Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration

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RESHAPING THE CONSTITUTION TO MEET THE PRACTICAL NEEDS OF THE DAY: THE JUDICIAL PREFERENCE FOR BINDING ARBITRATION

I. INTRODUCTION

In little more than two decades, ADR has been transformed from a rather obscure, seldom-used instrument—a footnote, if you will, to conventional judicial litigation—into a major mechanism resolving private disputes. ADR, with its wide array of services and providers, now exists as a parallel system of justice to our civil justice system.¹

Alternative Dispute Resolution (ADR) has indeed become a "junior varsity justice system" which now handles hundreds of thousands of private disputes each year.² While ADR traces its roots as far back as the 18th century mercantile community³ and several ADR organizations have now celebrated their 50th birthdays,⁴ the growth of ADR into a major mechanism for resolving private disputes is a fairly modern phenomenon. Even more remarkable is that Congress did not legislate this new alternative justice system, nor was it the consequence of any state effort to undermine the federal judiciary. Nor did the people create it by any constitutional amendment. Rather, the federal courts, attempting to clear their own crowded court dockets, have been the moving force that has transformed ADR into a court-sanctioned dispute resolution mechanism that now parallels the civil justice system.⁵

The courts’ new mission to combat overcrowded dockets seemingly

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4. The AAA, for example, was founded in 1926. See A Beginner’s Guide to Alternative Dispute Resolution (visited Feb. 28, 1996) <http://www adr.org/guides/guide.html>.

5. See MURRAY, supra note 3, at 527-30.
arose with the recent employment rights explosion. A decline in collective bargaining, followed by the rise of federally-created employment rights without an accompanying increase in funding for the increased administrative burden on the federal courts, has mainly accounted for the docket pressure that has preoccupied the modern courts. Yet, while private parties have always used alternative mechanisms to resolve contract disputes for reasons of expediency, economy, and privacy, only in the past two decades has the U.S. Supreme Court allowed statutory employment-related claims to be resolved in a private forum. Thus, while the increase in statutory employment rights may explain docket-overcrowding, the subsequent increase in ADR cases undoubtedly could not have occurred without the Court’s blessing.

In 1983, the Court announced a new “liberal federal policy endorsing arbitration” for the effective resolution of statutory employment claims. The Court found the new liberal policy in the Federal Arbitration Act (FAA), even though the FAA dated back to 1925 and for nearly sixty years prior Courts had rejected its application in employment-related disputes. Nevertheless, having declared the new national policy, the Court now could allow an increasing number of employment-related disputes to be shifted out of the federal judiciary and into binding arbitration.

Yet this new “junior varsity justice system” did not arise by sheer Court declaration alone. The Court needed to mold old constitutional principles to fit the new national policy that it claimed preferred ADR to traditional means for resolving statutory claims. The Seventh Amendment’s right to trial by jury had to be fashioned into less than an absolute right. The old constitutional separation of powers doctrine had to be reshaped into a more flexible canon—one less concerned with form than function. Article III’s language needed an updated translation. Finally, the fundamental guaranties of procedural due process had to be retrofitted to the arbitral forum, to somehow validate the resolution of federal rights in a non-judicial forum.

7. See MURRAY, supra note 3, at 524-25.
In short, over the past two decades, the Court's desire to clear judicial calendars had not come without substantial constitutional tampering. Yet, while the Court's operation to streamline the Constitution to meet the pressing needs of the day may have been a success thus far, some have argued that the Court's "patient may be dying." This Comment agrees.

Part II of this Comment briefly reviews the Court's attempts to shift statutory employment claims into binding arbitration. It begins with the 1953 interpretation of the FAA in *Wilko v. Swan* and concludes with the D.C. Circuit's novel decision in *Cole v. Burns International Security Services* in 1997. Part II also reviews the attempts of the modern U.S. Supreme Court to mold old constitutional principles to help clear crowded dockets. It focuses on those key cases in the past two decades that have reshaped the Constitution to allow for the binding arbitration of statutory claims.

Part III examines the Court's redefinition of the Seventh Amendment and its separation of powers doctrine, along with the modifications the Court has made to its traditional Article III and "procedural due process" principles. It questions the Court's jurisprudence over the past two decades that in many cases contradicts traditional principles that have stood for more than two centuries. Part III also explores the fundamental issues that the modern Court has tended to ignore as it has fashioned the Constitution into a more functional document.

Finally, Part IV concludes suggesting that, after two decades of the Court's functional constitutionalism, the courts may be the only faction

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13. 105 F.3d 1465 (D.C. Cir. 1997). *Cole* is a novel decision for three reasons: (1) it ordered arbitration of a Title VII claim contrary to the Court's 1974 decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); (2) it concluded that arbitration could be required as a condition of employment; and (3) it required employers to pay for the arbitration. See Andrew W. Volin, *Recent Legal Developments in the Arbitration of Employment Claims*, 51 DISP. RESOL. J. 16, 17 (1997).
14. This Comment treats statutory claims as if Article III courts held exclusive jurisdiction over them. However, Article III courts share jurisdiction over common law claims with their state counterparts, particularly in matters relating to Title VII. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990). Recognizing, however, that most state constitutions contain provisions analogous to Article III, a separate discussion regarding state constitutional issues would be redundant. See, e.g., Neil C. McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges to Speedy Trial and Speedy Disposition Provisions*, 62 TEMP. L. REV. 177, 184 (1989) (arguing that explicit provisions for separation of powers are found in a majority of state constitutions). Therefore, the state constitutional issues are not explored here.
that champions a preference for ADR in the resolution of statutory employment claims.

II. 1977-1997: TWO DECADES OF RESHAPING THE CONSTITUTION

Although traceable in some aspect as far back as the country’s colonial period, modern arbitration really developed in the context of collective bargaining. Unions and employers negotiating labor contracts agreed that, in any dispute regarding contract interpretation or rights, the parties would jointly select a neutral arbitrator to determine the parties’ intent and the extent of their contract. The parties agreed that the arbitrator’s decision was binding and, therefore, arbitration presented an expeditious and economical means for dispute resolution.

Because the courts considered the arbitrator’s construction of the contract to be what the parties bargained for, they carved out a very limited role for judicial intervention. They limited judicial review to determining whether an appealed claim was actually governed by the contract and whether the arbitrator acted within the scope of his neutral authority. Nor were the courts concerned with what processes or what facts the arbitrator used to reach his decision; the courts gave due deference to the arbitrator’s decision and only set aside a decision for “manifest disregard” of the law. For the courts, the question was “not whether the arbitrator . . . erred in interpreting the contract,” but


19. “Manifest disregard” has no one definition. The First Circuit requires the challenger to show that an award is “(1) unfounded in reason or fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.” Advest, Inc. v. McCarthy, 914 F.2d 6, 8-9 (1st Cir. 1990). The Sixth Circuit requires a challenger to show that “(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.” Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995). The Seventh Circuit says an award is in manifest disregard of the law if the arbitrator “deliberately disregarded” what he or she knew to be the law. Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992).
"whether [he] interpreted the contract." 20

To capitalize on labor's success with arbitration, parties to commercial contracts likewise attempted to resolve their disputes through arbitration. In 1925, stressing the need to avoid the delay and expense of litigation, Congress passed the Federal Arbitration Act (FAA) which provided for arbitration of controversies under any contract involving interstate commerce. 21 The FAA stipulated that commercial arbitration agreements would be just as valid under the law as any contract, 22 and thereafter the courts applied the FAA to contract controversies arising under various statutory provisions. 23 Pursuant to the FAA, courts easily reviewed commercial contract claims under the same auspices as they reviewed collective bargaining agreements.

The Supreme Court, however, did not find the FAA free of limitations. In Wilko v. Swan, the Court declined to uphold a New York Stock Exchange (NYSE) arbitration because the FAA conflicted with the Securities Act's provision forbidding waiver of the claimant's right to sue in court. 24 Likewise, in Alexander v. Gardner-Denver, 25 the Court went even further in holding that arbitration could not extend to the adjudication of a Title VII claim.

Final responsibility for enforcement of Title VII is vested with federal courts. [Title VII] authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices . . . . Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII. 26

In spite of Wilko's and Gardner-Denver's limitations, however, the Supreme Court still saw arbitration as a practical and expeditious means to clear the crowded federal court dockets. In 1983, the Court announced that the FAA manifested a "liberal federal policy favoring arbitration" 27 and in 1985, declaring its "strong belief in the efficacy of

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24. See id. at 438.
26. Id. at 44, 45 (citations omitted).
arbitral procedures," the Court upheld a mandatory arbitration clause for resolution of rights under the Sherman Act. In *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, the Court embraced arbitration with new fondness: "[To realize] the potential of these tribunals for the efficient disposition of legal disagreements arising from commercial relations . . . the courts will need to 'shake off the old judicial hostility to arbitration.'"

Two years later, in *Shearson/American Express, Inc. v. McMahon*, the Court reflected *Mitsubishi*’s affection for arbitration by distinguishing *Wilko* and compelling arbitration of a nearly identical claim brought in *Wilko*. Finally, in 1989, in a 5-4 decision, the Court overruled *Wilko* stating that it had "fallen far out of step with [the Court’s] strong endorsement of the federal statutes favoring [arbitration]."

In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court refused to extend *Gardner-Denver*’s Title VII distinction to a plaintiff’s claim based on the Age Discrimination in Employment Act of 1967 (ADEA), relying instead on those 1980s cases that seemed more hospitable to arbitration. The *Gilmer* Court held that a statutory claim arising under a commercial employment contract could be subject to binding arbitration because the arbitral forum provided a fair opportunity for the vindication of that claim. More importantly, the *Gilmer* Court (quoting *Mitsubishi*) contended that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it

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30. Mitsubishi, 473 U.S. at 638 (citation omitted).
31. Id.
34. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The *Gilmer* Court distinguished *Gardner-Denver* for three reasons: (1) the issue there was that Alexander did not contractually agree to arbitrate his Title VII claim; (2) an important concern was whether Alexander’s interests were properly advanced by the union; and (3) the case was “not decided under the FAA, which, as discussed above, reflects a ‘liberal policy favoring arbitration agreements.’” *Id.* at 35. (citation omitted). *Gilmer*’s distinction, however, is hardly supportable. *Gardner-Denver* only mentioned in a footnote the issue regarding what Alexander agreed to and simply mentioned in another footnote the Court’s concern about the union properly advancing Alexander’s claim. Moreover, in a third footnote, the majority declared that “[f]or the reasons stated in Parts III, IV, and V of this opinion, we hold that the federal policy favoring arbitration does not establish that an arbitrator’s resolution of a contractual claim is dispositive of a statutory claim under Title VII.” *Gardner-Denver*, 415 U.S. 36, 47 n.6. (1974). Arguably, the *Gilmer* Court did not just distinguish *Gardner-Denver*, but actually overruled it.

35. See *Gilmer*, 500 U.S. at 31.
only submits to their resolution in an arbitral, rather than a judicial forum.\textsuperscript{36} Furthermore, "having made the bargain to arbitrate . . . the burden [was on the claimant] to show that Congress intended to preclude a waiver of a judicial forum . . . ."\textsuperscript{37}

Immediately following the Court's seminal holding in \textit{Gilmer}, the lower courts embraced arbitration with similar affection and compelled arbitration of a variety of statutory claims.\textsuperscript{38} Finally, in 1997, following \textit{Gilmer}'s lead, the D.C. Circuit ruled that a statutory claim arising under a private employment contract could also be decided in an arbitral forum.\textsuperscript{39} The \textit{Cole} court acknowledged that it would be unlawful for an employer to force an employee to give up his substantive rights, but resting on \textit{Gilmer}, it did not extend this waiver prohibition to the forum for vindicating those rights.\textsuperscript{40} Although the court reasoned that an employee cannot be required as a condition of employment to waive access to any forum or even to a neutral forum, it found arbitration in general to be a satisfactory neutral forum to resolve Cole's claim.\textsuperscript{41}

Unlike \textit{Gilmer}, however, which relied on the quasi-judicial resources of the NYSE to oversee the arbitration of an employment claim arising under its auspices, the D.C. Circuit relied exclusively on a volunteer association—the American Arbitration Association (AAA)—to vindicate the claimant's statutory rights.\textsuperscript{42} The \textit{Cole} court neither explained, nor discussed, who would guarantee procedural fairness in the vindication of Cole's claim. It simply relied on the arbitrator's ethics and professional standards, embodied in arbitration's rich tradition, to assure Cole justice under the law.\textsuperscript{43}

Along with its new-found "liberal federal policy favoring arbitration,"\textsuperscript{44} the Court also proceeded to adapt its Seventh Amendment ju-

\textsuperscript{36} \textit{Id.} at 26 (citation omitted).
\textsuperscript{37} \textit{Id.} (citation omitted).
\textsuperscript{39} See \textit{Cole v. Burns Int'l Sec. Servs.}, 105 F.3d 1465, 1465 (D.C. Cir. 1997).
\textsuperscript{40} See \textit{id.} at 1482.
\textsuperscript{41} See \textit{id.}
\textsuperscript{42} The American Arbitration Association is a private non-profit organization founded in 1926 to foster the study of arbitration. The Association governs much of the country's arbitration, and contracts frequently stipulate that disputes will be governed by the Association's rules. \textit{See generally MURRAY, supra} note 3, at 527-30.
\textsuperscript{43} See \textit{Cole}, 105 F.3d at 1485.
\textsuperscript{44} Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
risprudence and its traditional separation of powers doctrine into more functional tools to help streamline the court dockets. Beginning in 1977 with *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, the Court began to move away from its traditional Seventh Amendment posture to a more flexible approach to the right to a jury trial. The Court’s classic approach as to whether the Seventh Amendment reached a claim involved asking whether the matter which, from its nature, [was] the subject of a suit at common law. If so, it deserved a jury trial.

By common law, (the Framers of the Seventh Amendment) meant . . . not merely suits, which the common law recognized, . . . but suits in which legal rights were to be ascertained and determined . . . . [The Seventh] amendment then 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.

Nevertheless, the *Atlas* Court distinguished its classic approach by resurrecting the public/private rights distinction made more than 120 years earlier in *Murray’s Lessee v. Hoboken Land and Improvement Co.*:

There 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.

Reasoning that the claim at issue in *Atlas* did not involve purely private rights, the Court held that "Congress [was] not required by the Seventh Amendment to choke the already crowded federal courts with

46. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). The test for whether an Article III court is necessary for an action at law is the same as the test for whether a party has a Seventh Amendment right to trial by jury. *Id.*
48. 59 U.S. 272, 284 (1855). The public/private rights distinction was clarified in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). "Public" rights arise between the government and others. "Private" rights are those which arise under statute, but where the government is not a party to the claim. *Id.* at 69-70.
new types of litigation . . . ." The Atlas Court argued that "the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases," and although "[t]he jury was the factfinding mode in most suits in the common-law courts, . . . it was not exclusively so . . . ." But, the Court cautioned that "in cases which do involve only 'private rights,' [it would accept] factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court . . . ."

Thus, three years later, in United States v. Raddatz, the Court approved the use of adjunct factfinders in the adjudication of purely private constitutional rights. Noting that a failure to approve the Federal Magistrates Act at issue in Raddatz "would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts," the Court approved the use of magistrates for hearing certain motions. So long as the magistrates were subject to sufficient control by an Article III district court and "so long as the ultimate decision [was] made by the district courts," the Court found that the scheme posed no constitutional threat.

Despite the Court's newly formulated functional approach to the right to trial by jury, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., a divided Court struck down an attempt to have common law claims decided by a bankruptcy court. A plurality concluded that, under the congressional scheme in Pipeline, so much authority had been vested in bankruptcy judges—who did not possess the judicial power of the United States—that the district courts no longer uniquely retained the "'essential attributes' of the judicial power." Justices Rehnquist and O'Connor concurred in the judgment, though admitting that the Court's Article III jurisprudence was fraught with "frequently arcane distinctions and confusing precedents." Nonetheless, they agreed that because in Pipeline, "[a]ll matters of fact and law . . . [were] to be resolved by the bankruptcy court in the first instance, with only tradi-

49. Atlas, 430 U.S. at 455.
50. Id. at 460.
51. Id. at 458.
52. Id. at 450 n.7.
54. Id. at 676 n.3.
55. Id. at 683.
57. Id. at 84-85.
58. Id. at 90.
tional appellate review by Art. III courts... the bankruptcy court [was] not an 'adjunct' of either the district court or the court of appeals."59 Writing in dissent, Justices White, Powell, and Chief Justice Burger highlighted the Court's division by arguing that it was

too late to return to the simplicity of the principle pronounced in Art. III and defended so vigorously and persuasively by Hamilton in the Federalist Nos. 78-82... Article III [should not] be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against the competing constitutional values and legislative responsibilities.60

Of course, the simple principle the Justices referenced was that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may... establish."61

Nevertheless, in Granfinanciera, S.A. v. Nordberg,62 the Court clarified how its revised Seventh Amendment posture was linked to the constitutional values of Article III by explaining that

Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to [non-Article III] tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized in Atlas Roofing, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee... 63

While the Granfinanciera majority upheld the right to a jury trial, the Court nonetheless remained strongly divided over Congress' power to remove statutory claims from the province of a jury in an Article III court. Three Justices dissented that the bankruptcy courts at issue were "specialized tribunals where juries have no place," whose workings would now be needlessly disrupted.64 Justice Scalia, concurring alone

59. Id. at 91.
60. Id. at 113 (White, J., dissenting).
63. Id. at 51-52 (citation omitted).
64. Id. at 81, 83 (White, J., dissenting).
however, objected to the Court's use of intuitive judgments regarding
the practical effects of these congressional schemes. The separation
of powers doctrine, he argued, "must be anchored in rules, not set adrift in
some multifactored 'balancing test'—and especially not in a test that
contains as its last and most revealing factor 'the concerns that drove
Congress to depart from the requirements of Article III.'" 65

Of course, the test to which Justice Scalia referred was the balancing
test announced three years earlier in Commodity Futures Trading
Commission v. Schor. 66 In Schor, the Court determined that a common
law claim, ancillary to a public claim, could be arbitrated outside the ju-
risdiction of an Article III court. Refusing to adopt formalistic and un-
bending rules in its separation of powers doctrine, the Schor Court set
down five factors it would weigh in assessing congressional schemes
"with an eye to the practical effect that the congressional action will
have on the constitutionally assigned role of the federal judiciary." 67 In
holding that the magnitude of intrusion on the Judicial Branch resulting
from the congressional scheme in Schor was only de minimis, the Court
reasoned that it would
defeat the obvious purpose of the legislation to furnish a prompt,
continuous, expert and inexpensive method for dealing with a
class of questions of fact which are peculiarly suited to examina-
tion and determination [outside an Article III court]. . . . We do
not think Article III compels this degree of prophylaxis. 68

Furthermore, the Court contended, even though "Congress gave the
CFTC authority to adjudicate such matters, the decision to invoke this
forum [was] left entirely to the parties and the power of the federal ju-
diciary to take jurisdiction of these matters [was] unaffected." 69 Never-
theless,

if Congress created a phalanx of non-Article III tribunals
equipped to handle the entire business of the Article III courts
without any Article III supervision or control and without evi-
dence of valid and specific legislative necessities, the fact that the
parties had the election to proceed in their forum of choice

65. Id. at 70 (citation omitted) (Scalia, J., concurring in part).
67. Id. at 851.
68. Id. at 856 (citations omitted).
69. Id. at 855.
would [not necessarily] save the scheme from constitutional at-
tack.\textsuperscript{70}

The \textit{Schor} Court went on to explain the constitutional difficulties
such a scheme would impose on its traditional separation of powers
doctrine. Admitting that its precedents did not admit of easy synthesis,
it nonetheless announced that the constitutionality of assigning adjudicative
functions to a non-Article III court would be assessed by refer-
ence to the purposes underlying Article III.\textsuperscript{71} Such an inquiry would be
guided by the principle that "practical attention to substance rather
than doctrinaire reliance on formal categories should inform the appli-
cation of Article III."\textsuperscript{72}

Concurrent with the Court's new interpretation of the Seventh
Amendment and Article III, its practical attention to substance rather
than form also began to dominate its "due process" jurisprudence.
During the same twenty-year period, the Court directed that procedural
due process could be streamlined to more accurately reflect the interest
at stake, the value of additional safeguards, and ultimately, the fiscal
and administrative burdens due process requires.\textsuperscript{73} Yet, the same period
also saw the Court "privatize" procedural due process in decisions that
increasingly blurred the distinction between who was due the process
and who was required to deliver it.

For example, in 1976, in \textit{Mathews v. Eldridge},\textsuperscript{74} the Supreme Court
relaxed the procedures a governmental agency must afford a claimant
before withholding a government benefit. The Court held that where
the consequences of rights deprivation were less serious, "the judicial
model of an evidentiary hearing [was] neither required, nor even the
most effective, method of decisionmaking in all circumstances."\textsuperscript{75}
Rather, the Court reasoned that the "ultimate balance involves a de-
termination as to when, under our constitutional system, a judicial-type
model must be imposed . . . . All that is necessary is that the procedures
be tailored, in light of the decision to be made, to the 'capacities and
circumstances of those who are to be heard.'"\textsuperscript{76}

\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{See id.} at 847.
\textsuperscript{72} \textit{Id.} at 848.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 322.
\textsuperscript{76} \textit{Id.} at 318-19.
In 1985, in *Cleveland Board of Education v. Loudermill,* the Court nevertheless clarified that under the Due Process Clause, once the government conferred certain substantive rights it could not take them away except pursuant to constitutionally adequate procedures. Employing the *Mathews* balancing test to the dismissal of a school employee denied a pre-termination hearing, the *Loudermill* Court ordered that at a minimum, an employee deserved notice, an explanation of the charges against him, and the opportunity to present his side of the story before being dismissed.78

Curiously, however, two years later the Court tied its reasoning in *Loudermill* to the due process rights of an employee dismissed by a private employer in *Brock v. Roadway Express, Inc.* Yet, the balance this time was not the government’s interest (as in *Loudermill*), but the private employer’s interest versus the severity of depriving a person of a means of livelihood. “While a fired worker may find employment elsewhere,” the court submitted, “the injurious effect a retaliatory discharge can have on an employee’s financial status . . . must be considered.”79

*Brock* extended the trend begun two years earlier in *Walters v. National Ass’n of Radiation Survivors,* namely, that the Court’s traditional due process jurisprudence was moving in a different direction. In *Walters,* the Court had approved the use of nontraditional decision-making that “does not contemplate the adversary mode of dispute resolution utilized by courts in this country.”80 Upholding a Veterans’ Administration rule effectively barring claimants from hiring attorneys, the Court noted that “[t]he flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution . . .”81

Thus, in 1991 the *Gilmer* Court finally made room for its flexible due process in alternative dispute resolution. As in *Brock,* the Court found that the NYSE arbitration rules protected against bias, allowed for discovery, depositions and subpoenas, and allowed for written awards and full equitable relief. It summarily rejected Gilmer’s challenge to the adequacy of arbitration procedures:82

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78. See id. at 546.
80. Id. at 263 (citation omitted).
82. Id. at 309.
83. Id. at 326.
[T]here has been no showing in this case that the NYSE . . . provisions . . . will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims. Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."\(^{85}\)

In 1997, the D.C. Circuit expanded on the due process requirements a private arbitral forum must provide. The Cole court looked to those procedures referenced in Gilmer and also to those promulgated by the AAA to assure that Cole received a fair arbitration hearing.\(^{86}\) The Cole court adopted all of Gilmer's referenced rules and also the AAA's Rule 35\(^7\) relating to administrative fees and Rule 36\(^8\) relating to shared expenses. Concerned that Cole not be forced to pay for justice, the court then ruled that the claimant must not be required to pay any of the arbitrator's fee.\(^8\)

The Cole court did not stop there however. It went on to suggest that, in the future, arbitrators should adopt additional procedural safeguards if they continued to review statutory claims. The court said the arbitrators must: (1) educate themselves about the law, (2) demonstrate a working knowledge of the statutes, (3) follow precedent, (4) adopt an attitude of judicial restraint, (5) actively ensure the record is adequately developed, and (6) provide procedural fairness.\(^9\)

In summary, beginning with Atlas in 1977, the Court's constitutional jurisprudence took on a more pragmatic and functional appearance that would continue for two decades. The Court had made an important

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85. Id. at 31 (citation omitted).


87. A filing fee of $500 must be advanced by the initiating party, subject to final apportionment by the arbitrator in the award, and an administrative fee of $150 per hearing day must be paid by each party, but the AAA may, in the event of extreme hardship on any party, defer to reduce the administrative fee. AMERICAN ARBITRATION ASS'N, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES Rule 35 (1996).

88. The expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and witnesses, will be shared equally by the parties, unless the parties agree otherwise or the arbitrator directs otherwise in the award. See id. at Rule 36.

89. The court reasoned that it would be unacceptable to require Cole to pay an arbitrator's fees, because such fees are unlike anything that he would have to pay to pursue his statutory claim in court. See Cole, 105 F.3d at 1484.

90. See id. at 1488.
doctrinal shift from its classic Seventh Amendment jurisprudence\(^1\) to "restrict the use of the civil jury, if contemporary needs made that the best policy."\(^2\) This shift was followed by Schor's more functional approach to the Court's traditional separation of powers doctrine to help clear the already crowded dockets of the federal courts. At the same time, even "due process under the law" was given a more flexible meaning to help streamline the adversarial process. Thus, it came as no surprise that during the same two decades, the Court would embrace ADR with a new fondness and transform its own preference for arbitration into a new liberal policy favoring arbitration.

Yet, while the Court seemed to move quickly to clear its overcrowded dockets, it had largely ignored the wear it had worked on old constitutional doctrines. And, while shifting statutory claims into ADR comported with its new mission, the modern Court nevertheless avoided discussing the constitutionality of its newfound "junior varsity justice system." Rather, like the litigants increasingly pushed to use an alternate forum to expeditiously resolve statutory disputes, the Court's old constitutional doctrines would have to similarly yield to the practical necessity of the day.

III. OLD CONSTITUTIONAL DOCTRINES MUST YIELD TO THE PRACTICAL NECESSITY OF THE DAY

The Court's operation to clear crowded dockets has required it to considerably bend old constitutional principles. Because the Court is singularly empowered to interpret the Constitution and determine what the law says, seemingly all of its modern interpretation is as unquestionably correct as its more traditional translation. Yet, the Court has never fully explained why two-hundred year old doctrinal principles could suddenly yield to the practical necessity of clearing court calendars. For example, pursuant to its separation of powers doctrine, the Court has never examined why if Congress had such a clear preference for arbitration, the FAA did not constitute congressional encroachment on the Court's traditional Article III jurisdiction. Nor has it ever explained how private litigants can remove their claims to an alternate fo-

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92. See Kirst, supra note 91, at 1291.
rum, thereby waiving the Constitution, simply because it is convenient
to do so. Neither has the Court questioned its own role in bending the
Seventh Amendment to actively help clear court dockets or whether the
Court itself had exceeded its own constitutional powers in doing so.
Nor has the Court discussed by what authority it could impose constitu-
tional requirements on the private ADR forum. During the same two
decades that saw ADR blossom into a parallel system of justice, the
Court’s discussion of these larger constitutional questions has remained
largely dormant.

A. The Practical Necessity of Congressional Encroachment on Article III

The Court’s traditional separation of powers doctrine, which ema-
nates from the constitutional tripartite form of government, protects
against the accumulation of all power in the hands of any one govern-
mental branch.93 Accordingly, Article III of the Constitution “safe-
guards the role of the Judicial Branch . . . by barring congressional at-
ttempts to ‘transfer jurisdiction [to non-Article III tribunals] for the
purpose of emasculating’ constitutional courts . . . .”94

Thus, when the Schor Court explained its traditional Article III ju-
risdiction, it began with its long-standing principle first cited in 1856, in
Murray’s Lessee v. Hoboken Land and Improvement Co.: “If Congress
‘withdraw[s] from judicial cognizance any matter which, from its nature,
is the subject of a suit at the common law,’” it runs the risk of improper-
ly encroaching on the federal judiciary.95

Despite this principle, the modern Court has never questioned the
constitutionality of the Federal Arbitration Act (FAA) nor examined
whether the Act was a congressional attempt to withdraw common law
claims from the reach of Article III courts. While the FAA’s primary
substantive provision stated only that a “contract [of] arbitration . . .
shall be valid, irrevocable and enforceable,”96 the Act said nothing
about who could arbitrate which claims, in what forum they could be
arbitrated, or whether the arbitral forum could decide common law

93. “The accumulation of all powers, legislative, executive, and judiciary, in the same
hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective,
may justly be pronounced the very definition of tyranny.” THE FEDERALIST NO. 47, at 336
(James Madison) (Benjamin Fletcher Wright ed., 1961).
omitted).
95. Id. at 854 (citing Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S.
272, 284 (1855)).
claims.

Early Courts interpreted the scope of the FAA very narrowly, holding that it did not reach common law claims. In Wilko, the Court reasoned that the FAA contained "no provision for judicial determination of legal issues such as is found in the English law."97 Two decades later, in Gardner-Denver, the Court agreed that, under the FAA, an arbitrator had "no general authority to invoke public laws."98 "He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties."99

In 1981, in Barrentine v. Arkansas Best-Freight Systems, Inc., Chief Justice Burger agreed that "[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts."100 And in 1985, Justice Stevens, dissenting in Mitsubishi, argued that "[n]othing in the text of the 1925 Act, nor the legislative history, suggest[ed] that Congress intended to authorize the integration of any statutory claims."101

Nevertheless, by 1991, in viewing the FAA as a reflection of Congress’ liberal federal policy favoring arbitration, the Gilmer Court had shifted the burden to the claimant to show that "Congress intended to preclude a waiver of a judicial forum for ADEA claims."102 Arguably, by shifting the burden to the claimant to prove otherwise, the Gilmer Court regarded the FAA as proof that Congress intended these common law claims to be resolved outside an Article III court. But, if this were so, the FAA’s congressional scheme surely had to run afoul of the very disclaimer pronounced in Murray’s Lessee; that such a withdrawal would improperly encroach on the federal judiciary.

Yet, the post-Gilmer Court has not attacked the FAA as a congressional attempt to passively create just such non-Article III tribunals.

99. Id. at 52 n.16.
101. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 646 (1985) (Stevens, J., dissenting). “Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims . . . . [T]his is the first time the Court has considered the question whether a standard arbitration clause . . . should be construed to cover statutory claims that have only an indirect relationship to the contract.” Id. at 646-47.
Presumably, when Congress passed the FAA in 1925 it expected contract arbitration to occur in some forum. That the AAA, for example, was founded a year later for the express purpose of fostering the use of arbitration as an alternate forum, appears to reinforce the notion that the FAA did, in fact, lead to the creation of non-Article III tribunals to handle Article III business.

Arguably, the Court's quiet retreat from the FAA stemmed from particular evidence that Congress never intended to undermine Article III's jurisdiction. Although Congress saw arbitration as an expeditious means to resolve contract disputes, and was motivated to enact the FAA for that reason, the legislative history suggests that Congress did not aim to have the FAA reach statutory employment claims.

The FAA's history shows that during the Senate Judiciary Subcommittee hearings on the Act, the chairman of the American Bar Association committee responsible for drafting the bill had assured the Senators that the FAA was not intended to be an act referring to labor disputes. "It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are . . . . Now that is all there is in this." Similarly, almost seventy years later, a House report on the 1991 Amendment that added an ADR clause to Title VII emphasized that the use of ADR mechanisms [was] intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believed that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, [did] not preclude the affected person from seeking relief under the enforcement provisions of Title VII.

Moreover, the House committee report, dated nineteen days before the Court decided *Gilmer*, concluded that "this view [was] consistent with the Supreme Court's interpretation of Title VII" in the *Gardner-
Thus, the evidence would suggest that Congress never intended to threaten the federal judiciary by enacting the FAA. Likewise, based on the history of the ADR clause in Title VII, it appears that Congress was satisfied with the Court’s narrow FAA interpretation. Therefore, when the Gilmer Court read a new “national preference for arbitration” into the FAA, it appeared to manufacture the preference from whole cloth. And, by its expansive and pragmatic interpretation of the FAA, the Court had single-handedly shifted statutory claims out of the Article III courts and into the arbitral forum by sheer judicial will.

The judicial will that seemed to liberally expand the FAA, was also found in the Court’s new tolerance for some limited congressional encroachment on its traditional Article III powers. During the same period, the Schor Court established its own five-factor balancing test to determine when a congressional scheme could, in fact, permissibly encroach on its Article III jurisdiction: (1) whether the program dealt with a limited area of the law and did not involve any grant of general jurisdiction to an alternative mechanism; (2) whether the agency could implement its orders, but had to apply to a federal court for enforcement; (3) whether factual findings could be overturned by a reviewing court if they were against the weight of the evidence; (4) whether all of the case’s legal rulings were subject to de novo review; and (5) whether the agency had any additional judicial powers.

However, if the power to arbitrate statutory employment claims was truly found in the FAA, as the Gilmer Court maintained, then the congressional scheme should have failed all but the second factor in the Schor balancing test. The arbitral forum had a broad grant of general jurisdiction under the FAA, factual findings could not be overturned by a reviewing court, and none of the arbitrator’s legal rulings were subject to de novo review unless made in “manifest disregard” of the law. The arbitrator’s power conceivably equated with or exceeded that of a federal judge: He could suspend or terminate the proceedings, order identical remedies or relief that could have been awarded in court, could require witnesses to testify under oath, and even determine who could attend the hearing. The only limiting factor under the Schor test was that the arbitrator could not directly enforce his award; parties to a

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106. Murray, supra note 3, at 674.
108. Section 10 of the FAA lists specifically the grounds for which an arbitration award may be set aside by a reviewing court. See 9 U.S.C. § 10 (1994).
decision had to apply directly to federal court for enforcement. Yet, this hardly appeared to be a saving factor under the Court’s prior cases.\(^{109}\)

Admittedly, the Schor Court had set down its factors within the context of a congressional scheme that diverted common law claims to a federal agency; diversion to a private dispute resolution forum was not an issue. Yet, the Schor balancing test did not concern itself with the aggrandizement of congressional power at the expense of the federal judiciary; rather, the primary concern in Schor was the threat of encroachment on the province of Article III.\(^{110}\) Thus, the Schor test would seemingly apply even if the congressionally enacted FAA diverted core claims away from Article III and into an arbitral forum. In other words, the threat, whether from Congress or elsewhere was one of equal danger. While the Schor Court also included “the concerns that drove Congress to depart from the requirements of Article III” among its balancing factors, then and after, it remained silent on any personal concerns it alone may have had for also departing from the traditional requirements of Article III.

Irrespective of the congressional motives behind the FAA, it seems persuasive that the Supreme Court’s persistently broad interpretation of the FAA’s purpose signaled a personal agenda. Coupled with its more flexible approach to its separation of powers doctrine as outlined in Schor, the Court now seemed even more inclined than Congress to expedite the resolution of claims outside the federal courts. Yet, what the Court historically should have examined as a congressional attempt to erode the jurisdiction of Article III, it had now judicially blessed.

Overall, it seems inexplicable that the Court could find a new federal preference in the FAA to validate the shift of statutory claims into the arbitral forum, while at the same time hide behind the Act’s legislative history in order to save the FAA from constitutional attack. The Court cannot have it both ways. Either the FAA represented a new congressional policy favoring arbitration of statutory employment claims, or it did not. If it did, the FAA clearly encroached on the prov-

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109. For example, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court struck down an agency arbitration scheme solely because it extended to all civil proceedings arising under Title 11 bankruptcy actions. See id.

110. See Schor, 478 U.S. at 856-57 (“[T]his case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the . . . question presented . . . is whether Congress impermissibly undermined . . . the role of the Judicial Branch.”).

111. Id. at 851.
ince of the Article III judiciary. If it did not, then the Court, not Congress, had eroded its own power under Article III.

B. The Practical Necessity of Private Encroachment on Article III

Despite any arguments that the FAA had resulted in congressional encroachment of the federal judiciary, the Court had nonetheless been content to regard arbitration as merely a private choice in forum selection: “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

Inasmuch as Gilmer had cautioned that “all statutory claims may not be appropriate for arbitration,” and Gilmer’s progeny had argued that not all statutory rights may be waived under an agreement to arbitrate, the Court had not regarded the arbitral forum as a threat to its traditional jurisdiction over statutory claims. As it reasoned in Schor, the “decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters [was] unaffected.”

The Schor Court, however, only reached this conclusion after first giving pragmatic new meaning to the separation of powers embodied in Article III, Section 1. Under the Court’s traditional view, Section 1 had two provisions, each serving a separate purpose. The first, its structural provision, served to protect the role of the independent judiciary within the constitutional scheme of tripartite government. The second, its personal provision, served to safeguard litigants’ rights to have claims decided before judges who are free from potential domination by other branches of government. In reviewing the constitutional problems arbitration contracts posed, the Schor majority explained that

[t]o the extent that [the] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties cannot by consent confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2 . . . . [T]he limitations serve institutional interests that the parties cannot be expected

115. Schor, 478 U.S. at 855.
116. See id. at 848.
Yet, the Court posited no such institutional interest in preserving the personal provision of Article III. It simply dismissed the safeguard as a "personal right" that could be waived. Aside from stating that it was reaching this conclusion for "practical reasons," the Court never explained how a constitutional provision could rise (or fall) to the level of a constitutional right. Nor did the majority describe why the Court could cure the slight "structural" constitutional difficulty imposed by the Schor parties' agreement to arbitrate, when neither Congress nor the parties could.

Justice Brennan argued persuasively in dissent that the personal provision and the structural provision of the doctrine were coextensive—"that a litigant may [never] waive his right to an Article III tribunal where one is constitutionally required." Only where the other branches have first encroached upon judicial authority, by assigning judicial power to non-Article III tribunals, may individual litigants be deprived of impartial decisionmakers. Justice Brennan warned that "as

117. Id. at 850-51.
118 See id. at 848. The Court offered no support for its transformation of this "provision" into a constitutional "right" that could be waived, admitting that "our cases have provided us with little occasion to discuss the nature or significance of this . . . safeguard." Id. Although the Court analogized the "personal provision" of the Framers' separation of powers concept to the "waiver" of right to trial by jury, etc., no precedent supports the Court's Article III transmutation. The Court did cite, however, to dicta from its Northern Pipeline decision. See Schor, 478 U.S. at 849:

Before the Act the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 n.31. (majority opinion) (emphasis added).

None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. Id. at 91 (Rehnquist, C.J., and O'Connor, J., concurring in the judgment) (emphasis added).

In that event, cases such as these would have to be heard by Art. III judges or by state courts—unless the defendant consents to suit before the bankruptcy judge—just as they were before the 1978 [Bankruptcy] Act was adopted. Id. at 95 (White, J., dissenting) (emphasis added).

Arguably, these isolated remarks about an unrelated issue hardly supported the Court's new Article III conclusion.

119. Schor, 478 U.S. at 867 (Brennan, J., dissenting).
120. See id.
individual cases accumulated in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated.\footnote{121}{Id. at 863-64.}

Three years later, in \textit{Mistretta v. United States}, Justice Scalia confessed that

the regrettable tendency of [the Court's] recent separation-of-powers doctrine [was] to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much . . . . [I]n the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.\footnote{122}{\textit{Mistretta v. United States}, 488 U.S. 361, 426-27 (1989).}

Obviously, Justices Brennan and Scalia gave more literal respect to the doctrine of separation of powers than did the more pragmatic \textit{Schor} majority. Alternately, so as to not "defeat the obvious purpose of the legislation [in \textit{Schor}] to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of [specific] questions of fact,"\footnote{123}{\textit{Schor}, 478 U.S. at 856.} the \textit{Schor} majority had reduced a basic constitutional provision to a waivable right and emasculated the province of its own traditional jurisdiction over common law claims.

Since \textit{Schor}, the modern Court has continued to regard the personal provision of Article III as nothing more than a personal right subject to waiver;\footnote{124}{Id. at 863-64.} that is, the litigants can remove their claims from the federal judiciary if their mutual wishes warrant. Yet, the Court has not accounted for how its pragmatic view remains inconsistent with Article III's three fundamental principles. The first, articulated by Justice Brennan, concerns the emasculation of the constitutional courts; that is, only where Congress (or the Court) first allows for an alternate forum to render legally recognized ADR decisions, would litigants even have a forum option. Thus, encroachment on Article III's jurisdiction by another branch seems a condition precedent to litigants using an alternate arbitral forum in the first place.

Second, the pragmatic view plainly ignored the people's more basic constitutional guaranty to have all their cases tried in courts of record.

\footnote{121}{Id. at 863-64.} \footnote{122}{\textit{Mistretta v. United States}, 488 U.S. 361, 426-27 (1989).} \footnote{123}{\textit{Schor}, 478 U.S. at 856.} \footnote{124}{See Brown, \textit{supra} note 11, at 1514-16 ("The Supreme Court has treated separation of powers as an isolated area of the law, governed by its own glacial dynamic . . . "). \textit{Id.} at 1514.}
before Article III judges. This institutional interest, one arguably paramount to the parties' private interest, is subjugated whenever private parties invoke their "personal right" to use ADR. Thus, the modern view has not accounted for this constitutional difficulty, nor explained why the parties' private interests were now suddenly paramount to the public's.

Third, the Court's pragmatic interpretation of its old doctrine plainly ignored that private resolution of controversies arising under the laws of the United States was one of the very privileges the people surrendered to the federal government. The Court offered no explanation as to why, individually and incrementally, private litigants can now re-claim a power constitutionally conferred in 1789. Seemingly, a constitutional amendment should be required to do so.

Overall, the modern Court has seemed untroubled by the wear it has worked on Article III's fundamental principles for the sake of expediency. "The trend marks a disturbing departure from the original objectives underlying the separation of powers. Rather than reinforcing a governmental design that furthers the public good, the Court's institutional rhetoric suggests an aim of preserving the government for its own sake."\textsuperscript{125}

Clearly, shifting statutory employment claims out of federal courts only to clear crowded dockets seemingly serves no higher purpose than to preserve the presently overcrowded federal judiciary. The greater public good embodied in Article III—the public's right to have its cases tried before judges insulated from governmental pressure—is incrementally sacrificed every time private litigants are forced to take their disputes elsewhere. Furthermore, the expedient solution the modern Court so fondly embraces masks the many larger institutional problems encompassed in using ADR to resolve statutory claims. It hides the fact that there are simply too few courts to keep pace with the number of statutory rights Congress creates, it disguises the inequity of private litigants paying for the kind of justice the public has historically been required to pay for, and it shields the unfortunate result that these same parties who financially support the public justice system, no longer feel invited to use it.

\textit{C. The Practical Necessity of Constricting the Seventh Amendment}

Along with the Court's improvisations to its separation of powers

\footnotetext{125. Brown, \textit{supra} note 11, at 1520.}
doctrine and Article III, over the same two decades the Court also gave new meaning to the Seventh Amendment. Although *Gilmer* and *Cole* suggested a limit to the types of statutory claims that could be heard in an arbitral forum, the Court had never articulated which claims must be given a trial by jury.

Traditionally, the Court had regarded the trial by jury as very dear, and encroachment on the right had been "watched with great jealousy." The Declaration of Independence cited the loss of the right of trial by jury as one of the many abuses of the Crown—a right that historically had been eroded for the sake of efficiency. Therefore, it was unsurprising that the Seventh Amendment was added to the Constitution to preserve the common law right to a trial by jury and to ensure that future Congresses were powerless to create new rights and commit their enforcement to a tribunal other than a court.

Yet, two hundred years later, the *Atlas* Court narrowly construed the right to trial by jury, citing the same "speedy and expert resolution" rationale that the English Crown had used to curtail the trial by jury centuries earlier. While *Atlas* employed the public/private rights distinction to allow an administrative agency to act in a fact-finding capacity, the agency's efficiency and expertise remained the underlying theme in the Court's rationale. While later critics have argued that the *Atlas* Court based its Seventh Amendment conclusions on com-

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126. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . . ." U.S. CONST. amend. VII. The Seventh Amendment has not been incorporated via the "Due Process Clause" of the Fourteenth Amendment. See Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 797 (1977). Thus, the Court's Seventh Amendment jurisprudence does not apply equally to the states; however, like the doctrine of separation of powers, the guaranty of a right to trial by jury appears in most state constitutions. See id.

127. Whether the Seventh Amendment reached a common law claim had historically been determined by the Court's ability to provide a legal remedy. See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 459-60 (1977).

128. Teamster's Local No. 391 v. Terry, 494 U.S. 558, 581 (1990) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.").

129. See DECLARATION OF INDEPENDENCE (U.S. 1776); see also Kirst, supra note 91, at 1339.

130. See Kirst, supra note 91, at 1339.

131. See *Atlas*, 430 U.S. at 455 ("Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.").

132. See generally id. at 455-57.
pletely faulty premises; the holding of Atlas has nevertheless endured. 133 The Gilmer Court, for example, also focused on the efficient resources of the New York Stock Exchange and the Securities Exchange Commission, much as Atlas had rested on OSHA’s ability to quickly and fairly determine the facts in Atlas’ claim five years before. 134 And as Cole illustrated, it was not long before the public/private rights distinction, along with the institutional resources of regulatory agencies, disappeared altogether, only to be replaced by an even more efficient, all-volunteer organization to hear the facts in a statutory employment claim. 135

In the criminal context, however, the Court had commonly required a defendant waiving his right to trial by jury to do so only when the waiver was knowing and voluntary and made with sufficient awareness of its consequences. 136 Yet, beginning in the early 1970s, the Court was intimating that the requirements for waiving the Seventh Amendment in a civil case need not be as rigid as those in a criminal case, 137 and that the “practical abilities and limitations of juries” may restrict the right to trial by jury. 138 The Court, however, had never spelled out in detail the standards for waiver, nor justified why the waiver of a constitutional right in a civil case should be different than in a criminal case. 139 Of course, by 1991, the Gilmer Court had made clear that the practical effect of signing agreements to arbitrate would presume a knowing waiver of the right to trial by jury and “having made the bargain to arbitrate, the party should be held to it.” 140 Overall, the Court had seemingly reduced the constitutional values represented by the Seventh Amendment

133. See, e.g., Kirst, supra note 91. Kirst contends that the Atlas Court misinterpreted the history of the Seventh Amendment by relying only on cases from 1856 and later. Furthermore, he argues that the Atlas Court contrived the “public rights” distinction from dicta in clearly distinguishable cases.


137. See D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972) (“Even if, for present purposes we assume the standard for waiver in a . . . [civil] case of this kind is the same standard applicable to waiver in a criminal proceeding . . . [o]ur holding, of course, is not controlling for other facts of other cases.”).

138. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). The Ross Court noted that “practical abilities and limitations of juries” was one factor that courts could consider in determining the application of the Seventh Amendment. Id.

139. See Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 TUL. L. REV. 1, 51 (1997).

140. Gilmer, 500 U.S. at 33.
to a low state of importance. Citing only the need to clear crowded dockets, while rejecting the underlying values of the Seventh Amendment as burdensome, pointed to the Court's clearly unusual constitutionalism.¹⁴¹

Moreover, it seemed puzzling that the Supreme Court, duty-bound to uphold the Seventh Amendment, could require parties to arbitrate when one litigant was standing in federal court crying "I don't want to arbitrate;" "I didn't know I was waiving my rights;" and "I had no choice but to sign this waiver." Equally curious is how the modern Court could merely claim to be neutral when binding the irresolute litigant to such a waiver of his constitutional rights. Arguably, "[b]y adopting a preference for arbitration over litigation, and by using this preference as a rule of construction, . . . the [Court was] restricting parties' access to litigation no less than if Congress had enacted a statute requiring private parties to take disputes to arbitration."¹⁴²

As with its separation of powers jurisprudence, in matters of the Seventh Amendment, the Court's discussion has been noticeably silent about its own role in the delegation of judicial power to a non-Article III tribunal.¹⁴³ That the Framers of the Constitution created three branches of government and armed them with the means to resist the encroachment of the others—to make the separation of powers self-executing—they placed no self-executing checks on a willful court. They thought "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution."¹⁴⁴ Moreover, the Framers truly envisioned a judiciary that

ha[d] no influence over either the sword or the purse; no direction either of the strength or the wealth of the society; and [could] take no active resolution whatever . . . . [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endan-

¹⁴¹. See Kirst, supra note 91, at 1343-44.
¹⁴². See Sternlight, supra note 139, at 47.
¹⁴³. The Court rarely discusses its role in reshaping the constitutional balance. Justice Blackmun alluded to this concern in United States v. Raddatz, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring), mentioning that where district courts devolve fact-finding power on magistrates, the only separation of powers threat is from within. Although Justice Blackmun did not pursue the matter further, presumably he considered an internal threat no threat at all.
gered from that quarter.\textsuperscript{145}

As was clear, the Framers anticipated a judiciary that remained unmindful of the strength or wealth of society. Arguably, they never suspected that a modern court, for purposes of expediency, would self-servingly or single-handedly rewrite the Constitution to clear its calendar. Thus, it remains curious why, over the last two decades, the Court has seemed increasingly preoccupied with docket-clearing, when—from an institutional standpoint—the length of its docket should be none of its concern.

\textbf{D. The Practical Necessity of Reshaping "Procedural Due Process"}

Paradoxically, over the two decades that saw the Court narrow its own sphere of power over statutory claims and simultaneously constrain the right to trial by jury, it expanded the reach of due process to touch the arbitral forum. Seemingly, the Court had felt obligated to legitimize binding arbitration of statutory claims outside the formal judicial process; that legitimacy arose when the claimant's "due process" rights had at least been tangentially observed in the arbitral arena.\textsuperscript{146} After all, the Constitution did not forbid denying a citizen of life, liberty or property, but only that the denial must follow "due process of law."

The due process guaranty found in the Fifth Amendment to the Constitution—that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . ."\textsuperscript{147}—originated from English common law. It first appeared in the Magna Carta as one of those old English liberties designed to secure subjects from arbitrary action of the Crown.\textsuperscript{148} That "no free man shall be taken, imprisoned, disseised, outlawed, banished, . . . except by . . . the law of the land"\textsuperscript{149} referred to the English common and statute law, and when the principle was constitutionalized in 1791, it referred to the same common law then known to the colonists.\textsuperscript{150}

Under the Fifth Amendment, "due process of law" constituted an

\textsuperscript{145} \textit{Id.} at 490-91.

\textsuperscript{146} \textit{See} Werdegar, \textit{supra} note 1, at 55 ("ADR needs the courts to assure the integrity of the system, to do so by imposing, as necessary, the fundamental requirements of due process.").

\textsuperscript{147} U.S. CONST. amend. V.


\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{See} Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276-80 (1856).
essential term in the social compact defining the rights of the individual and limiting the power of the new government.\textsuperscript{151} Although the Framers intended that the fundamental guaranty of due process be absolute,\textsuperscript{152} they left its exact boundaries undefined. Ever after, the Court had regarded "due process of law" as a living principle: "As in all cases involving what is or is not due process . . . no hard-and-fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case . . . .\textsuperscript{153} "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.\textsuperscript{154}

Despite its shifting boundary, the Court had adopted a broad due process definition, which at a minimum, guaranteed the citizen (1) notice of the proceedings against him, (2) an opportunity to defend himself before an unbiased tribunal, and (3) resolution of his claim in a manner consistent with essential fairness.\textsuperscript{155}

Inasmuch as the Court had at one time hinted that "due process" may be so rooted in the country's tradition and conscience as to be considered fundamental and "implicit in the concept of ordered liberty,\textsuperscript{156} the Court had never required that private persons guarantee "due process of law" to each other.\textsuperscript{157} "Due process of law" was strictly a constitutional provision and the Fifth Amendment said nothing about the rights of one citizen against the other. Therefore, it seemed strangely curious that, in 1987, the \textit{Brock} Court leaped to impose procedural requirements on private actors.\textsuperscript{158} Even stranger was that, four years later, the \textit{Gilmer} Court would discuss whether the private NYSE provided adequate procedures to fairly vindicate Gilmer's discrimination claim.\textsuperscript{159} And, in 1997, the new dimensions of procedural due process had come full circle, with the \textit{Cole} court dictating what procedures the courts

\textsuperscript{151} See \textit{In re Gault}, 387 U.S. 1 (1967).
\textsuperscript{152} See \textit{Hammond Packing Co. v. Arkansas}, 212 U.S. 322, 379 (1909).
\textsuperscript{154} Cafeteria and Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (citation omitted).
\textsuperscript{156} Rochin v. California, 342 U.S 165, 169 (1952) (citation omitted).
\textsuperscript{157} See, e.g., Deshaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989) (discussing the inapplicability of the "due process clause" of the Fourteenth Amendment to private conduct).
would require private arbitrators to follow in the future. 160

The modern Court's attempt to impose "due process" on the arbitral forum, however, yields several constitutional problems. The foremost difficulty stems from the Court's apparent wish to constitutionalize "due process of law" in the private arbitral forum. But, where parties have freely opted out of the judicial forum, arguably they should be left to use any process they mutually choose, rather than an externally imposed set of procedural rules. While Gilmer simply noted that the NYSE afforded Gilmer sufficient due process to fairly vindicate his claim, the D.C. Circuit went much further in Cole and set down process rules that the arbitral forum must observe in the resolution of statutory employment claims. 161 Yet, the Cole court did not explain who was responsible for providing the process—either one party as to the other, or whether the arbitrator to both—nor did it instruct what might result should due process be denied by any of the three. Nor did the Cole court identify by what authority it could impose these procedures on the parties or the AAA.

Traditionally, courts had not intervened in the procedures employed in binding arbitration. "Parties [could] stipulate to whatever procedures they want[ed] to govern the arbitration of their disputes; parties [were] as free to specify idiosyncratic terms of arbitration as they [were] to specify any other terms in their contract." 162 Clearly, the modern courts' attempts to impose "procedural due process" requirements on private parties ran contrary to their traditional laissez faire approach to private dispute resolution.

The courts' traditional approach, however, had evolved during a period in which binding arbitration was strictly confined to interpreting contractual provisions. With the advent of statutory claim resolution, arbitrators now had to go beyond the laws of the shop, industrial traditions, and written provisions. They had to filter, incorporate and assimilate court decisions decided on a daily basis under a variety of conditions and situations totally foreign to their own experience. 163 Yet,

while the courts' temptation to intervene in private dispute processes coincided with the use of ADR to resolve statutory claims, the fact that it did so should have triggered the courts' alarm, not their intervention.

Second, modern courts have never reconciled the "manifest disregard" standard of review with their new procedural due process mandate. For example, the traditional standard would only set aside an arbitration award for fraud, corruption, or manifest disregard of the law.\(^{164}\) Even the FAA specifically limited the cases in which the courts could vacate an arbitration award.\(^{165}\) Under the courts' new due process mandate, however, it was unclear whether a procedural violation could or should result in vacating an arbitrator's decision. But, if violations of "due process" could not warrant setting aside a decision, there seemed little point in even imposing the process on the parties.

Third, to justify imposing constitutional due process on private parties, and to remain consistent with the Court's state action doctrine, at the very least the courts would need to identify some kind of federal or "state action" that triggered the guaranty.\(^{166}\) In other words, modern courts would need to locate a federal or state government regulation that fosters and encourages the use of private ADR,\(^{167}\) or determine that the state exercised coercive power to encourage the use of ADR,\(^{168}\) or, at the very least, find that the arbitral forum performs a public function.\(^{169}\) While some commentators suggest that this is precisely the conditions under which ADR now operates,\(^{170}\) such a situation seems violative of the unequivocal language of the Constitution. "The Judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish."\(^{171}\) Therefore, to argue that the judicial power now somehow rests in a "junior varsity court," unordained or established by Congress,

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164. See Cole, 105 F.3d at 1486-87.
166. See, e.g., First Heritage Corp. v. National Ass'n of Sec. Dealers, Inc. (NASDAQ), 785 F. Supp. 1250 (E.D. Mich. 1992) (holding that the NASD is not a government entity so there is no state action or due process violation); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (holding that even though the utility was heavily regulated it was not a state actor and need not provide due process).
167. See, e.g., Jackson, 419 U.S. 345.
169. See, e.g., Jackson, 419 U.S. 345.
171. U.S. CONST. art. III, § 1, cl. 1.
in the first instance, is quite remarkable. Yet, to argue even further that the arbitral forum operates as a functional equivalent or is "fostered and encouraged" by government, in spite of the strictures of Article III, seems even more indefensible. Finally, to then impose "procedural due process" on the arbitral forum under the pretense that ADR is really state action, would seem to bend the Constitution beyond its breaking point.

In summary, to impose "due process" on the arbitral forum under a state action theory proves too much; that is, the argument's very foundation—that the arbitrator is actually a state actor—runs afoul of the very constitutional limitations imposed by Article III. Moreover, imposing "procedural due process" on private parties—by constitutionalizing it—requires the Court to take the Fifth and Fourteenth Amendments far beyond their text and far beyond any of the Court's prior precedents. Likewise, attempting to impose "due process" requirements in arbitration proceedings will require the Court to stray far from its traditional "manifest disregard" standard of review. It must now answer the difficult question of who in the arbitral forum is entitled to "due process of law," who is now constitutionally required to deliver it, and even more importantly, what happens when it is violated.

IV. CONCLUSION

Unquestionably, over the past two decades the Court has liberally fashioned the Constitution to meet the pressing needs of the day. Its traditional notions of separation of power, the right to trial by jury, and procedural due process have all had to yield to more expeditiously resolve cases and controversies outside the federal courts. Binding arbitration of statutory employment claims would become a matter of course. Yet, along with the Court's unexplained compulsion to focus on docket clearing rather than constitutional interpretation, its jurisprudence over the past two decades also remains largely silent on the larger constitutional issues that seemingly should have concerned the Court.

For example, if Congress, indeed, had declared a new national preference for resolving statutory employment claims in arbitration, then its preference could only reflect an attempt to emasculate the constitutional courts. Accordingly, Article III precluded such an encroachment. Alternately, if the Court failed to trigger Article III's structural limitation, then it could only mean that the Court, rather than Congress, was directing the strength and wealth of society. Surely, the Constitution could not tolerate such a threat to the general liberty of the people from the Court's quarter.
Likewise, if the people adopted a constitutional framework, in part, to safeguard their collective right to have their cases tried before judges insulated from majoritarian pressure, then it surely seemed idiosyncratic that persons other than judges could decide statutory claims. Seemingly, consenting parties could not agree to waive this fundamental constitutional provision anymore than they could contractually agree not to be bound by the laws of Congress. Surely, the Constitution could not withstand such a threat to the people's general liberty from the individual either.

Furthermore, the Court has never examined its role in manipulating statutory employment claims out of the federal judiciary. In pretending to be a passive bystander that merely enforces contracts to arbitrate, the Court has avoided confronting how radically, over the past two decades, its new constitutional interpretations have departed from its old jurisprudence. Voluntary arbitrators can now be factfinders; Congress can encroach a little on the province of the judiciary; private parties can now be required to observe due process. Yet none of these new conventions have been enacted by Congress or by constitutional amendment; they have arisen strictly from the modern Court's functional twist on old constitutional doctrines. Surely, the branch that the Framers deemed least dangerous to the political rights under the Constitution, had now taken on a new role in directing the strength and wealth of society.

As the two decades reflecting the Court's fondness for ADR come to a close, its functional constitutionalism has engendered criticism from many directions. The lower courts, the Executive Branch, the ADR

172. See Renteria v. Prudential Ins. Co., 113 F.3d 1104 (9th Cir. 1997) (holding that only an express Title VII waiver, made known when an arbitration agreement is signed, will constitute a knowing waiver); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997), cert. denied, 118 S. Ct. 294 (Oct. 14, 1997) (holding that general grievance arbitration provisions are insufficient for a knowing waiver); Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997), cert. denied, 118 S. Ct. 1511 (Apr. 20, 1998) (holding that unilateral acts by employers will not support a waiver); Rushton v. Meijer, Inc., 570 N.W.2d 271 (Mich. Ct. App. 1997) (holding that mandatory predispute arbitration agreements are unenforceable pursuant to public policy).

173. The Equal Employment Opportunity Commission's (EEOC) position is that requiring an individual to waive his or her right to trial by jury before a discrimination claim even arises subverts the purposes of Title VII. See EEOC, Policy Statement on Alternative Dispute Resolution, DAILY LAB. REP. (BNA) No. 137, at E-13-14 (July 18, 1995) (reaffirmed July 11, 1997, 571 PLI/Lit 539, 583 (Sep. 1997)). The National Labor Relations Board's (NLRB) position is that requiring an employee to sign an arbitration agreement is an unfair labor practice, as is the employee's discharge for not signing. See NLRB, General Counsel Report, January to September 1995, DAILY LAB. REP. (BNA) No. 36, at E-6-7 (Feb. 23, 1996). The Labor and Commerce Departments' Commission on the Future of Worker-
profession, and commentators have questioned the Court's routine shifting of statutory claims out of the federal judiciary. Accordingly, as the modern Court approaches the turn of the century, it may well be the last institution that supports a national preference for arbitration.

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175. See, e.g., Bompey et al., supra note 2; Brown, supra note 11; Feller, supra note 6; Dwight Golann, Making Alternative Dispute Resolution Mandatory: The Constitutional Issues, 68 OR. L. REV. 487 (1989); Kirst, supra note 91; Reuben, supra note 170; St. Antoine, supra note 17; Jean R. Sternlight, Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration, 74 WASH. U. L.Q. 637 (1996); Sternlight, supra note 139; Matthews, supra note 163.