Merrill, *supra* note 4, at 968.

65 215 U.S. 452, 459 (1910) (involving an order as to the distribution of coal cars alleged to be preferential during a shortage).

66 *See* Merrill, *supra* note 4, at 960–62. These cases articulated other standards resembling those in the Administrative Procedure Act.

67 222 U.S. 541, 546 (1912) (involving a rate order).

68 *Id.* at 548, 546–48; Merrill, *supra* note 4, at 961–62.

69 *See* Merrill, *supra* note 4, at 962–63, 967–68.

70 *Id.* at 942.

71 285 U.S. 22 (1932).

72 Merrill, *supra* note 4, at 981.

73 It was already evident that ICC cases were critical to this development. *See, e.g.*, Young, *supra* note 65, at 816–18; Woolhandler, *supra* note 56, at 197 (noting, although discussing an earlier era, that "it is only with the Interstate Commerce Commission (ICC) cases that the federal courts began to use the vocabulary of administrative law that has now become familiar through its incorporation into the Administrative Procedure Act," and citing, inter alia, Interstate Com. Comm'n v. Ill. Cent. R.R. Co., 215 U.S. 452, 470 (1910)). Merrill usefully tied the model to the Hepburn Act. Merrill, *supra* note 4, at 953.

objection is that Merrill may have minimized earlier manifestations of the appellate review model. A more substantial objection is that Merrill characterizes the ICC cases that used an appellate review model as definitely involving private rights.

A. Earlier Appearances of an Appellate Review Model

One objection—perhaps more of a quibble—is that Merrill may have been too intent on tying the appellate review model to the Hepburn Act, thus de-emphasizing earlier examples. He says little about the appearance of something like an appellate review model in 1870s land office cases.[74] He also minimizes the importance of some pre–Hepburn Act ICC cases in which the Court suggested deference to agency fact-finding in remanding cases to the agency when the agency had not considered certain facts relevant to the decision, due to its error of law.[75] He says that such cases manifested not so much moves toward an appellate review model as a concern that the courts not engage in "outright judicial ratemaking."[76] The cases he cites, however, do not articulate such concerns.[77]

B. Treating ICC Cases Generally as Involving Private Rights

It is true that Professor Merrill has illustrated the more widespread use of deferential fact review and reliance on the agency record in cases after the passage of the Hepburn Act such as *Interstate Commerce*

74 *See* Merrill, *supra* note 4, at 964 ("Professor Mashaw has noted that exceptions began to be recognized to the 'conclusiveness' of decisions by the Lands Office." (citing Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1408–11 (2010))); *see also* Mashaw, *supra*, at 1408 (stating, as to land cases, "a division of responsibility began to emerge between court and agency, somewhat along the lines of the appellate model's law-fact distinction"); Woolhandler, *supra* note 56, at 220–21 ("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 . . . ."). Perhaps Merrill treats the land office cases as being of lesser importance because they more readily fit into a public-rights category. *Cf.* Nelson, *supra* note 1, at 594.

75 *See* Merrill, *supra* note 4, at 950 n.41; E. Tenn., Va. & Ga. Ry. Co. v. Interstate Com. Comm'n, 181 U.S. 1, 23–27 (1901) (holding that the matter should be remanded to the agency when it failed to consider certain facts due to error of law); Interstate Com. Comm'n v. Clyde S.S. Co., 181 U.S. 29, 32–33 (1901) (holding that the matter should be remanded to the Commission when it had not considered certain facts due to erroneous construction of the statute); Louisville & Nashville R.R. Co. v. Behlmer, 175 U.S. 648, 669, 673–76 (1900) (similar); *cf.* Gregory Hankin, *Conclusiveness of the Federal Trade Commission's Findings as to Facts*, 23 MICH. L. REV. 233, 239 (1925) (citing *Behlmer* as giving "greater weight to the findings" of the ICC).

76 Merrill, *supra* note 4, at 950 n.41.

77 *See id.*

Commission v. Illinois Central Railroad Co.[78] and *Interstate Commerce Commission v. Union Pacific Railroad Co.*[79] But he claims not only that those cases manifested an appellate review model, but that they used such a model for private-rights issues, two decades prior to *Crowell v. Benson*.[80] He states: "On virtually any plausible theory of what it means to adjudicate private rights, the post-Hepburn Act ICC was involved in adjudicating private rights."[81] If Merrill has not established that the ICC cases used the appellate review model for private rights, however, he has not shown that *Crowell v. Benson* was old hat when it approved deferential fact review in a concededly private-rights case in 1932.

1. Operating a Railroad Involved Public Rights, but Claims of Confiscatory Rates Involved Private Rights

Traditionally the courts saw the operation of a railroad as involving a matter of public right. A railroad could not operate without governmental authorization, particularly because the enterprise had to tap into the public power of eminent domain.[82] The fact that railroads involved special government privileges subjected them to price regulation, whereas the so-called common occupations might only be subject to more limited police power regulations. Indeed, the Court in the *Granger Cases* held there was no right to judicial review when railroads claimed that the legislature had not allowed the regulated industry to charge sufficient rates.[83]

The Court in the 1890s modified the *Granger* result by holding that a railroad's allegation of confiscatory rates was entitled to plenary judicial review—including de novo review of facts.[84] The Court treated unremunerative rates as takings of property for public use, analogous to eminent domain.[85] The treatment of allegedly confiscatory rates is

78 215 U.S. at 459 (involving an order as to the distribution of coal cars).

79 222 U.S. 541, 542 (1912) (involving an order reducing lumber rates).

80 Crowell v. Benson, 285 U.S. 22 (1932); Merrill, *supra* note 4, at 980–81.

81 Merrill, *supra* note 4, at 987. Merrill argues that they were actions between private parties, involved no waiver of sovereign immunity, and were substitutes for common-law actions. *Id.*

82 *See* Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 977 (1975) (discussing Justice Field's distinguishing common occupations from enterprises that required special easements from government including for railroads the use of eminent domain powers).

83 Munn v. Illinois, 94 U.S. 113, 133–34 (1877). *Munn* involved a grain elevator, *id.* at 117, but other *Granger Cases* involved railroad rates. *See, e.g.*, Peik v. Chi. & N.-W. Ry. Co., 94 U.S. 164 (1877).

84 *See* Smyth v. Ames, 169 U.S. 466, 526, 546–47 (1898); Nelson, *supra* note 1, at 597.

85 Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 216–17, 221 (1984) (discussing use

itself evidence of the Court's reserving private rights for special treatment. The Court, moreover, continued this practice of de novo review of confiscation claims into the mid-1940s.[86]

2. Prospective v. Retrospective Claims

Even aside from confiscation claims, the Court retained distinctions between public and private rights in its review of ICC orders. As Professors Young and Nelson have pointed out, the ICC's prospective orders were treated as involving public rights, where Article III involvement could be reduced.[87] On the other hand, backward-looking claims for retrospective monetary relief—that is, reparations claims—allowed for de novo review of facts, including the possibility of introducing new evidence.[88]

Professor Merrill, however, argues that prospective orders should be treated as private rights just as much as reparations claims. He claims that the legislative history of the Hepburn Act shows no great concern with a prospective/retrospective differentiation.[89] Nevertheless, the text of the Act seems to maintain such a distinction by stating that judicial proceedings to enforce reparations orders "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated."[90]

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of the eminent domain concept in requiring nonconfiscatory rates based on present value); McCurdy, *supra* note 84, at 1001 (discussing Justice Field's position that unremunerative rates were effectively a taking without just compensation); *cf.* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1291–93 (2000) (discussing similar pre-*Lochner* uses of "general," nonfederal constitutional principles as applied to ratemaking in federal court diversity cases).

86 *See* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591 (1944). According to Merrill, not all claims of agency unreasonableness were confiscation claims. *See* Merrill, *supra* note 4, at 957–58 (discussing congressional debates and differentiating between arguments of confiscation and arguments that rates were unreasonably low). He does show that the Court moved toward restricting review to the agency record even in confiscation claims. *Id.* at 967–68.

87 Nelson, *supra* note 1, at 596–98; Young, *supra* note 65, at 814–15; *see also* Cent. R.R. Co. of N.J. v. United States, 257 U.S. 247, 256 (1921) (stating, as to an order requiring railroads to withdraw from certain joint rates, "[a]s to administrative orders operating *in futuro*, the Commission's findings of fact are conclusive, subject to qualifications here not pertinent"). The Court, however, said that the question of whether the discrimination found can be held to be attributable to the appellants was a matter of law for the court. *Id.* at 256–57.

88 *See* Nelson, *supra* note 1, at 598; Young, *supra* note 65, at 815, 822 (discussing different treatment of the reparations cases).

89 Merrill, *supra* note 4, at 985.

90 Hepburn Act, ch. 3591, sec. 5, § 16, 34 Stat. 584, 590 (1906).

Merrill argues, however, that it makes little sense to distinguish prospective from retrospective monetary liabilities, because both affect economic interests.[91] The fact that prospective orders might affect economic interests, however, does not mean they were outside of the category of public rights. Public rights obviously could include matters affecting economic interests—tax assessments being an obvious example.[92]

Professor Merrill also states that the Court soon started to use appellate-style review even for reparations claims.[93] If so, the use of an appellate review model was much subtler than it was for prospective orders. For example, he relies on *Spiller v. Atchison, Topeka & Santa Fe Railway Co.*[94] as showing the move to an appellate review model.[95] Admittedly, the Court refers to review for "substantial evidence."[96] In *Spiller*, however, the parties had waived a jury trial, and the railroads relied on a transcript of testimony before the ICC rather than new evidence in the district court.[97] The railroads argued that, disregarding certain documentary evidence as hearsay, there was insufficient evidence before the ICC to support the order.[98] But they did not introduce all the evidence before the agency.[99] In that context, the Court stated, "But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced."[100]

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91 Merrill, *supra* note 4, at 987 (indicating that both types of orders determined "how much money the shipper had to pay . . . for specific services").

92 *See supra* note 53 and accompanying text.

93 Merrill, *supra* note 4, at 968–69.

94 253 U.S. 117 (1920).

95 Merrill, *supra* note 4, at 969 (citing *Spiller*, 253 U.S. at 126).

96 *Spiller*, 253 U.S. at 126. The Court recited statutory provisions as to reparations including that "the findings and order of the commission shall be prima facie evidence of the facts therein stated." *Id.* (quoting Hepburn Act, ch. 3591, sec. 5, § 16, 34 Stat. 584, 590 (1906)). The Court then stated,

> These provisions allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.

Id.

97 *Id.* at 120, 124–25.

98 *Id.* at 124. The Court noted that the railroads had failed to object to the evidence before the Commission. *Id.* at 130. And in the district court, they provided only a sample of the allegedly defective evidence. *Id.* at 124–25.

99 *Id.* at 125.

100 *Id.* Merrill cites two commentators who opined that ICC fact-findings in reparations cases were getting more respect than previously—a result they both thought desirable. Merrill, *supra* note 4, at 968 & n.139 (citing A.M. Tollefson, *Judicial Review of the Decisions of the*

Merrill makes a similar claim of greater leniency in judicial review as to FTC orders.[101] But the FTC statute itself provided that the "findings of the commission as to the facts, if supported by testimony, shall be conclusive."[102] And like the nonreparations ICC orders, these were prospective orders.[103]

* * *

Merrill has supplied a valuable account of the rise of the appellate review model in ICC cases after the passage of the Hepburn Act in 1906. But his claim that the ICC cases demonstrate that the Court clearly allowed private-rights claims to be litigated under this model prior to *Crowell* is more questionable.

CONCLUSION

Modern scholars sometimes claim that their study of a particular area undermines or "unsettles" a more general analytical framework.[104] Most legal categories may be subject to qualification and complications.[105] The examples of the private land cases and ICC orders, however, do not seriously undermine the public/private-rights distinction for determining when significant Article III involvement was required for administrative adjudication.

Interstate Commerce Commission, 11 MINN. L. REV. 504, 505–06 (1927); Hankin, *supra* note 77, at 240). But they both noted that there was less deference for fact-finding in reparations claims than for nonreparations orders. *See* Tollefson, *supra*, at 510, 530; Hankin, *supra* note 77, at 240–42; *cf.* Tollefson, *supra*, at 522 (discussing a case allowing new evidence in the federal court). The standard of fact review appears to have remained uncertain.

101 Merrill, *supra* note 4, at 942.

102 Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 720 (1914), *discussed in* Nelson, *supra* note 1, at 597.

103 Nelson, *supra* note 1, at 596–97. The courts in all events were not very deferential to FTC orders. *See* Merrill, *supra* note 4, at 970–71 (indicating that the Supreme Court often reversed the Commission but because it freely defined unfair competition itself rather than on the ground that the facts failed to support the Commission's conclusion). The extent of judicial review of facts here too seems to have remained uncertain. *Cf.* Hankin, *supra* note 77, at 258–59 (providing cases where the courts delved into facts).

104 *See, e.g.*, Ablavsky, *supra* note 4, at 348.

105 *See, e.g.*, *supra* note 52.