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SPECIALIZED ADJUDICATION IN AN ADMINISTRATIVE FORUM: BRIDGING THE GAP BETWEEN PUBLIC AND PRIVATE LAW

Carl N. Pickerill*

INTRODUCTION

What if antitrust litigants could, instead of litigating their cases before federal courts of limited expertise, litigate them before a hall-of-fame antitrust panel composed of Richard Posner,1 Robert Pitofsky,2 and Herbert Hovenkamp?3 What if, instead of plaintiffs relying on lay juries for an answer about whether they were harmed in a mass toxic tort case, the plaintiffs could rely on the word of the best scientists in the field? What if aggrieved shareholders, instead of bringing their derivative lawsuits before an attorney-gamesmanship-susceptible mishmash of juries and judges, could turn to an expert tribunal of economists and brokers? These kinds of trials seem as desirable in theory as they are impossible in practice. Or are they?

Countless scholars have noted the ascension of alternative dispute resolution (ADR) in the modern legal world as a way to achieve

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* Candidate for Juris Doctor, Notre Dame Law School, 2008; B.A. Sociology, University of Chicago, 2005. Many thanks to Professor Jay Tidmarsh for his guidance and suggestions throughout the writing and researching of this Note. I owe a debt of gratitude as well to Executive Notes Editor G. David Mathues for the fruitful discussion of note topics with him over the summer and throughout the year. And I would like to thank the entire Law Review staff for their substantive and editing contributions to the Note. Most importantly, I would like to thank my wife Emily for the support she has given me throughout law school.


2 See Robert Pitofsky et al., Trade Regulation (5th ed. 2003).

such specialized adjudication. ADR's obvious benefits—efficiency, adjudication by an expert, and cost-effectiveness—have buoyed its use. Yet other scholars decry it a thing that undermines the traditionally judge-driven development of the common law. Arbitration's inability to create precedent and its inconsistent results makes some question its legitimacy. On the other hand, practitioners, corporations, and some legal scholars remain suspicious of judges' and juries' abilities to "get it right" in highly technical cases. Additionally, the docket burden on federal courts ensures a lengthy trial process, especially for technical cases, further encouraging litigants to choose arbitration.


6 See, e.g., Reuben, supra note 4, at 983–85 ("ADR has not yet earned its legitimacy as a fair and impartial means of dispute resolution . . . . [T]here are fewer rules to define the terms of the debate . . . .").

7 See Francis R. Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?, 70 F.R.D. 199, 205–06 (1976) (decrying the gamesmanship and the nuisance of settlements that often drive litigants away from the courtroom into arbitration).

8 See Simon H. Rifkind, Are We Asking Too Much of Our Courts?, 70 F.R.D. 96, 99–100 (1976); see also Suzanna Sherry, Logic Without Experience: The Problem of Federal Appellate Courts, 82 NOTRE DAME L. REV. 97, 109–27 (2006) (arguing that the current Supreme Court and federal appellate courts have created an untenable situation for district courts by expanding jurisdiction while limiting trial judge discretion). Sherry argues quite persuasively that the Supreme Court and appellate courts have expanded federal jurisdiction through abrogation of state sovereign immunity and loosening of supplemental jurisdiction, standing, and federal court intervention rules, while stripping trial judges of discretion not to hear certain state claims. Id. 109–23.
What is the solution to the discontent inherent in both private and public adjudication? Private ADR cannot provide the solution because it guts public common law. Public law cannot provide the solution because of its lack of expertise, costs, and inefficiencies. Instead, Congress should create a hybrid system similar to modern administrative courts. Such a system should be, and could be, a streamlined, constitutionally-acceptable process where panels of

After enunciating an Eleventh Amendment state sovereign immunity doctrine in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court proceeded to abrogate that immunity in a trio of cases. *See Sherry, supra*, at 111–13 (discussing *Central Virginia Community College v. Katz*, 126 S. Ct. 990, 994 (2006) (holding that states do not have immunity from bankruptcy proceedings), *Tennessee v. Lane*, 541 U.S. 509, 530–34 (2004) (upholding the Americans with Disabilities Act, banning disability discrimination in public accommodations), *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 728–40 (2003) (upholding Congress’s enactment of the Family Medical Leave Act, requiring state employers to provide unpaid leave for employees caring for an ill family member)). Likewise, the Court backed away from its holding in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (requiring a federal cause of action for federal question jurisdiction), by ruling in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005), that a state cause of action raising a federal issue may be subject to federal jurisdiction. *See Sherry, supra*, at 115–16. Simultaneously, many appellate courts have interpreted the federal supplemental jurisdiction statute, 28 U.S.C. § 1367 (2000), to limit trial judge discretion to exercise supplemental jurisdiction. *See Sherry, supra*, at 125. The result has been to burden federal dockets with cases, in which disputing jurisdiction has become the main event. This fact, along with the highly technical nature of business litigation, helps explain why so many of these cases eventually find their way into arbitration and other forms of ADR.

9 Obviously there is no one solution to the “discontent.” For a discussion of other proposed solutions to the private-public law divide see *infra* note 11 and accompanying text

10 Some have opined that legislative courts and administrative courts are distinct. *See Harold H. Bruff, Specialized Courts in Administrative Law, 43 Admin. L. Rev. 329, 360 (1991) (advocating for a specialized court to review administrative agency action). I concur with that statement; it is well established that the Tax Court—an Article I legislative court—operates differently from an administrative law court. Compare 26 U.S.C. §§ 7441, 7453 (2000) (establishing the Tax Court and providing for use of Federal Rules of Evidence), *and Tax Ct. R. Prac. & P. I(a) (permitting rulemaking through notice and comment to the public only for Tax Court procedure), with 5 U.S.C. §§ 553–557 (2000) (permitting liberal use of evidence rules; permitting agency rulemaking and adjudication affecting both substantive and procedural rights). However, because this Note asks whether Congress can and should legislate a hybrid specialty court system, and because both Tax Courts and administrative courts are—strictly speaking—legislat ed entities, I will treat both the same and focus exclusively on the operation of administrative courts.
experts in administrative agencies serve as factfinders in their respective fields.\footnote{Administrative courts are not the \textit{only} solution to the public court/private court dichotomy. Other solutions propose: 1) using specialized state business courts, similar to the Delaware Court of Chancery; 2) combining the systems of ADR and public law; and 3) creating a national expert appeals court to hear claims directly from administrative agencies. For a discussion proposing the use of specialized state courts see Jay Tidmarsh, \textit{Pound's Century, and Ours}, 81 \textit{NOTRE DAME L. REV.} 513, 580 (2006) (suggesting that a merger of traditional and alternative forums of adjudication could take the form of "specialized courts, akin to Delaware's Chancery Court"); see also \textit{DEL. CONST.} art. IV, § 10 (establishing the Delaware Court of Chancery to hear cases arising under the laws of incorporation). The Chancery Court in particular and specialized business courts in general have received much attention due to their capability of providing expert adjudicators in complex cases. See Rochelle C. Dreyfuss, \textit{Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes}, 61 \textit{BRook. L. REV.} 1, 2–3 (1995) (comparing Delaware's Court of Chancery to other specialized business tribunals and noting a "trend toward adjudicating business disputes in a specialized tribunal"). \textit{But see} Marcel Kahan & Ehud Kamar, \textit{The Myth of State Competition in Corporate Law}, 55 \textit{Syan. L. REV.} 679, 725–26 (2002) (arguing that political realities prevent state legislators from establishing business courts and a rule-based business code that would allow them to compete with Delaware for incorporations and also noting the relative ease in establishing such courts). The point of contention surrounding specialized state courts would be Congress's power to not only strip the federal courts of jurisdiction over certain specialized cases, but to mandate the creation of specialized courts at the state level. \textit{See} Henry M. Hart, Jr., \textit{The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic}, 66 \textit{HARv. L. REV.} 1362, 1363–66 (1953); see also Anthony J. Bellia, Jr., \textit{Congressional Power and State Court Jurisdiction}, 94 \textit{GEO. L.J.} 949, 950–51 (2006) (looking at federal regulation of state court jurisdiction and showing that under \textit{Testa v. Katt}, 330 U.S. 386, 394 (1947), Congress can force states to enforce a federal action if it has "jurisdiction adequate and appropriate under established local law to adjudicate [the] action" (citing \textit{id.} at 394)). For a discussion proposing a "unification" of ADR and public courts by importing more procedural safeguards and reasoned opinions into arbitration see Reuben, \textit{supra} note 4, at 1046–86 (suggesting a unification of "trial and some of what is now called private ADR into a single system of interrelated dispute resolution processes . . . preserving the virtues of the various ADR processes while acknowledging their minimal but meaningful constitutional limits"). For a discussion of national expert appeals court proposals see Bruff, \textit{supra} note 10, at 360 (arguing for "a semi-specialized legislative court sitting nationwide to review both high-volume, fact-intensive agency adjudications, and some other programs that . . . need specialization") and Richard L. Revesz, \textit{Specialized Courts and the Administrative Lawmaking System}, 138 U. PA. L. REV. 1111, 1115, 1166–67 (1990) (arguing for "review of administrative action in specialized courts" and that such courts should also possess fact-finding functions).}
participants by offering expert adjudication, but would also serve the public by developing the common law by providing a source of reasoned opinions and consistent results that current ADR does not provide.

Part I looks more closely at the criticisms leveled at both public and private adjudication; by seeing the problems in each system we can better see what we need in a new system of administrative courts. Parts II through IV are organized in accordance with the most important principles that this system must vindicate: Part II considers the principles of institutional legitimacy and precedential value that scholars claim is lacking from private ADR; Part III looks at the principles of efficiency and expertise that other scholars claim is lacking from public courts; Part IV looks at principles of constitutionality—Article III restrictions and the Seventh Amendment. The conclusion will propose a system of specialized administrative courts in specialized fields having all the desirable attributes of current forums of adjudication (legitimacy, precedent, expertise, and efficiency), avoiding their undesirable attributes (inconsistency, illegitimacy, cost, nonexpertise), and conforming with constitutional standards.

I. INSUFFICIENT AND UNSATISFYING: GRIPES ABOUT CURRENT FORMS OF ADJUDICATION

A. Complaints About the Judicial System

Dissatisfaction with the federal judiciary is hardly a new phenomenon. Adjudication by nature lends itself to the resolution of individual problems and individual disputes. Consequently, no individual litigant is willing to compromise the thoroughness of procedure in the name of efficiency. However, litigants also have an interest in resolving their disputes expeditiously. So while they may demand a process that strives to get things right on the merits, other concerns prevail. One of those is efficiency.

12 See infra Part IV.

13 Many of the procedural alterations to federal adjudication owe their development to criticism that Roscoe Pound leveled at the federal courts at the beginning of the twentieth century. Although his criticisms—which decried the courts’ slavish adherence to procedural technicality over substance—find only marginal comparison with the criticisms made by ADR proponents today, they compose part of a general discontent with the federal judiciary. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 Rep. A.B.A. 395, 414 (1906), reprinted in 35 F.R.D. 273, 289 (1964) (bemoaning the time wasted and justice undelivered by virtue of judges' insistence upon technical and procedural purity). For a comparison of the challenges that faced Pound’s legal world and the structural instabilities of our present system of adjudication, see Tidmarsh, supra note 11, at 513–17.
Just over thirty years ago, the Judicial Conference of the United States addressed multiple concerns confronting the federal judiciary, including its inefficiencies.\textsuperscript{14} Their conference, whose title—"Causes of Popular Dissatisfaction with the Administration of Justice" (commonly known as the Pound Conference)—echoed the turn-of-the-century complaints of Roscoe Pound, provided a blueprint for reforming the judiciary by supplementing it with ADR. In his keynote address, then Chief Justice Warren Burger spoke of "the design of some new—even radically new—'vehicles' to take [the judiciary] where [it] want[ed] to go in the years ahead."\textsuperscript{15} Burger's comments, which forecasted the soon-to-follow ADR explosion, read more like an admonition than a well-defined proposal for new organizational legislation. Their instructive value, however, lies in their suggestions for change. Burger's demands stem mainly from a concern with efficiency. His outline of the "most satisfactory, the speediest and the least expensive means"\textsuperscript{16} of adjudication included proposals for: flexible and informal small claims courts;\textsuperscript{17} "well-developed forms of arbitration;"\textsuperscript{18} and forums where personal injury cases don't "take years to complete."\textsuperscript{19}

Although Burger didn't couch his demands in the most eloquent of prose, adherents to his ideas were no less vocal. Other speakers at the conference blamed judicial ineffectiveness, backlogged dockets, and pre-trial discovery for the courts' inefficiencies.\textsuperscript{20} One speaker satirized the plight of judges, who, unable to examine the "million[s] of documents" that crop up during discovery, ultimately decide to "giv[e] plaintiffs access to all of defendant's files and records, relevant and irrelevant."\textsuperscript{21} Aside from constituting a blatant invasion of privacy, such a description raises the specter of cases unresolved for years and provides impetus for turning away from the courts.

\begin{itemize}
  \item \textsuperscript{14} Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, in 70 F.R.D. 79 (1976) [hereinafter Pound Conference].
  \item \textsuperscript{16} Id. at 93.
  \item \textsuperscript{17} Id. at 94; cf. FED. R. CIV. P. 1 ("These rules . . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").
  \item \textsuperscript{18} Burger, supra note 15, at 94.
  \item \textsuperscript{19} Id. at 95.
  \item \textsuperscript{20} See Kirkham, supra note 7, at 203; Rifkind, supra note 8, at 99–100.
  \item \textsuperscript{21} Kirkham, supra note 7, at 203.
\end{itemize}
The strongest critics at the 1976 Pound Conference harped upon the federal judiciary's inability to handle complex cases. The parade of horribles trotted before the Conference included a case involving hundreds of witnesses, a case where a jury sat for eleven months and cases involving dozens of lawyers and dozens of defendants. A simple Westlaw search according to firm or attorney demonstrates that such convoluted arrangements are hardly the exception. Most notable among these criticisms of federal adjudication, however, were criticisms of the way the public seemed to view judges as omniscient and of the inability of juries to comprehend legal issues in civil litigation. The critics doubted not only a "jack[ly] of all trades" judge's ability to provide solutions to every legal problem, but judges' abilities to even explain such complex legal matters to juries who lacked the "interest or attention necessary" to understand them.

22 Id. at 208; Rifkind, supra note 8, at 103–04.
23 Rifkind, supra note 8, at 108 (citing United States v. IBM, 67 F.R.D. 40 (S.D.N.Y. 1969) in which the "government announced it would call 100 witnesses, and IBM said it would call 400" in a trial that the judge promised would take one year to try and one year to decide).
24 Id. at 108 (citing United States v. Dardi, 330 F.2d 316 (2d Cir. 1963)). The author cynically asked whether such process actually "constitute[d] a trial." Id.
25 Id. at 108 n.13 (citing United States v. Ark. Fuel Oil Corp., 1960 Trade Cas. (CCH) ¶ 69,619 (N.D. Okla. 1960) (involving a case in which 84 lawyers represented the defendant)); see also United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945) (commencing upon a complaint which named 63 defendants).
26 For example, a Westlaw search conducted on December 1, 2006 in the "All Federal Cases" database (ALLFEDS) using the terms "at(Skadden & Kirkland & Sidley)" yielded seven results. The first result was Pinney v. Nokia, Inc., 402 F.3d 430 (4th Cir. 2005), a case in which eighteen plaintiffs and fifty-three defendants were represented by fifty-one lawyers in a tort action involving telephone radio transmissions. The second result, Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749 (5th Cir. 2001), while having only ten litigants, featured fifty lawyers in a health care fraud case. This is not meant to be scientific; it serves only as an illustration of the complexity of the cases and the extensive participation of the litigants.
27 Kirkham, supra note 7, at 208.
28 Rifkind, supra note 8, at 98; see also id. at 110 (stating that the complexity of such fields of law as antitrust and securities overburdens the courts, whose subsequent inconsistent decisions "make[] the law less certain" and "lessen[] respect for both the courts and the law").
29 Kirkham, supra note 7, at 208; see also id. at 200–01 (expressing fear of judicial and jury determination of "suit[s] affecting millions of stockholders, hundreds of thousands of employees, pension and trust funds, banks and lending institutions," and suggesting that courts' interpretations of an "unreasonable restraint of trade" for purposes of the Sherman Act would be akin to a legislature's interpretation of the Due Process Clause).
The Pound Conference’s criticisms and Burger’s suggested solutions have found reception both among judges and—perhaps more obviously—among legal practitioners. Practitioners and litigants have deserted the federal courts for private litigation in ever increasing numbers.30 In addition, both Congress and the federal judiciary itself have taken Burger’s admonitions to heart. Congress passed the Civil Justice Reform Act (CJRA)31 in 1990, requiring five experimental district courts to adopt ADR methods to “reduce[e] cost and delay in civil litigation.”32 After the CJRA was allowed to sunset in 1997, Congress enacted the Alternative Dispute Resolution Act (ADR Act)33 in 1998, requiring every federal district court to make ADR available to litigants.34

Likewise, the federal judiciary has renewed its concerns with overloaded dockets and inefficiency expressed at the Pound Conference. Notions of efficiency and cost-effectiveness underlay the Judicial Conference’s Long Range Plan of 1995, which “encourage[d] each federal court to expand the scope and availability of alternative methods of dispute resolution,” noting the difficulty of “receive[ing] early and firm trial dates.”35

The Plan’s concern with efficiency goals translated into a series of 110 recommendations and 77 suggested implementation strategies.36 Although the Long Range Plan generally advised Congress not to enlarge federal jurisdiction, one specific recommendation hinted at

30 Catherine Cronin-Harris, Mainstreaming: Systematizing Corporate Use of ADR, 59 ALB. L. REV. 847, 848–58 (2004) (tracing the expanded use of ADR in the business world); Alan W. Kowalchyk, Resolving Intellectual Property Disputes Outside of Court: Using ADR to Take Control of Your Case, 61 DISP. RESOL. J., May-July 2006, at 28, 30 (noting the attraction of using ADR to resolve intellectual property disputes because it is “less costly and faster . . . less formal than litigation, it allows for less discovery, judicial rules of evidence do not apply”); Jack M. Sabatino, ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution, 47 EMORY L.J. 1289, 1300–01 (1998) (surveying the vast possibilities for ADR forums, including a litany of special court-annexed ADR codifications for disputes involving forestry practices, public school bus routes, surface water rights, and earthquake insurance, among other things). But see Eisenberg & Miller, supra note 4, at 2, 19–21 (arguing that litigants in certain fields have begun to shun ADR).
32 Id. § 104(b)(2), 104 Stat. at 5097.
34 Id.
36 Id. at 21–144.
another potential source of dissatisfaction among litigants: judicial expertise.37

Criticisms of the absence of judicial expertise have produced predictable results. Increasingly, for litigants who don’t want to subject themselves to the capriciousness of a sympathetic jury or nonexpert judge, the allure of arbitration is too good to pass up.38 In forums where “parties can select a decision maker with expertise”39 and avoid “an unsophisticated, uninformed jury,”40 the risks of watching an untrained or insufficiently attentive decisionmaker misconceive the complex scientific or economic issues in one’s case are reduced.

The sheer burden of these cases and the sheer volume of matters tried and pending before the courts is also an area of concern for litigants. In addition to the transactional costs that deter litigants from entering the federal courts, judges’ bursting dockets deter the judges themselves from wanting to take additional cases. Both the 1976 Pound Conference and the 1995 Long Range Plan made overtures to the unwieldy state of federal dockets. While the 1976 Pound Conference looked to ADR as the judiciary’s savior, the Long Range Plan admonished Congress to shrink jurisdiction, while continuing Burger’s call to increase the use of ADR.41 Judith Resnik summarized the consensus within the federal judiciary as follows: “Don’t expand the life-tenured ranks . . . . Rely . . . on delegation . . . of non life-tenured federal judges, as well as [on] devolution to the states or retrenchment on access to federal courts . . . .”42

37 Id. at 109-10 (advocating for more extensive “education and training” for judges and noting that the “[s]ocial, technological and demographic changes will require a higher level of judicial competence”).


39 Kowalchyk, supra note 30, at 30, 33 (noting that in some IP mediations, a team of mediators may be used, each of whom possess expertise in the different issues that arise in the mediation).

40 Arnold, supra note 5, at 1049 (describing judges as “the luck of the draw among friends of Senators” who are “without sophisticated patent, technology, copyright and business experience and are overworked”).

41 CONF. ON LONG RANGE PLANNING, supra note 35, at 23-39.

42 Judith Resnik, The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations, 86 Geo. L.J. 2589, 2610 (1998). Resnik has also noted Congress’s enthusiasm for creating new substantive rights, which would seem to place Congress’s objectives in the area of federal causes of action in direct conflict with both the objectives of the federal judiciary and the goals of the CJRA and the ADR Act. See Judith Resnik, “Uncle Sam Modernizes His Justice”: Inventing the Federal District
There exists agreement among litigants, Congress, and the federal courts that something must be done about the unwieldy nature, inefficiency, and nonexpertise of federal adjudication. Up until now, the answer to that question has been to transfer decisionmaking responsibilities to private arbitrators and mediators. While these forums offer significant advantages—such as expertise and efficiency—many commentators point out their drawbacks.

B. ADR and its Discontents

The inefficiencies and nonexpertise of the federal courts deter litigants from using them to resolve their disputes. In recent years, they have filled that void by turning to alternative forums. Private ADR, although hardly novel, provides litigants with that alternative forum.

ADR exists in a variety of forms. While in arbitrations a neutral party selected by the litigants determines the legal issues in dispute, mediation involves a neutral third party lacking the power to impose a solution. Arbitrators can conduct the proceedings according to the manner in which the litigants customize them. Correspondingly, the arbitrations can be “less formal, faster, and less expensive than the judicial process.” Arbitrations can be either binding or nonbinding, upon which the litigants must agree before hand.

Courts of the Twentieth Century for the District of Columbia and the Nation, 90 GEO. L.J. 607, 649 (2002) (noting the “474 new causes of action” created by Congress between 1974 and 1998). On the other hand, the current twenty-first century Supreme Court has shown a willingness to expand federal jurisdiction while decreasing the discretion exercised by district court judges. See Sherry, supra note 8, at 98, 127 (arguing that appellate judges have ignored the rigors of trial court litigation in enunciating “fuzzy rules on jurisdictional questions and clear rules limiting trial court discretion” which has produced disputes over jurisdiction rather than the merits of cases).

43 See Sabatino, supra note 30, at 1297 (“Commercial arbitration has been practiced for centuries and statutorily authorized for decades.” (footnote omitted)).


45 Id. at 194. The verdict is still out on whether ADR truly is faster and less expensive. Compare James S. Kakalik et al., An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act 4 (1996) (finding “no strong statistical evidence that time to disposition, litigation costs, or . . . satisfaction with case management were significantly affected, either positively or negatively” by the use of ADR), with Donna Stienstra et al., Fed. Judicial Ctr., Report to the Judicial Conference Committee on Court Administration and Case Management 215 (1997) (finding a twenty-eight percent improvement on the median age of cases at termination for cases in the Western District of Missouri required to participate in an ADR program, compared with those not permitted to participate).
Mediation consists only of negotiations in which a mediator seeks to reach a result suitable to both parties.\textsuperscript{46} Other forms of ADR combine arbitration and mediation in different ways, again, according to prior agreement by the litigants. \textit{Mini-trials} and \textit{summary jury trials} allow attorneys to present their cases before an advisory group, and in some cases a jury, who then provide feedback on the relative merits of each case.\textsuperscript{47} One further variant is \textit{early neutral evaluation} where a neutral party identifies the strengths and weaknesses of the litigants' cases in an effort to compel settlement.\textsuperscript{48} Furthermore, Rule 68 of the Federal Rules of Civil Procedure permits defendants to tender offers of settlement to plaintiffs before trial.\textsuperscript{49}

Congress has also helped shape ADR, enacting two statutes to promote its use.\textsuperscript{50} The first—the aforementioned CJRA\textsuperscript{51}—required certain pilot federal districts to refer "appropriate cases to [ADR] programs" and offer nonbinding early neutral evaluation programs where litigants present their cases to a neutral party.\textsuperscript{52} It involved a limited number of federal district courts for a limited number of years. The second—the aforementioned ADR Act,\textsuperscript{53} which essentially replaced the CJRA after it expired in 1997—requires every federal district to implement an ADR plan for use in all civil actions.\textsuperscript{54} District judges may refer cases to arbitration, where decisions are then entered as the judgment of the court if a party to the arbitration fails to file a written demand for a trial de novo following the arbitration.\textsuperscript{55}

Litigants bear the costs of the arbitrator. Although ADR proponents argue that these costs are more than offset by the brevity of the proceedings,\textsuperscript{56} ADR's detractors cite the exorbitant fees that arbitrators...
tors charge,\(^57\) bemoaning the development of a system of "second class justice" in which "the better-off can avoid [courts] by buying their way into the litigation counterpart of a gated community."\(^58\)

Its proponents recognize this opposition. Judge Wayne Brazil, for example, acknowledged both the "second class justice" concern and the concern about falling rates of cases that are actually terminated during or after a trial.\(^59\) Although Brazil advocates adding ADR services to the federal courts, he cautions against "assess[ing] ADR program value with myopic self-congratulation"; he cites reports in the Northern District of California showing that while 47% of mediators believed the effectiveness of ADR processes, only 22% of parties felt similarly.\(^60\)

ADR’s critics are even more scathing. Most bemoan not only its ineffectiveness, but its tendency to remove important cases from federal jurisdiction. Professor Owen Fiss’s 1984 article, for example, claimed that encouraging settlement served only to avoid controversy, which correspondingly avoided resolution of cases important to society.\(^61\) Other commentators claim that contractually-compelled arbitration will soon place particular types of cases—like consumer class actions—outside the jurisdiction of the federal courts.\(^62\) And still others say that taking such cases outside of federal jurisdiction—while bringing costly and protracted litigation to a resolution—doesn’t

\(^57\) \textit{In re Atlantic Pipe Corp.}, 304 F.3d 135, 144 (1st Cir. 2002).
\(^58\) \textit{Rowe Et Al.}, \textit{supra} note 44, at 215.
\(^59\) Brazil, \textit{supra} note 4, at 125 (citing a study finding that the percentage of cases terminated during or after trial decreased from 4.3% to 2.2% of all civil case terminations between 1990 and 2000).
\(^60\) \textit{Id.} at 146-47.
\(^61\) Fiss, \textit{supra} note 4, at 1076. Fiss illustrates quite vividly the societal import of such issues by distinguishing uncontroversial cases involving corporate litigants of equal bargaining strength with scenarios such as "a struggle between a member of a racial minority and a municipal police department over alleged brutality, or a claim by a worker against a large corporation over work-related injuries." \textit{Id.}
\(^62\) Myriam Gilles, \textit{Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action}, 104 Mich. L. Rev. 373, 375-76 (2005) (arguing that the rise in use of contractual class action waivers prevents consumer class actions not only in the federal courts, but in arbitrations as well); see also Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94 (1991) (holding valid and binding a forum clause placed on already-purchased tickets, and finding consent to the clause despite plaintiffs’ inability to view the tickets until after the purchase had been made). Presumably, after \textit{Carnival Cruise}, a defendant seller could always compel arbitration or a class action waiver by including one with the purchased product, and as Gilles points out, "it will become malpractice for corporate counsel \textit{not} to include such clauses." Gilles, \textit{supra}, at 377 (emphasis added).
ensure that arbitrators have adhered to legal standards or that the public interest has been served.63

Finally, one of the greatest concerns over the increased use of ADR is its tendency to undermine further development of the law. ADR proponent Judge Brazil acknowledged certain judges' fear that "ADR may be used to reduce the opportunities the courts and the public have to develop new legal norms."64 Professor Fiss put it in somewhat starker terms, claiming that settlements "deprive . . . court[s] of . . . the ability to render an interpretation . . . . To settle for something means to accept less than some ideal."65 In other words, arbitrators have effectively become the interpreters of law, while judges have devolved to a last resort: If things go really poorly, we'll let the courts step in; otherwise the arbitrator's word is final.

In a more recent criticism of ADR, Professors Perschbacher and Bassett argued that ADR suspends the growth of legal precedent.66 They argue that fewer decided cases result in a body of law with "far fewer formal, publicly announced decisions applying rules and standards" which in turn "distort[s] the law, because [ADR] . . . do[es] not constitute legal precedent."67 Correspondingly, the opportunities for a judge to apply a statute or legal standard to new sets of facts are reduced, while non precedential arbitration decisions, over which the courts don't always exercise oversight, take their place. The law thereby sacrifices its predictability and uniformity in the name of efficiency.

Ultimately, ADR's dissimilar treatment of similar factual scenarios, inconsistent conclusions, preclusion of the adjudication of important cases, and neglect of judge-made common law, demand a solution. Much like the manner in which the dual systems of common law and equity eventually found a common ground, so must ADR and traditional adjudication bridge the gaps between them.68

In light of this, one commentator has argued that certain procedural gaps have effectively already been bridged.69 Others argue that

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63 Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 677-78 (1986) (giving environmental law and family law cases as examples that do not belong in arbitration or mediation).
64 Brazil, supra note 4, at 125.
65 Fiss, supra note 4, at 1085–86.
66 Perschbacher & Bassett, supra note 5, at 19–22.
67 Id. at 27.
68 Tidmarsh, supra note 11, at 576–77 (arguing generally for a "new merger" between "our present legal procedure with the 'new equity'"—alternative dispute resolution).
69 Sabatino, supra note 30, at 1295 (arguing that certain procedural norms such as notice, discovery, partisan submissions, and subpoenas emerge in ADR).
ADR must incorporate even more procedural norms to make the two systems compatible, while still others argue that court-annexed ADR is in fact public and thus amenable to due process restrictions.70

Scholarly proposals to bridge the gap between public and private adjudication are as numerous as scholarly criticisms against public and private adjudication. But rather than merging two somewhat incompatible systems, why not create new forums within already existing administrative agency infrastructure to absorb the excesses of both? The creators of administrative agencies fashioned them as disinterested experts capable of resolving the complexities of the modern age.71 Why not use their expertise in the adjudication of today’s most complex and docket-consuming litigation?

The intellectual foundation for such an infrastructure would arise from case management, a phenomenon that grew out of the 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure.72 Case management’s strongest—and most controversial—incarnation has arguably been Judge Jack Weinstein, who orchestrated resolutions to complex cases such as the Agent Orange and DES claims.73 Weinstein’s managerial activism prompted one writer to brand him a “creator of the ‘temporary administrative agency’” due to his expansion of the court’s reach in involving more “actors and institutions . . . in a given” litigation controversy.74

The notion of the judge as an administrative agency evokes images of the self-professedly disinterested and expert administrator

70 Reuben, supra note 4, at 954–55. Reuben also notes that arbitrators under certain arbitration rules issue written opinions to litigants. Id. at 1083–84. These opinions do not serve as stare decisis precedent in future arbitrations, however. See Paul R. Verkuil, Privatizing Due Process, 57 ADMIN. L. REV. 963, 983–87 (2005) (noting that the Supreme Court regularly affirms arbitration decisions, despite potential Due Process concerns and therefore arguing for more procedural safeguards to be implemented through congressional enactment); supra note 11 (discussing other solutions to the private-public court divide).


72 See FED. R. CIV. P. 16 advisory committee’s notes (1983 amend.) (requiring a scheduling order and a final pre-trial conference prior to adjudication, effectively granting a quasi-administrative role to judges in the litigation process).


who issues regulations in his field of specialty unburdened by special interest or political coercion.\textsuperscript{75} One commentator has run with that evocation, claiming that in the mass tort context, administrative agencies—with authority derived from Congress to “effect binding regulation”—should act as facilitators of private agreements, rather than relying upon docket-burdened judges like Jack Weinstein.\textsuperscript{76} The rationale is that agencies are sufficiently capable to balance the numerous and competing interests often at stake in such complex cases.

Parts II, III, and IV of this Note will sprint forward with that suggestion, arguing that Congress can and should offer litigants an expert and disinterested administrative alternative to both ADR and the federal courts.

II. INSTITUTIONAL LEGITIMACY AND PRECEDENTIAL VALUE

A. Why Does the Legal System Need Precedent?

Although the Posner-Pitofsky-Hovenkamp antitrust dream team panel mentioned in the Introduction would not be inconceivable in an ADR setting, its opinions would not promote the development of public law. This Part proposes that Congress’s hybrid system of expert adjudicators bestow upon the legal community the fruits of its expertise by resolving legal disputes in public forums and issuing reasoned opinions.

Of course, simply arguing for public resolution of disputes and written opinions certainly begs the question: Why is the development of law through institutional resolution of legal disputes important? Many commentators would argue against it. One main purpose of ADR, they say, is to insulate litigating parties from the public view.\textsuperscript{77} Such a view is not without its critics, however, who argue that secrecy not only advantages the more well-equipped party,\textsuperscript{78} but often allows

\textsuperscript{75} See Landis, supra note 71, at 28.

\textsuperscript{76} Richard A. Nagareda, Turning From Tort to Administration, 94 Mich. L. Rev. 899, 904 (1996).

\textsuperscript{77} Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 Geo. L.J. 2663, 2683 (1995) (criticizing those demanding a “full public airing of the fact-finding and discovery process” as too focused “on the needs and interests of those other than the immediate parties to [the] . . . dispute”).

\textsuperscript{78} See Fiss, supra note 4, at 1075 (“Consent is often coerced; the bargain may be struck by someone without authority . . . justice may not be done.”).
the arbitrator to arrive at results in conflict with governing legal norms.\footnote{79}{See Frank Elkouri & Edna A. Elkouri, How Arbitration Works 586, 533–40 (Alan M. Ruben ed., 6th ed. 2003). "[W]hile court decisions can influence an arbitrator's decision...[n] in some instances...arbitrators disagree with the decisions handed down by courts and refuse to follow them." \textit{Id.} at 538–40. Ultimately, the rules an arbitrator follows are drafted "by the parties themselves...As such, private-sector parties are free to control the degree to which the arbitrator is to consider external law, including statutes, and regulations, in deciding the case." \textit{Id.} at 486 (footnote omitted).}

But there exist still other reasons why a good adjudicatory system should have both precedent and institutional legitimacy. First, publication of legal opinions from resolved cases provides the public with notification of what the law is.\footnote{80}{See David M. Engel, Legal Pluralism in an American Community: Perspectives on a Civil Trial Court, 1980 AM. B. FOUND. RES. J. 425, 435–36 (contesting the assertion that informal resolution of conflicts in society form "customary law" in the way that "cases and controversies" form common law; asserting that "[f]rom cases and controversies emerge new law, new norms, and new relationships"); Jack B. Weinstein, Some Benefits and Risks of Privatization of Justice Through ADR, 11 OHIO ST. J. ON DISP. RESOL. 241, 249 ("For law to serve its function as giving expression to enforceable behavioral norms, it must be made publicly for all to see...Members of the public must know what the law is...").}

ADR, although it gives directives to the parties involved, does not create any binding precedent upon which later litigants can rely.\footnote{81}{See Elkouri & Elkouri, supra note 79, at 588–89, 596–98 (noting that arbitration decisions may preclude future arbitration through res judicata or collateral estoppel, but that the persuasive weight of arbitration case law depends upon the persuasive value that individual arbitrators choose to give it in individual arbitrations). Additionally, the development of a unified body of arbitration case law depends largely upon the arbitration decisions that actually make it to publication. See Reuben, supra note 4, at 1083–87. Professor Reuben notes that different arbitration organizations have different rules regarding the publication of written opinions: Some advocate for it, while most cite it as an invitation to judicial review. Reuben also notes that in the labor arbitration context, "in which written and reasoned opinions have been customary for years, only an estimated ten percent of the opinions issued are actually published." \textit{Id.}}

Second, development of the law through judicial opinions provides a building of consensus on how a particular (and oftentimes ambiguous) statute will be applied.\footnote{82}{Antitrust law presents perhaps the most salient example of an ambiguous statute, the Sherman Act, 15 U.S.C. §§ 1–7 (2000 & Supp. IV 2004). The Sherman Act prohibits "[e]very contract, combination...or conspiracy, in restraint of trade." This ambiguity has found some clarity through judicial interpretation. \textit{See, e.g., Bd. of Trade of Chi. v. United States, 246 U.S. 231, 239–41 (1918) (qualifying antitrust prohibitions in allowing certain reasonable restraints designed to enhance competition); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 351–55 (1897) (holding, in one of the first antitrust cases, that combinations and contracts restricting trade only collaterally to a sale might not be banned by the antitrust laws, but that others..."'}
Third, judicial interpretation and publication of the law affords the legal system flexibility in the event that perceptions of governing legal norms change over time. Third, judicial interpretation and publication of the law affords the legal system flexibility in the event that perceptions of governing legal norms change over time.88 Fourth, publication of reasoned opinions gives the public and politicians a chance not only to react, but to act upon application of particular legal standards by changing them through the legislative process.84 Finally, and this is perhaps the point made most often by ADR’s critics, public scrutiny and resolution of certain legal disputes forces society to confront certain problems that might otherwise receive short shrift.85

Administrative agencies can provide an alternative both to traditional forums for adjudication and forums of alternative dispute resolution. On the one hand, administrative agencies and their courts mimic many of the formalities of the courts, including application of were); United States v. Addyston Pipe & Steel Co., 85 F. 271, 278–79 (1898), aff’d, 175 U.S. 211 (1899) (reaffirming Trans-Missouri and holding that contracts void at common law had been made unlawful by the Sherman Act).


85 See Fiss, supra note 4, at 1085–87 (advocating for the position that litigation should seek “Justice Rather Than Peace”); supra text accompanying notes 61–63.
all relevant legal authority; on the other hand, agency adjudications can progress more quickly than traditional trials due to the absence of certain legal formalities. Additionally, they are conducted by administrative law judges (ALJs), who possess expertise in their field.

B. The Administrative Procedure Act’s Default Rules

The Administrative Procedure Act establishes general rules for agency action. The modes of agency action consist of two general modes of rulemaking (informal and formal rulemaking), and two general modes of adjudication (informal and formal adjudication). The first, informal rulemaking—otherwise known as notice and comment proceedings—permits agencies to adopt rules of governance by giving written notice to affected persons of an agency’s proposed rule and permitting those persons to comment upon the proposed rule. The agency must then take those comments into account in promulgating a final rule constituting the agency’s “basis and purpose” for the rule adopted. The second, formal rulemaking, requires the agency to follow an elaborate set of procedures before adopting a final rule, permitting cross-examination, discovery, rules of evidence, etc. The

87 See infra Part III.
90 Id. § 553(c); see, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (requiring agencies to divulge the “thinking that has animated . . . a proposed rule and the data upon which that rule is based”); Auto. Parts & Accessories Ass’n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (adding in dicta that the “concise general statement of . . . basis and purpose” mandated by Section [553] will enable [the reviewing court] to see what major issues of policy were ventilated by the informal proceedings”); see also Lawson, supra note 88, at 243–52 (describing “hybrid APA rulemaking,” in which judges on the D.C. Circuit—the court in which the majority of administrative appeals are heard—grafted additional procedural requirements onto agency rulemaking). But see Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 545–46 (1978) (prohibiting appellate courts from reviewing and overturning agency rulemaking proceedings on the basis of the procedural devices employed). Vermont Yankee has been understood to apply only to the proceedings themselves, and not to the additional requirements that courts may graft onto the process of “notice and comment” or publication of a “basis and purpose.” Lawson, supra note 88, at 273–83.
91 5 U.S.C. §§ 553, 556–557. The formal rulemaking procedures are listed in §§ 556–557. Section 553 establishes that agencies must follow these procedures only when the individual agency’s organic statute calls for a hearing “on the record.”
third, informal adjudication imposes "essentially no procedural constraints" on the agency in deciding disputes arising between parties.\textsuperscript{92} Finally, formal adjudication imposes the entire panoply of procedures on agency action between individual litigants.\textsuperscript{93} These procedures include notice to the parties, discovery, cross examination, etc., but are generally regarded as less restrictive than the Federal Rules of Evidence.\textsuperscript{94} Although Congress's hybrid system of administrative adjudication would use only the fourth method of agency action (i.e. formal adjudication), agencies do possess wide discretion to use a combination of rulemaking and adjudication in resolving disputes.\textsuperscript{95}

C. A Look at One Agency and How it Would be Imitated

The APA represents merely a default. Congress may impose additional rules on individual agencies in their enabling statutes. The important point is that Congress can create an agency however it wants with whatever procedures it wants, subject to constitutional restraints.\textsuperscript{96} Consequently, Congress could legislate a hybrid system of expert administrative adjudication however it wants. To simplify
things, I will focus on one agency—the Commodity Futures Trading Commission (CFTC)—whose formal adjudicatory structure demonstrates the efficiency, expertise, and legitimacy that the hybrid adjudicatory system must have. A system structured similarly to the CFTC could realize some of the attributes that neither public nor private law possesses.

The CFTC has authority to implement the Commodity Exchange Act (CEA), which, among other things, permits disgruntled customers of professional commodity brokers to bring causes of action against brokers for violations of the CEA. One could easily imagine such a provision in the SEC Act or the FTC Act, where, for example, antitrust litigants could have their cases heard before our dream team Posner-Pitofsky-Hovenkamp panel, or a panel of similar expertise but lesser renown.

Within the CFTC, litigants bring their claims before an ALJ, who follows the procedural restraints of agency regulations and the APA in reaching a decision. The litigants bring the claims and the ALJ resolves the claims in a formal adjudication. Furthermore, ALJ resolution culminates in a reasoned opinion following established statutory, judicial and agency precedent. Whether that opinion binds future agency adjudications as a stare decisis-type precedent has been a subject of controversy; the controversy has largely found resolution in the affirmative, albeit not without some disagreement.
such an affirmation, however, Congress could stipulate that ALJ decisions serve as precedent by stipulating in the agency's enabling statute that prior adjudications will either bind through stare decisis or at least serve as highly persuasive precedent in future adjudications.102 And in fact, many agencies that act principally through adjudication reviewing agency actions required agencies to adhere to established agency precedent. See United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 280 (1929) (if an agency "interpretation has not been uniform, it is not entitled to... respect or weight"). The Court shifted gears in 1984, however, deciding that agencies are best positioned to interpret their statutory mandates, and upholding an agency action "if the statute is silent or ambiguous with respect to the specific issue," and the interpretation "is based on a permissible construction of the statute." Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The natural corollary to Chevron would seem to be that agencies are free to interpret their regulations in one way one day and another way the next. The Court, however, has made two recent attempts to ensure more adherence to agency precedent. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (holding that courts defer to agency actions only where "Congress delegated authority to the agency... to make rules carrying the force of law; and... the agency interpretation... was... in the exercise of that authority" (emphasis added)); Christensen v. Harris County, 529 U.S. 576, 586-87 (2000) (holding that agency opinion letters interpreting agency regulations and statutes—in contrast to formal adjudications—"lack the force of law" and are not entitled to Chevron deference (emphasis added)). Additionally, courts should look to agency consistency in determining a measure of deference. Id. The Court in Mead and Christensen held that when confronted with mere opinion letters or statements of policy that interpret statutes, courts should apply Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that deference to the agency "depend[s] upon... all those factors which give it power to persuade"), and its style of deference instead of Chevron deference. Mead, 533 U.S. at 219; Christensen, 529 U.S. at 587. Although this ensures that agencies will adhere to precedent when promulgating opinion letters and statements of policy (interpretations "lacking the force of law"), Murphy feels that agencies have free reign to abandon past precedent when they see fit. Murphy, supra, at 1022 ("Chevron... suggested that agency consistency should have little bearing on deference."). Murphy proposes instead a "commitment theory" in which agency interpretations—including orders issued in formal adjudication—would receive deference only if consistent with prior agency interpretations. Id. at 1071-72. In reality, his fears may be a bit overblown. In addition to the APA, which prohibits agency action that is "arbitrary, capricious, [or] an abuse of discretion," 5 U.S.C. § 706(2)(A) (2000), the D.C. Circuit—a leading voice on administrative law—has said that an agency "cannot ignore its own relevant precedent but must explain why it is not controlling." LeMoyne-Owen Coll. v. NLRB, 357 F.3d 55, 60 (D.C. Cir. 2004) (citing BB & L, Inc. v. NLRB, 52 F.3d 366, 369 (D.C. Cir. 1995)) (reversing NLRB determination that faculty members were not management for purposes of collective bargaining because of contradiction with prior precedent).

102 See Lawson, supra note 88, at 197 ("[O]rganic statutes... empower and limit the agency in question.").
operate in this manner. In such agencies, the adjudicators constitute part of the administrative policymaking scheme, which, although largely concerned with application of administrative policy, is nevertheless bound by established law and Congress’s limited grant of jurisdiction to it. The Posner-Pitofsky-Hovenkamp ALJ dream team, along with a cadre of other adjudicators similarly situated in an administrative agency, could thereby establish precedent in cases between individual litigants and later rely—and cause other agency adjudicators to rely—on that precedent in deciding future cases.

Although ALJs under most statutory schemes may occasionally depart from established precedent, courts generally disfavor it. It is occasionally allowed, however, in those circumstances where a particular case calls for the establishment of a new rule or alternative treatment. In these instances, the ALJ behaves more like a policymaker than an actual judge. The ALJ sets policy that potentially departs from agency precedent but still preserves his adjudicatory duties. His quasi-policymaker, quasi-adjudicator role evokes images of Judge Weinstein’s managerial judging mentioned in Part I. Unlike generalists like Judge Weinstein, however, ALJs possess expertise in their respective fields appropriate to resolve complex cases. And unlike arbitrators, their decisions demand precedential deference from future adjudicators. The ideal ALJ in this scheme is therefore an expert adjudicator who can slip on a policymaking hat from time to time, and upon whose decisions future litigants can rely.

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103 See Magill, supra note 95, at 1394, 1399 (noting that orders of the NLRB and FERC operate as precedent and also noting which agencies rely mainly on adjudication and which on rulemaking); see also Charles H. Koch, Jr., Policymaking by the Administrative Judiciary, 56 ALA. L. REV. 693, 703–05 (“Stare decisis is not the rule in administrative adjudications [although] . . . agencies . . . are held to precedent only until a change can be justified. . . . [A]dministrative law demands consistency in agency adjudicative decisions . . . but consistency attentive to the need for dynamic administration.”).

104 See Koch, supra note 103, at 705 (arguing that agencies must have the flexibility to allow their law to evolve and “adjust to the real world and to learn from experience”).

105 See id. at 720–30 (advocating for greater ALJ policy participation through liberal intervention, record-building, and liberal use of the rules of evidence in adjudications).

106 See Murphy, supra note 101, at 1033 (noting that the notion of Chevron deference is predicated in part on the fact that “agencies generally possess greater technocratic expertise than courts”).

This Part showed how administrative courts can attain the principles of institutional legitimacy and precedential value—indispensable attributes of our common law system that are largely absent from ADR. Part III will consider attributes of an inverse quality from those discussed in Part II: efficiency and expertise are the hallmarks of any good arbitration panel, but generally elude the grasp of traditional adjudication.

III. EFFICIENCY AND EXPERTISE

Part II commenced with a question of purpose. This Part will do the same: Why are efficiency and expertise important elements of a system of adjudication? First, litigants want it, and if adjudicatory regimes place themselves at the service of litigants, then litigants shouldn’t be made to feel unserved. As shown in the introduction, revolutions in adjudication occur when litigants are dissatisfied with what they are getting. Where can one see this more markedly than in the context of ADR. The common sense view is that litigants shun traditional forms of adjudication in favor of alternative dispute resolution for a myriad of reasons. Litigants and the legal community in general have voiced complaints about the lack of expertise among judges, the inefficiency of the process, and the panacea

108 See supra notes 8–30 and accompanying text.
109 See Carrie Menkel-Meadow, Dispute Resolution: The Periphery Becomes the Core, 69 JUDICATURE 300, 300 (1986) (noting that the forces underlying ADR developments focused on “participation, flexibility of both process and result and access to justice of those previously foreclosed”). Additionally, see Judge Posner’s opinion in an appeal from a 60(b) order setting aside an arbitration award, which noted that the defendant “wanted something different from judicial dispute resolution. It wanted dispute resolution by experts in the insurance industry who were bound to have greater knowledge of the parties, based on previous professional experience, than an Article III judge, or a jury.” Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983).

110 See e.g., MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW 200 (1990) (listing the criteria for choosing international arbitrators as “experience of the arbitrator, preferably in the specific area” and the “arbitrator’s knowledge of the languages of the litigants or of the language in which the proceedings will take place”); Wayne D. Brazil et al., Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution, 69 JUDICATURE 279, 284 (1986) (noting the criteria for choosing neutrals in early neutral evaluation as including “reputation for good judgment and fairness, experience in litigation, and to the extent possible, expertise in the subject area”); see also Michael Noone, Mediating Personal Injury Disputes, in RETHINKING Disputes 23, 40 (Julie Macfarlane ed., 1997) (noting the complexity of personal injury compensation and the “need for depth of knowledge in personal injury law” among mediators).
that ADR can provide. Second, certain cases demand efficiency and expertise, and litigants in those cases often cannot trust the technical ability of a generalist judge. The cases mentioned by the presenters at the 1976 Pound Conference are illustrative. Antitrust provides perhaps the most prominent and complex example, but other areas of the law can prove to be just as complex and just as wanting of a technically-sound decisionmaker. Third, democracy demands efficient and precise resolution of disputes. Completely aside from efficiency’s embodiment in our nation’s founding documents, the undercurrents of demands for efficiency as a democratic necessity color the literature of the legal field.

Administrative law courts respond to these demands. From their very inception, administrative agencies were billed as expert disinterested regulatory regimes that could deal with issues of commerce.

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111 See Rubino-Sammaritano, supra note 110, at 200 (“Those trained in law sometimes indulge in slow . . . proceedings . . . which is exactly what the parties usually wish to avoid by referring the dispute to arbitration.”).

112 See Brazil et al., supra note 110, at 279 (noting studies showing that expediting pleadings and discovery through mediation can speed adjudication).

113 See supra text accompanying notes 23-25 (citing antitrust cases involving thousands of documents, hundreds of witnesses and dozens of lawyers in a complex area of the law).

114 See, e.g., FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 462 (1986). In this case, the defendants made certain pro-competitive justifications for concertedly withholding x-ray information from insurance companies, among them that “x-rays, standing alone, are not adequate bases for diagnosis of dental problems or for the formulation of an acceptable course of treatment.” Id. Whether a district court would be equipped to answer that question and others inevitably arising in the course of litigation is a point of dispute.

115 See Kowalchyk, supra note 30, at 30 (discussing the use of ADR in IP context); see also Dianne Saxe, Water Disputes in Ontario: Environmental Dispute Resolution and the Public Interest, in RETHINKING DISPUTES, supra note 110, at 233, 237 (noting the appeal of “technically qualified mediators” in environmental disputes).

116 U.S. CONST. amend. VI (providing right to a speedy and public trial by an impartial jury in criminal prosecutions).

117 See Tidmarsh, supra note 11, at 564 (noting that litigation has sprawled into a complex system in which attorneys often have the most at stake, clients have lost their ability to “decide whether, when, where, and against whom to bring suit,” and extreme expenses and delays are more often the norm than not (citing In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1338-40, 1344-46 (E.D.N.Y. 1985) (costing $9 million in attorneys’ fees in $180 million class settlement with 2.4 million plaintiffs)); see also Burger, supra note 15, at 92 (“Jurors, witnesses and litigants continue to have their time squandered. They are . . . shuffled about court-houses in confusion caused by poor management within the courts. The delays and high costs in resolving civil disputes continue to frighten away potential litigants.”).
energy resources, drugs, etc. more effectively than Congress. Obvi-
ously, the regulatory state itself has its critics. Rather than tackle
the criticisms of the administrative state from the nondelegation per-
spective, I will focus instead upon the adjudicators within administra-
tive agencies—administrative law judges.

The expertise virtues of using administrative courts in specialized
adjudication arise from the nature of the adjudicators themselves. The
Office of Personnel Management examines, certifies, and
appoints competent ALJs through a lengthy process of interviews,
tests, and evaluations. Through a practice known as "selective certi-
fication," ALJ candidates with particularized expertise can receive
preference in appointment as long as they have two years of experi-
ence hearing formal cases in the field. An individual agency, such
as the FTC for example, when seeking to appoint ALJs with special-
ized antitrust knowledge—such as the Posner-Pitofsky-Hovenkamp
panel—could select them on the basis of expertise "in the field of [antitrust] law." The agency—and, incidentally, those appearing
before agency adjudicators—therefore have an expectation that the
adjudicators possess the requisite expertise.

Additionally, the expertise of the ALJs within each agency will be
implemented over the jurisdiction that each agency possesses. Rather
than submitting their disputes before a traditional forum of general
jurisdiction, litigants could bring their disputes before specialized
tribunals. Because each agency possesses its own ALJs, whose skills are
specially tailored to adjudicating specialized disputes, litigants will
gain the benefits of expert adjudications that those agencies offer. In

118 Landis, supra note 71, at 154–55 (1938) (referring to agency administrators as
"men of professional attainment in various fields").

119 See, e.g., Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power:
(arguing that the Necessary and Proper Clause is an affirmative grant of legislative
power, but it is limited by the word "proper" and by underlying constitutional princi-
ples, including separation of powers); Peter B. McCutchen, Mistakes, Precedent, and the
Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 COR-
NELL L. REV. 1, 9 (1994) (advocating a formalist approach to separation of powers that
would permit "[n]o commingling of legislative, executive or judicial power ... except
where specifically provided in the constitutional text" and acknowledging that such a
model would not harmonize with the current administrative state). The nondelega-
tion concerns raised by these authors are beyond the scope of this Note.

120 See supra Part II (discussing ALJs in the CFTC).

121 See Jeffrey S. Lubbers, Federal Administrative Law Judges: A Focus on Our Invisible

122 Id. at 117–19.

123 Id. at 117 (citing U.S. Office of Pers. Mgmt., Announcement No. 318 (1979 ed.)).
allusion to the Introduction, ALJ adjudications could take place before SEC ALJs in securities actions, Antitrust Division ALJs in anticompetitive practice actions, CFTC ALJs in commodities trading actions, etc.

In addition to the advantages of expertise that agencies can offer, efficiency advantages also exist. These advantages arise from the liberal use of evidence rules that ALJs can utilize. This phenomenon is not without its critics. The rationale for permitting such efficiency depends upon expertise of the adjudicator. An expert ALJ is more likely to recognize the difference between useless and misleading nonhearsay evidence on the one hand, and useful instructive hearsay evidence on the other; in admitting the latter and excluding the former, he expedites a process that might otherwise necessitate countless motions and procedural safeguards in the federal courts. Further, the use of agency adjudication obviates the concern some litigants have with subjecting their disputes to a jury of their peers. Litigants' fears that jury manipulation and jury ineptitude preclude precise resolution of disputes have manifested themselves in such cynical slogans as: "[C]ross examination invariably does no more than demonstrate forensic talent or score trial points irrelevant to the final decision." With thousands of dollars on the line, the last thing a litigant wants is a judge or a jury susceptible to technical hocus pocus and junk science.


125 See, e.g., Graham, supra note 86, at 367–84 (advocating for application of the Federal Rules of Evidence in administrative hearings, arguing that the APA standard, 5 U.S.C. § 556(d), does not avoid delays by eliminating argument over admissibility, but increases them by creating "voluminous records through the submission of marginally relevant . . . evidence" and noting that some agencies—including the NLRB and the FCC—apply the Federal Rules of Evidence "so far as practicable," but that such an approach is unpredictable). But see Ernest Gellhorn, Rules of Evidence and Official Notice in Formal Administrative Hearings, 1971 Duke L.J. 1, 1 (arguing against the use of Federal Rules of Evidence (FRE) in formal adjudications); id. at 14 (noting that hearsay evidence—otherwise excluded under FRE—is sometimes more reliable than direct evidence and that its exclusion would not make sense before an ALJ, who "is equally exposed to the evidence whether he admits or excludes it"); id. at 37 (noting other ALJ deviations from FRE, including substitution of written for oral evidence; in general, an ALJ should be able to rely on his expertise).

126 Gellhorn, supra note 125, at 40.

127 See, e.g., David E. Bernstein, Quackspertise, WALL ST. J., Sept. 30, 2006, at A9. Bernstein notes the extreme example of lawsuits arising in those state courts that have not adopted the rule of evidence formulated in Daubert v. Merrell Dow Pharmaceuticals,
Using ALJs to hear litigation begs its own questions: To what extent is the ALJ beholden to the agency? How much weight does the decision of the ALJ carry—i.e. are agencies free to overrule him? Does the administrative process not merely add another layer to the adjudicatory system—i.e. to what extent can parties just appeal an ALJ decision to a district or appellate court?128

The first question raises issues of prosecutorial and judicial independence. If the ALJ is beholden to a prosecuting agency, then—as the theory goes—he will be more likely to find in favor of the agency.129 In reality, both Congress and the agency itself can provide a buffer between the ALJ and the prosecuting agency. The CFTC, for instance, has promulgated a regulation providing ALJs “will not be responsible to or subject to the supervision or direction of any . . . employee . . . of the Commission engaged in . . . investigative or prosecutorial functions.”130 Furthermore, the proposed hybrid system of administrative adjudication contemplates actions between private litigants in which the agencies themselves are not parties to the case—similar to the disgruntled customer provision of the CFTC.131

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129 This concern would come up, for example, in the context of SEC or FTC investigations. The FTC can investigate potential antitrust violations, bring these before an ALJ within the FTC, and prosecute the violator based upon the findings. See, e.g., 16 C.F.R. § 3.2 (2006) (providing for formal proceedings for those violations of statutes requiring determination “on the record after opportunity for an agency hearing”). The SEC, likewise, can investigate securities trading improprieties, bring these before an ALJ in an SEC action, and prosecute the violators based upon the findings. See, e.g., Securities Exchange Act of 1934 § 12j, 15 U.S.C. § 78l(j) (2000) (providing for SEC suspension of a security after a hearing “on the record after notice and opportunity”).

130 17 C.F.R. § 12.8 (2006); see Bruff, supra note 10, at 346–47 (noting that Congress often separates adjudicators from the rest of the agency, but that results are inconclusive as to whether “split enforcement” better promotes fairness); see also 17 C.F.R. § 12.305 (2006) (allowing the parties to a formal adjudication to “request an [ALJ] to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases” and allowing the parties to seek an interlocutory review by the agency of the ALJ’s decision).

Although the agency may have an interest in a particular outcome, it will lack as strong an incentive to intervene. Additionally, agencies cannot dangle the threat of removal over an ALJ; they are removable only after a hearing for good cause as determined by the Merit Systems Protection Board.\textsuperscript{132}

The second question—agency reversal of ALJ decisions—has a long case history to allay any fears of it occurring. First, final determinations of the ALJ become final if not appealed to the agency within the time period specified in the agency's organic statute.\textsuperscript{133} Although agencies do on occasion decide against the decisions of ALJs, the courts frown upon such agency activism.\textsuperscript{134} Furthermore, Congress could theoretically provide a statutory provision in the hybrid system statute restricting or stripping agency review of ALJ decisions, unless manifestly against agency regulations or statute.\textsuperscript{135}

To the third question—appeals of final agency decisions to a federal court—one could say that although agency decisions are appealable,\textsuperscript{136} courts are not expected to review the merits or the application of law in a particular case, but merely ask whether the agency acted within the boundaries set by Congress in the agency's enabling statute.\textsuperscript{137} The substance of the agency decision itself is subject to defer-

\textsuperscript{133} See id. § 557(b) (providing for appeal to the agency from an ALJ decision if made within the time provided by individual agency rule).
\textsuperscript{134} See Lawson, supra note 88, at 384. Initial findings by ALJs “often carry great weight with reviewing courts . . . . [A]gencies generally need to have very good reasons for rejecting credibility determinations made by adjudicators who actually saw the witnesses.” Id. In fact, as Lawson later notes, “agencies must explicitly account for the findings of initial adjudicators,” meaning that in reviewing the ALJ's formal findings, the agency must provide reasoning and justification for why the ALJ decided a case incorrectly. Id.; see Kimm v. Dep't of Treasury, 61 F.3d 888, 892 (Fed. Cir. 1995) (overturning agency rejection of ALJ findings and stating that agency must “articulate[ ] sound reasons, based on [a] record [largely compiled by the ALJ] for its contrary evaluation”).
\textsuperscript{135} Completely stripping agency review of ALJ decisions would essentially make administrative courts similar to legislative courts like the Tax Court. See Bruff, supra note 10, at 345 (noting that Article I Tax Court judges “reside in separate organizations from the agencies they review”).
\textsuperscript{136} See 5 U.S.C. § 704 (making agency actions subject to judicial review); see, e.g., 7 U.S.C. § 18(e) (permitting appeal of any CFTC order filed under disgruntled securities customer statute to a United States Court of Appeals).
enforcement and the court is not empowered to substitute its judgment for that of the agency, as long as the agency remains within the bounds of an unambiguous statute. A look at statistical evidence from one particular agency suggests that the rate of appeals from agency decisions is not that high; the threat of specialized ALJ adjudication simply constituting an additional layer of review therefore remains low. Judge Robert Bork has even gone so far as to suggest that disputes arising in administrative courts and other Article I courts should be denied access to Article III courts unless "an important question of statutory construction or constitutional law was raised." While the notion is undoubtedly interesting, it extends beyond the scope of this Note. Ultimately, the important assertion of the preceding paragraphs is that the structural attributes of agency adjudication do not inhibit their efficiency.

The use of administrative courts is not without its concerns, however. Agency "capture" is a common concern of critics of administrative agencies. One commentator has noted that the "tension

The regulation allowed a state to "adopt a plantwide definition of the term 'stationary source,'" Chevron, 467 U.S. at 840, meaning the state could consider all of the pollution-emitting devices of a plant to be one "stationary source" for purposes of the EPA. Consequently, a state could permit a plant to install new equipment as long as the installation would not increase total emission from the plant. Chevron sued, and the Supreme Court held for the agency, id. at 865–66, creating the Chevron deference two-step analysis discussed in note 101.

138 This statement obviously produces some tension with my assertion in Part II, that ALJ decisions can serve as precedent because courts expect them to reach results consistent with previous adjudications. See supra note 101 and accompanying text. Given courts' reluctance to approve retroactive orders arising from agency adjudications, and recent hostility toward agency decisions that depart from previous agency precedent, one can say that while courts will give deference to ALJ decisions—a la Chevron—they will be loath to do so when the ALJ departs from precedent upon which the parties to a dispute had relied.

139 U.S. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMM'N, BIENNIAL REPORT—FY 1998–1999, app. A, available at http://www.oshrc.gov/publications/biennial/biennial98-99.html. The OSHRC received 2324 new cases in 1999: 156 of those were disposed of by ALJs after a formal hearing, 2025 of which were disposed of by ALJs without a formal hearing, and 43 were disposed of by commissioners. Of these cases, 28 were appealed to the circuit courts. Id.


141 Matthew D. Zinn, Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits, 21 STAN. ENVTL. L.J. 81, 107–11 (2002). Zinn discusses capture theory—the notion that regulators are susceptible to the private interests of the regulated, specifically regulated industries—in the context of environmental regulation and summarizes the factors most likely to lead to agency "capture" in general. Id. at 108–09. They include: a small number of regulated interest groups, scarcity of
between expertise and bias has existed for centuries." Although both these concerns and the concerns involving ALJ independence from the agency itself are valid, solutions exist. Congress could, as it has done in past statutes, provide for ALJ independence in enabling statutes. Additionally, it could provide for procedural safeguards in the selection of ALJs. Finally, the administrative structure and subsequent case law themselves have insulated ALJ decisions from the intervention of their employing agency.

An additional concern comes from the use of alternative non-ALJ "presiding officers" or administrative judges (AJs) in agency adjudications. AJs enjoy even less protection from agency bias than ALJs and are generally regarded as less qualified than ALJs. Typically, however, they are not employed in formal adjudication. The answer to the AJ quandary lies in Congress simply eliminating their use or providing similar criteria for hiring as apply to ALJs. Although this valid

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agency resources, regulated groups' influence over elected officials, and the tendency of agency regulators to regulate with an eye toward jobs in regulated industries. Id. at 108-11; see also ROGER G. NOLL, REFORMING REGULATION 40-43 (1971) ("Most regulatory issues are of deep interest to regulated industries . . . .").

142 Bruff, supra note 10, at 346.
143 See supra note 130.
144 As mentioned in this Part, hiring of ALJs is done by the Office of Personnel Management. See 5 U.S.C. § 5362 (2000).
145 See supra text accompanying notes 130-34.
146 See Judith Resnik, Judicial Independence and Article III: Too Little and Too Much, 72 S. CAL. L. REV. 657, 659 (1999); see also Jeffrey S. Lubbers, APA-Adjudication: Is the Quest for Uniformity Faltering?, 10 ADMIN. L.J. AM. U. 65, 70-73, 77 (1996) (noting the differences between ALJs and non-ALJs). Lubbers notes that the number of ALJs not working in either the NLRB, the Department of Labor, or the Social Security Administration declined from 170 to 155 between 1984 and 1996. Id. at 70. The number of AJs—who on average earn approximately $40,000 less than ALJs—rose to 2692 in 1989. Id. at 70-73. In contrast to the hiring of AJs, the hiring of ALJs is a highly scrutinized process. The agency must oftentimes "giv[e] short shrift to special expertise" unless the applicant has extensive litigation or formal hearing experience. Id. at 73. Lubbers advocates reestablishing a multi-grade structure of hiring ALJs, retaining the ALJ title, and providing a "real career path for aspiring administrative judges." Id. at 77. For the specialized hybrid system to have success, I believe it should preserve the integrity of the ALJ office. Therefore, I agree with Lubbers's contentions.

147 This is not to say that AJs and other "presiding officers" are never employed in what one commentator has called "relatively formal adjudications." See Jeffery Lubbers, Federal Agency Adjudications: Trying to See the Forest and the Trees, 31 Fed. B. News & J. 383, 387 (1984). Lubbers's article discusses congressional efforts in the 1980s to separate ALJs from their respective agencies and to create a national corps of ALJs, concentrated mainly in the Department of Labor and the Social Security Administration. Id. at 385-86. Lubbers notes that the congressional plan failed to account for the hundreds of AJs and presiding officers that hear substantially more—albeit less formal—cases than ALJs. Id.
concern warrants additional discussion, it is beyond the scope of this Note.

This Part has shown how administrative courts would provide an answer to the efficiency and expertise concerns at the heart of ADR’s complaints against traditional adjudication. Part IV poses a more salient question: Is this sort of thing even constitutional?

IV. CONSTITUTIONALITY OF THE SPECIALTY HYBRID SYSTEM

Policies advocating reform do not exist in a legal vacuum. Constitutional restraints prohibit the creation of certain types of courts, certain types of adjudication, and certain acts of Congress. Congress may face limitations in implementing a system of non-Article III “jury-less” adjudications. Additionally, in providing for adjudications in an administrative forum, Congress has disturbed certain due process rights associated with Article III judicial independence. To what extent is Congress even authorized to strip the federal courts of jurisdiction and to what extent is Congress authorized to then place that jurisdiction in the hands of ALJs?

A. Jury Trial

The 1976 Pound Conference produced a plethora of vitriolic criticism directed toward traditional means of adjudication. The conference participants reserved a most healthy dose of that criticism for the use of the jury trial in civil cases in the United States. Indeed, the United States is an anomaly in this regard; but the arguments for “preser[ving]” the Seventh Amendment’s cherished right to a jury trial have, over the years, retained their vitality, emphasizing the Seventh Amendment’s role as a harbinger of democracy. This occurs much to the chagrin of reformers, who note concerns with runaway

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148 See supra notes 14–29 and accompanying text.
149 See Rowe et al., supra note 44, at 218–19.
150 U.S. Const. amend VII (“[W]here the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”); see also Jean R. Sternlight, Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 Ohio St. J. on Disp. Resol. 669, 671 (2001) (“The federal Constitutional right to a jury trial has long been deemed one of the fundamental elements of our system of justice.”); Ellen E. Sward, Legislative Courts, Article III, and the Seventh Amendment, 77 N.C. L. Rev. 1037, 1056–57 (1999) (noting that jury service “brings community values into the judicial process . . . educates the citizenry” and ensures “political participation”).
151 See Tidmarsh, supra note 11, at 547 (noting strong arguments in support of such items of American exceptionalism as the jury trial). Tidmarsh cautions that “nostalgia blind[s] us to the trend line . . . . [W]e must develop a clear understanding
jury verdicts and damages awards,152 technical incompetence,153 and susceptibility to deft attorney "gamesmanship."154

The Supreme Court announced the test for application of the jury right in Chauffers Local No. 391 v. Terry.155 Money damages suits that would have required a jury at common law at the time of the nation's founding must be tried before a jury.156 Exceptions do exist, however, for certain complex issues.157 Additionally, the jury right's vitality shows susceptibility in the context of waiver.158 Although, as one commentator has noted, courts are reluctant to enforce pure jury trial waiver without the parties' negotiation and knowing consent to the waiver, this reluctance dissipates in the context of arbitration.159 As noted earlier in the mass tort context,160 arbitration clauses can take cases out of traditional adjudicatory forums before their facts even materialize, and can place them in the hands of arbitrators. The Supreme Court itself favors and enforces arbitration clauses, despite their effective evisceration of the jury trial right.161

of the procedural pieces we must . . . jettison." Id.; see supra notes 14–30 and accompanying text.

152 See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 431 (2003) (Ginsburg, J., dissenting). The size of the trial jury's verdict in State Farm prompted Justice Ginsburg to state "[t]he large size of the award . . . in this case indicates why damages-capping legislation may be altogether fitting and proper." Id. Justice Ginsburg dissented on grounds that the Court had attempted to reform state law of punitive damages through use of the Due Process Clause. Id.


154 Kirkham, supra note 7, at 205.


156 Id.

157 See Markman v. Westview Instruments, Inc., 517 U.S. 370, 388–91 (1996) (permitting the judge to determine the construction of certain terms of art within a claim before a jury); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) (holding in a trademark damages case that to maintain a suit at equity, rather than at law before a jury, "the plaintiff must . . . show that the [case is] of such a 'complicated nature' that only a court of equity can satisfactorily unravel [it]" (quoting Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887))); Matsushita, 631 F.2d at 1084 (holding that "[D]ue process precludes trial by jury when a jury is unable to [decide rationally and resolve each disputed issue on the basis of a fair and reasonable assessment of the evidence . . . and application of relevant legal rules]").

158 Fed. R. Civ. P. 38(d) (jury trial of right waived if not asserted); see Sternlight, supra note 150, at 678.

159 Sternlight, supra note 150, at 695.

160 Gilles, supra note 62, at 375.

161 See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–33 (1991) (finding that mandatory arbitration could be imposed on an employee in an employment
In using waiver as a way for the hybrid-specialty system to avoid Seventh Amendment impediments, there would, of course, be a trick in luring litigants who might otherwise negotiate for an arbitration clause. This Note operates under the assumption that Congress's system would offer the attractive aforementioned attributes—efficiency and expertise—from Part III. But even if litigants could be persuaded to negotiate for "hybrid-specialty-court clauses," it is questionable whether waiver could or even should be used as a way for hybrid-specialty system of administrative courts to get around the Seventh Amendment. Although litigants may waive individual rights, they may not waive institutional rights. And while the jury trial is most definitively an individual right, rights such as separation of powers—also implicated by trying cases in administrative courts—are most definitively nonwaivable institutional rights. Additionally, litigants must waive their jury right knowingly—although the Supreme Court has never so held. As mentioned previously, waiver most often occurs in the contractual context. Manufacturers, credit card companies, or even cruise lines may insert arbitration clauses—and presumably also "hybrid-specialty-court clauses"—in contracts and purchasing agreements that later compel parties to arbitrate any disputes without a trial. While courts have been receptive of this, they might not be receptive of such clauses compelling actual adjudication before an administrative court, unless the waiver is made knowingly.

Matters involving complicated technicalities may—according to one court—even require a nonjury trial to protect due process. This sentiment has appeared in Supreme Court jurisprudence as well.

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dispute notwithstanding the employee’s claims that arbitration deprived him of a judicial forum, is susceptible to bias toward the employer, permits only limited discovery, fails to produce written opinions, and is subject to limited judicial review); Sternlight, supra note 150, at 695–96; see also Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583–93 (1985) (showing the Court’s amenability to Congress selecting binding arbitration as a forum for resolving disputes, despite Article III).

162 The Seventh Amendment’s most ardent supporters have also noted these particular attributes as constituting the strongest arguments underlying the administrative state’s nonjury trial status. See Sward, supra note 150, at 1108–11.


167 See Markman v. Westview Instruments, Inc., 517 U.S. 370, 389–90 (1996). In patent cases "a jury’s capabilities to evaluate demeanor . . . or to reflect community standards are much less significant than a trained ability to evaluate the testimony in relation to the overall structure of the patent." Id.
but has not gained nearly enough traction to justify predicking an entire adjudicatory system upon these holdings.\textsuperscript{168}

In reality, however, the concern over the Seventh Amendment undermining the hybrid-specialty system might not even matter. As one commentator has noted, even if the litigants to a hybrid-court dispute had not waived their right to a jury trial, "[t]he Court has permitted legislative courts to assert jurisdiction over public \ldots rights without regard to the consent of the litigants."\textsuperscript{169}

\section*{B. Article III Values: Adjudication Before an Administrative Tribunal}

Congress has authorized quasi-judicial acts before non-Article III courts, commissions, and other entities since its early history.\textsuperscript{170} But is such authorization constitutional? Can Congress enact a statute and mandate that all causes of action arising under that statute be adjudicated before a non-Article III court?

The Supreme Court first ruled on the constitutionality of such arrangements in \textit{Murray's Lessee v. Hoboken Land & Improvement Co.}\textsuperscript{171} In \textit{Murray's Lessee}, the plaintiff—a federal tax collector for the port of New York—had accumulated excess accounts in violation of his employment obligations.\textsuperscript{172} The Solicitor of the Treasury, acting pursuant to an act of Congress permitting liens to be laid on lands of persons indebted to the United States,\textsuperscript{173} issued a "warrant of distress" for the balance found after an audit of the plaintiff's account.\textsuperscript{174} The plaintiff raised two objections to the auditing and warrant. First, he argued that the warrant constituted a taking of property without due process of law.\textsuperscript{175} Second, he argued that Article III, Section 1 of the Constitution required such judicial power as the issuance of a warrant to be situated firmly in the judicial branch.\textsuperscript{176} The Court disagreed. Although—as the court admitted—"the auditing of the accounts of a

\textsuperscript{168} See \textit{Dairy Queen, Inc. v. Wood}, 369 U.S. 469, 478 (1962) (noting that "it will indeed be a rare case in which" the plaintiff can prove the burden of showing that issues are too complicated for a jury to comprehend).


\textsuperscript{171} 59 U.S. (18 How.) 272 (1855).

\textsuperscript{172} \textit{Id.} at 274–75.


\textsuperscript{174} \textit{Murray's Lessee}, 59 U.S. (18 How.) at 275.

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.}
receiver of public moneys may be . . . a judicial act," certain actions, while susceptible of the designation "judicial," do not necessarily require the exercise of judicial power.\textsuperscript{177} Congress therefore had the right—through its "power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect"—to grant the power to issue warrants to an executive administrative entity.\textsuperscript{178} The Court ultimately relied upon a distinction between "public rights" and "private rights," permitting non-Article III courts to adjudicate "public rights."\textsuperscript{179} The question that such reliance begs is: what counts as a "public right?" The Court's answer to that question over the next century-and-a-half determines the constitutionality of the proposed administrative specialty court system.

\textit{Crowell v. Benson}\textsuperscript{180} was the first case to uphold the use of administrative agencies as adjunct courts.\textsuperscript{181} In \textit{Crowell}, the court relied upon \textit{Murray's Lessee}'s distinction between public and private rights\textsuperscript{182} to uphold statutory provisions permitting determination of compensation awards by the Employees' Compensation Commission.\textsuperscript{183} The plaintiff in \textit{Crowell} had challenged the validity of statutory provisions permitting extrajudicial determinations of compensation awards owed by admiralty employers to employees killed while on the job.\textsuperscript{184} The Court ruled that because such compensation fell within the legislative process and therefore within the legislative authority, the legislature could choose the means of determining issues of fact validating compensation.\textsuperscript{185} Because the dispute centered around a governmental benefits program that Congress could have chosen to withhold, the

\begin{itemize}
  \item \textsuperscript{177} \textit{Id.} at 280, 282–83.
  \item \textsuperscript{178} \textit{Id.} at 281.
  \item \textsuperscript{179} \textit{Id.} at 284.
  \item \textsuperscript{180} 285 U.S. 22 (1932).
  \item \textsuperscript{181} \textit{Id.} at 62–65.
  \item \textsuperscript{182} \textit{Id.} at 50 ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts . . . as it may deem proper." (quoting \textit{Murray's Lessee}, 59 U.S. (18 How.) at 283–86)). The \textit{Murray's Lessee} Court's opinion had held that a plaintiff's status as a public servant, combined with his public debt owed to a public agency made his case one of "public rights" and thus susceptible to extrajudicial determination. \textit{Murray's Lessee}, 59 U.S. (18 How.) at 283–85.
  \item \textsuperscript{183} \textit{Crowell}, 285 U.S. at 60–62.
  \item \textsuperscript{185} \textit{Id.} at 58.
\end{itemize}
Court ruled that it constituted a “public right” susceptible of—but not requiring—judicial determination.186

This particular definition of “public rights”—rights associated with congressionally created benefits programs—underlay the Court’s momentous reassembly of the federal bankruptcy court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co.187 Justice Brennan, writing for a slim plurality, admitted that “[t]he distinction between public rights and private rights has not been definitively explained in our precedents.”188 He then relied on “public rights” doctrine to limit the bankruptcy court’s jurisdiction.189 Northern Pipeline involved a common law contract case brought before the bankruptcy court—a legislative court created by Congress whose core function was “the restructuring of debtor-creditor relations.”190 Justice Brennan ruled that while this core function—involving a “public right” created by the Bankruptcy Act—was indeed a permissible exercise of jurisdiction, jurisdiction over common law contract claims—as differentiated from the Bankruptcy court’s normal docket of restructuring cases—was not allowed.191

Justice White dissented, noting that the plurality’s holding threatened—as it most surely did—the entire administrative state.192 Indeed, Justice Brennan addressed this seeming inconsistency, albeit rather awkwardly, saying that as long as the “essential attributes of judicial power are retained in the Art. III court,” the Article I court could withstand constitutional scrutiny.193

Justice White’s dissent, which argued for allowing Congress to balance Article III virtues with administrative efficiency values,194 bore

186 Id. at 50.
188 Id. at 69.
189 Id. at 71–72, 76. Brennan also noted that exceptions to Article III adjudication had been made in a limited number of circumstances, namely territorial courts (before westward expansion in the nineteenth century), courts-martial, and administrative courts adjudicating purely “public rights.” Id. at 71.
190 Id.
191 Id.
192 Id. at 102, 113 (White, J., dissenting) (noting that the decision threatened “a large body of administrative law” and, read literally, would “overrule a large number of our precedents upholding a variety of Art. I courts—not to speak of those [Article] I courts that go by the contemporary name of ‘administrative agencies’”); see also Martin H. Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197, 214–24 (rejecting as inadequate both Justice Brennan’s and Justice White’s approaches).
193 N. Pipeline, 458 U.S. at 81 (majority opinion).
194 Id. at 117–18 (White, J., dissenting).
fruit in later Court opinions. First in *Thomas v. Union Carbide Agricultural Products Co.*\(^{195}\) and later in *Commodity Futures Trading Commission v. Schor*,\(^{196}\) the Court upheld the constitutionality of federally mandated adjudication in non-Article III forums. In *Union Carbide*, the Court permitted Congress to require binding arbitration of claims filed under the Federal Insecticide, Fungicide, and Rodenticide Act\(^{197}\) with limited Article III judicial review.\(^{198}\)

*Union Carbide* relied on Crowell's proposition that cases arising from rights created by federal regulatory programs—"public rights"—are susceptible to non-Article III adjudication.\(^{199}\) This effectively rejected *Northern Pipeline*’s definition of "public rights" (public benefit programs or instances where the government is a party to the case)\(^{200}\) in lieu of a new one (federal regulatory programs).\(^{201}\) *Schor* continued this line of reasoning. *Schor* featured two parties\(^{202}\)—one, a disgruntled stock customer, the second, a broker who the customer had sued for violation of the Commodities Futures Trading Commission Act.\(^{203}\) The case was heard before the CFTC who, six years earlier, had issued a regulation permitting counterclaims arising out of the same transaction or occurrence as the underlying claim.\(^{204}\) The defendant stock broker in *Schor* took advantage of the regulation to counterclaim against the plaintiff.\(^{205}\) When the Commission resolved the case in favor of the defendant, the plaintiff asserted that the Commission never had jurisdiction over the counterclaim.\(^{206}\)

\(^{196}\) 478 U.S. 833 (1986).
\(^{198}\) *Union Carbide*, 473 U.S. at 582–84.
\(^{199}\) *Id.* at 586–89 (citing Crowell v. Benson, 285 U.S. 22, 53 (1932)) (echoing Justice White’s dissent in *Northern Pipeline* that “practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III”).
\(^{201}\) *Union Carbide*, 473 U.S. at 593–94 ("[C]ongress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.")
\(^{205}\) *Schor*, 478 U.S. at 837–38.
\(^{206}\) *Id.* at 838.
After reviewing the statutory authority, Justice O'Connor, writing for the majority, relied directly on *Union Carbide* and implicitly on Justice White's dissent in *Northern Pipeline*, stating "resolution of claims such as [plaintiff's] cannot turn on conclusory reference to the language of Article III."207 She then addressed the counterclaim, stating that Congress's interest in providing an expert and expeditious forum for resolution of the original claims necessarily made common law counterclaims candidates for administrative adjudication.208 Employing a four-factor balancing test,209 O'Connor relegated the "public rights" doctrine to jurisprudential oblivion, stating: "there is no reason inherent in separation of powers principles to accord the state law character of a ['private rights'] claim talismanic power in Article III inquiries."210

While *Schor* did not overrule *Northern Pipeline* explicitly,211 one must wonder whether *Northern Pipeline* still has staying power. *Schor* seems to permit non-Article III courts to exercise jurisdiction over cases normally heard by either federal or state court judges, as long as the case is not terribly important and the judicial power is not terribly infringed.212 *Northern Pipeline*, however, seemed to deny that same exercise of jurisdiction to the Bankruptcy court. Indeed, Justice Brennan, the author of *Northern Pipeline*'s plurality opinion, dissented in *Schor*, noting that the Court had favored "legislative convenience" over the precedent set in *Northern Pipeline*.213 In all likelihood, even if *Schor* did not overrule *Northern Pipeline*, its and *Union Carbide*'s definition of "public rights" departed from *Northern Pipeline*'s. "Public rights" as understood by the *Union Carbide* majority are not rights arising from

207 *Id.* at 847 (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985)).

208 *Id.* at 855-57.

209 *Id.* at 851 ("[1] the extent to which the 'essential attributes of judicial power' are reserved to the Article III courts, . . . [2] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [3] the origins and importance of the right to be adjudicated, and [4] the concerns that drove Congress to depart from the requirements of Article III").

210 *Id.* at 853.

211 *Id.* at 892-53. *Schor* distinguished *Northern Pipeline* because the bankruptcy court in that case had expansive jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." *Id.* (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)). The Court in *Schor* reasoned that although the CFTC had jurisdiction over state law counterclaims arising out of CFTC proceedings, claimants in the proceedings were required to subsequently seek enforcement by a district court. *Id.*

212 *Id.* at 851.

213 *Id.* at 862 (Brennan, J., dissenting).
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federal benefits programs; nor are they “matters arising between the Government and persons subject to its authority.” They are instead rights arising under federal statutes that do not “depend on or replace a right... under state law.” Thus, Union Carbide restricted Northern Pipeline's holding to a prohibition on Congressional “vest[ing] in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants.” And Schor chipped another chunk off of Northern Pipeline by providing an exception for common law counterclaims in administrative adjudications. Schor and Union Carbide permit the hybrid system of expert administrative adjudication proposed in Part I, not only to the extent that panels will be able to hear claims arising under federal statutes, but also counter-claims and related claims arising out of the same facts or circumstances.

Yet one lingering issue remains: the jury trial. Although the hybrid system seems to pass Article III muster, it must also withstand the scrutiny of the Seventh Amendment. Crowell, Union Carbide, and Schor all involved cases in which the defendant could have sought a jury, but for the waiver of the jury right by the parties involved. Can Congress really mandate that litigants try their cases before administrative tribunals without a jury?

As the Crowell-Union Carbide-Schor line of cases show, the Court has been receptive to administrative agency adjudication without a jury trial when the adjudications involve either federal benefits programs or federal regulatory programs. The bankruptcy court, however, has had less success before the Court. Aside from Northern Pipeline, the Court also decided Granfinanciera, S.A. v. Nordberg, holding that a claim brought by a bankrupt corporation’s trustee to void a fraudulent transfer from the corporation’s predecessor to its creditor was entitled to a jury trial where the creditor had not submitted a claim against the corporation in bankruptcy court. The trustee of the corporation in Granfinanciera had filed a petition for reorganization under Chapter 11. The trustee then filed suit within one year of the petition against petitioner, a Columbian financial institution that

215 Id. at 584.
216 Id.
217 See supra text accompanying notes 202-14.
219 Id. at 57-58 & n.13; id. at 64-65.
220 Id. at 36.
had received $1.7 million from the corporation without consideration.\textsuperscript{221} The petitioner claimed a jury right, but the Bankruptcy court disagreed. The Supreme Court reversed both that court and the two lower courts.

In doing so, the Court resurrected the "public rights" doctrine but noted that for public rights, the Seventh Amendment does not grant parties a jury right if "Congress assigns its adjudication to an administrative agency."\textsuperscript{222} Although the Court gave no reason for its apparent distinction between administrative courts and legislative courts in the jury trial context, the Court has historically treated them differently.\textsuperscript{223} One commentator has suggested that this is a mere result of general deference to the administrative state;\textsuperscript{224} as Justice White noted in \textit{Northern Pipeline}, a decision of such dismantling magnitude could have momentous effects.\textsuperscript{225} Other scholars have echoed the same sentiments, noting that the adjudicatory functions of the entire administrative state could be thrown into doubt.\textsuperscript{226} It is also possible that agencies' greater involvement in the adjudicatory process ensures a bit of supervision that the bankruptcy court does not have.

The Court, however, would resist such a distinction. In its view, administrative courts and legislative courts are subject to the same constitutional strictures; the fact that the Bankruptcy court has fared more poorly than administrative agencies is a product of mere coincidence. The Court in \textit{Granfinanciera} went to great lengths, in fact, to preserve nearly all of its non-Article III court case law. It rejected the \textit{Northern Pipeline} view that "matter[s] of public rights must at a minimum arise 'between the government and others,'"\textsuperscript{227} and emphasized that private rights "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution" were per-

\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.} at 42 n.4.
\textsuperscript{224} \textit{See} Sward, \textit{supra} note 150, at 1096-97.
\textsuperscript{225} \textit{N. Pipeline}, 458 U.S. at 102.
\textsuperscript{226} \textit{See}, e.g., 1 \textsc{Richard J. Pierce Jr.}, \textsc{Administrative Law Treatise} § 7.1, at 28-29 (4th ed. 2002) (noting that \textit{Northern Pipeline} "cast a shadow of uncertain magnitude over the constitutionality of the adjudicatory powers granted to many agencies").
\textsuperscript{227} \textit{Granfinanciera}, 492 U.S. at 54 (citing \textit{N. Pipeline}, 458 U.S. at 69).
It declined to decide, however, whether the restructuring of debtor-creditor relations in bankruptcy constituted, in fact, a "public right." Additionally, it held that the trustee's fraudulent conveyance suit was one that would have been tried before a jury at common law and thus its entitlement to a jury trial at modern law depended "upon whether the creditor ha[d] submitted a claim against the estate, not . . . upon whether Congress chanced to deny jury trials to creditors who have not filed claims and who are sued by a trustee to recover an alleged preference." In short, the Court found that the fraudulent conveyance suit was not sufficiently integral to the bankruptcy court's statutory scheme to deserve an exemption from the Seventh Amendment. Had the suit been part of a bankruptcy court proceeding, however, it is arguable that the Court would have allowed the suit to proceed without a jury.

Granfinanciera's conclusion ultimately equates its Article III jurisprudence with its Seventh Amendment jurisprudence, and implicitly affirms the holdings of Union Carbide, Schor, and Crowell: "[T]he question whether the Seventh Amendment permits Congress to [use administrative tribunals] that do[ ] not employ juries . . . requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." Thus, it is clear that nothing in the Seventh Amendment under Granfinanciera prohibits Congress from accomplishing anything that it can constitutionally accomplish under the Crowell-Schor-Union Carbide line of cases. Unless a claim coming before an administrative agency tribunal were either not sufficiently integral to the

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228 Id. (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94 (1985) (Brennan, J., concurring)).
229 Id. at 55-56 & n.11. Arguably, much of what the Court currently categorizes as "public rights" could be interpreted differently. See Pierce, supra note 226, § 7.1, at 28-29 ("A great deal of what modern federal agencies do can be characterized as resolution of disputes with respect to private rights."). This demonstrates that one's point of reference for defining "public rights" will ultimately determine the outcome: A definition that turns on whether Congress has provided a structure to solve private disputes will cull more cases into the concept of "public rights," whereas a definition that turns on the identity of the parties—as Northern Pipeline did—will tend to exclude more cases from that concept.
230 Granfinanciera, 492 U.S. at 58.
231 This depends, of course, on whether the Court would even consider restructuring to be a "public right." See supra note 211 and accompanying text. For purposes of an administrative hybrid scheme of adjudication, a court would have to inquire both as to whether a particular cause of action brought before an agency were sufficiently integral to the regulatory scheme, and whether that regulatory scheme were even a "public right."
232 Granfinanciera, 492 U.S. at 53.
agency's statutory scheme or the statutory scheme itself were not considered to be a "public right," Congress could constitutionally assign that claim to the tribunal.\footnote{233}

CONCLUSION

The allure of administrative agencies lies not in their somewhat controversial conformance with the Constitution but in their ability to apply expertise to the complexity of cases arising in the modern age. It no longer suffices—nor is it desirable—to have a jury of one’s peers decide the fate of an alleged antitrust violator, a medical malpractice victim, or an international contract dispute. Congress realizes this. Litigants realize this. And even courts realize this. Although the nature of traditional adjudication has become more technical and expert-oriented,\footnote{234} one must still question whether courts or expert panels are better equipped to determine such complex issues.

For litigants, certainly, the choice has been clear. Many disputes that originally may have concluded with a trial now conclude in arbitration. Litigants value the autonomy in selecting an expert adjudicator familiar with its industry and practice who can deliver a disposition in a cost-efficient way. But this may come at the detriment to society at large; this is an admittedly nebulous claim, but it is one that evokes questions: Does it matter that arbitrators may reach different conclusions on similar sets of facts? Does it matter that litigants can consent to what law will and will not apply? Does it matter that arbitrators are

\footnotetext[233]{See Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 855–56 (noting that Congress’s assignment of common law counterclaims arising out of disputes before the CFTC sought to “mak[e] effective a specific and limited federal regulatory scheme” and that the CFTC’s adjudication of the counterclaims was “incidental to, and completely dependent upon, adjudication of reparations claims created by federal law” (emphasis added)).

\footnotetext[234]{See e.g., United States v. Microsoft Corp., 87 F. Supp. 2d 30, 35 (D.D.C. 2000) (involving highly technical antitrust action over Microsoft’s attempts to monopolize, tying of its internet browser to its operating system, and anticompetitive behavior toward rival firms), aff’d in part and rev’d in part, 253 F.3d 34 (D.C. Cir. 2001); Smith v. Van Gorkom, 488 A.2d 858, 875–81 (Del. 1985) (involving landmark business judgment rule case finding that a company’s board of directors had not considered the appropriate value of the company’s “true value” in accepting an offer for sale, prompting an outcry not only from directors, officers, and insurance companies, but from the Delaware legislature as well); see also Del. Code Ann. tit. 8 § 102(b)(7) (2001) (permitting companies to immunize director action in duty of care cases); Richard A. Posner, Antitrust in the New Economy 2–8 (U. Chi. Law & Econ., John M. Olin Law & Econ. Working Paper No. 106, 2000), available at http://ssrn.com/abstract=249316 (questioning whether traditional antitrust enforcement is appropriate to respond to developments in today’s economy).}
neither bound by nor create precedent? And does it matter that these arbitrations, hidden from public view, strip the legal system of its opportunity to develop its norms and standards?

Employing experts in administrative adjudications provides an answer to these questions and a solution to the dilemma facing the American legal system. Although some may protest the very constitutional basis upon which the administrative state is built, most would agree that it is here to stay. The jurisprudence of even the strictest of separation-of-powers originalists on the Supreme Court—with the exception, maybe, of Justice Thomas—hasn’t challenged the constitutionality of administrative agencies. And although some may protest the extra-judicial methods that administrative courts employ, most would agree that the efficiency advantages that the agencies’ disinterested experts offer exceeds anything that can be found in the federal court system.

I don’t suggest that administrative agencies are the only solution to the expanse separating public from private adjudication. I suggest only that administrative agencies and their adjudicatory mechanisms lend themselves to the sort of complex technicalities that characterize cases today and that have precipitated the schism between private and public law.

235 Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 487 (2001) (commenting that he would “be willing to address the question whether [the] delegation jurisprudence has strayed too far from [the] Founders’ understanding of separation of powers).