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SEVENTH AMENDMENT RIGHT TO JURY TRIAL IN NON-ARTICLE III PROCEEDINGS: A STUDY IN DYSFUNCTIONAL CONSTITUTIONAL THEORY

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The right to a jury trial in civil cases, as enumerated in the Seventh Amendment to the United States Constitution, is an integral part of the Bill of Rights. Nevertheless, in this Article, Professor Redish and Mr. La Fave argue that the Supreme Court has failed to preserve this right when Congress has relegated claims to a non-Article III forum. Furthermore, they argue, the Court has done so without providing any basis in constitutional theory to justify such a relinquishment.

Professor Redish and Mr. La Fave first examine the Supreme Court’s interpretation of the Seventh Amendment in instances where Congress has remained silent on the issue of the availability of a jury trial. They proceed to examine the Court’s contrasting response when Congress has explicitly directed that adjudication be held in a non-Article III forum, without a jury. In an effort to explain the Court’s approach to Seventh Amendment interpretation, they advance several possible doctrinal models, none of which, in their view, satisfactorily explains the Court’s apparent deference to Congress’s decision not to allow a jury trial. They suggest that the only rational explanation for the Court’s current Seventh Amendment jurisprudence is functionalism: deferring to Congress’s determination that some social or political objective outweighs constitutional considerations. They conclude that such deference by the Court, as the guardian of the Constitution, is not only unprincipled, but that such a practice actually endangers the supremacy of the Constitution and undermines the judiciary as the countermajoritarian check on the majoritarian branches of government.

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INTRODUCTION

The Seventh Amendment right to a jury trial in civil cases\(^1\) is surely as much a part of the Constitution as the First Amendment right of free speech\(^2\) or the Fifth Amendment right against self-incrimination.\(^3\) Yet, perhaps because the Seventh Amendment has been pedagogically exiled from traditional constitutional law and instead relegated to the largely sub-constitutional inquiry of civil procedure,\(^4\) when the Supreme Court is asked to enforce the jury trial right, it often seems to abandon any grounding in governing principles of American constitutional and political theory. To be sure, the Court has been more than vigorous in its protection of the jury trial right in the absence of a congressional directive to the contrary.\(^5\) When, however, Congress has clearly enunciated that use of a civil jury is incompatible with the accomplishment of its legislative goals, the Court has, for the most part, turned and run faster than a defeated army in retreat.\(^6\) Such a judicial attitude is indefensible as a matter of Seventh Amendment construction\(^7\) and is

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\(^1\) "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

\(^2\) "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

\(^3\) "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

\(^4\) It is worthy of note that every current civil procedure casebook includes discussion of the Seventh Amendment right, while no current constitutional law casebook does so. Compare RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 505-83 (2d ed. 1995) (discussing Seventh Amendment right) and MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE 749-80 (5th ed. 1990) (same) with DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (1993) (containing no discussions of Seventh Amendment) and GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (2d ed. 1991) (same).


\(^6\) One possible aberration from this otherwise unwavering deference is Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), in which the Court held unconstitutional the absence of a jury trial in an adjudication before a non-Article III bankruptcy judge of an attempt by a trustee in bankruptcy to void an allegedly fraudulent conveyance. See discussion infra notes 81-88 and accompanying text.

\(^7\) See discussion infra part III.
inconsistent with the principles of judicial review embodied in *Marbury v. Madison.* Moreover, it stands in violation of the fundamental precepts of constitutional democracy, which preclude the majoritarian branches from sitting in final judgment on the constitutionality of their own actions.

Nowhere is this abdication of judicial responsibility more starkly apparent than in the Court's treatment of the jury trial right in those instances where Congress has relegated adjudication of federally-created statutory claims to a federal forum whose adjudicators lack the protections of salary and tenure guaranteed by Article III of the Constitution. In such proceedings, which include administrative adjudications and enforcement proceedings as well as actions brought before non-Article III "legislative" courts, the Supreme Court has all but abandoned the Seventh Amendment right, even though there is absolutely no legitimate, principled basis on which to conclude that a jury trial right is somehow inapplicable to such proceedings.

If the Court were simply to make clear that Congress possesses unlimited authority to avoid the use of juries any time it chooses to place adjudication in a non-Article III forum, one would at least enjoy the benefits of an easily understood and applied doctrinal standard. True, it would still be difficult to comprehend why Congress was thought to possess such unlimited and unreviewed power despite the existence of an applicable provision of the countermajoritarian Constitution which seemingly limits that power. Such a ruling would also leave unclear whether, if Congress does possess such authority with regard to non-Article III proceedings, it lacks the same power with regard to proceedings adjudicated in an Article III court, and if so, why. Nevertheless, at least the advantages of doctrinal ease of application would remain. Sadly, however, the Court's jurisprudence denies us even whatever benefits might be derived from such doctrinal certainty. Purely as a practical matter, it is clear that when the dust settles, in most cases Congress possesses ultimate authority to deny the jury trial right by transferring adjudication to a non-Article III forum. The Court, however, has

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8 5 U.S. (1 Cranch) 137 (1803); see discussion *infra* notes 186-92 and accompanying text.
10 "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.
11 See discussion *infra* part II.
12 See discussion *infra* part III.
13 See discussion *infra* notes 165-66 and accompanying text.
achieved this end by resorting to convoluted, unpredictable, and virtually Byzantine doctrinal contortions that will require, in future cases, a great deal of judicial time and effort in order to resolve the Seventh Amendment issue. Thus, paradoxically, the Court has managed to give us the worst of both worlds—the disadvantages of total judicial abdication without any of its advantages.

Given the often controversial status of the civil jury trial purely as a matter of current social policy, the right’s selective demise at the will of Congress may seem to represent a relatively minimal undermining of individual liberty. It might be argued that such a loss could not compare, for example, to the loss of the rights of free expression or freedom of religion. Perhaps if the Court were openly to proclaim the Seventh Amendment’s relative inferiority, and therefore expendability, one could rest more easily in the belief that the abandonment of fundamental notions of judicial review embodied in the Court’s Seventh Amendment jurisprudence were not likely to have a dangerous spillover impact on judicial interpretation and enforcement of other constitutional rights. The Court, however, has made no such proclamation. To the contrary, the Court’s staunch belief in the social value of the Seventh Amendment right remains unwavering—except where Congress has concluded otherwise. Thus, no basis exists upon which to distinguish the Court’s Seventh Amendment analysis from its treatment of other Bill of Rights protections.

Our inquiry into the Court’s treatment of the Seventh Amendment can be viewed on two distinct levels. On the most concrete plane, our analysis is intended to critique and refocus the Supreme Court’s Seventh Amendment jurisprudence. On another level, however, our concern is with the broader, ominous implications for American constitutional theory to which the Court’s Seventh Amendment analysis arguably gives rise.

14 See discussion infra part II.
15 It has been suggested on occasion that use of the civil jury trial adds significant time-consuming burdens and expenses to the judicial process and that jury decisions are often plagued by racial or ethnic prejudice. See Redish, supra note 5, at 502-08. Additionally, critics have questioned the jury’s ability as a fact-finder. See, e.g., JEROME FRANK, COURTS ON TRIAL 108-45 (1949); LEON GREEN, JUDGE AND JURY 353 (1930) (“As a scientific method of settling disputes the general verdict rates little higher than the ordeal, compurgation or trial by battle.”). This problem is thought by some to be most intense in so-called complex litigation. See, e.g., In re Japanese Elec. Prods. Anti-trust Litig., 631 F.2d 1069, 1084 (3d Cir. 1980) (concluding that “due process precludes trial by jury when a jury is unable to perform this task with a reasonable understanding of the evidence and the legal rules”).
16 See discussion infra part II.
17 The only possible explanation for this distinction is the Seventh Amendment’s divergent pedagogical pedigree, see supra note 4, but this is surely an inadequate ground of distinction for analytical purposes.
In order to provide a proper baseline for analysis of Congress’s power to ignore jury trial requirements, Part I of this Article describes the Court’s approach to the Seventh Amendment when Congress has remained silent on the use of juries as part of the adjudicatory process. Part II of this Article examines how the Court’s Seventh Amendment construction has differed when Congress has directed that adjudication be held in a non-Article III forum without the use of juries. Part III discusses two approaches to Seventh Amendment interpretation, labeled the “historical/forum” and “conditional waiver” models, that arguably could provide principled justification for the Court’s willingness to retreat in the face of a congressional assault on the jury trial right. This Article argues, however, that both models are fatally and unambiguously flawed, and therefore neither even colorably supports the Court’s enormous deference to congressional judgments on the use of a jury trial. Instead, beneath the Court’s cryptic and often confusing attempts to invoke constitutional principle in support of its deference to congressional will is the theoretically illegitimate principle of unadorned functionalism, the third model discussed in our analysis. This mode of constitutional analysis proceeds on the belief that where Congress has concluded that enforcement of the Seventh Amendment right would be incompatible with attainment of Congress’s legitimate goals, the Seventh Amendment is somehow rendered irrelevant.

Use of this “functionalist” model in Seventh Amendment interpretation is troubling as a matter of constitutional theory, because nothing in the text, structure, or history of the Seventh Amendment provides any basis on which to permit reliance on such a social balancing process. Even more troubling, however, is that under the version of functionalism employed in Seventh Amendment interpretation, it is not the Court but Congress, the very majoritarian branch sought to be controlled by the countermajoritarian Bill of Rights, making the final decision on matters of constitutional import. Use of such an approach constitutes a wholly unprincipled judicial abandonment of a constitutional right, for no other reason than the Court’s deference to the conclusion of the majoritarian branches that enforcement of that right would be politically or socially difficult or inconvenient. It is hard to imagine a more stark departure from the constitutional theory of judicial review that was envisioned so wisely in Marbury v. Madison.18

On very rare occasions the Court has actually overridden a congressional determination not to employ juries.19 When the Court has departed from the model of judicial abdication and congressional deference, it has not done so because of its recognition of the model’s complete inconsistency with governing principles of American constitutional theory. Rather, it has done

18 See discussion infra notes 186-92 and accompanying text.
so because, aberrationally, it has taken seriously that which was quite probably never intended to be taken seriously: the veil of principled analysis with which the "functionalist-abdication" model had been clothed in past decisions. Because the elements of that veil of principle have, in actuality, never been relevant to legitimate Seventh Amendment interpretation, the Court's subsequent aberrational reliance on those elements to override the congressional decision not to employ juries turns out to be both awkward and illogical.

In conclusion, Part IV of this Article suggests a fourth analytical model that we describe as the "strict historical" approach. This model arguably could justify, in a truly principled manner, many of the Court's modern decisions authorizing congressional discretion to avoid jury trial. Use of a strict historical approach, however, has never been accepted by the Court, quite probably because the Court is unwilling to accept all of the model's practical implications about the modern scope of the jury trial right, even in the absence of congressional restriction on the use of the civil jury. As a result, the Court has failed to take advantage of a coherent method of bringing about, by means of a process that does not threaten core notions of constitutional democratic theory, its politically desired result of giving Congress broad discretion to abandon the civil jury trial right.

I. ESTABLISHING THE CONSTITUTIONAL BASELINE: SEVENTH AMENDMENT INTERPRETATION IN THE ABSENCE OF CONGRESSIONAL INTERVENTION

To grasp the full significance of the Supreme Court's approach to congressional efforts to place adjudication in non-Article III forums without the use of juries, it is first necessary to understand the Supreme Court's Seventh Amendment interpretation when Congress has not made such a choice. It is only by seeing how vigorously the Court has expanded and enforced the civil jury trial right absent congressional interference that one may fully comprehend how dramatically the Court's enforcement of that right dissipates when Congress does choose to enter the picture. By its terms, the Seventh Amendment directs that the right to jury trial shall be "preserved" in "[s]uits at common law." Use of this wording has lead to a historically-based interpretive model, one which measures the jury trial right by reference to the practices of the English courts as of 1791, the year of the amendment's ratification. Pursuant to this standard, a litigant will have a constitutional right to jury trial if and only if he would have been afforded a

21 See discussion infra part IV.
22 U.S. CONST. amend. VII.
jury trial had the same litigation arisen in 1791. That issue was, in turn, resolved by asking whether the case would have been heard at law, with the opportunity for a jury trial, or in equity, where no jury was used.

According to the generally accepted historical view, the distinction between law and equity was, in the overwhelming majority of cases, determined not by an assessment of the relative fact-finding capabilities of judge and jury, but rather simply by the allocation of jurisdiction between courts of law and equity. In most, though by no means all, cases, the legal-equitable division was made on the basis of the remedy sought: where damages were sought, the suit was at law; where injunctive relief or specific performance was sought, the suit was equitable. Established procedure

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25 Id. at 375. See generally Charles Wolfram, The Constitutional History of the Seventh Amendment, 57 MINN. L. REV. 639 (1973) (examining the history surrounding the adoption of the Seventh Amendment in order to determine the original understanding of the amendment).
26 In more modern times, it has been argued that historically, the abilities of juries actually influenced the allocation between law and equity. See Patrick Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 COLUM. L. REV. 43, 65-77 (1980). But cf. Richard O. Lempert, Civil Juries and Complex Cases: Let's Not Rush to Judgment, 80 MICH. L. REV. 68, 74 (1981) (“As I read the evidence, it appears that the historical test gives little comfort to those who wish to read a complexity exception into the [S]eventh [A]mendment.”).

In Ross v. Bernhard, 396 U.S. 531 (1973), the Court indicated in dictum that the “legal” nature of an issue is determined in part by “the practical abilities and limitations of juries.” Id. at 538 n.10. In subsequent decisions, however, the Court failed to make reference to this factor. See, e.g., Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990); Tull v. United States, 481 U.S. 412 (1987). In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), the Court suggested that the reference in the Ross footnote was intended to refer to the “quite distinct inquiry into whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme.” Id. at 42 n.4.

27 See, e.g., Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). The one clearly established exception concerned an accounting, where the complexity of the task could transform a case from legal to equitable. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) (“[T]he plaintiff must be able to show that the ‘accounts between the parties’ are of such a ‘complicated nature’ that only a court of equity can satisfactorily unravel them.”) (citation omitted).

28 See FLEMING JAMES, CIVIL PROCEDURE 344 (1965) (“At no time in history was the line dividing equity from law altogether—or even largely—the product of a rational choice between issues which were better suited to court or to jury trial. . . . Rather, the choice between law and equity frequently was made upon consideration of other factors.”).

29 See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 654-61 (5th ed. 1994); see also Beacon Theatres, 359 U.S. at 506-11 (discussing the effect of the Declaratory Judgment Act and Federal Rules of Civil Procedure on equitable and legal issues, and
also dictated that equity would act only when the remedy at law was inadequate.  

The task of translating historical practice into the modern procedural context has not proven to be easy. This is due to the fact that where law and equity have merged, new remedies and procedural devices have been created, and new substantive causes of action have been established. Yet, given the historical directive clearly embodied in the Seventh Amendment’s text, the Court would appear to have no principled alternative in its interpretation of the jury trial right.  

To avoid the modern anomalies that might result from an attempt to provide a rigid reproduction of history, the Court has attempted to view the historical dividing line between law and equity from the perspective of modern conditions. Thus, although the Court has proclaimed adherence to the established precept that equity will act only when the remedy at law is inadequate, it has chosen to measure the adequacy of “legal” remedies by reference to modern conditions, rather than to the circumstances of 1791. While such an approach is not free from controversy, and on occasion has arguably been applied in a questionable manner, at least in the abstract it represents a principled interpretation of the amendment’s text. By its use of the term “preserved,” the amendment directs that the jury trial right be measured in terms of its existence in 1791, and at that time a case would be heard in equity, without a jury, only when the remedies at law were inadequate. The amendment does not explicitly provide, however, that adequacy of the legal remedy today be determined by the practices of the past. Instead, one could reasonably construe the amendment’s historical directive to require that the law-equity distinction today be drawn, as it was in 1791, on the basis of the adequacy of the legal remedy, but drawing that distinction by analyzing the adequacy of the legal remedy as it exists today, rather

the corresponding relationship to a jury trial right).

30 See, e.g., Beacon Theatres, 359 U.S. at 506-07.
31 See, e.g., Ross v. Bernhard, 396 U.S. 531, 539-43 (1970) (holding that post-amendment merger of law and equity renders shareholder’s derivative action legal, even though it was equitable in 1791); Dairy Queen, 369 U.S. at 478 (noting that the availability of appointment of special masters to assist a jury renders jury trial adequate to conduct complex accounting); Beacon Theatres, 359 U.S. at 508-11 (discussing the expansion of adequate legal remedies available due to the existence of the Declaratory Judgment Act and the Federal Rules, and the corresponding effect on equity).
32 See Redish, supra note 5, at 490-502.
33 See cases cited supra note 31.
34 See Redish, supra note 5, at 490-502 (suggesting that such an approach unduly expands reach of jury trial right).
35 Most subject to criticism has been the decision in Ross, where the Court appeared to rewrite the nature of the derivative action at common law. See Ross, 396 U.S. at 545 (Stewart, J., dissenting) (“The Court begins by assuming the ‘dual nature’ of the shareholder’s action. . . . This conceptualization is without any historical basis.”).
than in 1791. Indeed, it might be argued that the Court's "modernizing" approach is wholly consistent with the well-accepted model of modern constitutional interpretation, which views the document as a living, growing entity.  

The Court has similarly held that the Seventh Amendment's historical directive does not require photographic reproduction of historical procedures when those procedures are found to be "collateral" to the jury trial right. Thus, new procedural limitations on the use of juries may be developed, as long as they do not interfere with the performance of that which was the jury's essential function at the time of the amendment's adoption. Finally, although the amendment dictates only that the jury trial right be "preserved," the fact that a particular cause of action did not exist in 1791 does not necessarily free it from the Seventh Amendment's mandate. Instead, at least since the time of Justice Story's opinion in Parsons v. Bedford, the Court has asked whether, if the newly created cause of action had existed at the time of the amendment's ratification, the suit would have been deemed one in law or equity. If, either through discovery of a substantive analogue or by reference to the nature of the remedy sought, the Court determines that the suit would have been adjudicated in the law courts in 1791, suits under that cause of action are deemed to be controlled by the jury trial right.

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38 See, e.g., id. at 388-96 (holding directed verdict constitutional, even though it did not exist in its current form in 1791).


By common law [the framers of the Seventh Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the amendment may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. Id. at 447.


41 These are the two factors currently considered by the Court in deciding whether a modern suit is to be deemed legal or equitable. Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 565 (1990); Tull v. United States, 481 U.S. 412, 417-18 (1987). The latter factor is said to be given more weight than the former. Terry, 494 U.S. at 565.

42 See cases cited supra note 31; see also Curtis v. Loether, 415 U.S. 189, 195-96 (1974) ("[T]his cause of action is analogous to a number of tort actions recognized at
In fashioning its approach, the Court has expressly declared its unwillingness to counterbalance the amendment's jury trial directive with subconstitutional social policy harms to which the use of jury trial might give rise in a particular situation. Such a refusal appears constitutionally proper in light of the absence of any reference to such concerns in either the text or structure of the amendment. A superficially appealing argument might be fashioned that such factors could properly be considered, consistent with the terms of the amendment, because historically equity acted when the remedy at law was inadequate. Thus, when strong countervailing social policies against the use of the civil jury exist, the remedy at law might today be deemed inadequate for the very reason that a suit at law would require use of a jury. As already noted, however, with the one exception of an accounting, little or no historical basis exists to support the position that at the time of the amendment's ratification, adequacy of legal remedy in any way turned on the social costs or harms of juries. Accordingly, reliance on the adequacy-of-remedy analysis to support the imposition of modern limitations on the jury trial right would constitute nothing more than a cynically-developed veneer for the unprincipled undermining of a constitutional right, in a manner not contemplated by either the text or structure of that right.

The preceding discussion has described Seventh Amendment jurisprudence as it has been developed in a context of congressional neutrality on the appropriateness of jury use. In fact, commentators have emphasized this point, suggesting that the amendment's reach might be curtailed in the event Congress expressed a clear choice against the use of jury trial. The accuracy of this conclusion remains uncertain. The following analysis demonstrates, however, that if accepted, such a conclusion would represent a dramatic departure from fundamental principles of American constitutional theory.

43 See Curtis, 415 U.S. at 198 ("We are not oblivious to the force of petitioner's policy arguments [against the use of jury trial]. . . . More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment.").

44 See supra notes 26-28 and accompanying text.

45 See, e.g., Jack H. Friedenthal et al., Civil Procedure (2d ed. 1993). [T]he Supreme Court has not yet been faced with the situation in which Congress has expressed a strong preference for nonjury trial and has provided reasons supporting that preference. Read more narrowly, then, the cases do not foreclose the possibility that Congress can provide for a statutory cause of action that is not purely equitable to be enforced in the district courts without a jury trial.

Id. at 504.
II. SEVENTH AMENDMENT INTERPRETATION IN THE FACE OF CONGRESSIONAL TRANSFER OF ADJUDICATION TO A NON-ARTICLE III FORUM

In those instances where Congress has transferred adjudication of a federal claim to a non-Article III forum, such as an administrative agency, the Court has changed dramatically its Seventh Amendment analysis from its description in the preceding section. As early as 1921, in its decision in *Block v. Hirsh*, the Court made clear its willingness to view such situations differently for Seventh Amendment purposes. In *Block*, the Court upheld Congress’s power to temporarily suspend District of Columbia landlords’ legal remedy of ejectment and to relegate them to fact-finding in an administrative forum, without a jury. In response to a Seventh Amendment challenge, the Court stated: “If the power of the Commission established by the statute to regulate the relation [between landlord and tenant] is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.” Nevertheless, while the Court had, in fact, already upheld Congress’s power to establish the commission apart from Seventh Amendment considerations, such a conclusion is wholly unresponsive to the Seventh Amendment concern. The Court simply appeared to assume that if the commission were constitutionally valid in all other ways, no Seventh Amendment right could conceivably attach itself to such administrative proceedings.

The Court first made a serious attempt to rationalize the inapplicability of the Seventh Amendment right to non-Article III proceedings in *NLRB v. Jones & Laughlin Steel Corp.* In the National Labor Relations Act, Congress invested the National Labor Relations Board with authority to decide whether an employer had committed an unfair labor practice under the statute and to order reinstatement and backpay where appropriate. In response to a Seventh Amendment attack, the Court had two answers. Initially, it reasoned that “[t]he instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding.” Secondly, the Court responded that the only arguably “legal” relief for which a jury trial could be required under

46 256 U.S. 135 (1921).
47 Id. at 153-58.
48 Id. at 158.
49 Id. at 154-58.
50 301 U.S. 1 (1937).
52 Id. § 160(c).
53 Jones & Laughlin, 301 U.S. at 48.
the Seventh Amendment was the award of backpay, and such relief was merely incidental to the primary relief of reinstatement, which was equitable. Therefore, under the historically well-established "clean-up doctrine," the equitable forum could adjudicate such incidental legal issues without contravening the Seventh Amendment.

Both of the Court's proffered reasons at least superficially adhere to the principled dictates of the Seventh Amendment, and thus would not appear to fall under the heading of a "functionalist abdication" model. In reality, however, the Court's first reason is wholly inconsistent with both Seventh Amendment text and relevant Supreme Court doctrine. By its terms, the amendment applies to "[s]uits at common law." Surely, it would defy linguistic reality to characterize the proceeding before the National Labor Relations Board as something other than a "suit." The action concerns nothing more than a classic legal dispute between private parties asserting competing factual claims and legal rights. It therefore fits well within the scope of Article III's so-called "case or controversy" requirement for adjudication in a federal court. While the Court was correct of course in its assertion that the particular proceeding did not exist at common law, the amendment makes no reference to "proceedings"; rather, it refers merely to "suits."

To be sure, if not only a particular proceeding but also the underlying substantive right itself did not exist in 1791, that fact could conceivably provide a principled textual basis for removing the suit from the strictures of the Seventh Amendment. Ever since its decision in Parsons v. Bedford, however, the Court had long rejected such reasoning. Instead, for newly created substantive rights, the Court has always asked whether, if the right had existed at common law, there would have been a jury trial.

To be sure, if not only a particular proceeding but also the underlying substantive right itself did not exist in 1791, that fact could conceivably provide a principled textual basis for removing the suit from the strictures of the Seventh Amendment. Ever since its decision in Parsons v. Bedford, however, the Court had long rejected such reasoning. Instead, for newly created substantive rights, the Court has always asked whether, if the right had existed at common law, there would have been a jury trial. If the answer is yes, the Seventh Amendment right is deemed to be as applicable as if the cause of action had actually existed in 1791. The Court made no suggestion in Jones & Laughlin that it in any way intended to abandon the teachings of Parsons, nor has the Court done so since that time. Thus, to

54 Id.
55 Under the "clean-up" doctrine, a court in equity could dispose of legal questions, as long as they were incidental to the equitable claim. See A. Leo Levin, Equitable Clean-up and the Jury: A Suggested Orientation, 100 U. PA. L. REV. 320 (1951); see, e.g., Jones & Laughlin, 301 U.S. at 48-49.
56 U.S. CONST. art. III., § 2.
57 See supra note 39.
59 See, e.g., Pernell, 416 U.S. at 375-76 (finding statutory right to recover possession of real property essentially equivalent to an ejectment action, which historically was resolved by jury).
60 See, e.g., id.
61 See FRIEDENTHAL ET AL., supra note 45, at 500-06.
the extent that the Court in *Jones & Laughlin* was implicitly exempting newly created causes of action from the confines of the Seventh Amendment, it was apparently doing so only when Congress had chosen to rely upon the expertise and efficiency of administrative fact-finding, with which a jury trial would be incompatible as a functional matter. Indeed, the modern day Supreme Court has expressly distinguished *Jones & Laughlin* from traditional suits in Article III courts solely on this "functional incompatibility" ground.  

In *Jones & Laughlin* the Court quite probably could have avoided the need to adopt its apparent selective abandonment of the *Parsons* directive, had it chosen to rely exclusively on its second basis for rejecting the jury trial right. No one could seriously doubt that the requested relief of reinstatement sought in *Jones & Laughlin* was properly characterized as equitable, to which no jury trial right historically attached. Nor was it unreasonable for the Court to conclude that, in the case before it, reinstatement constituted the primary relief requested. Hence, pursuant to the venerable "clean-up" doctrine, an equity court would have been authorized, at the time of the Seventh Amendment's adoption, to provide legal relief incidental to the primary equitable relief. At least in the case before it, then, the Court in *Jones & Laughlin* need not have selectively manipulated the rule of *Parsons v. Bedford* in order to uphold the NLRB proceeding against a Seventh Amendment challenge. The Court in *Jones & Laughlin*, however, appears to have considered the practical stakes to be much higher than merely the result in the immediate case before it. At stake, arguably, was the fate of much of the New Deal, for if the Seventh Amendment right to jury trial were to attach to a large portion of the adjudications vested in the administrative process, one of the New Deal's primary goals—efficient rule by an expert cadre of bureaucrats—would have been rendered considerably more difficult to attain.

Overt recognition of such a pragmatic rationale for the inapplicability of the jury trial right in administrative proceedings actually came many years later in *Curtis v. Loether*. In *Curtis*, the Supreme Court steadfastly refused to balance the Seventh Amendment right against competing social policy considerations in an Article III court proceeding brought to enforce a federal statutory right. In response to the argument that *Jones & Laughlin*

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62 See *Curtis*, 415 U.S. at 194 ("*Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme.") (footnote omitted).

63 See generally Levin, supra note 55.

64 See generally *JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS* (1938).


66 See id. at 198. At issue in *Curtis* was whether the Civil Rights Act or the Seventh
supported such a pragmatic weighing process, the Court in *Curtis* distinguished *Jones & Laughlin* as a case in which use of a jury trial would be "incompatible" with the congressionally-created administrative scheme.\(^67\) The Court thus puzzlingly combined in the same opinion a rigidly principled refusal to balance a constitutional right with an open admission that interference with a congressional legislative scheme would justify abandonment of that right.

Three years after *Curtis*, in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,\(^68\) the Court removed any conceivable doubt about the scope of Congress's power to place adjudication of federal statutory claims in a non-Article III tribunal, free from the strictures of the Seventh Amendment. In *Atlas Roofing*, the Court considered a Seventh Amendment challenge to the Occupational Safety and Health Act of 1970.\(^69\) That Act authorized federal administrators to inspect private workplaces and to impose civil penalties for violations of federally established health and safety standards for workers.\(^70\) The proceeding was to be brought initially before an administrative law judge of the Occupational Safety and Health Review Commission.\(^71\) Under the Act, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."\(^72\) The Court, in an opinion by Justice White, found the Act constitutional:

> At least in cases in which "public rights" are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be incompatible.\(^73\)

While the Court’s reference in *Atlas Roofing* to the so-called "public rights" doctrine arguably limits the extent of its deference to congressional will, its

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67 See *Curtis*, 415 U.S. at 194; *supra* note 62.
70 *Id.*
71 *Id.* § 661(i) (current version at 29 U.S.C. § 661(j) (1988)).
72 *Id.* § 660(a).
73 *Atlas Roofing*, 430 U.S. at 450.
reliance on that concept in Seventh Amendment interpretation is puzzling. Nothing in the history of common law practice in any way distinguished between law and equity on the basis of the "public" or "private" nature of the right being adjudicated. Rather, as established doctrine makes clear, that distinction turned largely on the nature of the relief sought. In contrast, the public rights concept evolved in a jurisprudential universe quite distinct from that of the Seventh Amendment: determination of the scope of Congress's authority to place adjudication of federal claims in non-Article III forums. Since its decisions in *Murray's Lessee v. Hoboken Land & Improvement Co.* and *Crowell v. Benson,* the Court has recognized that Congress may transfer adjudication of "public" but not "private" rights to such forums, despite Article III's seemingly unlimited dictate that "the judicial power shall be vested" in courts whose judges possess protection of their salary and tenure. The Court has adhered to the public-private right dichotomy in fashioning the scope of congressional power to vest adjudicatory authority in non-Article III federal forums, even though it has never clearly explained either the exact nature of the conceptual distinction be-


75 See discussion supra notes 26-31 and accompanying text.

76 See generally Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III,* 101 HARV. L. REV. 915 (1988) (arguing that although initial adjudications may be made by non-Article III courts, appellate review of those adjudications should be by Article III courts); Martin H. Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision,* 1983 DUKE L.J. 197 (discussing alternative rationales for allocating judicial authority between Article III and non-Article III courts).

77 59 U.S. (18 How.) 272 (1855).

[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

*Id.* at 284. But cf. Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 66 (2d ed. 1990) (noting that the Court in *Murray's Lessee* "made no reference to the language, history or policies of Article III to support [the] suggested dichotomy").

78 285 U.S. 22, 50 (1932) ("As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.").

tween the two forms of rights or the rationale for drawing the distinction in
the first place.80

Despite its total lack of prior grounding in Seventh Amendment jurispru-
dence, the Court’s sudden insertion of the public rights doctrine into analy-
sis of the jury trial right went largely unexplained in Justice White’s opinion
in Atlas Roofing. Nevertheless, the Court drew on the public rights dichoto-
my in fashioning the scope of the Seventh Amendment right in its subse-
quent decision in Granfinanciera, S.A. v. Nordberg.81 In that case the Court
held unconstitutional the absence of a defendant’s jury trial right in an ac-
tion brought by a trustee in bankruptcy to void an allegedly fraudulent con-
voyance.82 The Court so held, even though Congress had designated such
actions to be “core proceedings,” to be adjudicated in the first instance by
non-Article III bankruptcy courts.83 The majority in Granfinanciera reached
its conclusion while purporting to adhere to the teachings of Atlas Roof-
ing.84 “Congress may devise novel causes of action involving public rights
free from the strictures of the Seventh Amendment,” Justice Brennan wrote,
“if it assigns their adjudication to tribunals without statutory authority to
employ juries as factfinders.”85 He added, however, that Congress

80 See REDISH, supra note 77, at 64-71. In its original context of Article III inter-
pretation, “[t]he public-private right dichotomy effectively frustrates the purposes served by
the constitutional protections of judicial independence.” Id. at 68.
81 492 U.S. 33 (1989). For a perceptive discussion of Granfinanciera, see G. Ray
Warner, Rotten to the “Core”: An Essay on Juries, Jurisdiction and
82 Granfinanciera, 492 U.S. at 40-49.
1978, Congress had established a system of non-Article III bankruptcy courts to replace
the previously existing “referee” system. Northern Pipeline, 458 U.S. at 53. While Con-
gress designated these courts to be “adjuncts” to the federal district courts, the Supreme
Court in Northern Pipeline found the bankruptcy courts to be too independent of the
district courts to fit within the “adjunct” concept. Id. at 76-87. The Court further held
that like non-Article III courts, the bankruptcy courts could not constitutionally adju-
dicate state-created rights involving the trustee in bankruptcy, because the only federal
judicial bodies with power to hear such “private right” claims were Article III federal
courts. Id. at 67-72. See generally infra note 130 (discussing Congress’s response to the
ruling in Northern Pipeline).
84 Granfinanciera, 492 U.S. at 51-55.
85 Id. at 51. Notice should be made of Justice Brennan’s qualification that the as-
signment is to “tribunals without statutory authority to employ juries as factfinders.” Id.
His implication seems to be that Congress may not remove the jury trial right even
from a non-Article III forum, unless it has statutorily rendered that forum incapable of
using juries, even when adjudication of a public right is involved. This qualification
might explain the Court’s earlier invocation of the Seventh Amendment right in Pernell
v. Southall Realty, 416 U.S. 363 (1974), even though the proceeding in question was in
the local District of Columbia courts, which do not have Article III status. Palmore v.
United States, 411 U.S. 389, 407-10 (1973). While the Court in Pernell acknowledged
lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury... To hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law... 86

Justice Brennan distinguished Atlas Roofing on the grounds that adjudication of a public right was not involved in Granfinanciera. 87 To reach that conclusion, however, it was necessary for him to explain exactly why a bankruptcy trustee's right to void a fraudulent conveyance did not fall within the definition of "public right," a concept that had mysteriously remained undefined in Atlas Roofing. 88 Such a task would present little difficulty under the definition originally adopted in Justice Brennan's plurality opinion in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 89 where the Court held that it was a violation of Article III to use non-Article III bankruptcy courts to adjudicate state-created claims involving a bankrupt. 90 In Northern Pipeline, Justice Brennan had reasoned that except in the case of certain narrow, historically-based exceptions, 91 Congress could, consistent with Article III, vest federal adjudicatory power in non-Article III bodies only for claims of "public right." 92 He confined that concept "only to

the existence of the line of cases recognizing the absence of the jury trial right in administrative proceedings, the Court nevertheless stated:

We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes... to an administrative agency. Congress has not seen fit to do so, however, but rather has provided that actions... be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction. Where it has done so, and where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial. Pernell, 416 U.S. at 383.

If, however, Congress were by statute to establish a non-Article III court for the District of Columbia to adjudicate all public rights without the use of jury trial, it would seem that, by the Court's logic, the Seventh Amendment would not provide a bar. Thus, in neither Pernell nor Granfinanciera does the Court appear to be drawing a distinction, for Seventh Amendment purposes, between non-Article III administrative proceedings and non-Article III legislative courts. See discussion infra part III.A.1.

86 Granfinanciera, 492 U.S. at 51-52.
87 Id. at 55.
88 See discussion supra notes 80-81 and accompanying text.
90 Id. at 83-87.
91 These exceptions included both territorial and military courts. See id. at 64-66.
92 Id. at 67.
matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'

Under this definition, a fraudulent conveyance action brought by a trustee in bankruptcy against a private entity or individual clearly could not be thought to involve adjudication of a public right. After *Northern Pipeline*, however, the Court in *Thomas v. Union Carbide Agricultural Products Co.* significantly altered the definition of "public right" for purposes of Congress's power to transfer adjudication to a non-Article III forum: "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."

Justice O'Connor, speaking for the Court, reasoned that "[t]o hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme." In a separate concurring opinion, Justice Brennan, author of the *Northern Pipeline* plurality opinion, ignored his own prior unambiguous assertions to the contrary in *Northern Pipeline*, and asserted:

the plurality opinion in *Northern Pipeline* [does not] suggest[] . . . that "the right to an Article III forum is absolute unless the federal government is a party of record" . . . . Properly understood, the analysis elaborated by the plurality in *Northern Pipeline* does not place the Federal Government in an Art. III straightjacket whenever a dispute technically is one between private parties.

The Court appeared to go even further a year later in *Commodity Futures Trading Commission v. Schor.* In that case, the Court upheld Congress's power to vest in the non-Article III Futures Trading Commission the authority to adjudicate state-created counterclaims for breach of contract brought by a broker who had been sued by a client for federal law viola-
Justice O'Connor, once again writing for the Court, stated that "there is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries." Citing the Court's earlier explanation, she noted:

"[T]he public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers" is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication. Accordingly, "the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers."

A strong argument could be fashioned that the trustee's right to void a fraudulent conveyance made by the bankrupt, the very claim involved in Granfinanciera, meets the revised standards adopted in Thomas and Schor for definition of a "public right." If so, in light of the Court's earlier holding in Atlas Roofing that Congress need not extend the jury trial right to an adjudication of a "public right" in a non-Article III proceeding, Congress's failure to employ a jury in the adjudication of such a claim in the non-Article III bankruptcy courts should not be deemed a violation of the Seventh Amendment. The goal of the bankruptcy system is to free the bankrupt from the shackles of past debt while simultaneously protecting the interests of the bankrupt's creditors by making them whole to the greatest extent possible. Obviously, the smaller the size of the bankrupt's estate, the less that each creditor will receive. Thus, a trustee's right to void a fraudulent conveyance performs the central functions of assuring the largest estate possible and effectuating a division of that estate among creditors in

100 Id. at 857.
101 Id. at 853.
102 Id. at 853-54 (quoting Thomas, 473 U.S. at 589 (quoting Northern Pipeline, 458 U.S. at 68)).
103 Id. at 854. Justice Brennan dissented, arguing: "the Court, in emphasizing that this litigation will permit solely a narrow class of state-law claims to be decided by a non-Article III court, ignores the fact that it establishes a broad principle." Id. at 865 (Brennan, J., dissenting).
104 See discussion supra notes 68-73 and accompanying text.
accordance with the priorities adopted by Congress. Under this analysis, the fraudulent conveyance action would easily fit under the Court's definition in *Thomas* of "public right" as "a seemingly 'private' right that is ... closely integrated into a public regulatory scheme." Without even acknowledging the strong central connection between the "seemingly 'private' right" involved in the fraudulent conveyance action and the "public regulatory scheme" of bankruptcy, Justice Brennan's opinion in *Granfinanciera* concluded that "[a]lthough the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance ... seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." Justice Brennan supported his conclusion by reasoning that such actions "are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." Upon superficial examination, *Granfinanciera* may appear to impose meaningful limits on Congress's power to circumvent the Seventh Amendment right to jury trial: where adjudication of "private," rather than "public" rights is involved, Congress may not deprive a litigant of a jury trial when such a right would have existed at common law, even when adjudication occurs in a non-Article III federal forum. Even if it were true that *Granfinanciera* imposes such limitations, however, questions would remain as to why the existence of the Seventh Amendment right in any way turned on the public or private nature of the right being adjudicated. Certainly, no such connection existed at common law in 1791, the temporal point of Seventh Amendment reference. Moreover, an additional, unresolved question remains regarding whether Congress could circumvent the Seventh Amendment right when adjudication of a "public right" was placed in an Article III court, rather than in a non-Article III forum. Neither *Atlas Roofing* nor *Granfinanciera* directly considered this issue. It is, however, by no means clear, on the basis of *Granfinanciera*, that ultimately Congress is truly restricted in its power to remove a jury trial from a non-Article III proceeding, even in the case of a private right adjudication.

In *Granfinanciera*, Justice Brennan could hardly deny that much in *Atlas Roofing* at least implied total judicial deference to a congressional judgment

109 Id. at 56.
110 Id. at 54-55.
111 See discussion *supra* notes 22-25 and accompanying text.
112 See discussion *infra* notes 165-66 and accompanying text.
concerning the incompatibility of the use of civil jury trial with a statutory scheme. One might reasonably have expected Justice Brennan to distinguish *Atlas Roofing* on the grounds that *Atlas Roofing*'s deferential analysis logically applied only to the adjudication of public rights, something Justice Brennan had already concluded was not the subject of litigation in *Granfinanciera*. After all, he had expended considerable effort in his explanations of both the intersection between the Seventh Amendment and the public rights doctrine on the one hand, and the definition of a “public right” on the other. Nevertheless, he did not distinguish *Atlas Roofing*. Instead, Justice Brennan responded in the following manner:

To be sure, we owe some deference to Congress’ [sic] judgment after it has given careful consideration to the constitutionality of a legislative provision. But respondent has adduced no evidence that Congress considered the constitutional implications of its designation of all fraudulent conveyance actions as core proceedings. Nor can it seriously be argued that permitting jury trials in fraudulent conveyance actions brought by a trustee against a person who has not entered a claim against the estate would “go far to dismantle the statutory scheme,” as we used that phrase in *Atlas Roofing* [which] plainly assumed that such claims carried with them a right to a jury trial. In addition, one cannot easily say that “the jury would be incompatible” with bankruptcy proceedings . . . .

Although this passage does not formally commit the Court to this position, Justice Brennan’s words create a reasonable inference that had Congress made careful consideration of the Seventh Amendment right before directing that jury trials not be used in the adjudication of fraudulent conveyance actions, or had the Court been convinced that jury trials were, in fact, “incompatible” with the legislative scheme, Congress’s decision to abandon the jury trial right would have been constitutionally acceptable. After all, if nothing were intended to turn on the presence or absence of these factors, why would Justice Brennan have given them attention in the first place?

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113 Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n, 430 U.S. 442, 450 (1977); see discussion supra note 73 and accompanying text; infra note 115 and accompanying text. In this context, it is worth noting that Justice White’s opinion in *Atlas Roofing* started out by stating “[a]t least in cases in which ‘public rights’ are being litigated,” *Atlas Roofing*, 430 U.S. at 450 (emphasis added). He thus left open the question of Congress’s power in the absence of a public right.

114 *Granfinanciera*, 492 U.S. at 51-55.

115 *Id.* at 61-62 (quoting *Atlas Roofing*, 430 U.S. at 454 n.11; *id.* at 450).
Tending to undermine this reading of the \textit{Granfinanciera} opinion, and arguably confusing the issues completely, is Justice Brennan’s subsequent assertion that although possibly “providing jury trials in some fraudulent conveyance actions . . . would impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations . . . ‘[t]hese considerations are insufficient to overcome the clear command of the Seventh Amendment.’”\footnote{Id. at 63 (quoting \textit{Curtis v. Loether}, 415 U.S. 189, 198 (1974)).} One might arguably construe this statement to represent the Court’s refusal to balance away a constitutional right on the basis of competing concerns of governmental convenience in a manner not contemplated in the text or structure of the Constitution, but such a conclusion is far from clear. Initially, the statement appears inconsistent with the immediately preceding passages, which emphasize both Congress’s failure to consider expressly the jury trial right issue, and the lack of incompatibility between use of jury trials and bankruptcy adjudication. If the Seventh Amendment’s commands must be adhered to regardless of competing social policies, why would the Court emphasize the absence of those competing considerations, at least without appropriately couching that discussion with the label of dictum?

A conceivable resolution of this internal inconsistency may turn on the Court’s choice of wording. When the Court in \textit{Granfinanciera} invoked what could be characterized as the “line-in-the-sand” language from \textit{Curtis v. Loether},\footnote{\textit{Curtis}, 415 U.S. at 198.} it was doing so solely in the context of its discussion of how the use of jury trials might “impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations.”\footnote{\textit{Granfinanciera}, 492 U.S. at 63.} Perhaps the Court intended to say that while such \textit{relatively minimal} interferences with the congressional scheme were “insufficient to overcome the clear command of the Seventh Amendment,”\footnote{\textit{Curtis}, 415 U.S. at 198.} \textit{total} incompatibility, as the Court apparently found to exist in both \textit{Jones & Laughlin} and \textit{Atlas Roofing},\footnote{See discussion \textit{supra} notes 62, 67, 74 and accompanying text.} actually would be “sufficient” to outbalance the Seventh Amendment right.

Whether the \textit{Granfinanciera} Court actually intended such a qualification, intended its discussion about incompatibility merely as surplusage, or simply failed to notice the possible inconsistency between its statement and the public-private right dichotomy, probably matters little in the long run. Close examination of the Court’s unexplained reliance in both \textit{Atlas Roofing} and \textit{Granfinanciera} on the public rights doctrine as a rationale for the congressional power to abandon the jury trial right in non-Article III forums reveals that the public rights doctrine, at least when applied in the Seventh Amend-
ment context, is fundamentally incoherent. Rather than providing a principled basis upon which to determine the proper scope of congressional power to remove the civil jury trial from federal adjudications, reliance on the public rights doctrine in reality amounts to a fig leaf of constitutional principle, used to shield the Court's effective abdication of its responsibilities of judicial review when the Seventh Amendment jury trial right is at stake. Justice White all but acknowledged this fact in his opinion for the Court in *Atlas Roofing*. In that case he made only passing reference to the "public rights" grounding for the Court's deference to congressional will, and instead expended considerable effort to explain why use of jury trials would significantly disrupt the congressional scheme. He had recognized much the same point in his opinion for the Court some eleven years earlier in *Katchen v. Landy*, which he subsequently reiterated once again in his dissent in *Granfinanciera*.

As *Granfinanciera* shows, use of a fig leaf of principle may occasionally dictate a departure from the intended total deference to Congress that would derive from a more open judicial embrace of unadorned functionalism. Such departures, however, will likely prove to be relatively rare. As a practical matter, the public rights analysis leaves Congress with enormous and largely unbridled discretion to circumvent the jury trial right when it deems it pragmatically advisable to do so. This point is underscored by the mysterious absence of even a hint of explanation in any of the Court's opinions concerning the textual, historical, or conceptual basis for the claimed intersection between the public rights doctrine on the one hand and the Seventh Amendment on the other. Exploration of any conceivable basis for that intersection reveals how indefensible such a connection is as a matter of both Seventh Amendment doctrine and constitutional theory.

121 *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450, 455 (1977); see discussion supra note 73 and accompanying text.

122 *Atlas Roofing*, 430 U.S. at 450-55; see discussion infra notes 194-96 and accompanying text.

123 382 U.S. 323, 339 (1966) (holding that the Bankruptcy Act established a structure within which a bankruptcy court has summary jurisdiction over a claim for the surrender of voidable documents).

124 *Granfinanciera*, 492 U.S. at 80, 83 (White, J., dissenting).

125 See, e.g., *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (clarifying *Granfinanciera* as determining the availability of a jury trial based on whether the creditor has submitted a claim against the bankruptcy estate, not based on a trustee's preference action).
III. THE PUBLIC RIGHTS—SEVENTH AMENDMENT INTERSECTION: 
EXPLORING THE CONCEIVABLE RATIONALES

No one, to our knowledge, has ever suggested that the common law 
practice of 1791 in any way determined the use of a jury trial on the basis 
of whether the underlying substantive right to be enforced could be character-
ized as “public” or “private.” Hence, the Court’s invocation of that dis-
tinction cannot be justified on the basis of the traditionally employed histori-
cal interpretive model of Seventh Amendment construction. Thus, if reli-
ance on the public rights doctrine in Seventh Amendment interpretation is to 
be explained, it must be by resort to alternative analytical models. Three 
such models could be fashioned: the “historical/forum” model, the “condi-
tional waiver” model, and the “functionalist” model. The first two models 
conceivably could provide principled constitutional grounding for the appli-
cation of the public rights doctrine to Seventh Amendment interpretation, 
but close examination reveals that these models are flawed in the abstract 
and not properly applicable in Seventh Amendment interpretation. Although 
the third model adequately rationalizes the Court’s distinction, that model is 
wholly inconsistent with accepted principles of judicial review and Ameri-
can constitutional theory, and therefore must be rejected.

A. The Historical/Forum Model

The “historical/forum” model effectively bridges Article III’s interpretive 
reliance on the public rights doctrine and the Seventh Amendment historical 
mode of interpretation. Under this model, the public rights doctrine has no direct relevance to Seventh Amendment interpretation. Rather, that doctrine determines solely whether Congress may transfer federal adjudication to a non-Article III forum, which is the doctrine’s traditional role. The doctrine’s indirect impact on Seventh Amendment interpretation turns on the assumption that the right to jury trial is not triggered in a non-Article III proceeding, regardless of either the nature of the relief sought or the historical practice had the case arisen in a traditional judicial setting. If valid, use of such a model would comport with the requirements of principled judicial

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126 See discussion supra part I. Of course, it could be argued that because most of today’s public rights, enacted by Congress, did not exist in 1791, no jury trial right applies. Such a conclusion, however, would be inconsistent with the classic Seventh Amendment interpretive principle of Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830), regularly followed by the modern Supreme Court, which focuses primarily on the nature of the relief sought, rather than on the historical origins of the underlying substantive rights. See discussion infra notes 142-43 and accompanying text.

127 See discussion supra notes 76-80 and accompanying text.
review. The Court would simply be holding that Congress may transfer the adjudication of public rights to a non-Article III forum, and that, purely as a matter of principled Seventh Amendment construction, the right to a jury trial does not apply in such proceedings.

While some doctrinal support for this model may be found in both Jones & Laughlin and Atlas Roofing, the Court's decision in Granfinanciera arguably suggests that the Court is not employing the "historical/forum" model to rationalize its Seventh Amendment jurisprudence. In Granfinanciera, pursuant to the congressional legislative scheme, the fraudulent conveyance action was heard by a bankruptcy judge, a non-Article III adjudicator, yet nevertheless the Court held that the jury trial right applied. If the Court's rationale for the intersection of the public rights doctrine and the Seventh Amendment was, in fact, the "historical/forum" rationale, presumably the fact that the fraudulent conveyance action was heard by a non-Article III adjudicator should have been dispositive, but that was not the result. Even though the claim was adjudicated by a non-Article III judge, the fact that a private right was involved in Granfinanciera was deemed by the Court to render the Seventh Amendment right to jury trial applicable. This analysis suggests the existence of a direct connection between the public rights doctrine and the Seventh Amendment, rather than the indirect connection contemplated by the "historical/forum" rationale.

See supra notes 50-73 and accompanying text. Granfinanciera, 492 U.S. at 64.

Mention should be made of the reason that a non-Article III bankruptcy judge was constitutionally permitted to adjudicate a private right in the first place. Such a practice may at first appear puzzling, in light of the Supreme Court's finding in Northern Pipeline that adjudication of private rights by non-Article III bankruptcy judges was unconstitutional. See supra note 97 and accompanying text. The reason for granting non-Article III bankruptcy judges such adjudicative power is that in Northern Pipeline, Justice Brennan had indicated that non-Article III adjudication could be justified, above and beyond the public rights doctrine, if the non-Article III adjudicators were "adjuncts" to the district courts. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-84 (1982). He concluded, however, that, as constituted under the 1978 Act, bankruptcy judges independently exercised too much judicial power to be properly characterized as adjuncts. Id. at 84-86.

In the Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 1334(b) (1988), Congress responded to Northern Pipeline by reshaping the bankruptcy courts in order to make them true "adjuncts" to the federal district courts. 28 U.S.C. § 151 (1988) now provides that bankruptcy judges are to constitute a unit of the district court. Under 28 U.S.C. § 152(a)(1), bankruptcy judges, who are appointed for fourteen-year terms, "serve as judicial officers of the United States district court established under Article III of the Constitution." Id. § 152(a)(1). While this action could effectively avoid Article III problems for bankruptcy court adjudication of private rights, it of course would have no effect on a Seventh Amendment challenge.
In any event, reliance on the "historical/forum" rationale to justify the intersection of the public rights doctrine and the Seventh Amendment is fatally flawed in several important respects. Two ways exist in which the "historical/forum" model might be thought to justify this intersection—that which we describe as the "historical executive" rationale and the "new equitable forum" rationale. We will consider each separately.

1. The "Historical Executive" Rationale

The essential premise of the "historical executive" sub-model is that, pursuant to the well-established mode of Seventh Amendment interpretation tying the jury trial right to analogous historical practice, that right should be deemed inapplicable to non-Article III adjudication. This conclusion is reached, the argument proceeds, because the closest common law analogue to adjudication outside of a traditional judicial forum is direct executive action by officers of the king, where the jury trial right was of course inapplicable. On a textual level, under this sub-model, an action in a non-Article III forum is simply not a "suit" to which the jury trial right attaches.

Even if the premises of this rationale were fully accepted, it would be difficult to deem it relevant to adjudication in a non-Article III "legislative" court. Such courts, at least when they are adjudicating actual cases or controversies, resemble Article III courts in every significant respect except in their protections of salary and tenure. This sole distinction hardly renders the action before the non-Article III adjudicator something other than a "suit" for purposes of the Seventh Amendment's text. Nor, as a matter of historical analogy, do these distinctions bring the proceedings under Article III courts closer to royal executive action than to traditional common law adjudication, given that English common law judges themselves lacked protections of salary and tenure. Arguably administrative non-Article III

\[131\] See discussion supra part I.

\[132\] Current examples are territorial courts, military courts, and the Tax Court. See REDISH, supra note 77, at 53-64.

\[133\] Article III's case-or-controversy requirement does not apply to legislative courts, though much of their work would fit within the requirement's bounds. See id.

\[134\] This dichotomy may explain the Court's willingness to find the Seventh Amendment right applicable to the non-Article III District of Columbia local courts. Pernell v. Southall Realty, 416 U.S. 363, 365-69 (1974). Nevertheless, it remains unclear how the Court would have ruled on the applicability of the Seventh Amendment right if Congress had expressly denied to those courts the authority to conduct civil jury trials. See supra note 85.

\[135\] Indeed, one of the grievances listed in the Declaration of Independence was the lack of independence of the King's judiciary. See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) ("He has made Judges dependent on his Will alone, for the tenure
adjudication benefits more from the textual and historical reasoning of the "historical executive" rationale than does legislative court adjudication. Although no one could reasonably believe that legislative courts are not properly deemed "courts," there exists a venerable doctrinal basis for concluding that administrative agencies are not properly described in this manner. The text of the Seventh Amendment, however, makes no reference to "courts." Rather, it refers solely to "suits." While administrative rulemaking obviously does not qualify as a "suit," it would defy all reality to suggest that administrative adjudication of a statutorily created cause of action on behalf of or against a private individual or entity does not constitute a "suit." Such a proceeding represents a classic illustration of the adversary controversies conceptually and traditionally adjudicated by judicial bodies. Thus, such adjudicatory procedures are hardly analogous to non-ju-

of their offices, and the amount and payment of their salaries.

136 The Supreme Court first employed a "functional" standard to determine whether an adjudicatory body constitutes a "court" for purposes of the removal statutes. See Upshur County v. Rich, 135 U.S. 467 (1890). In Upshur County, the Court held that despite the fact that removal was from a "county court," the case did not involve a removable "suit." Id. at 477. The Court reached this conclusion by examining the actual powers, composition, and procedures of the entity, stating:

The principle . . . is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit.

Id.

Under the functional test, many agency actions would be deemed to be the adjudication of "suits." Although some courts continue to employ the functional test, see, e.g., Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 576 (4th Cir. 1989); Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1102 (7th Cir. 1979); Volkswagen de P.R., Inc. v. Puerto Rico Labor Relations Bd., 454 F.2d 38, 41-45 (1st Cir. 1972); others have refused to do so, see, e.g., County of Nassau v. Cost of Living Council, 499 F.2d 1340, 1343 (Temp. Emer. Ct. App. 1974). Recently, one court of appeals stated that "[t]here is . . . evidence in other Supreme Court decisions from the same era that Upshur County did not broadly adopt a 'functional test' by which an administrative body would be treated as a 'court' for federal removal purposes simply because it performs a judicial function." Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1263 (3d Cir. 1994). In another opinion, the Third Circuit asked "whether the coercive powers that the administrative agency possesses compel compliance with effluent limitations . . . . The second inquiry concerns the procedural similarities the agency proceeding might have to a suit in federal court . . . . " Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc., 759 F.2d 1131, 1137 (3d Cir. 1985).

137 See, e.g., In re Pacific Ry. Comm'n, 32 F. 241, 255 (C.C.N.D. Cal. 1887) ("The term [cases or controversies] implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."); see also Muskat v. United States, 219 U.S. 346, 356-57 (1911) (quoting Justice Field's definition of "cases or controversies" in In re Pacific Railway Commission).
dicial royal executive action that may have taken place at the time of the Seventh Amendment's adoption. In any event, even if accepted, this administrative agency-legislative court dichotomy could not be rationalized by resort to the public rights doctrine, because that doctrine draws no such distinction for purposes of Article III analysis. In its original context, that doctrine was developed for the sole purpose of distinguishing between Article III and non-Article III adjudicatory power.\footnote{See discussion supra notes 76-80 and accompanying text.}

2. The "New Equitable Forum" Rationale

An alternate means of explaining the "historical/forum" model is to argue that adjudication in a non-Article III forum represents a proceeding wholly unknown at common law and therefore uncontrolled by the Seventh Amendment, which guarantees the right only as it existed at common law. Alternatively, one could argue that such forums are appropriately viewed as inherently equitable in nature because they were created by Congress in order to avoid the delays and inefficiencies involved in traditional adjudication. Once again, however, neither explanation can withstand closer analysis.

Initially, the fact that the particular proceeding or forum in question may not have existed at common law should not automatically remove it from the command of the Seventh Amendment, any more than the fact that the particular underlying substantive claim did not exist at common law does not have this effect. Under Justice Story's \textit{Parsons} analysis,\footnote{See discussion supra notes 39-42 and accompanying text.} the existence of the proceeding or cause of action at common law is irrelevant. As long as the proceeding is appropriately characterized as a "suit," one determines the claim's legal or equitable nature by examining both the remedy sought and historical analogies to the underlying action.\footnote{See discussion supra part I.} Thus, under \textit{Parsons}, a jury trial right will apply regardless of the nature of the forum in which the suit is to be adjudicated, so long as the case would have been adjudicated at law \textit{had it existed in 1791}.\footnote{Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).} As the modern day Supreme Court has explained, the latter issue is generally resolved by examining the nature of the relief sought.\footnote{See Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) ("The . . . inquiry [into the remedy sought] is more important in our analysis.").} Hence, if the private plaintiff in an administrative proceeding sought money damages, or if the government sought a civil enforcement penalty, those cases would have been adjudicated in courts
of law, rather than in equity. 143 Under Parsons, then, it matters not at all that the adjudication takes place in a forum unknown at common law. 144

It is true, of course, that the Supreme Court could avoid this difficulty in implementing the "new forum" rationale simply by overruling Justice Story's venerable opinion in Parsons. After all, the Parsons approach does not inexorably follow from the text of the Seventh Amendment, and the Court has in the past not deemed Justice Story's opinions to be immune from subsequent reconsideration in other contexts. 145 The problem, however, is that the Supreme Court has never suggested that Parsons should be overruled. To the contrary, it has expressly reaffirmed it on more than one occasion. 146 Moreover, it is difficult to see how the Court could, at least in a principled manner, overrule Parsons selectively, so that its holding continued to apply to adjudication of newly created statutory rights in the Article III courts but did not apply to adjudication in newly created non-Article III proceedings. We return, therefore, to square one—seeking a principled basis on which to distinguish application of the Seventh Amendment right in Article III and non-Article III proceedings. Unless the Court were (1) expressly to overrule Parsons selectively, rendering it inapplicable to non-Article III proceedings, and (2) to provide some principled basis to support the position that Parsons's "historical translation" approach applies to new forums, but not to new causes of action, the "new forum" rationale fails to justify a special Seventh Amendment rule for non-Article III proceedings. At this point, at least, the Supreme Court has attempted to do neither.

Even if the mere fact that the forum was created after 1791 does not justify exclusion of the Seventh Amendment from non-Article III proceedings, such exclusion could be rationalized if those new forums were properly capable of characterization as exclusively equitable. Such a conclusion appears inappropriate, however, given that much of the relief awarded in these proceedings is properly characterized only as the equivalent of classic legal remedies. Perhaps this conclusion would change were Congress to label formally the relief awarded in non-Article III proceedings as "equitable." Indeed, there exists some basis in Supreme Court doctrine for the view that congressional characterization of relief as equitable conclusively removes any question about the possibility of a jury trial right. 147 When a

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143 Regarding the legal nature of the civil enforcement penalty, see Tull v. United States, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law.").

144 See supra notes 39-42 and accompanying text.

145 For example, the Court, in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), overruled Justice Story's famed opinion in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).


147 See Chauffeurs, Teamsters & Helpers Local 391 v. Terry, 494 U.S. 558, 572 (1990). Prior to Terry, however, in Granfinanciera, Justice Brennan stated that as a
constitutional right turns on the outcome of a factual question, however, both Supreme Court precedent and accepted principles of constitutional theory dictate that the judiciary have the final say, lest the majoritarian branches be given effective power to overrule the countermajoritarian limits of the Constitution.\textsuperscript{148} Hence, Congress cannot be given conclusive power to void the Seventh Amendment right simply by waiving a legislative wand, characterizing as "equitable" relief that which has historically been deemed "legal."\textsuperscript{149}

Justice White, both in his opinion for the Court in \textit{Atlas Roofing}\textsuperscript{150} and in his dissent in \textit{Granfinanciera},\textsuperscript{151} found support for the position that the jury trial right did not apply to the forums in question from the fact that historically the jury trial right did not extend to every forum.\textsuperscript{152} He pointed to courts of equity and admiralty, as well as to military courts and state courts as examples of forums in which the Seventh Amendment right has always been inapplicable.\textsuperscript{153} None of these historical examples, however, provides logical support for the position that the right is similarly inapplicable in non-Article III forums. Even though the forums in the first two examples cited by Justice White existed in 1791, the Seventh Amendment does not dictate a jury trial right in those situations for the simple reason that those forums historically did not employ jury trials. The same is quite probably true of military courts, where no one appears to have suggested the historical use of jury trials. In any event, such forums present truly unique circumstances that have always been thought to distinguish the particular form of adjudication for virtually every purpose.\textsuperscript{154} Finally, the right has never applied in state courts for the simple reason that no provision of the Bill of Rights was intended to apply to the states.\textsuperscript{155} Accordingly, the Sev-

\textsuperscript{148} See, e.g., Crowell v. Benson, 285 U.S. 22, 60 (1932). \textit{See generally} REDISH, supra note 9; discussion \textit{infra} notes 185-92 and accompanying text.

\textsuperscript{149} See \textit{Granfinanciera,} 492 U.S. at 52.


\textsuperscript{151} \textit{Granfinanciera,} 492 U.S. at 79-80 (White, J., dissenting).

\textsuperscript{152} \textit{Id.} at 80 (White, J., dissenting); \textit{Atlas Roofing,} 430 U.S. at 449-55.

\textsuperscript{153} \textit{Granfinanciera,} 492 U.S. at 79 n.5 (White, J., dissenting); \textit{Atlas Roofing,} 430 U.S. at 458.


\textsuperscript{155} Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833). Although many of the provisions of the Bill of Rights have been incorporated through the Fourteenth Amendment's Due Process Clause, this is not the case for the Seventh Amendment. \textit{See, e.g.,} Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 365-67 (1952) (Frankfurter, J., concurring in the judgment).
The Seventh Amendment does not impose a jury trial right in state court, even in purely legal actions. Justice White's reliance on the state court analogy therefore proves too much. Analogizing the Seventh Amendment's role in federal courts to its role in state courts would effectively do away with the jury trial right altogether.

An argument might be fashioned, however, that actions in non-Article III forums are properly viewed as equitable, to which no jury trial right attaches because the "remedy at law"—adjudication that includes a jury trial—would be prohibitively burdensome, and therefore "inadequate." The fact, however, that use of jury trial makes adjudication more burdensome or inefficient, has, as a general matter, never served as an adequate basis for characterizing a case as equitable rather than legal. Thus, use of such an analysis would distort the Seventh Amendment's historical directive beyond recognition.

B. The "Conditional Waiver" Model

We have already seen that the inapplicability of the Seventh Amendment right to non-Article III proceedings cannot properly be rationalized by resort to the traditional historical inquiry of Seventh Amendment analysis. An alternative analysis that could conceivably rationalize such a conclusion is the "conditional waiver" model. Unlike the "historical/forum" model, which at least purports to rationalize the virtual mutual exclusivity between the jury trial right and the use of non-Article III forums by resorting to interpretation of the Seventh Amendment, the "conditional waiver" model begins with the assumption that the Seventh Amendment does in fact provide a jury trial right in non-Article III proceedings when legal relief is sought. The model excludes the jury trial right, not on the basis of internal constitutional interpretation, but rather on the basis of some form of the logical proposition that "the-greater-includes-the-lesser." Under this interpretation, the very same reasoning that leads to application of the "public rights" exception to the requirement of Article III adjudication likewise simultaneously leads to the conclusion that Congress may revoke the jury trial right in, and only in, the adjudication of public rights.

The model's reasoning, which has never been expressly adopted by the Court in its decisions interpreting either the Seventh Amendment or Article

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156 The one exception where complexity could have transformed a legal issue into an equitable one was an accounting. See discussion supra note 27.

157 See discussion supra notes 26-28 and accompanying text.

158 But see Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51-55 (1989) (finding a Seventh Amendment jury trial right in a non-Article III court, where a private right as opposed to a public right was being litigated); discussion supra notes 81-88 and accompanying text.
III, is that because Congress is not constitutionally obligated to create public rights in the first place and is in any event protected against suit by sovereign immunity, Congress logically can take the "lesser" step of creating the right and allowing itself to be sued in certain circumstances. Accordingly, Congress could condition the receipt of a public right on the recipient's implicit agreement to waive either adjudication of that right in an Article III forum, the right to jury trial, or both.

If this logic were ever to be accepted, however, it could occur only in a situation in which Congress had created a right, and the adjudication in question had been brought by the recipient to enforce that right. It is only under those circumstances that the logic of "the-greater-includes-the-lesser" applies even superficially, for it is only in this situation that the private party is receiving a benefit that the government was not obligated to provide. Unless the government is providing a benefit to which the individual had no independent right, the government cannot rely on the premise that its greater power not to provide the benefit at all logically implies its power to provide the benefit subject to waiver of preexisting rights or other limitations. Thus, in a case in which the government is seeking to impose a burden or penalty upon a private party rather than providing a benefit, this reasoning is rendered completely irrelevant.

If one were to consider a case, such as Atlas Roofing, in which the government sought to act coercively to enforce a statutorily-imposed obligation against a private individual or entity, reliance on the logic of "the greater-includes-the-lesser" would be absurd. The government could not rationally say to that party: "We did not have to impose this obligation on you in the first place; therefore, we can take the lesser step of imposing the obligation on you only on the condition that you waive your constitutional rights to an Article III forum and/or a jury trial." In response, there can be little doubt that the private party would choose to decline the "obligation." In all likelihood, that is why the rule is referred to as the public "rights" doctrine, rather than the public "obligations" doctrine. The same logical defect applies to a case brought by one private party to enforce a statutorily created right against another private party. While the "greater-includes-the-lesser" logic could conceivably work as to the plaintiff, surely it would be truly Orwellian to apply it to the coerced defendant.

Presumably for these reasons, Justice Scalia, in his separate opinion in Granfinanciera, argued that the definition of a "public right" should be confined to suits in which the government is a party acting in its sovereign capacity. Under the logic just described, however, even Justice Scalia’s

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159 It should be recalled, however, that the Court has failed to provide any alternative explanation.

160 See discussion supra notes 68-73 and accompanying text.

161 Justice Scalia observed:
model is defective, because it is not sufficiently confined. Because all Justice Scalia demands is that the government be a party—presumably either as a defendant or a plaintiff—his approach would illogically reach situations (like that in Atlas Roofing) where the government is acting coercively. In any event, the Court has not so confined the concept. Although Justice Brennan’s plurality opinion in Northern Pipeline suggested “that a matter of public rights must at a minimum arise ‘between the government and others,’” in the subsequent decision of Thomas v. Union Carbide Agricultural Products Co., the Court nevertheless held that Congress may exclude cases from Article III adjudication where Congress has “create[d] a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be . . . appropriate for agency resolution with limited involvement by the Article III judiciary.” Even Justice Brennan, in a separate concurring opinion in Thomas, agreed with the assumption that the government need not be a party to the action in order to render a case an adjudication of “public rights.” Surely, then, the “greater-includes-the-lesser” logic cannot justify a Seventh Amendment exception for adjudication of public rights, at least under the broad scope of the Court’s current definition of that phrase.

In my view a matter of “public rights,” whose adjudication Congress may assign to tribunals lacking the essential characteristics of Article III courts, “must at a minimum ‘arise between the government and others.’” Until quite recently this has also been the consistent view of the Court. . . .

The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine. . . .

It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights of the public—that is, rights pertaining to claims brought by or against the United States. For central to our reasoning was the device of waiver of sovereign immunity, as a means of converting a subject which, though its resolution involved a “judicial act,” could not be brought before the courts, into the stuff of an Article III “judicial controversy.” Waiver of sovereign immunity can only be implicated, of course, in suits where the Government is a party. Granfinanciera, 492 U.S. at 65-66, 68 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).


164 Id. at 598 (Brennan, J., concurring).

165 It should once again be emphasized that even if the Court were to refine its modern approach to the public rights doctrine in keeping with Justice Scalia’s concurrence in Granfinanciera, the “greater-includes-the-lesser” logic that underlies the “conditional waiver” model is wholly inapplicable in cases in which the government, suing as a plaintiff, is acting coercively. See discussion supra note 161 and accompanying text.
Even if the Court were to do something it has never done and confine the concept of public rights to the narrow category of adjudications brought by a private party against the government to vindicate a statutorily-created right, both logical and practical problems would continue to plague the doctrine’s use as a rationale for exclusion of the Seventh Amendment right from non-Article III proceedings. Initially, there appears to be no way to confine the doctrine’s logic to cases of non-Article III adjudication. If the Court is proceeding on the assumption that the private party has waived a constitutional right because of the principle that “the-greater-includes-the-lesser,” then there is no logical reason why Congress could not deny right to a jury trial, even in those proceedings heard in an Article III court. The same logical implications thought to derive from the government’s voluntary choice to create the right and to allow itself to be sued to enforce it are relevant, regardless of the nature of the adjudicatory forum employed.

One might respond that if and when the question of the applicability of the “greater-includes-the-lesser” clearly presents itself, the Court actually would reach such a conclusion. Although the Court asserted in Curtis v. Loether that competing policy considerations cannot overcome the Seventh Amendment’s “clear command,”166 commentators have noted that Congress had failed to make clear, in the underlying statute, its choice against the use of jury trial, and that it is uncertain what the Court would have done had Congress made such a decision clear.167 Given that the Court in both Atlas Roofing and Jones & Laughlin emphasized the administrative nature of the forum,168 application of the public rights analysis to determine the scope of the Seventh Amendment right in Article III courts would represent a substantial extension. Yet the fact remains that use of the “conditional waiver” rationale would seem to be as applicable to such proceedings as it is in administrative adjudication.

One should hardly express pleasure at the prospect that the Court actually might extend the “logic” of the public rights doctrine to encompass the loss of the jury trial right in Article III adjudications, as well as non-Article III proceedings. The fundamental problem with the “conditional waiver” rationale of the public rights exception, even when that term is given its narrowest definition,169 is that it completely ignores the salutary limitations imposed by the so-called “unconstitutional conditions” doctrine. Under that doctrine, Congress may not condition receipt of a benefit on the waiver of a

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166 Curtis v. Loether, 415 U.S. 189, 198 (1974); see discussion supra note 43 and accompanying text.
167 See FRIEDENTHAL ET AL., supra note 45, at 504.
169 By “narrowest definition,” we mean confining the doctrine to cases in which a private party is suing the government to enforce a statutorily created right. See discussion supra notes 159-60 and accompanying text.
constitutional right.\textsuperscript{170} While the Court has on occasion construed the doctrine in a manner that may unduly narrow its reach,\textsuperscript{171} it continues to stand for the proposition that government may not employ its awesome power effectively to pressure private individuals into the waiver of constitutional rights.\textsuperscript{172} Under these circumstances, the doctrine posits, such waiver cannot reasonably be deemed to represent a truly voluntary choice.\textsuperscript{173} Perhaps there exist principled means by which the Court could distinguish either or both the Seventh Amendment and Article III contexts from those situations normally reached by the unconstitutional conditions doctrine. The Court, however, has not attempted to fashion such a principled distinction, quite probably because the Court has never expressly acknowledged that the "con-


\textsuperscript{171} See Rust v. Sullivan, 500 U.S. 173, 196-200 (1991). At issue in Rust were regulations regarding Title X of the Public Health Service Act, which provides federal funds for family planning services. Id. at 178. The regulations in question specified that a Title X project could not provide counseling concerning, referrals for, or advocacy of abortion. Id. at 179-80.


\textsuperscript{173} According to Professor Sullivan:

The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.

Sullivan, supra note 170, at 1415.

Professor Sullivan argues "that the doctrine has not been applied often enough." Id. at 1418. She suggests, however, that "a focus on coercion [as a rationale for the doctrine] is unlikely to be helpful." Id. at 1420. Instead, she contends that the focus should be on the systemic effect of conditions on the distribution of rights in the polity as a whole. Unconstitutional conditions implicate three distributive concerns. The first is the boundary between the public and the private realms, which government can shift through the allocation of benefits as readily through the use or threat of force. . . . The second distributive concern of [the] unconstitutional conditions doctrine is the maintenance of government neutrality or evenhandedness among rightholders. The third is the prevention of constitutional caste . . . .

Id. at 1421.
ditional waiver” rationale actually explains the public rights doctrine’s connection to interpretation of either Article III or the Seventh Amendment.

At least in the context of Article III interpretation, the modern Court has available to it the support of precedent to justify its use of the public rights doctrine, though at no point do any of the early cases provide an explanation for the connection. Even less explanation was provided, however, for Atlas Roofing’s intersection of the public rights analysis with the right to jury trial in non-Article III forums. As our discussion has shown, once one attempts to explicate this intersection, one immediately recognizes the gross disparity between the intersection and accepted constitutional doctrine. The only remaining explanation for the judicial deference imposed by the public rights doctrine, then, is a theory of unadorned functionalism. It is therefore to an examination of that theory that we now turn.

C. The “Functionalist-Abdication” Model

1. The Proper Role of Functionalism in Constitutional Theory

On the broadest level, the theory of functionalism in constitutional review posits that the scope of constitutional dictates may be shaped or influenced, at least in part, by the social, political, or practical implications that arise from conceivable interpretations. More often than not, however, the theory has meant that otherwise applicable constitutional dictates can be made to give way in the face of competing social or political interests. Although Alexander Bickel argued that inclusion of functionalist considerations as part of the judicial review process represented wholly unprincipled and illegitimate exercises of the judiciary’s role, in certain instances such considerations are perfectly consistent with the proper performance of judicial review. For example, where the Fourth Amendment prohibits only “unreasonable” searches and seizures, examination of functional concerns is not only permitted but textually required, as an element of the judi-

174 See cases cited supra notes 77-79 and accompanying text.
175 See generally Martin H. Redish, Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta, 39 DEPAUL L. REV. 299 (1990) (criticizing alternative analytical models for deciding separation of powers cases, especially in regards to Morrison v. Olson and Mistretta v. United States, and arguing that a formal separationist model ought to be applied).
178 U.S. CONST. amend. IV.
cial interpretation of the term "unreasonable." Functionalist considerations also would seem to be textually appropriate, at least to a limited extent, in the interpretation of the constitutional dictate of procedural due process.\footnote{A minimum floor of process must be required, lest the due process protection be rendered meaningless. \textit{See} Martin H. Redish & Lawrence C. Marshall, \textit{Adjudicatory Independence and the Values of Procedural Due Process}, 95 YALE L.J. 455, 472-74 (1986).}

Where the relevant constitutional text does not, on its face, incorporate a case-by-case assessment of functionalist considerations, judicial limitation of a constitutional directive on functionalist grounds may nevertheless be appropriate under limited circumstances. Limited consideration of functionalism may be proper, for example, under a theory of "pragmatic formalism," which allows functional considerations to influence the judicial definition of ambiguous constitutional terminology.\footnote{\textit{See} U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) (imposing utilitarian balancing test as measure of procedural due process).} Additionally, limited use of functionalism is quite probably appropriate when exclusion of functionalist concerns would cause such extreme harm or disruption that if a reviewing court were forced to choose between total protection and total non-protection, it would as a practical matter have to choose the latter.\footnote{\textit{See} REDISH, \textit{supra} note 176, at 101 (suggesting that under "pragmatic formalism," a court should define linguistically ambiguous terms by means of "a combination of policy, tradition, precedent, and linguistic analysis").}

Outside of these three contexts, judicial reliance on functionalist considerations as a basis for limiting an otherwise unlimited constitutional dictate is indefensible as a matter of American constitutional theory. To be sure, in the face of a choice between several equally plausible textual constructions, the reviewing court's assessment of their respective impact on social policy will be all but inescapable.\footnote{An example would be the First Amendment right of free speech. U.S. CONST. amend. I.} Absent such circumstances, however, nothing in the judiciary's intended role in the constitutional process authorizes it to sit in judgment on the wisdom of the constitutional provisions that it is asked to interpret and enforce. Exercise of such unlimited policymaking power would be inconsistent with the limited function of an unrepresentative and unaccountable judiciary in a constitutional democracy, and would threaten a society's ability to insulate rights from simple majoritarian revocation.\footnote{\textit{See} REDISH, \textit{supra} note 176, at 9-10.}

As problematic as such judicially determined functionalism may be, even more troubling is what we label a "functionalist-abdication" model. In
judicially determined functionalism, the reviewing court itself retains the final authority to decide whether, in a particular case, competing social or political concerns outbalance an otherwise applicable constitutional dictate. In contrast, under a “functionalist-abdication” model the political branches of the federal government make the final, unreviewable, or at least unreviewed, decision as to whether social concerns sufficiently counterbalance a constitutional command to justify abandonment or restriction of that command. A variation of the “functionalist-abdication” model that is in many ways even more pernicious is the “definitional abdication” model of judicial review. Pursuant to this model, a reviewing court, while purporting to test governmental action by the terms of the Constitution, will accept unquestioningly the majoritarian branches’ characterization of their actions as falling within the terms of constitutional directives. Such an approach arguably presents greater dangers than a pure “functionalist-abdication” model, because it conveys an illusion of judicial scrutiny that may provide governmental action with considerably greater legitimacy in the eyes of the public than it deserves. Use of this model effectively turns our constitutional democratic system on its head, by giving ultimate interpretive power to the very majoritarian branches sought to be held in check by the countermajoritarian Constitution.

To grasp this obvious but compelling element of American constitutional theory, one need only recall the words of Chief Justice Marshall in *Marbury v. Madison*:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

In a long line of decisions, the Supreme Court has rejected the “definitional abdication” model as a legitimate mode of judicial review. See *Jacobellis v. Ohio*, 378 U.S. 184, 190 n.6 (1964); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 49-52 (1936); *Crowell v. Benson*, 285 U.S. 22, 54-59 (1932); *Ng Fung Ho v. White*, 259 U.S. 276, 282-85 (1922). The model has received its greatest acceptance, albeit implicitly, from the Supreme Court in its interpretation of the Seventh Amendment. See discussion infra part III.C.2.
Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.\footnote{Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803) (emphasis added).}

The Constitution is framed in mandatory, rather than advisory terms, and is subject to a stringent supermajoritarian amendment process.\footnote{"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . . ." U.S. CONST. art. V.} The fact that in Article III the framers simultaneously insulated the federal judiciary from direct majoritarian pressures\footnote{U.S. CONST. art. III, § 1 (providing protections of salary and tenure).} and vested the judiciary with authority to adjudicate cases arising under the Constitution\footnote{U.S. CONST. art. III, § 2, cl. 1.} makes clear their understanding that the courts would act as interpreters and enforcers of the nation’s governing document.\footnote{See The Federalist No. 78, at 524-25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).} Such an approach makes perfect sense, as one of us has previously argued:

It should not be difficult to determine that when the majoritarian branch is allowed to act as the final arbiter of the counter-majoritarian constitutional limitations on its authority, at least as a practical matter there are no limitations at all. Indeed, one should need to draw only on common sense and generic experience to make this realization. . . . All one need do to grasp the point is to imagine a litigation between two parties, where the final decision is to be made
by one of those parties. Just as it would be absurd to suppose that the resolution of such a case could be deemed fair, so, too, is it absurd to imagine that one majoritarian branch could be universally trusted to make a fair assessment of a constitutional challenge to its actions.\textsuperscript{191}

As basic as the concept of independent judicial review is to our constitutional structure,\textsuperscript{192} in the context of the Seventh Amendment right in non-Article III proceedings, the conclusion appears inescapable that the "functionalist-abdication" model has provided the driving force behind the Supreme Court's doctrine.

2. \textit{The "Functionalist-Abdication" Model in Seventh Amendment Interpretation}

Whatever cryptic and conclusory references the Court has made to the public rights doctrine in its construction of the Seventh Amendment in non-Article III proceedings, and whatever its feeble attempts to place that construction within the logical flow of traditional Seventh Amendment interpretation, when the dust settles there can be little doubt that some form of functionalism underlies the Court's current doctrinal outlook. The total and obvious inadequacy of the alternative interpretive models should, standing alone, provide sufficient proof of this assertion.\textsuperscript{193} If one demands more supporting evidence, we need only look at the Court's words. For example, Justice White's opinion for the Court in \textit{Atlas Roofing} made a number of important references to the functional implications of the Seventh Amendment's application to administrative proceedings.\textsuperscript{194} Additionally, the Court has noted, on other occasions, the "incompatibility" between the jury trial right and the administrative process, as if that factor somehow were deemed to be dispositive of the litigants' constitutional right.\textsuperscript{195} Indeed, even Justice Brennan, author of \textit{Granfinanciera}, noted in a subsequent opinion that despite the fact that legal relief is sought, the jury trial right is

\textsuperscript{191} See REDISH, supra note 9, at 81.

\textsuperscript{192} Note that under the "political question" doctrine, the Supreme Court has indicated that under narrowly defined circumstances, the judiciary will decline to review a constitutional issue. \textit{See}, \textit{e.g.}, \textit{Nixon v. United States}, 113 S. Ct. 732, 735 (1993). The doctrine may be attacked because of its stark inconsistency with judicial review theory. \textit{See} REDISH, supra note 9, at 111-36. The doctrine, however, is extremely narrow in scope. Thus, even if accepted, it would have no conceivable applicability to the Seventh Amendment issue.

\textsuperscript{193} See discussion supra part III.A-B.

\textsuperscript{194} \textit{Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n}, 430 U.S. 442, 450 (1977); see discussion supra notes 68-73 and accompanying text.

\textsuperscript{195} \textit{Curtis v. Loether}, 415 U.S. 189, 194 (1974); see discussion supra notes 65-67 and accompanying text.
inapplicable when "Congress has permissibly delegated the particular dispute to a non-Article III decisionmaker and jury trials would frustrate Congress' [sic] purposes in enacting a particular statutory scheme."\textsuperscript{196}

Even more troubling than the Court's apparent reliance on functionalism is its use of the "functionalist-abdication" model. In possible contrast to the Court's use of functionalism in the interpretation of the reach of Article III, in its Seventh Amendment construction in non-Article III contexts, the Court appears rarely to have proceeded on the assumption that it retains meaningful authority to review and reject the congressional determination. Rather, the Court appears to assume implicitly that in every instance in which Congress has made the judgment that a full blown jury trial before an Article III court would be inefficient or inadvisable, that judgment is dispositive. Even in Granfinanciera, the one decision that actually invalidated the failure of Congress to provide a jury trial right before a non-Article III adjudicator,\textsuperscript{198} the Court's words arguably implied that had Congress made an explicit judgment that the Seventh Amendment right should be deemed inapplicable, that judgment would have been accorded substantial, and possibly dispositive, weight.\textsuperscript{199}

Possibly even more pernicious to the values of judicial review is the Court's occasional use in its Seventh Amendment doctrine of "definitional abdication." Under this practice, the Court purports to enforce the Seventh Amendment as a countermajoritarian limitation on Congress, yet totally defers to congressional conclusions concerning the equitable or legal nature of a particular action.\textsuperscript{200} As a result, any time Congress wishes, it may ef-
fectively circumvent the Seventh Amendment jury trial right simply by characterizing the relief provided by a particular statue as "equitable."

Such "definitional abdication" has, as a traditional matter, quite rightly been inconsistent with American constitutional theory, as demonstrated by the so-called "constitutional fact" doctrine in Crowell v. Benson, and similarly decided cases. It is therefore highly doubtful that the Court would engage in such definitional deference in virtually any area of constitutional interpretation other than the Seventh Amendment. Thus, although the Court has not always been consistent in its invocation of this form of deference, the fact that it has done so at all largely distinguishes its Seventh Amendment jurisprudence from traditional constitutional analysis.

Two potential problems plague our characterization of unadorned functionalism as the underlying rationale for the Court's approach to the

VII provides that "the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1988). The Court rejected the Union's argument, in part because "Congress specifically characterized backpay under Title VII as a form of 'equitable relief.' . . . Congress made no similar pronouncement regarding the duty of fair representation." Terry, 494 U.S. at 572 (citation omitted).

"In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." Crowell v. Benson, 285 U.S. 22, 60 (1932). The Court in Crowell framed the issue as "whether the Congress may substitute for constitutional courts . . . an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizens depend." Id. at 56.

In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), the Court refused to defer to Congress's decision to characterize a fraudulent conveyance action brought by the trustee in bankruptcy as a "core" bankruptcy proceeding, which would have rendered the action purely equitable as a historical matter. See id. at 60-61 ("Congress simply reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations and that apparently did not suffer from any grave deficiencies. This purely taxonomic change cannot alter our Seventh Amendment analysis.") (footnote omitted).
role of the Seventh Amendment in non-Article III proceedings. First, one might question the accuracy of such an assertion, in light of the Court's continued emphasis on the presence of a public right as a prerequisite to a finding of Seventh Amendment inapplicability. If the Court truly were employing a "functionalist-abdication" model, the argument might proceed, it should matter little whether the underlying substantive right is deemed to be public or private. Second, one might argue that if unadorned functionalism accurately reflected the Court's Seventh Amendment doctrine, there would be no logical means of confining the congressional deference to cases involving non-Article III forums. Congress could just as easily conclude that use of juries in Article III court proceedings would disrupt achievement of its legislative goals. Neither of these concerns, however, effectively undermines the perception that in its essence, the Court's doctrine concerning the Seventh Amendment's role in non-Article III proceedings amounts to use of a "functionalist-abdication" model.

The Court's reliance on the "public rights" doctrine as a basis for deference to Congress amounts to little more than a thin veil of principle for the vast functionalist deference that is at work.\(^{204}\) Initially, this view is supported by the absence of any logical explanation for the Seventh Amendment-public rights intersection.\(^{205}\) Secondly, as it has evolved in its original context of Article III interpretation, the public rights doctrine itself has degenerated into a type of functionalist analysis. No longer is the doctrine conceptually confined to cases in which the government is a party. Instead, the key inquiry in a public rights doctrine analysis is whether even a seemingly "private" right is ancillary to a broader legislative scheme.\(^{206}\)

One could perhaps make a case for the proposition that a true "functionalist-abdication" model should logically extend to Article III court adjudication, as well as to adjudications in non-Article III forums. In fact, it remains uncertain whether the Court actually would adopt so deferential a model of judicial review were Congress to make clear its decision to exclude the jury trial right from Article III court proceedings.\(^{207}\) If the Court ultimately were to draw a distinction for Seventh Amendment purposes between Article III and non-Article III proceedings, however, the explanation could well be that the Court has adopted a partial functionalist model. Under this analysis, a congressional decision to require that use of non-Article III adjudication, or at least administrative non-Article III adjudication,\(^{208}\) automatically constitutes sufficient grounds for deference to the congressional judgment that use of jury trial would be inappropriate. Paradoxically, then, such an

\(^{204}\) See discussion supra notes 110-25 and accompanying text.

\(^{205}\) See discussion supra notes 74-80 and accompanying text.

\(^{206}\) See discussion supra notes 87-103 and accompanying text.

\(^{207}\) See discussion supra notes 45, 113-15 and accompanying text.

\(^{208}\) See discussion supra note 194 and accompanying text.
analysis would represent a form of "partial" total deference. In other words, under specified circumstances, that is, when Congress transfers adjudication to a non-Article III forum, the Court will not question the wisdom of congressional judgment concerning the incompatibility between legislative goals and the use of jury trials.

Whether the Court's use of the "functionalist-abdication" model is ultimately to be limited to the non-Article III context, however, is largely beside the point from the broader perspective of constitutional theory. Except in limited circumstances, the provisions of the Bill of Rights are not abandoned merely because their use would give rise to political or social inconvenience. Even the fact that enforcement of a constitutional right would severely disrupt a congressional scheme must be deemed irrelevant, lest our essential constitutional structure be turned on its head. By way of contrast, few constitutional theorists today would suggest that the First Amendment right of free expression must give way merely because its enforcement would be "incompatible" with a congressional scheme. Certainly, such an approach would be inconsistent with current free speech doctrine. Congress could not, for example, constitutionally prohibit criticism of one of its legislative programs because such criticism could have the effect of undermining achievement of the program's social goals. A greater departure from our constitutional scheme would result from total judicial deference to a congressional determination concerning that incompatibility. The Court has provided absolutely no principled basis on which to distinguish, for these purposes, the Seventh Amendment right to jury trial from the First Amendment right of free expression.

IV. THE STRICT HISTORICAL ALTERNATIVE

There exists one means by which the Court conceivably could justify its deference to Congress in at least most non-Article III adjudications. The Court has never openly considered this method, quite probably because its adoption would inexorably confine the scope of the jury trial right in contexts beyond the relatively limited situations of non-Article III adjudication or express congressional override. For the most part, no one today disputes that the Seventh Amendment dictates a resort to historical practice at the time of the amendment's adoption in order to determine the modern scope of the jury trial right. One could reasonably debate, however, exactly

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209 See discussion supra notes 178-84 and accompanying text.
210 Generally, when expression is sought to be regulated, government must establish a compelling interest. See, e.g., Widmar v. Vincent, 454 U.S. 263, 270 (1981).
212 See discussion supra notes 185-92 and accompanying text.
213 But see generally Kenneth S. Klein, The Myth of How to Interpret the Seventh
how tied to historical practice the Seventh Amendment inquiry should be. Under Justice Story's modernizing approach in *Parsons v. Bedford*, a court is to apply the jury trial right even to substantive rights that have been created since 1791, as long as a jury trial would have been employed at that time had the cause of action existed.\(^{214}\)

Largely—and maybe only—because of *Parsons*, a Seventh Amendment issue arises in the case of non-Article III adjudication. Under the public rights doctrine, Congress has power to vest adjudicatory power in such tribunals only when Congress has created the substantive right.\(^ {215} \) Meanwhile, even absent *Parsons*, the Seventh Amendment might present a problem for congressionally created rights that replace preexisting common law rights. In the case of most rights enacted by Congress, this problem is not likely to present an obstacle. Nor should the principle of stare decisis present a significant hurdle to the abandonment of *Parsons*. Stare decisis always has been thought to play a more limited role in constitutional adjudication.\(^ {216} \)

There exists no principled basis on which to confine the impact of *Parsons*'s abandonment to cases of congressional action. If *Parsons*'s modernizing directive were to be ignored, the Seventh Amendment would have to be deemed inapplicable in all contexts in which a newly created substantive right is the subject of adjudication, regardless of whether Congress has affirmatively acted to exclude jury trial. Thus, the Seventh Amendment's relevance to modern federal court litigation would be dramatically reduced under an abandonment of *Parsons*. Such a result would be wholly inconsistent with the Court's doctrinal expansion, over the last 35 years, of the Seventh Amendment right in cases in which Congress has not expressly excluded a jury trial.\(^ {217} \) Because there is no constitutional right to a non-jury trial,\(^ {218} \) Congress could choose to provide a statutorily-created jury trial right in adjudications of substantive rights created after 1791. In the numerous situations in which Congress has remained silent on this issue, however,

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\(^{214} \) *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830); see discussion supra notes 39-42 and accompanying text.

\(^{215} \) See discussion supra notes 68-80 and accompanying text.

\(^{216} \) See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962). This is not to say that stare decisis plays no role in constitutional adjudication. See, e.g., Planned Parenthood v. Casey, 114 S. Ct. 909 (1994).

\(^{217} \) See discussion supra part I.

\(^{218} \) See WRIGHT, supra note 29, at 653.
abandonment of Parsons would result in a dramatic retrenchment of the existing constitutional right.

The Court’s current doctrinal structure effectively draws a rough dichotomy between cases of express congressional exclusion of jury trial, or at least congressional transfer to a non-Article III forum combined with such express exclusion, on the one hand, and those in which Congress remains silent on the jury trial question, on the other. Although abandonment of Parsons would exclude the constitutional right from many cases in which it currently applies, it would continue to allow Congress to exclude jury trial while simultaneously providing the Court’s Seventh Amendment jurisprudence with a coherence and level of principled analysis woefully absent under its current structure.

CONCLUSION

It would be an understatement to suggest that the Court’s approach to the Seventh Amendment right in the context of non-Article III adjudication lacks coherent or principled grounding in constitutional theory. On various occasions, the Court has relied on wholly conclusory references to the public rights doctrine, on flawed and misleading analyses of Seventh Amendment interpretation, or on explicit reference to an “incompatibility” between the jury trial right and a congressional scheme in the particular case.

Ultimately, the Court’s exclusion of the jury trial right from most cases of congressional transfer of adjudication to a non-Article III forum can be rationalized only by means of a principle of functionalism. Under this principle, the Court allows Congress to conclude that the needs of a particular legislative scheme require adjudication without jury trial. The Court does this, despite its assumption that absent such congressional action, the Seventh Amendment would dictate the existence of the jury trial right. Judicial revocation of an otherwise applicable constitutional right solely because of a congressional judgment of incompatibility of that right with a legislative scheme effectively inverts two fundamental precepts of American constitutional theory. Those precepts are the supremacy of the Constitution over conflicting congressional legislation and the power of the countermajoritarian judiciary to sit as the final arbiter of the Constitution’s limits on the actions of the majoritarian branches.

Acceptance of this critique of the Court’s Seventh Amendment jurisprudence would not necessarily lead to reversal of the Court’s decisions upholding congressional abandonment of the jury trial right in non-Article III proceedings. The Court could achieve much the same result by overruling its decision in Parsons v. Bedford. This action would render the Seventh Amendment inapplicable in any case in which the underlying substantive

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219 See discussion supra notes 81-93 and accompanying text.
cause of action was created after the amendment's adoption. If, however, the Court were to choose not to overrule *Parsons*, under our critique it would have to abandon most of its decisions upholding the exclusion of the jury trial right in non-Article III proceedings where legal relief is sought. Our process-based critique is agnostic on the issue of *Parsons's* current vitality. Under governing principles of American constitutional theory, however, the Court cannot have it both ways.