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Federal Courts & Federal Rights

Gordon G. Young
University of Maryland School of Law, gyoung@law.umaryland.edu

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FEDERAL COURTS & FEDERAL RIGHTS

COMMENTARY

*Gordon Gregory Young**

I. INTRODUCTION

In its 1977 decision in *Atlas Roofing Co. v. Occupational and Health Review Commission*,[1] the Supreme Court stated that the seventh amendment right to a jury trial[2] generally was inapplicable in administrative proceedings. More recently, the Court in *Parklane Hosiery Co. v. Shore*,[3] affirming the decision of the United States Court of Appeals for the Second Circuit,[4] found no violation of the seventh amendment by the application of the doctrine of collateral estoppel and thus determined that findings made in an administrative enforcement proceeding could later be used preclusively by a different party in a private legal action.[5]

This Commentary asserts that the *Atlas* Court interpreted the seventh amendment without attempting to deal adequately with the text of that provision in light of its history, instead choosing to base its decision upon earlier Supreme Court cases themselves devoid of adequate historical analysis.[6] The *Shore* Court, while deciding against the claimed seventh amendment protection, arguably undertook an analysis that is an improvement over that in *Atlas*. The *Shore* majority did not deal in detail with historical materials, relying, as did the *Atlas* Court, on earlier Supreme Court cases. The *Shore* majority, however, unlike *Atlas*, relied on an earlier opinion that had grappled with relevant historical arguments, and

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* Associate Professor of Law, Syracuse University College of Law; J.D., New York University School of Law; LL.M. Harvard University Law School.

[1] 430 U.S. 442 (1977).

[2] U.S. CONST. amend. VII. For the text of the seventh amendment, see text accompanying note 38 *supra*.

[3] 99 S. Ct. 644 (1979).

[4] 565 F.2d 815 (2d Cir. 1977), *aff'd*, 99 S. Ct. 644 (1979).

[5] *See* text and accompanying notes 84-117 *infra*.

[6] *See* text accompanying notes 45-59 *infra*.

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thus may have provided the historical basis, which is indispensable to justify its result.[7]

The *Atlas* decision remains disturbing, notwithstanding the opinion in *Shore*. The *Shore* decision arguably involved merely the notion of the seventh amendment's flexibility with respect to changes in " 'procedural incidents or details of jury trial.' "[8] In contrast, the *Atlas* Court, in its rationale if not its holding, addressed the vastly more important issue of congressional power to eliminate jury trials in a given category of civil cases by simply recharacterizing them as administrative proceedings.[9]

While I am disturbed by the *Atlas* Court's conclusions as to the scope of the seventh amendment, I do not criticize these conclusions, but rather, the process of constitutional analysis by which the Court arrived at them. What follows then is not a substantive evaluation of the seventh amendment issues raised in *Atlas* and *Shore*.[10] Nor is it an attempt to describe and criticize the Supreme Court's analyses in a wide variety of constitutional contexts. It is, rather, a portion of the latter task: it is a criticism of the Court's decisionmaking process in one important case dealing with a provision of the Bill of Rights. My argument is that the analytical pro-

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[7] *See* text accompanying notes 109-17 *infra*.

[8] 99 S. Ct. at 654 (quoting Galloway v. United States, 319 U.S. 372, 390 (1942)).

[9] *See* text accompanying notes 67-75 *infra*.

[10] One interesting analysis of the issue raised in *Atlas* was published in response to the decision of the United States Court of Appeals for the Third Circuit in the companion case to *Atlas*, Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Comm'n, 519 F.2d 1215 (3d Cir. 1975), *aff'd*, 430 U.S. 442 (1977). *See* Note, *Constitutional Law—Adminstrative Adjudications Resulting in the Imposition of a Statutory Money Penalty Constitute a Class of Actions to Which the Seventh Amendment Does Not Apply*, 7 SETON HALL L. REV. 458 (1976) (rejecting the position ultimately taken by the Supreme Court). The strong textual-oriented seventh amendment analysis made in that Note was available to, but ignored by, the Supreme Court in *Atlas*.

The issue in *Shore* similarly had been discussed in one law review article prior to the Supreme Court's decision in that case. *See* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971).

It is not my purpose to present original historical scholarship dealing with the purpose of the seventh amendment or to attempt to show merely the internal inconsistency of the Supreme Court's seventh amendment decisions. These tasks have been performed admirably elsewhere. *See, e.g.*, Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640 (1973). *See also* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 N.W. L. REV. 486 (1975) (arguing persuasively that the Supreme Court's seventh amendment decisions are not based on a carefully reasoned and consistently applied theory of that amendment). I will draw on such materials to illustrate the points I wish to make.

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cess employed in *Atlas* to define the seventh amendment jury trial right deviates substantially from the dictates of the public notion of "judicial morality," *i.e.*, that which lawyers in our tradition expect from the Supreme Court.

II. Taking Seventh Amendment Rights Seriously

This section is divided into three parts: Part A offers a brief discussion of the importance to constitutional analysis of identifying the precepts of a widely shared morality concerning how judges ought to deal with the text of the Constitution; Part B identifies and examines perhaps the most basic of such precepts—that historical analysis of the *purpose* of a particular constitutional provision is the correct threshold inquiry in constitutional cases, because we currently consider the Constitution to be a document written to bind future generations; Part C then examines the *Atlas* case for signs that the Supreme Court took seriously its institutional responsibility to attempt a historical-purposive analysis of the seventh amendment.

A. *The Notion of Judicial Morality and Its Relationship to the Notion of Rights*

The discussion of legal rights is frequently confused by shifts between descriptive and normative points of view and by the intricate ways in which such viewpoints are mutually dependent. From the narrowest descriptive point of view, a right exists when the highest court that will decide a matter declares it to exist. It is, however, commonplace to observe that such a narrow descriptive view does not help a judge decide a case. Thus, in order to reach a decision, he or she will not ask the circular question, "What will my decision be?" but rather, "How ought this case be decided under the rules and other authoritative materials of this legal system?" It is the latter question that recognizes that the judicial decisionmaking process is subject to public expectations: when lawyers, and any lay persons who seriously engage in legal argument, criticize a judge for having erred in deciding the rights of the parties, such criticism can be based only upon some independent notion of how judges ought to decide.

To the extent that there is widely shared agreement among lawyers about how judges ought to proceed in deciding cases, that agreement defines a public-morality or normative perspective from which the action of courts can be criticized. An example of an attempt to define such a critical-moral perspective is Professor

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Ronald Dworkin's book, *Taking Rights Seriously*.[11]

Dworkin focuses on "hard cases," those in which recognized clear rules demand no one result.[12] He rejects the quite ordinary assertion that judges simply exercise discretion in such cases, arguing that our shared notion of what judges ought to do in such circumstances is too complex and subtle to be characterized as permitting pure discretion.[13] There are principles that are recognized parts of our legal system.[14] Unlike rules, principles compel no particular result, but rather are analogous to vector arrows pointing at results.[15] Sometimes principles which are indisputably applicable to a single case will nevertheless point at differing results; it is then that the relative force of each principle must be determined.[16] To the extent there is no authoritative view on the relative weight to be accorded to principles, judges must make personal value judgments.[17] They must, however, be sure that they have exhausted authoritative material first, and they must apply their values carefully and consistently.[18]

Dworkin implies that lawyers tacitly understand that judges

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[11] R. DWORKIN, TAKING RIGHTS SERIOUSLY 105-15 (1977). Dworkin suggests that judicial morality requires that judges adhere to those rules that are acknowledged parts of the legal system. These are to be found in either written constitutions, *id.* at 106, validly enacted constitutional statutes, *id.* at 107, or the common law of the jurisdiction within which the judge sits, *id.* at 108. Where any or all of these rules are applicable to a particular case, no judge may simply choose to ignore them. Rather, he is compelled to grapple with the dictates of the legislative and common law precedents, notwithstanding that determining just how to do so may be difficult, and there may be disagreement among responsible judges as to the proper approach.

Dworkin indicates that there is a limit to the sweep of even "settled" authoritative materials. That is, Dworkin argues that where authoritative materials compel no particular result a judge must formulate and rely upon his own theory of law to decide matters which are the subject of legitimate disagreement among judges. *Id.* at 105-15.

[12] *Id.* at 81.

[13] *Id.* at 31-39, 68-71.

[14] *Id.* at 22-24.

[15] *Id.* at 22-28. The analogy is valid to a point. As with vectors, the result of the application of a principle cannot be predicted without knowledge of the other forces (in my metaphor, other principles) bearing on the outcome. *Id.* at 26. According to Dworkin, different judges, however, legitimately may assign a different force to a particular principle. *Id.* at 36. In contrast, in the world of physics each force presumably has an objective value.

[16] *Id.* at 35-36.

[17] *See* note 11 and accompanying text *supra*.

[18] *Id.* The judge's own values are to be applied only after authoritative material has been exhausted, and then, only to develop the concepts that are authoritatively parts of the system but the content of which is disputed. *Id. See* R. DWORKIN, *supra* note 11, at 107, 123-30.

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ought to behave in this manner. For example, it is the prevailing view of judicial morality that judges *ought* to consider publicly recognized principles, even though no authoritative written rule requires that they do so.[19] A judge therefore errs when he fails to follow the real, although uncodified, rule that such principles must be consulted. If his failure affects the outcome of the case, he has established rights from a descriptive point of view, but denied them from a public normative perspective.[20]

I agree with that which Dworkin implies—that the notion of legal rights, in a publicly recognized sense, is dependent upon a shared perspective of how judges ought to decide cases. Courts take rights seriously in Dworkin's sense only when they adhere to the uncodified but real rules defining their institutional responsibility. In Part B, I hope to identify a precept of our prevailing view of judicial morality less controversial than those upon which Dworkin focuses and then to examine the Supreme Court's opinion in *Atlas* to determine whether the Court adhered to that precept.

B. *Judicial Morality and Constitutional Rights*

There seems to be agreement among lawyers that the Constitution is binding law. Such assertion standing alone, however, is not particularly helpful. The physical Constitution is simply cold text, an arrangement of symbols. The meaning of any such arrangement of symbols lies solely in its use in a community of speakers.[21] This Constitution then, has no meaning apart from our understanding of how its text is to be used in making legal decisions.

It is not the physical Constitution itself which requires us to use its text in a particular way; nor can it be merely the intent of the long dead framers of the document which controls. It is, rather, simply the current understanding among lawyers that the document ought to be used in a particular way.[22]

Currently, the virtually unanimous view of judicial morality as it pertains to constitutional decisionmaking is that the Constitution

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[19] R. DWORKIN, *supra* note 11, at 123-26.

[20] *Id.* at 279-80.

[21] This is perhaps the most important lesson of Wittgenstein's later philosophy. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 20 (3d ed. G. Anscombe trans. 1958). *See also* A. KENNY, WITTGENSTEIN 155 (1973).

[22] Of course, in some immediate, coercive sense, no final decisionmaker, *i.e.*, one whose judgment will not be reviewed by a higher authority, is required to act in any particular way. It is recognized, however, that in a normative sense a judge is required by prevailing notions of his institutional responsibility to behave in certain ways. *See* note 11 and accompanying text *supra*.

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ought to be treated as setting forth rules binding upon future generations.[23] Thus, the present view of judicial morality recognizes that the Bill of Rights is designed to fix individual rights so that they can stand against majority action[24] and can be changed only by means of a process itself specified in a binding way.[25]

If the current bedrock principle of judicial morality requires the Constitution to be treated as a set of rules written in the past to bind the future, then it follows that the threshold inquiry in constitutional cases necessarily must be historical in nature. This does not mean that historical inquiries will be made explicitly in every case or that where made they will consume the most decisionmaking time. It does mean, however, that courts of the United States have a recognized obligation to deal with the Constitution as open to change only where the document itself provides for it.

Certain constitutional provisions may indeed provide for change. Dworkin, for example, deals admirably with loosely-woven provisions such as the fourteenth amendment's due process clause, arguing plausibly that the amendment itself is best understood as an invitation to future generations to apply their own standards of fairness.[26] There is every reason to impute to the framers the understanding that the document was to be deemed flexible where its text reasonably suggests flexibility.[27]

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[23] This proposition, which implies the primacy of historical analysis, is based upon my own observations. There are, however, certainly some who seem to disagree. 2 CORWIN, AMERICAN POLITICAL SCIENCE REVIEW 290 (1925), *reprinted in* E. CORWIN, AMERICAN CONSTITUTIONAL HISTORY 108 (1964) ("The proper point of view . . . is that of regarding [the constitution] as a living statute, palpitating with the purpose of the hour, reenacted with every waking breath of the American people . . . ."). *See also* Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977).

[24] *See* R. DWORKIN, *supra* note 11, at 133.

[25] *See* U.S. CONST. art. V. Article V provides, in relevant part:

> The Congress, whenever, two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, 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, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

[26] R. DWORKIN, *supra* note 11, at 131-37.

[27] *Id.* It is no novel assertion that the concept of a constitution itself may suggest reading flexibly those portions fairly susceptible to such a reading. This is the fair purport of Justice John Marshall's statement, "[W]e must never forget it is *a con-*

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Unfortunately, so large a part of the body of modern American constitutional case law has dealt with such loosely-woven provisions[28] that the interest-balancing analysis invited by them may have come to seem synonymous with constitutional analysis generally.[29] It is easy, then, for courts to lose sight of the fact that such balancing is improper, under prevailing standards of judicial morality, where the Constitution, as read in historical context, cannot fairly be understood as authorizing it.

An example may prove helpful. How should a court deal with a clear and specific constitutional provision such as the one that fixes the minimum age for presidents at thirty-five years?[30] No one would suggest that a court, believing that persons were currently maturing earlier or later than in 1791, could read thirty-five as thirty or forty, respectively. A court would not have this freedom even if, at the time, age was no longer generally reckoned in years but in some other unit of time. The reason is, of course, that if the Constitution is a binding document, such a provision, read in historical context, permits no such flexibility. Thus, if still considered binding by the legal system then prevailing, the Constitution would require the conversion of a candidate's age into years as that term was understood in 1791.

The seventh amendment's command is equally unequivocal as applicable to categories of actions that were recognized in 1791.[31] What is unclear, however, is its application to the categories recognized in the twentieth century that differ from those of the earlier time. If the Constitution is binding, the threshold inquiry must be, "What flexibility was envisioned for the seventh amendment when it was drafted?"

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stitution we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

[28] Raoul Berger states that the "Fourteenth Amendment is probably the largest source of a court's business," R. BERGER, GOVERNMENT BY JUDICIARY 1 (1977) (citing Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 229 (1955)), and suggests that the Supreme Court has read its own values into that amendment. I do not agree with all of Professor Berger's criticisms of a value judgment approach as it may be applied to loosely-woven constitutional provisions such as the fourteenth amendment.

[29] It is my thesis that the Supreme Court may well have adopted such an approach in Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 422 (1977). The Supreme Court there offered no adequate reason for its seemingly flexible interpretation of the seventh amendment. For a full discussion, see text accompanying notes 32-82 *infra*.

[30] U.S. CONST. art II, § 1, cl. 4.

[31] *See* Curtis v. Loether, 415 U.S. 189, 193 (1974).

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C. Atlas *and its Foundation*

In *Atlas*,[32] the Supreme Court upheld against a seventh amendment challenge agency enforcement procedures that provided for a civil money penalty. The Occupational Safety and Health Act of 1970[33] provided that factual determinations of the Occupational Safety and Health Review Commission (the Commission) were binding upon a reviewing court if supported by substantial evidence[34] and hence, it precluded a trial in court to determine the existence of violations and the propriety of civil penalties imposed.[35] The *Atlas* petitioners were found by the Commission to have violated certain safety standards of the Act and, as a consequence, abatement orders were issued and civil money penalties were imposed.[36] Upon review, the Supreme Court upheld the procedures of the Commission, rejecting petitioners' contention that the statutory scheme denied them their right to a trial by jury as guaranteed by the seventh amendment,[37] which provides:

> 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 reexamined in any Court of the United States, than according to the rules of common law.[38]

The announced rationale[39] for *Atlas* is essentially that whenever Congress creates a new cause of action, regardless of its remedial characteristics, it can avoid jury trial rights by providing for

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[32] 430 U.S. 442 (1977). In the same opinion the *Atlas* Court decided Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977).

[33] 29 U.S.C. §§ 651-671 (1976).

[34] *Id.* § 660(a).

[35] *See* 430 U.S. at 447.

[36] *See id.* Petitioners, following the review procedures of the Act, 29 U.S.C. §§ 659-661, (1976), unsuccessfully contested the orders and penalties. *See* 430 U.S. at 447-48.

[37] Petitioners argued that a suit in federal court for the imposition of a civil penalty was a suit for a money judgment, a legal action, and therefore acquired a right to a jury trial. *See id.* at 449. Petitioners argued further that Congress could not abrogate that right by assigning to an agency the power to determine the government's right to a civil penalty. *See id.* at 450.

[38] U.S. CONST. amend. VII.

[39] There is a possible argument, based upon the understanding of the framers of the Bill of Rights that, if the Court had so chosen, *Atlas* could have been decided on the ground that no matter the nature of the forum, suits by the federal government are triable without a jury. The argument, however, has been dismissed as weak. *See* Note, *supra* note 10 at 477-81.

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agency adjudication.[40] The *Atlas* Court concluded from prior cases that when Congress creates "new statutory '*public rights*' " it may provide, consistently with the seventh amendment, that an administrative agency will be charged with adjudicating those rights.[41] The Court reasoned, in part:

> Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation nor prevented from committing some new types of litigation to administrative agencies with special competence in the field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency.[42]

Clearly, the *Atlas* Court's suggestion that such congressional power is confined to public rights is not meaningful unless it is construed to mean that the power is confined to any regulation of private conduct that affects the public interest. This construction is supported by the *Atlas* Court's characterization of an earlier case, which also permitted agency instead of jury factfinding, as within the sweep of that congressional power over "public rights." That case, *NLRB v. Jones & Laughlin Steel Corp.*,[43] involved an administrative right to recover back pay, which Congress used to *supplant* analogous contract rights enforceable at common law.[44]

The *Atlas* Court, however, failed to offer an adequate justification for its interpretation of the seventh amendment, either in terms of precedent or the language and history of the amendment. This lack of reasoned justification is evidence of what I believe to be the Court's failure to take seventh amendment rights seriously.

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[40] 430 U.S. at 455. The Court's announcement is particularly interesting in light of its holding in Curtis v. Loether, 415 U. S. 189, 193-95 (1974). There, the jury right was asserted in a private action authorized by § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612 (1976). The Court held that if Congress creates a new private cause of action that is to proceed in federal court and "involves rights and remedies of the sort typically enforced in an action at law," the right to a jury trial attaches. 415 U.S. at 195. Thus the *Curtis* Court apparently considered to be relevant both the forum to which the litigants were assigned and the resemblance of the statutorily created cause of action to an action at common law.

[41] 430 U.S. at 455 (emphasis added).

[42] *Id.* at 453-54.

[43] 301 U.S. 1 (1937).

[44] Prior to the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1976), an employee's suit to recover for wrongful dismissal under a contract of employment would have been a suit at common law. For a further discussion of *Jones & Laughlin*, see text accompanying notes 46-53 *infra*.

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(1) *Precedential Justification for the* Atlas *Interpretation of the Seventh Amendment.* To begin with precedent, *Jones & Laughlin* is arguably one of only two cases in which the Supreme Court dealt explicitly with, and denied the existence of, the right to a trial by jury in an administrative proceeding.[45] In *Jones & Laughlin* the respondent argued that an order to pay back wages was synonymous with a money judgment and that consequently in a proceeding seeking such relief, it must be accorded the right to a jury trial. The Court rejected that argument, observing that the seventh amendment "perserves" the right to a jury trial as that right was recognized at common law when the amendment was adopted.[46] Accordingly, the amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a common law suit."[47] Determining then that the action before it was neither one at common law nor one in the nature of such action, the Court concluded, "The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for lost time are requirements imposed for the violation of the statute and are remedies appropriate to its enforcement."[48]

The *Atlas* Court seized upon the Court's "statutory" characterization of the proceeding, quoting in text that portion of the Court's statement and giving it emphasis.[49] The *Atlas* Court, how-

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[45] The *Atlas* Court itself noted, 430 U.S. at 456, that some of the cases upon which it relied did not expressly address the seventh amendment question: Helvering v. Mitchell, 303 U.S. 391 (1938); Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932); Phillips v. Commissioner, 283 U.S. 589 (1931); Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 (1909); Murray's Lessee v. Hoboken Land Co., 59 U.S. (18 How.) 272 (1855). Notwithstanding, the Court considered that each did involve nonjudicial factfinding and found it "difficult to believe that these holdings or dicta did not subsume the proposition that a jury trial was not required." 430 U.S. at 456.

The Court did note further, however, that the other cases upon which it relied expressly considered that administrative factfinding was not barred by the seventh amendment. *Id.*; Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Block v. Hirsh, 256 U.S. 135 (1921). However, two of the cases did so in dicta: in *Pernell*, the Court recognized the right to a jury trial when a judicial forum is provided for disputes involving legal issues, and in *Curtis*, the right to a jury trial was found applicable to a statutorily created private damage action brought in federal court. For a discussion of the *Block* case, see text accompanying notes 54-58 *infra*.

[46] 301 U.S. at 48.

[47] *Id.*

[48] *Id.* at 48-49 (citations omitted).

[49] In discussing *Jones & Laughlin*, the *Atlas* Court quoted:

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ever, relegated to a footnote its observation that the *Jones & Laughlin* Court disposed of the constitutional claim "on the separate grounds that the amendment is inapplicable where 'recovery of money damages is an incident to [nonlegal] relief.' "[50] The *Atlas* Court took great pains to reject that alternative explanation of *Jones & Laughlin* in favor of one affirming congressional power to assign such supplanting actions to agency factfinding, stating:

> The Court also rejected the Seventh Amendment claim in Jones & Laughlin on the separate ground . . . [that] in such cases courts of equity would historically have granted monetary relief. In Jones & Laughlin, the NLRB ordered reinstatement of a dismissed employee, an order analogous to injunctive relief historically obtainable only in a court of equity, and consequently this alternative ground was an adequate one to decide Jones & Laughlin. However, this alternative ground would have been insufficient to decide the more general question of the NLRB's power to order backpay where, for one reason or another, no such equitable order was sought.[51]

The *Jones & Laughlin* Court, however, certainly seemed to have considered the equitable "clean-up" doctrine[52] to be an explanation for finding the seventh amendment inapplicable. My argu-

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> "The instant case is not a suit at common law or in the nature of such suit. The proceeding is one unknown to the common law. *It is a statutory proceeding.* Reinstatement of the employee and payment for time lost *are requirements [administratively] imposed for violation of the statute and are remedies appropriate to its enforcement.* The contention under the Seventh Amendment is without merit."

430 U.S. at 453 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937)) (brackets and emphasis added by the *Atlas* Court).

[50] *Id.* at n.10 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937)) (brackets added by the *Atlas* Court).

[51] *Id.*

[52] Traditionally, the equity "clean-up" doctrine allowed a court of equity, in certain circumstances, to dispose of an entire case, including any issues of a legal nature that might have been involved. *See* DOBBS, REMEDIES 84 (1973). For example, in Gulbenkian v. Gulbenkian, 147 F.2d 173, 176 (2d Cir. 1945), the court ruled that where plaintiff sought an injunction or specific performance *and* was entitled to money damages, the chancellor, in determining equitable issues, might also determine the legal issues. Thus, in a restricted number of cases, when the legal issue was viewed as "incidental" to the equitable claim, the latter overshadowed the former. *See* DOBBS, *supra*, at 84. The use of the "clean-up" doctrine to authorize an equity court to exercise jurisdiction over legal issues has retained little significance today, in part because of the ease with which equitable and legal claims may be joined and the existence of legal and equitable counterclaims. *See* RE, EQUITY AND EQUITABLE PRINCIPLES 33 (1975). *Cf.* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (holding that the jury trial right could not be lost when legal claims were joined with equitable claims).

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ment with the *Atlas* Court's use of *Jones & Laughlin* is not that the *Jones & Laughlin* Court clearly did intend the equitable nature of such proceeding to be the sole ground for its decision. It is, rather, that the *Jones & Laughlin* Court, in the case before it, might have understood such reason to be the crucial factor, notwithstanding the Court's going beyond that statement.[53] The *Atlas* Court's complete reliance on the portion of the Court's statement concerning the statutory nature of the proceeding does not seem wholly justifiable. Whatever the actual justification for the *Jones & Laughlin* decision, however, the ultimate point here is that even a court that exalts stare decisis over a reasoned and historically informed explication of the Constitution's text would not find *Jones & Laughlin* to be tightly binding precedent; the lack of a fully reasoned analysis as well as the availability of multiple explanations makes difficult any firm reliance upon that case.

Block v. Hirsh[54] is the second of the two precedents that dealt explicitly with the right to jury trials in administrative proceedings. The *Block* Court, indeed, was presented with the argument that an administrative scheme violated the seventh amendment because it consigned to an agency for factual determination questions in a landlord-tenant dispute concerning the right to possession of real property.[55] Although the *Block* Court offered little discussion of the seventh amendment issue, the opinion, finding no bar to the administrative scheme,[56] must be considered responsive to that argument.

Block surely can be treated as precedent in favor of the *Atlas* Court's interpretation of the seventh amendment. Notwithstanding that an action to recover possession of property is a legal action,[57] the *Block* Court held valid the procedure that denied a jury trial. Of course, there are ways in which an advocate would attempt to

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[53] There are two possible justifications that may be offered for the *Jones & Laughlin* Court's additional statements. First, the essential factor enabling the Court legitimately to characterize the proceeding as "statutory" may have been that the proceeding did not supplant a common law suit but only an equitable one. However, a second explantation, considered either as dictum or an alternative holding, I admit is more plausible, *see* note 49 *infra*; the Court may have considered that the statutory character of the proceeding was alone sufficient to find that no jury trial right existed.

[54] 256 U.S. 135 (1921).

[55] It is not clear from the reported case that the seventh amendment argument was made, but that point was briefed to the Court. Brief for Defendant in Error at 4, 19-21, Block v. Hirsh, 256 U.S. 135 (1921).

[56] 256 U.S. at 158.

[57] Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

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blunt the force of the decision. For example, the legislation challenged in *Block* was an emergency measure enacted to fight the severe housing shortage generated by war[58] and thus, the holding plausibly could be limited to the war emergency context. Nevertheless, I think it must be treated as supporting precedent.

It is important to note, however, that neither *Block* nor *Jones & Laughlin* contained reasoned analysis of the seventh amendment's application to administrative proceedings. Both *Jones & Laughlin* and *Block* merely offer unsupported conclusions about the effect of the seventh amendment without any apparent attempt to examine the language of that provision in its historical context. Indeed, in neither *Jones & Laughlin* nor *Block* did the Court have sophisticated briefs dealing with the seventh amendment argument. In each case, to the extent that the argument was made at all, it appeared almost as an afterthought.[59] It was not until three decades later, in *Atlas*, that the Court had before it both the isolated issue of the application of the amendment to administrative actions[60] and thoughtful briefs dealing with the amendment in its historical context.[61] Unfortunately, the Supreme Court, which has asserted that stare decisis has less force in the constitutional context than in others,[62] chose to support its explication of the seventh amendment upon a case law foundation either wanting in reasoned analysis or inconclusive as to the grounds supporting it.

Although there were no dissents in *Atlas*, in its companion case, *Frank Irey, Jr., Inc. v. Occupational Safety and Health Commission*,[63] a dissent was registered in the United States Court of

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[58] 256 U.S. at 155-56.

[59] The arguments on the general applicability of the seventh amendment to the administrative proceedings were conclusory. *See, e.g.*, Brief for Defendant in Error at 19-21, Block v. Hirsh, 256 U.S. 135 (1921); Brief for Respondent at 99-105, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[60] Both *Block* and *Jones & Laughlin* were complex cases presenting substantial issues along with the seventh amendment issue: in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22-44 (1937), the Court considered the validity of regulatory programs under the commerce clause, and in Block v. Hirsh, 256 U.S. 135, 153-58 (1921), the Court considered the legitimacy of the use of police powers in an emergency context. A fair reading of the briefs and opinions in each case indicates that in both the amendment issue occupied a small portion of the energies of the Court and advocates.

[61] *See* note 79 and accompanying text *infra*.

[62] *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 695 (1978) ("[W]e have stated that *stare decisis* has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes through legislation . . . .") (citation omitted).

[63] 519 F.2d 1200 (3d Cir. 1974), *aff'd on rehearing*, 519 F.2d 1215 (3d Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

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Appeals for the Third Circuit by Judge Gibbons.[64] Judge Gibbons, discussing the position adopted by the court of appeals' majority, and that ultimately taken by the Supreme Court, argued that the result effectively gave Congress the power to define and limit the reach of the seventh amendment. Judge Gibbons disagreed that the conclusion was supported by precedent, stating:

> If this is the teaching of the one authority upon which the majority relies, then unbeknownst to the world of legal scholarship, *NLRB v. Jones & Laughlin Steel Corp.* . . . [effected] the most profound and enormous redistribution of power among the three branches of the federal government of any case in the Court's history. . . . [I]f Congress can by fiat define the term "administrative adjudication" and thereby necessarily define the seventh amendment term "Suits at common law," what role do the article III courts play? . . . [M]y point is that . . . the constitutional scheme of things requires that the Court, not Congress, give meaning to the Constitutional terms, and thereby define the limits of administrative proceedings.[65]

In light of their thin analytical underpinnings, neither *Jones & Laughlin* nor *Block* seem compelling as precedents.[66] An examination of *Atlas* for signs of constitutional analysis which deals directly with the meaning of the seventh amendment in its historical context yields equally unsatisfactory results.

(2) *Textual and Historical Justification for the* Atlas *Interpretation of the Seventh Amendment.* While the *Atlas* position may ultimately prove to be justified by an historical-purposive analysis, it is difficult to discern such justification from the opinion by the Court. Surely, before it avoided the plausible, narrow justifications for nonjury trials supplied by both *Block* and *Jones & Laughlin*, and before it recognized a sweeping congressional power, the *Atlas* Court was obligated to offer an adequately documented and reasoned analysis of the seventh amendment's text as understood in its historical context.[67] The Court provided almost none, however.[68]

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[64] *Id.* at 1207, 1219.

[65] *Id.* at 1221-22 (citation omitted).

[66] Additionally, courts do have the power to and do occasionally overrule a case on the ground that it was wrongly decided. *See* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (overruling portion of Monroe v. Pape, 365 U.S. 167 (1961)).

[67] *See* text accompanying notes 21-31 *supra*.

[68] The Court does provide a brief glimpse of some of the history of the amend-

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Instead, the Court offered a series of *ipse dixits*, demonstrative of the Court's position yet unenlightening as to its rationale.

The Court stated that the seventh amendment was merely "declaratory of the existing law" since it mandated only that a trial by jury "was to be 'preserved' "; hence the amendment "did not purport to require a jury trial where none was required before."[69] Additionally, the amendment attempted neither to alter the methods of determining facts in actions traditionally tried without a jury,[70] nor to "freeze equity jurisdiction" as it was in 1789.[71] The Court then emphasized that "the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases,"[72] and concluded:

> [The seventh amendment] took the existing legal order as it found it, and there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes. We cannot conclude that the Amendment rendered Congress powerless . . . to create new public rights and remedies by statute and commit their enforcement, if it chose to, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries . . . .[73]

The *Atlas* Court addressed the very real concern that its decision would permit Congress to nullify the jury trial right since Congress could freely assign to an administrative forum those disputes concerning matters heretofore adjudicated in a judicial forum. The Court responded to that concern, not with reasons for the existence of the congressional power asserted, but with a promise that some limit exists:

> The argument is well put, but it overstates the holdings of our prior cases and is in any event unpersuasive. Our prior cases support administrative factfinding in only those situations involving "public rights," *e.g.*, where the Government is involved

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ment, 430 U.S. at 459-60, but does so from the perspective of cases dealing with the issue tangentially or in other contexts.

[69] *Id.* at 459.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 460.

[73] *Id.*

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> in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, property and a vast range of other cases as well are not at all implicated.[74]

The articulated limit to congressional power, *i.e.*, the "public rights" concept, seems coextensive with the federal government's power to create agencies to regulate matters designated to be of national concern. Consequently, it is arguable that the limit exists only after congressional action has rendered it meaningless to a litigant.[75]

If the Court were not constrained by the Constitution, but were instead free to base its decisions upon the Justices' notions of prudence, the Court perhaps could determine plausibly that jury trials are either undesirable or desirable in federal civil actions and apply the seventh admendment accordingly. The Court, however, is considered bound by the Constitution.[76] This entails, under the prevailing standards of judicial morality, that the Court is expected to render its constitutional interpretations in the light of the framers' purposes.[77]

(3) *Analysis Not Undertaken and Important Arguments Not Answered By the Court in* Atlas. The *Atlas* petitioners, using language from an earlier Supreme Court opinion and citing to other historical materials, urged a position that seems compelling on the surface at least: " 'In a just sense, the 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.*' "[78] There is a strong argument, based upon historical materials, that the words "common law" as used in the seventh amendment were indeed intended to define a

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[74] *Id.* at 458.

[75] It might be argued, for example, that once Congress has determined to place a matter in the hands of an agency for resolution, the "national interest" label would attach and hence, Congress will be deemed to have exercised its power within the limitation defined.

[76] *See* text accompanying notes 21-31 *supra*.

[77] *See id.*

[78] Brief for Petitioners at 24, Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 443, 446 (1830) (emphasis by Petitioners deleted, emphasis added).

Judge Gibbons proposed this argument in his dissent in *Irey*. 519 F.2d at 1207-15; *see also* Note, *supra* note 10, wherein the position is stated forcefully. The argument was not answered by the Court in *Atlas* save in a conclusory manner, *see* text accompanying notes 73-77 *supra*.

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catch-all category for all proceedings other than those which by historical accident were triable solely to a judge.[79]

The *Atlas* Court had available to it materials with which to shape a meaningful response to petitioners' argument.[80] However, the Court did not reveal whether it considered the historical materials and resolved that the materials (1) were clearly in favor of the nonapplication of the seventh amendment to administrative proceedings, or (2) were inconclusive, thereby permitting the consideration of such factors as efficiency in the decisionmaking process.

A court that takes seriously its obligation to deal with an important application of a guarantee of individual rights has a duty, at the very least, to offer an account of its struggle with historical materials.[81] The Supreme Court failed to fulfill that duty in *Atlas*. I would urge, therefore, that the far-reaching statements in *Atlas* be reconsidered at the next available opportunity. The historical arguments must be answered or, if they remain unanswered after reference to available material, the Court must so declare and explain why it should indulge in a presumption against the plausible interpretation of the seventh amendment, which yields protection under a "catch-all" definition of "common law."[82]

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[79] In the brief to the *Atlas* Court, the petitioners cited the following authorities: Federal Judiciary Act of 1789, 1 Stat. 73; An Act for the Ease of the Subject, 21 James 1, ch. 4; Act of March 3, 1803; Leg. History Note, 1948, 28 U.S.C. § 1783, at 7623 (1970 ed.); American Act, 4 Geo. 3, ch. 151; Declaration of Independence; 12 THOMAS JEFFERSON PAPERS (Princeton Univ. Press 1950); 2 WORKS OF MADISON, 183 (1900); 1-2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833); I. ESPINARSE, A TREATISE ON THE LAW OF ACTION ON PENAL STATUTES 5 (1813); FEDERAL PAPERS, No. 83 (The New American Library of World Literature, 1961 ed.); I.W. HOLDSWORTH, A HISTORY OF ENGLISH LAW; PLUKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed.); 2 LEGAL PAPERS OF JOHN ADAMS (A.L. Wroth & H. Zibot, eds. 1965); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1967). Brief for the Petitioners at vi-vii, Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977).

Respondents' brief cited 34 separate documents, including correspondence of the framers, proposed amendments to the Bill of Rights and state constitutions and declarations of rights. Among those authorities cited and not included in the list of sources cited by petitioner were: 1 ANNALS OF CONGRESS (1789); BIOGRAPHICAL DICTIONARY OF THE AMERICAN CONGRESS, 1774-1971 (G.P.O. 1971); MAIN, THE ANTIFEDERALISTS (1961); A.T. MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION (1964); SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971). Brief for the Respondents at viii-xii, Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 422 (1977).

[80] *See* note 79 *supra*.

[81] *See* text accompanying notes 21-31 *supra*.

[82] *See* text accompanying notes 78-79 *supra*.

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III. POST-*ATLAS* HISTORICAL-PURPOSIVE ANALYSIS OF THE SEVENTH AMENDMENT

As noted at the outset,[83] the Supreme Court's decision in *Parklane Hosiery Co. v. Shore*[84] arguably offers an analysis more satisfactory than that offered by the *Atlas* Court. In *Shore*, plaintiff instituted a federal class action on behalf of minority shareholders against Parklane Hosiery Co. and several of its officers, directors and controlling shareholders.[85] Plaintiff alleged essentially that defendants made misleading statements in a proxy statement by failing to disclose material facts about a proposed merger.[86] Seeking recision of the merger and money damages, plaintiff claimed that the failure to disclose violated[87] sections 10(b), 13(a), 14(a), and 20(a) of the Securities Exchange Act of 1934.[88]

During the pendency of the class action, the Securities Exchange Commission (SEC) brought suit in the federal district court against Parklane and its president, both of whom were defendants in the class action.[89] The SEC alleged facts concerning the proxy statement that were basically identical to those in the class action.[90] Seeking an injunction and other equitable relief, the SEC alleged violations of the Securities Act of 1933[91] and the Securities Exchange Act of 1934.[92]

The district court decided the SEC's action for equitable relief, finding that the proxy statement was misleading in failing to disclose material facts. The court imposed liability under section 14(a), but limited the relief to requiring Parklane to amend its erroneous filings with the SEC.[93] The Second Circuit affirmed this disposition.[94]

Thereafter, plaintiff in the class action moved for summary judgment against the defendants named in the SEC suit, arguing

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[83] *See* text accompanying notes 1-10 *supra*.

[84] 99 S. Ct. 644 (1979).

[85] *See* 565 F.2d 815, 816 (2d Cir. 1977), *aff'd*, 99 S. Ct. 644 (1979).

[86] *See id.* at 816-17.

[87] *See id.*

[88] 15 U.S.C. §§ 78j(b), 78m(a), 78n(a), 78t(a) (1976).

[89] *See* 565 F.2d at 817.

[90] *See id.*

[91] Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976).

[92] Sections 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78m(a), 78n(a) (1976).

[93] SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 486-87 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977), *aff'd*, 99 S. Ct. 644 (1979).

[94] 558 F.2d 1083 (2d Cir. 1977), *aff'd*, 99 S. Ct. 644 (1979).

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that the doctrine of collateral estoppel barred the defendants from relitigating the facts determined in the SEC enforcement proceeding. The district court rejected this argument, apparently persuaded by the decision of the Court of Appeals for the Fifth Circuit in *Rachal v. Hill*,[95] which required a jury trial under circumstances similar to those in *Shore*. The *Shore* order permitting a jury trial was certified to the Second Circuit, and that court reversed.[96]

Rachal held that the seventh amendment required a jury trial of the issues raised in a private damage suit under the securities laws although the same issues had been determined adversely to a defendant in an earlier SEC injunction action.[97] The Fifth Circuit reasoned that Supreme Court precedent demonstrated great deference to the demand for a jury trial.[98] In particular, the Supreme Court has required that in a suit in which both legal and equitable claims appear, the legal claim is to be tried first to a jury to avoid jeopardizing the valued "right" to a jury trial.[99] Persuaded by this requirement, the *Rachal* court would not allow the offensive use of collateral estoppel to defeat the jury trial right.

The Second Circuit in *Shore* rejected the analysis offered in *Rachal*. The court disagreed that the precedent provided by the Supreme Court indicated the unconstitutionality of the use of col-

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[95] 435 F.2d 59 (5th Cir. 1970). In denying the summary judgment motion, the district court merely cited the *Rachal* case. *See* 565 F.2d at 818.

[96] 565 F.2d at 818.

[97] 435 F.2d at 60-61.

[98] *Id.* at 63-64. *See, e.g.*, Beacon Theatres v. Westover, 359 U.S. 500, 509 (1959) ("only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims"); Dairy Queen v. Wood, 369 U.S. 469, 473 (1962) (where both legal and equitable issues are presented in a single case, "any legal issues for which a jury trial is timely and properly demanded [must] be submitted to a jury"). In addition to the seventh amendment question, the *Rachal* court also noted its doubt as to whether collateral estoppel could appropriately be applied in light of a lack of mutuality and considerations of fairness. 435 F.2d at 63. The court, however, found it unnecessary to rely on this ground. *Id.* For a discussion of the importance of a lack of mutuality to the seventh amendment argument in *Shore*, see notes 106-17 and accompanying text *infra*.

[99] In Beacon Theatres v. Westover, 359 U.S. 500 (1959), plaintiff sought injunctive and declaratory relief in connection with a threatened antitrust action. Defendant interposed a counterclaim seeking treble damages for alleged antitrust violations. The lower court had rejected a request for a jury trial on the legal claim since it had been joined with the equitable claim. The Supreme Court, however, refused to allow the equitable claim to take priority over the legal claim and insisted upon the right to a jury trial.

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lateral estoppel in the circumstances presented.[100] Rather, the Second Circuit determined that the Supreme Court in fact implicitly recognized that collateral estoppel was available to bar a legal claim after a determination on an equitable claim.[101] The Second Circuit reasoned that had the Supreme Court not made this assumption, then in a suit in which the claims were joined, the order of trying the claims would have been of no moment. An earlier nonjury fact determination would have presented no danger of obliterating the jury trial right "since the defendant would . . . have been *guaranteed* a jury trial of the [legal claim] regardless of the outcome of the equitable claim."[102] The *Shore* court then concluded that when an equitable claim has been fully and fairly litigated in an earlier suit and facts have been determined against a defendant there, collateral estoppel may be invoked to bar a later legal claim without offending the seventh amendment,[103] notwithstanding that the later claim is brought by a different party.

In considering the availability of collateral estoppel, the Fifth Circuit applied the seventh amendment right to a jury trial literally, while the Second Circuit rested its contrary result on a plausible interpretation of earlier Supreme Court cases.

The Supreme Court granted certiorari[104] to resolve the conflict between the Second and Fifth Circuits.[105] As in the circuit courts, the issue was not whether a prior equitable suit could be given collateral estoppel effect in a later common law suit when the parties in each were the same;[106] an application of collateral estoppel where there was mutuality of parties apparently was recognized prior to the framing of the seventh amendment and thus was beyond the scope of its guarantee.[107] The issue before the Supreme Court was, rather, whether the seventh amendment was compatible with the use of collateral estoppel to benefit a plaintiff who was not a party to the prior equitable proceeding. Such an application

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[100] The Second Circuit reviewed the cases upon which the Fifth Circuit relied, *e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

[101] 565 F.2d at 820.

[102] *Id.* at 820-21 (emphasis and brackets added).

[103] *Id.* at 821.

[104] 435 U.S. 1006 (1978).

[105] *See* 99 S. Ct. at 648 & n.3.

[106] *Rachal* and *Shore* each involved a private plaintiff's attempt in a suit at common law, to have the benefit of facts found in an earlier equitable proceeding brought by an administrative agency. *See* 435 F.2d at 60-61; 565 F.2d at 817-18.

[107] *See* 99 S. Ct. at 653-54.

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of collateral estoppel, free of the requirement of mutuality, was unknown in 1791,[108] and therefore arguably violative of the seventh amendment.

In deciding the issue in favor of preclusion, the *Shore* majority found "no persuasive reason . . . why the meaning of the Seventh Amendment should depend on whether or not mutuality of parties is present."[109] The Court characterized collateral estoppel as a "procedural device[ ]"[110] and analogized to such other devices as directed verdict and summary judgment, the use of which had been held consistent with the seventh amendment[111] notwithstanding that they had been developed after its adoption.[112] Although the *Shore* majority undertook no extensive independent historical analysis of the seventh amendment,[113] the Court relied in particular on one case that addressed the historical arguments concerning the relationship of the seventh amendment to the use of a directed verdict.[114] In *Galloway v. United States*,[115] the majority analyzed the historical materials and determined that "[t]he [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing."[116] Applying the *Galloway* rationale, the *Shore* majority deemed it immaterial that mutuality was necessary in 1791 and concluded that the seventh amendment posed no bar to the application of collateral estoppel.[117]

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[108] *See id.* at 653, 655.

[109] *Id.* at 654.

[110] *Id.*

[111] Galloway v. United States, 319 U.S. 372, 388-93 (1943) (directed verdict); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-21 (1902) (summary judgment). *See also* Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931) (retrial on damage issue alone).

[112] 99 S. Ct. at 654. Justice Rehnquist, dissenting, argued that the devices relied on by the majority in fact did have counterparts at common law and thus, their use could be justified on that basis. *Id.* at 660-61.

[113] Adopting a rationale similar to that of the Second Circuit, *see* text accompanying notes 100-103 *supra*, the Supreme Court noted that the notion "that an equitable determination could have collateral estoppel effect in a subsequent legal action was the major premise" of the Court's holding in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). 99 S. Ct. at 653.

[114] 99 S. Ct. at 654.

[115] 319 U.S. 372 (1942).

[116] *Id.* at 390.

[117] The *Shore* Court stated:

> The law of collateral estoppel, like the law in other procedural areas

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It might be argued that in at least relying on a case wherein a historical analysis was undertaken, the Supreme Court in *Shore* discharged its institutional responsibility to provide the historical basis for the result that otherwise makes sense only in terms of efficiency and fairness. Justice Rehnquist's dissent,[118] based on his reading of the seventh amendment in its historical context, also, seems to offer precisely the required analytical foundation. Asserting that "[t]he right to trial by jury in civil cases at common law is fundamental to our history and jurisprudence," Justice Rehnquist argued that the majority had "reduced this valued right . . . to a mere 'neutral' factor."[119] In his view, the application of the seventh amendment, "perhaps more than with any other provision of the Constitution, [is] determined by reference to the historical setting in which the Amendment was adopted."[120]

Noting the Court's statement in *Galloway*, Justice Rehnquist recognized that the seventh amendment is meant to preserve "not the incidental or collateral effects of common law practice in 1791" but the substance of the jury trial right.[121] He rejected the notion, however, that this view of the amendment's reach would permit a drastic incursion into the role of the jury simply by implementing "any nominally 'procedural change.' "[122] Since, in his view, a substantial alteration in the jury's province easily could be termed "procedural reform," any other position essentially would permit "judicial repeal" of the seventh amendment.[123] Justice Rehnquist forcefully argued that in view of the constitutional underpinnings of the jury trial right, an "invasion" of the jury's function, beyond that recognized in 1791, could not be justified by mere invocation of considerations of judicial economy or accuracy.[124]

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defining the scope of the jury's function, has evolved since 1791. Under the rationale of the *Galloway* case, these developments are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791.

99 S. Ct. at 654.

[118] *Id.* at 655-64.

[119] *Id.* at 655.

[120] *Id.* at 656.

[121] *Id.* at 659.

[122] *Id.*

[123] *Id.*

[124] *Id.* Justice Rehnquist argued further that, even assuming no seventh amendment violation, offensive use of collateral estoppel ought not to be permitted "where the party who is sought to be estopped has not had an opportunity to have the facts of his case determined by a jury." *Id.* at 661-62. He discussed and rejected the prudential considerations with respect to efficiency that would be paramount in deciding whether to apply collateral estoppel to the facts in *Shore*. Citing the "strong

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Justice Rehnquist's vigorous *Shore* dissent suggests that he takes seriously seventh amendment rights and reflects agreement with the analytical approach presented in Section II above. There does appear, however, to be an inconsistency between the thrust of his attack on the *Shore* majority and his belief in the continued validity of the *Atlas* decision, in which he took part.[125] Citing *Atlas* and *Jones & Laughlin*,[126] Justice Rehnquist reaffirmed that Congress could "commit enforcement of statutorily created rights to an 'administrative process or specialized court,' "[127] notwithstanding that in *Shore* he could "see no 'imperative circumstance' requiring this wholesale abrogation of jury trials."[128]

Justice Rehnquist's citation of *Atlas* and *Jones & Laughlin* is in conflict with his earlier statement that

> to sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment. And since we deal here not with the common law *qua* common law but with the Constitution, no amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its function, can always be denominated "procedural reform."[129]

Justice Rehnquist's position would seem to be that it is unacceptable for the sake of procedural efficiency to permit the abrogation of the jury trial right. Yet, is not agency adjudication of disputes that were formerly actions at common law simply a more dramatic instance of a "procedural device," serving to eliminate the

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federal policy favoring jury trials," *id.* at 662 (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Jacobs v. New York, 315 U.S. 752, 752-53 (1942)), Justice Rehnquist could discern no "unmanageable problems that have resulted" from their use. *Id.*

[125] *Id.* at 662 n.21. The *Atlas* decision was unanimous; Justice Blackmun did not participate.

[126] *Id.*

[127] *Id.* (quoting Curtis v. Loether, 415 U.S. 189, 195 (1974)).

[128] *Id.* at 662. Justice Rehnquist also remarked, "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Id.* at 657.

[129] 99 S. Ct. at 659.

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"province of the jury" in a class of cases wherein a jury trial would have been available in 1791? Justice Rehnquist seems to suggest that any compromise based upon considerations of efficiency would admit of no logical stopping point.[130] As a result, it remains a mystery why Justice Rehnquist was willing to make this compromise in the *Atlas* case, where he participated in the Court's partial, but significant repeal of the seventh amendment.

IV. CONCLUSION

Although the *Shore* majority and dissent evince somewhat more respect for textual-historical inquiry than did the unanimous *Atlas* Court, neither opinion gives any indication that the *Atlas* case, in its far-reaching impact, will be reexamined employing the proper historical base. That case, however, must be reexamined; if we are committed to the seventh amendment guarantee, then the Court must justify with a considered textual analysis a decision that sanctions not merely changes in procedure but arguably large-scale destruction by Congress of the right to trial by jury.

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[130] *See* text accompanying note 123 *supra*.

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