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LEGISLATIVE COURTS, ARTICLE III, AND THE SEVENTH AMENDMENT

ELLEN E. SWARD*

Congress has established numerous judicial and quasi-judicial bodies, collectively called "legislative courts," that do not have the characteristics of courts established in accordance with Article III of the Constitution. With some exceptions, where Congress has been able to establish such non-Article III legislative courts consistent with the Constitution, the Supreme Court generally has not required juries for adjudication that takes place within these tribunals. Professor Sward analyzes the Court's Article III and Seventh Amendment jurisprudence and questions the constitutionality of many types of jury-less adjudication in the legislative courts.

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* Professor of Law, University of Kansas. B.A., University of Cincinnati, 1970; J.D., Harvard, 1979. Several of my colleagues have read drafts of this Article, and the piece is much improved for their efforts. They are Bob Casad, Sid Shapiro, Rick Levy, and Tom Stacy. I benefited from summer research support from the University of Kansas School of Law, and from the support and encouragement of its dean, Mike Hoeflich. Thanks to my research assistants for their able work: Mike Benkowitz, Brandee Caswell, Jack Mercer, Rob Vaught, and Amy Fowler. Any remaining errors are, of course, mine. This Article is an expanded version of part of chapter 4 in a book I am writing, tentatively titled The Civil Jury in the United States (unpublished manuscript, on file with the author).

I. INTRODUCTION

Article III of the United States Constitution governs the "judicial Power of the United States."[1] The Constitution itself, however, establishes only one court—the Supreme Court.[2] Article III and Article I then give Congress the power to establish "inferior Courts."[3] Like the Supreme Court, inferior courts established under Article III must have judges who "shall hold their Offices during good Behaviour, and ... [whose compensation] shall not be

1. U.S. CONST. art. III, § 1.
2. *See id.*
3. *Id.*; *see id.* art. I, § 8, cl. 9.

diminished during their Continuance in Office."[4] The life tenure and salary protections reflect the separation of powers principle behind our constitutional government, ensuring that judges are independent of the political process.[5]

Nevertheless, the power of Congress to establish judicial or quasi-judicial bodies outside of the constraints of Article III apparently has never been doubted. Often collectively called "legislative courts,"[6] such bodies are usually justified under the Necessary and Proper Clause, which empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution [its powers under the Constitution]."[7] The first legislative courts were established by some of the early Congresses, which created military tribunals[8] and territorial courts,[9] and provided for the adjudication of some matters by executive agencies, a precursor to the modern administrative agency.[10]

The Seventh Amendment to the United States Constitution guarantees to citizens suing or being sued in the federal courts the right to a jury trial in "Suits at common law."[11] The Seventh Amendment has been interpreted to require a jury trial in those civil cases that would have required one in England in 1791—the year the Seventh Amendment was ratified.[12] Under modern interpretations,

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4. *Id.* art. III, § 1.

5. *See* THE FEDERALIST NOS. 78, 79 (Alexander Hamilton); Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 768 (1986).

6. The term "legislative courts" apparently first appeared in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828). I will use the terms "legislative courts," "Article I courts," and "non-Article III courts" interchangeably.

7. U.S. CONST. art. I, § 8, cl. 18.

8. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 920 (1988).

9. *See* J.W. SMURR, TERRITORIAL JURISPRUDENCE 155-77 (1970).

10. *See* Fallon, *supra* note 8, at 919-20.

11. U.S. CONST. amend. VII. The full text of the Seventh Amendment is as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id. While the Seventh Amendment does not apply to the states, all of the states have their own constitutional or statutory guarantees of a civil jury trial. *See, e.g.*, KAN. CONST. BILL OF RIGHTS § 5; LA. CODE CIV. PROC. ANN. art. 1731 (West Supp. 1998).

12. *See* Dimick v. Scheidt, 293 U.S. 474, 476 (1935); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). *See generally* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (examining the history of the Seventh Amendment as it relates to the modern federal right to a civil jury trial).

that includes cases arising under statutes that did not exist in 1791 if the statute provides for rights and remedies analogous to those that existed at common law.[13] The Seventh Amendment also requires a jury when a case includes both legal and equitable issues,[14] though such cases would have been heard without a jury in England in 1791.[15]

The key difference between legislative courts and Article III courts is the absence of life tenure and salary protections for judges in legislative courts. A common, but not universal, difference is the absence of a jury trial in legislative courts. The power of Congress to divert disputes to legislative courts is a subject of considerable discussion in the cases and commentary.[16] The extent to which that power can be used to divest parties of the right to a jury trial remains, however, largely unexamined. Indeed, cases and commentators often consider the Seventh Amendment issue as derivative of the Article III issue, and thus not worthy of separate attention.[17]

In this Article, I will demonstrate that the Seventh Amendment has independent force that needs to be reckoned with in legislative courts. To that end, I will first present, in Parts II-IV, a comprehensive analysis of the Supreme Court's Article III jurisprudence regarding legislative courts—primarily administrative

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13. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974).

14. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508 (1959).

15. In England in 1791, separate courts for law and equity generally meant that legal and equitable issues were not heard together. Occasionally, however, a court of equity might determine legal issues under the so-called "cleanup doctrine," which provided that if equity had jurisdiction of a matter, it also could hear and decide related legal issues. *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 231 (Spencer W. Symons ed., 5th ed. 1941). Courts of law, whose jurisdiction was limited to common law writs, could never hear and decide equitable matters. *See* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 33-36 (2d ed. 1981).

16. *See, e.g.*, Fallon, *supra* note 8; Martin H. Redish, *Legislative Courts, Administrative Agencies and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197; Richard B. Saphire & Michael E. Solimine, *Shoring up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. REV. 85 (1988); Young, *supra* note 5.

17. The Supreme Court has said that Congress's power to assign adjudication of "public rights" matters to a legislative court determines the right to a jury trial. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 455 (1977) (allowing jury-less adjudication in an administrative agency). The Court repeated this proposition 12 years later, but its holding did not necessarily link Article III and the Seventh Amendment. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989) (holding that a jury was required for a common law fraudulent conveyance action, but not addressing whether the non-Article III bankruptcy courts could determine the matter with or without a jury). I have found only one article, other than student notes, that has focused on the right to jury trial in legislative courts, though others have addressed the issue in passing. *See* Martin H. Redish & Daniel J. LaFave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL OF RTS. J. 407 (1995).

agencies. In doing so, I will, in some cases, flesh out the analysis from the bare bones of the Court's statements. This is necessary because the Court's Article III jurisprudence often drives its discussion of Seventh Amendment issues, particularly with respect to administrative agencies. I will then, in Parts V and VI, add the Seventh Amendment into the analysis, discussing both what the Court has said about jury trials in various legislative courts and what it has overlooked. The organization of this analysis is complex, as there are several dimensions to the problem. Among them are the various kinds of legislative courts that have been created, the values that Congress and the courts seek to vindicate in choosing one kind of court over another, the kinds of issues presented in such courts, and the various constitutional justifications that have developed. I will try to integrate these dimensions without losing sight of any of them. Thus, I begin, in Part II, with a catalogue of the kinds of legislative courts that currently exist. In Part III, I describe the values that underlie Article III, legislative courts, and the Seventh Amendment. These first two parts provide a foundation for the analysis that follows.

Parts IV and V are the core of the Article, as they describe in detail the most important of the constitutional justifications for legislative courts: the "public rights" doctrine and the balancing test that has evolved from it. This doctrine is used primarily to justify adjudication in administrative agencies, though bankruptcy courts have also figured in its development. Part IV discusses the Article III problem. In discussing the public rights doctrine and the balancing test, I first describe the Supreme Court's jurisprudence on the doctrine. I then try to make sense of the doctrine, first by cataloguing and re-defining the range of issues, from pure public to pure private, that are encompassed within the doctrine, and then by discussing the propriety of using the doctrine to justify adjudication in administrative agencies and bankruptcy courts—the two kinds of legislative courts where it has been used. In Part V, I relate the doctrine to Seventh Amendment issues. As to the Seventh Amendment issues, I will describe what the Supreme Court has said about how the right to a jury trial relates to the public rights doctrine and the balancing test, and identify the constitutional constraints and the policy considerations that relate to the choice of jury-less adjudication in a legislative court.

Part VI then briefly describes three other justifications for the use of legislative courts and their implications for the Seventh Amendment: waiver, sovereign immunity, and the plenary power

rationale. These justifications generally apply to legislative courts other than administrative agencies and bankruptcy courts, though waiver can operate in any kind of court. My analysis of these justifications will have a structure similar to that of my analysis of the public rights doctrine and the balancing test.

This analysis will emphasize two major problems with the current doctrine. First, the Court's Article III jurisprudence is incomplete, inconsistent, and, at times, nearly incomprehensible. I try to identify the main problems and suggest some analytical points that might clarify the issues. Second, the Court, when it analyzes legislative courts, has not given adequate consideration to the history, language, and values behind the Seventh Amendment. If the Court were to do so, it would probably find that the Seventh Amendment operates, in some instances, as an independent check on Congress's power to assign adjudication to legislative courts sitting without a jury. Thus, my analysis suggests that many types of jury-less adjudication that are now commonplace would be unconstitutional. Such a finding has the potential to be quite disruptive given the role that legislative courts play in modern adjudication. I will suggest some methods for minimizing that disruption, though I concede that maintaining the status quo, however weak its constitutional base, may be more pragmatic and therefore more attractive. Better the devil we know.

II. VARIETIES OF LEGISLATIVE COURTS

The several varieties of legislative courts differ significantly among themselves and have different political and theoretical geneses, but they share one characteristic: their judges do not enjoy life tenure and salary protection.[18] Legislative courts include administrative agencies, adjuncts, courts for claims against the United States, territorial courts, and military courts.[19] All of them have been held not to violate the requirements of Article III, at least in most circumstances. Some legislative courts use juries, but the Supreme Court's jurisprudence on the right to a jury trial in legislative courts is not particularly clear or well-developed. In this section, I will briefly describe the various legislative courts and their use of the jury.

18. For discussions of these kinds of adjudicators, see Fallon, *supra* note 8, at 918-26; Redish, *supra* note 16; Saphire & Solimine, *supra* note 16; Young, *supra* note 5, at 768-69.

19. Non-Article III adjudication can occur in other contexts as well, even if no fixed court is established. One example is mandatory arbitration. *See infra* note 162 and accompanying text.

A. *Administrative Agencies*

The most significant kind of legislative court is the administrative agency. Agencies, of course, are much more than courts, which distinguishes them from the other kinds of legislative courts discussed here. Rather, agencies administer regulatory statutes and benefit programs by making rules that implement and clarify the statutes, and by enforcing the statutes and the rules through administrative adjudication.[20] Federal agencies handle some 350,000 adjudications every year,[21] eclipsing the 240,000 cases filed every year in federal courts.[22] When agencies adjudicate matters, they do not employ juries; indeed, agencies are supposed to bring expertise to the matter, and that expertise is inconsistent with the use of lay decision makers.[23] Thus, agency adjudication is conducted by administrative judges, many of whom are employees of the agency.[24]

B. *Adjuncts*

Adjuncts function within the Article III district courts and are under the supervision of district court judges. They operate under a reference from the district court, which can withdraw that reference

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20. For descriptions of the administrative process, see 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (3d ed. 1994); RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS (2d ed. 1992); BERNARD SCHWARTZ, ADMINISTRATIVE LAW (2d ed. 1984). The statement in the text is a gross oversimplification, as agencies are quite varied in the work they do. They are, however, all governed by the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1994), so their basic structure and governance will have some general similarities.

21. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 393 (4th ed. 1996).

22. *See* 1 FEDERAL COURTS STUDY COMMITTEE: WORKING PAPERS AND SUBCOMMITTEE REPORTS 30 tbl.5 (1990).

23. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 90 (1965) (stating that "the concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder").

24. There are two kinds of administrative judges. Administrative law judges ("ALJs"), numbering about 1000 throughout the federal agencies, are responsible for adjudicating disputes and have certain protections designed to ensure their independence. *See* John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 263 (1992). There are also about 2700 administrative adjudicators, most of whom have duties in addition to adjudication, and whose independence is less protected than that of the ALJs. *See id.* at 353. Agencies have procedures designed to keep those employees responsible for adjudication separate from those with responsibility for investigation and prosecution. *See* 5 U.S.C. § 554(d) (1994) (providing that an employee engaged in investigation or prosecution functions cannot participate in adjudicatory decisionmaking); PIERCE ET AL., *supra* note 20, § 9.3.5 (noting that § 554(d) separation of functions requirements apply only to formal adjudication).

at any time.[25] The best known of these adjuncts are the magistrate judges,[26] who assist the district judges by managing discovery,[27] hearing pretrial motions,[28] and, if the parties consent, conducting trials.[29] The system of magistrate judges was held in 1980 not to violate Article III.[30] Bankruptcy courts are also considered adjuncts,[31] though their format differs significantly from that of magistrate judges. While magistrate judges take part in cases brought originally in an Article III court and follow the Article III court's rules, bankruptcy judges operate within a separate court. To be sure, the bankruptcy courts are deemed to be a "unit" of the district courts,[32] but the bankruptcy courts have their own rules, separate from the Federal Rules of Civil Procedure, and cases can sometimes be commenced directly in bankruptcy courts.[33] Bankruptcy courts have a wide-ranging jurisdiction over matters both central to and related to bankruptcies.[34] They also have considerable independent procedural authority, including the power to conduct trials.[35] They largely operate independently of the district courts, even if nominally under the district courts' control.[36]

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25. *See, e.g.*, 28 U.S.C. § 157(a) (1994) (allowing district courts to refer matters to bankruptcy courts); *id.* § 636 (describing powers and duties of magistrates and the power of judges to refer matters to magistrates). *See generally* Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989) (examining modern judicial adjuncts under the Federal Rules of Civil Procedure).

26. *See* 28 U.S.C. §§ 631-639 (1994).

27. *See, e.g.*, D. KAN. R. 72.1.1(c).

28. *See* 28 U.S.C. § 636(b)(1)(A).

29. *See id.* § 636(a)(3). Magistrates can decide non-dispositive matters themselves, with only deferential review by the district court. *See id.* § 636(b)(1). They can hear and make recommendations as to dispositive matters such as summary judgment motions, but the district court must make a de novo "determination" of the matter. *See id.* The Court has held that the district court is not required to conduct a de novo "hearing." *See* United States v. Raddatz, 447 U.S. 667, 674 (1980). In other words, the district judge makes her own decision based on evidence that the magistrate has heard but the judge has not. The parties also can consent to a magistrate's hearing and deciding dispositive matters. *See* 28 U.S.C. § 636(c)(1).

30. *See Raddatz*, 447 U.S. at 683.

31. *See* 28 U.S.C. § 151 (1994).

32. *See id.*

33. *See* FED. R. BANKR. P. 1002. Some districts have a bankruptcy clerk, and in those districts, cases can be commenced by filing a petition with the bankruptcy clerk. Otherwise, cases must be filed with the district court's clerk. *See id.* at advisory committee's note to the 1987 amendments.

34. *See* 28 U.S.C. § 157 (1994).

35. *See id.* § 157(e).

36. In 1982, the Supreme Court held the 1978 version of the law establishing bankruptcy courts unconstitutional on the ground that it gave too much of the judicial power of the United States to non-Article III courts. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (plurality opinion). Congress revised the

The Supreme Court has held that there is a constitutional right to a jury trial for private legal claims adjudicated in the bankruptcy courts.[37] Both magistrate judges and bankruptcy judges can conduct jury trials, but only with the consent of the parties;[38] without that consent, the jury trial must be held before a district court judge. Because consent is required, litigants who elect to have their jury trials conducted by magistrate judges or bankruptcy judges have effectively waived their claim to an Article III judge.[39]

C. *Courts for Claims Against the Government*

Congress has also established some courts that adjudicate claims against the government. These include the Tax Court,[40] which adjudicates claims by taxpayers who dispute deficiency determinations by the Internal Revenue Service, and the United States Court of Federal Claims,[41] which adjudicates a variety of proprietary claims against the United States, such as contract claims. These courts have judges who are appointed for fixed terms,[42] and

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jurisdictional statute in 1984, making it clear that bankruptcy jurisdiction was given initially to an Article III district court, which then had the power to make a blanket reference of bankruptcy matters to the bankruptcy court. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101, 104, 98 Stat. 333, 333, 340 (codified at 28 U.S.C. §§ 157, 1334 (1994)). Bankruptcy courts can decide "core" matters on their own, with only deferential review by the district court. *See* 28 U.S.C. § 157(b). They can hear "non-core" matters and make recommendations as to their disposition to the district judge, who conducts a de novo review. *See id.* § 157(c). Certain matters, however, *must* be heard by the district courts. *See id.* § 157(b)(5) (mandating that personal injury and wrongful death claims be heard by the district courts); *id.* § 157(d) (mandating that matters arising in part under federal laws affecting interstate commerce be heard by the district courts). These provisions are very similar to the provisions in the magistrate statute distinguishing between dispositive and non-dispositive matters. *See supra* note 29. *But see infra* notes 246-55 and accompanying text (showing that the effect of these provisions in the bankruptcy court is very different from those governing on the magistrates). The Supreme Court has yet to rule on the constitutionality of the bankruptcy courts under the revised statute.

37. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 55-56 (1989).

38. *See* 28 U.S.C. § 636(c)(1) (1994) (magistrate judges); *id.* § 157(e) (bankruptcy judges).

39. See *infra* notes 395-401 and accompanying text for a discussion of the power of litigants to waive Article III protections.

40. *See* 26 U.S.C. § 7441 (1994). For a general overview of the United States Tax Court's history and process, see HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 395-493 (1979); *Types of Tax Court Jurisdiction*, 15 Stand. Fed. Tax Rep. (CCH) ¶ 42,058 (1998).

41. *See* 28 U.S.C. § 1491 (1994).

42. *See, e.g., id.* § 172(a) (establishing 15 year terms for judges in the Court of Federal Claims); *id.* § 7443(e) (establishing 15 year terms for Tax Court judges).

they operate without juries.[43]

The Court of Federal Claims is also empowered to hear compulsory counterclaims by the government against persons bringing suit there.[44] In a breach of contract claim by a citizen against the government, for example, the government would have to assert any counterclaim it had for breach of the same contract, and there would be no jury trial for the government's claims against the citizen.[45] Such claims by the government otherwise would normally be brought in an ordinary federal court where a jury would be available to decide legal rights and remedies.[46]

D. Territorial Courts

Territorial courts are established by Congress in connection with its power to make all necessary rules and regulations regarding United States territories;[47] these courts generally deal with local law, much like the state courts. Territories under the country's jurisdiction today include Puerto Rico, Guam, the U.S. Virgin Islands, and various Pacific island territories, all of which have local courts created by territorial constitutions or legislatures with authorization from Congress.[48] The District of Columbia also has local courts, though they are authorized by a different clause of the Constitution than the ordinary territorial courts.[49] Territorial courts were assumed to be constitutional under Congress's Article I powers as early as the second quarter of the nineteenth century,[50] but were

43. *See* United States v. Sherwood, 312 U.S. 584, 587 (1941). See *infra* notes 432-67 and accompanying text for a discussion of the justification for jury-less adjudication in such courts.

44. *See* CLAIMS CT. R. 13(a).

45. *See* McElrath v. United States, 102 U.S. 426, 440 (1880).

46. *See* 28 U.S.C. § 1345 (1994) (granting district courts jurisdiction over civil actions brought by the United States); United States v. Rosati, 97 F. Supp. 747, 748-49 (D.N.J. 1951) (holding that a jury trial is available when United States brings suit); *cf.* Robert G. Skelton & Donald F. Harris, *Bankruptcy Jurisdiction and Jury Trials: The Constitutional Nightmare Continues*, 8 BANKR. DEVS. J. 469, 491-97 (1991) (discussing counterclaims and the right to a jury trial in bankruptcy courts).

47. *See* U.S. CONST. art. IV, § 3, cl. 2.

48. *See, e.g.*, 48 U.S.C. § 1424-1(a) (1994) (Guam); *id.* § 1611(a) (Virgin Islands).

49. *See* U.S. CONST. art. I, § 8, cl. 17. The local courts in the District of Columbia were created by Congress rather than by a local legislative body. *See* District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 111, 84 Stat. 475, 475 (codified at D.C. CODE ANN. § 11-101 (1995)).

50. *See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). The Court in *Canter* suggested that a legislative court could not have any of the jurisdiction described in Article III. *See id.* at 546. That conclusion has been disputed, in part because if it were true, there could be no appeal from legislative courts to Article III courts. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 545 n.13 (1962).

not explicitly held constitutional until 1973.[51] For the most part, local courts in the territories use juries.[52]

Most of the territories also have federal courts of some kind. The United States district courts in Puerto Rico and the District of Columbia are created under Article III, so their judges have the tenure and salary protections of other Article III judges, and the Seventh Amendment applies.[53] Some territories, however, have an anomalous federal court in addition to their local courts.[54] Though denominated "United States District Courts," these courts, which consider both matters that fall within the Article III powers of the federal courts and some local territorial matters, are not Article III courts.[55] It has been held that the Constitution does not require jury trials in such courts in either criminal or civil cases.[56] The federal district courts in those territories, however, are bound by procedures enacted by the local legislatures, and both Guam and the Virgin Islands have provided for jury trials.[57] The District of Columbia is different. It has an Article III United States District Court, where

51. *See* Palmore v. United States, 411 U.S. 389, 410 (1973) (upholding District of Columbia local courts).

52. *See, e.g.*, 7 GUAM CODE ANN. § 22104 (1995); V.I. CODE ANN. tit. 5, § 321 (1994).

53. *See* 28 U.S.C. § 88 (1994) (District of Columbia); *id.* § 119 (Puerto Rico); *see also* LaForest v. Autoridad de Las Fuentes Fluviales de Puerto Rico, 536 F.2d 443, 446 (1st Cir. 1976) (holding that civil plaintiffs in the United States District Court for the District of Puerto Rico have the Seventh Amendment right to a jury trial).

54. *See, e.g.*, 48 U.S.C. § 1424(a) (1994) (Guam); *id.* § 1611(a) (Virgin Islands); *id.* § 1821 (Northern Mariana Islands).

55. *See* Government of the Virgin Islands v. Bryan, 738 F. Supp. 946, 948 (D.V.I. 1990).

56. *See* Balzac v. Porto Rico, 258 U.S. 298, 309 (1922) (holding that Seventh Amendment right to a jury trial does not extend to territories not incorporated into the union absent congressional intent to do so); American Pac. Dairy Prods. v. Siciliano, 235 F.2d 74, 78 (9th Cir. 1956) (holding that there is no right to a jury trial in civil suits in the District of Guam); Pugh v. United States, 212 F.2d 761, 762-63 (9th Cir. 1954) (stating that the constitutional right to a jury trial does not apply to criminal cases in the District of Guam). The matter is more complicated than these cases suggest, however. See *infra* notes 491-518 and accompanying text for a more thorough discussion of the right to jury trial in these courts. Since the decision in *Balzac*, the district court in Puerto Rico has been made into an Article III court. *See* 28 U.S.C. § 119 (1994).

57. *See, e.g.*, 7 GUAM CODE ANN. § 22104 (1995) (providing for jury trials in civil cases at law in which the amount in controversy exceeds $20 and for criminal cases where possible punishment is more than 60 days imprisonment or fine is in excess of $500); V.I. CODE ANN. tit. 5, § 321 (1994) (providing for jury trial in civil actions "except otherwise provided by law"). This reliance on local legislatures for the jury trial right makes sense if territorial courts are analogized to state courts because the Seventh Amendment does not apply to state courts. *See* 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.8, at 256 n.12 (1986); *see also infra* notes 500-05 and accompanying text (discussing varied approaches towards providing jury trials taken in U.S. territories and the District of Columbia).

the Seventh Amendment applies.[58] It also has non-Article III local courts, and the Supreme Court has held that the Seventh Amendment applies to them as well.[59]

E. Military Courts

Another kind of legislative court is the military court, which adjudicates crimes committed by military personnel.[60] Military courts are established under Congress's power to "make Rules for the Government and Regulation of the land and naval Forces."[61] Military courts were found to be constitutional in 1857.[62] Military courts do not handle civil matters at all, so the Seventh Amendment is not implicated in their creation or operation.[63]

F. Summary

All five kinds of legislative courts have been upheld under Article III of the Constitution. A civil jury is constitutionally required for some cases in only two: the adjuncts and the local courts in the District of Columbia. In Parts IV, V, and VI, I will try to make some sense of this state of affairs.

III. ARTICLE III, NON-ARTICLE III, AND SEVENTH AMENDMENT VALUES

If we are to assess accurately the legal and political issues relating to jury-less non-Article III adjudication, we must identify the values that underlie the two kinds of courts and the Seventh Amendment. These values should inform our choice of an adjudicatory method, if the Constitution permits a choice at all.

A. Article III Values

The life tenure and salary protection that Article III judges enjoy are designed to protect our interests in separation of powers

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58. *See* 28 U.S.C. § 88.

59. *See* Pernell v. Southall Realty, 416 U.S. 363, 383 (1974). For a discussion of these strange permutations, see *infra* notes 491-518 and accompanying text.

60. *See* 10 U.S.C. §§ 816-821 (1994).

61. U.S. CONST. art. I, § 8, cl. 14.

62. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65, 83-84 (1857).

63. *See* 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-11.00 (1991). "Juries" composed of service personnel are employed in military courts, but such juries are selected by the authority that convenes the court-martial. *See* 1 *id.* § 15-11.00. Article III and Sixth Amendment provisions related to the criminal jury do not apply. *See* 1 *id.* I will, for the most part, ignore military courts in this Article because I am concerned with the right to a *civil* jury.

and an independent judiciary.[64] While separation of powers is an institutional interest, the independent judiciary has both institutional and personal aspects—it is valuable to reinforce the separation of powers, but it also helps ensure individual litigants a fair hearing.

1. Separation of Powers/Checks and Balances

One of this country's founding principles is that the executive, legislative, and judicial powers should be vested in separate entities.[65] Indeed, the legislative, executive, and judicial functions are described in separate articles of the Constitution.[66] This structure stems from a belief among the founders that concentration of all three functions of government in the same hands leads to tyranny.[67] Strict separation of powers, however, is unattainable and may be undesirable because the efficiency costs would be too great.[68] Thus, a better characterization of the constitutional structure is probably "checks and balances," though we tend to use the term "separation of powers." A system of checks and balances tolerates some overlap of function, but provides many ways for each branch to check the others.[69] One of the most

64. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986); Fallon, *supra* note 8, at 937-38, 941.

65. *See* THE FEDERALIST NOS. 47, 51 (James Madison). For additional overviews of the history and meaning of the separation of powers doctrine, see W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965); Letter from John Jay to Thomas Jefferson (Aug. 18, 1786), *in* 10 THE PAPERS OF THOMAS JEFFERSON 271, 272 (Julian P. Boyd ed., 1954); Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), *in* 10 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 602, 603; Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 394-415 (1935); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303-22 (1989). For critiques of the separation of powers doctrine under modern American government, see JAMES O. FREEDMAN, CRISIS AND LEGITIMACY 15-20 (1978); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 607-13 (1986); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596-640 (1984).

66. Article I describes the legislative power, Article II describes the executive power, and Article III describes the judicial power.

67. *See* THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.").

68. *See* Lloyd N. Cutler, *Now is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387, 387-88 (1989).

69. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 387-88 (3d ed. 1996) (distinguishing between the description of federal structure as a separation of powers, which suggests autonomous branches, and description as checks and balances, which suggests overlap); *see also* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 258 (1985) (arguing that separation of powers had been abandoned in favor of checks and balances in the framing of the

important judicial checks on the other, political, branches of government is the power of judicial review.[70] The life tenure and salary protections help to reinforce this structure. Judges who need not fear removal from office or loss of salary from opposing the political branches are more likely to be willing to exercise that important power of judicial review. Thus, separation of powers, with its system of checks and balances, is an institutional value that benefits all citizens equally, insofar as all citizens have an interest in preventing government tyranny. While there has always been some overlap of function among the three branches in the federal government,[71] the Supreme Court has generally tried to monitor encroachments by one branch of government on the others and to prevent those encroachments that are unacceptable.[72]

2. Judicial Independence

The judicial independence that results from separation of powers is an institutional value—it benefits all of us equally to know that the courts cannot be manipulated by the political branches, even if we never use the courts ourselves. But individual litigants also have a personal interest in judicial independence that the life tenure and salary protections help to preserve.[73] An independent judiciary helps to guarantee a fair and impartial assessment of litigants' cases, unaffected by the political pressures of the day.[74] In particular, persons pressing unpopular positions should have a greater

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Constitution).

70. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (asserting the power of judicial review); THE FEDERALIST NO. 80 (Alexander Hamilton).

71. *See* Verkuil, *supra* note 65, at 322.

72. *See id.* at 311-12.

73. Apart from the separation of powers, there also might be a due process right to an independent judiciary. *See* Wiener v. United States, 357 U.S. 349, 355-56 (1958). In *Wiener*, a former member of the War Claims Commission who had been appointed by President Truman filed suit for back pay, claiming that he had been illegally removed from the Commission by President Eisenhower, who wished to appoint his own nominee to the position. *See id.* at 349-50. Congress had created the Commission in 1948 to adjudicate war claims, but had not expressly provided for the removal of a commissioner. *See id.* at 350. The Supreme Court held that the judicial character of the Commission mandated that it remain free from the control or influence of the executive and legislative branches. *See id.* at 355-56. Accordingly, the Court concluded that the President lacked the power to remove a member of a non-Article III adjudicatory body. *See id.* at 356.

74. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848, 848-51 (1986) (noting that the tenure and salary provisions of Article III reflect both a structural interest in separation of powers and a personal interest in an independent judiciary). I am suggesting that separation of powers is both an end in itself and a means to achieving an independent judiciary. The latter has both institutional and individual aspects.

confidence that their positions will receive a fair hearing if the judge cannot lose her job or have her salary reduced for siding with them.

B. *Non-Article III Values*

Congress may constitute a legislative court for a variety of reasons. Legislative courts may bring a greater efficiency to the adjudication of certain matters than an Article III court provides, or they may allow the use of expert decision makers, which is thought to increase both efficiency and accuracy. Congress could also create non-Article III courts because it desires to keep control over its regulatory programs in one of the political branches, though that motivation is less legitimate given the separation of powers principle that underlies our form of government.

1. Efficiency

Procedures in Article III courts are often cumbersome and time-consuming.[75] Liberal joinder of claims and parties under the Federal Rules of Civil Procedure allows cases to become quite complex.[76] Discovery, pre-trial motions, and the jury trial can all make Article III litigation a prolonged, expensive experience.[77] As a result, a movement toward alternative litigation strategies has been gaining momentum, fueled by congressional enactments,[78] judicial experimentation,[79] and abandonment of the courts by prospective litigants.[80] Legislative courts can provide important efficiency

75. *See generally* Symposium, *Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 217 (1985) (examining problems with civil litigation and their potential solutions).

76. *See, e.g.*, FED. R. CIV. P. 13 (counterclaims and cross-claims); FED. R. CIV. P. 14 (third-party practice); FED. R. CIV. P. 18 (joinder of claims and remedies); FED. R. CIV. P. 20 (permissive joinder of parties); FED. R. CIV. P. 24 (intervention).

77. *See* A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227-36 (1985).

78. *See, e.g.*, Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, § 103(a), 104 Stat. 5089, 5090-96 (codified as amended at 28 U.S.C. §§ 471-482 (1994)) (requiring each district court to implement measures to confront cost and delay in litigation).

79. One such experiment that is beginning to gain acceptance occurs in the mass tort context where the court must determine individual damages for a large number of victims. Some courts have held trials on a representative sample of cases and then extrapolated the average damage award to the remaining victims. *See, e.g.*, *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1020-21 (5th Cir. 1997); Hilao v. Estate of Marcos, 103 F.3d 789, 792-93 (9th Cir. 1996). *But see* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319-20 (5th Cir. 1998) (requiring individual determinations of damages in an asbestos exposure case).

80. *See* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (1983) (discussing the development of alternative dispute resolution); LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM (1990) (discussing various techniques for settling disputes in families, business, and the legal

benefits. They may employ simpler procedures that allow litigation to progress more rapidly and at lower cost, though they are bound by constitutional due process requirements.[81] They may adjudicate matters without juries, which add time and expense to litigation.[82] They may use expert decisionmakers, who can get to the heart of the issue more quickly.[83]

Once a non-Article III court has a case, there may be additional efficiency gains from allowing the court to hear related matters.[84] This is much like the efficiency justification in Article III courts for the compulsory counterclaim rule, which requires the assertion of counterclaims that arise out of the same transaction or occurrence as the original claim.[85] Indeed, non-Article III courts sometimes have compulsory counterclaim rules of their own, which require litigants to assert claims in legislative courts that would otherwise be cognizable in Article III courts.[86]

The very success of legislative courts has created another efficiency justification. Legislative courts—especially administrative agencies—handle so many cases every year that it would now be impossible to abolish them.[87] The flood of litigation into Article III courts that would result from such abolition would be overwhelming. Thus, even if there had been no efficiency issues in the formation of

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system, including negotiation, mediation, arbitration, and adjudication); Elwood F. Oakley, III & Donald O. Mayer, *Arbitration of Employment Discrimination Claims and the Challenge of Contemporary Federalism*, 47 S.C. L. REV. 475, 477-80 (1996) (discussing the increasing use of employer-mandated arbitration agreements).

81. *See* WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 4 (1986); PIERCE ET AL., *supra* note 20, § 5.1.3. Due process does not require Article III courts to have time-consuming, cumbersome, and expensive procedures. In theory, we could gain efficiency advantages by streamlining Article III procedures, and some of the "reforms" of recent years are intended to do exactly that. It may be easier, however, to set up alternative dispute resolution mechanisms than to make revolutionary changes in existing Article III procedures—especially if those changes are perceived as offering less protection to litigants.

82. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 193 n.1 (1996); HANS ZEISEL ET AL., DELAY IN THE COURT 71-81 (Greenwood Press 2d ed. 1978) (1959); Peter H. Schuck, *Mapping the Debate on Jury Reform*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306, 317-18 (Robert E. Litan ed., 1993).

83. *See infra* notes 89-94 and accompanying text (discussing arguments in favor of the use of expert decision makers).

84. Hearing related matters avoids the waste of judicial resources that occurs when multiple litigation is necessary. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855-58 (1986) (holding that expertise and efficiency are valid reasons for Congress to authorize the CFTC to hear common law counterclaims).

85. *See* FED. R. CIV. P. 13(a).

86. *See, e.g.*, FED. CL. R. 13(a).

87. *See* Fallon, *supra* note 8, at 925; *supra* notes 21-22 and accompanying text (contrasting the volume of cases in legislative courts with those in Article III courts).

legislative courts, efficiency concerns now weigh heavily in favor of retaining those courts.

These efficiency benefits explain why Congress might want to assign adjudication of some matters to courts using special procedures, but they do not explain why Congress does not set up such courts with judges who have life tenure and salary protection. One answer is that the need for adjudication in legislative courts is not static; if Congress abolished a program, for example, the system could be saddled with a large number of judges with life tenure and salary protection and nothing to do.[88] Similarly, market forces could result in large increases or decreases in the number of bankruptcy filings, so Congress needs some flexibility to vary the number of bankruptcy judgeships.

2. Expertise

One reason why some legislative courts are more efficient is that they employ expert decision makers, in contrast to the generalist judges or lay jurors in Article III courts.[89] It may be time-consuming and expensive to try to educate Article III decision makers on the intricacies of an esoteric field.[90] Efficiency is not the only reason for

88. That does not seem to be a serious threat right now because many Article III judgeships are going unfilled and existing judges are overworked as a result. *See, e.g.*, Peter Baker, *Clinton Says Republicans Are "Threat to Judiciary,"* WASH. POST, Sept. 28, 1997, at A6; Angie Cannon & Ron Hutcheson, *Many Unfilled Judgeships Causing Huge Backlog*, BUFFALO NEWS, Aug. 8, 1997, at A3, *available in* 1997 WL 6453280; Editorial, *Shirking Its Responsibility: Senate Doing Judicial System Disservice by Failing to Confirm Federal Judges*, PEORIA JOURNAL-STAR (Illinois), Oct. 15, 1997, at A4, *available in* 1997 WL 7679440.

89. The only current Article III courts with specialized subject matter jurisdiction are the United States Court of Appeals for the Federal Circuit and the Court of International Trade. The Federal Circuit has enough specialties that it has some of the benefits of a generalist court. *See* 28 U.S.C. § 1295 (1994) (granting the Federal Circuit exclusive jurisdiction over appeals concerning international trade, patent, and a variety of specialized statutes). The Court of International Trade has a more limited jurisdiction, much of which involves jurisdiction to review administrative decisions relating to tariffs and trade. *See id.* §§ 1581, 1582, 1584. It can also hear counterclaims relating to such matters, however. *See id.* § 1583.

90. The primary means of educating generalist judges and lay decision makers in Article III courts is through expert witnesses. *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1116. Many trials, however, become a battle of experts, making it difficult for persons outside the field to make rational judgments. *See, e.g.*, Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1535-36 (D.C. Cir. 1984) (showing disagreement between experts over how soon a disease would manifest itself after exposure to toxic chemicals); Andrew MacGregor Smith, Note, *Using Impartial Experts in Valuation: A Forum-Specific Approach*, 35 WM. & MARY L. REV. 1241, 1244-45 (1994) (criticizing the current legal system for creating the "battle of the experts," which often leaves "the court in little better position than when it started").

using expert decision makers, however. While we value the generalist judge as one who can bring a wide range of experience and knowledge to bear on a problem,[91] the modern world presents us with some issues that can only be understood by persons who are specialists in a given field. In such instances, the task of educating lay decision makers may be nearly impossible. Thus, some legislative courts are explicitly created to take advantage of the greater accuracy that may be had from decision makers who are experts in the field.[92] This is especially true of administrative agencies.

The benefits that we gain from having expert decision makers do not explain, however, why we could not have expert Article III judges. Indeed, specialized Article III courts are not unknown. The Court of International Trade and the Court of Appeals for the Federal Circuit are both Article III courts with specialized subject matter jurisdiction,[93] and there have been other such courts throughout our history.[94] If Congress decided to abolish a program, however, we could find not only that we had a large number of judges with nothing to do, but that they would be judges whose expertise was so narrowly defined that they would be of little help either in the generalized Article III courts or in other legislative courts. Of course, such judges could presumably learn to have a broader outlook, but that could take some time. Thus, for reasons of both efficiency and expertise, Congress could well prefer to create legislative courts whose judges do not have life tenure and salary

91. *See, e.g.*, Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 331 (1991); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 745-49 (1981); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984?: An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 779-80 (1983); Simon Rifkind, *A Special Court for Patent Litigation?: The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425, 425 (1951).

92. *See* JAFFE, *supra* note 23, at 121-32.

93. *See supra* note 89 (describing the Federal Circuit and the Court of International Trade); *see also* Gregory W. Carman, *The Jurisdiction of the United States Court of International Trade: A Dilemma for Potential Litigants*, 22 STETSON L. REV. 157, 161 (1992) (discussing jurisdictional issues in the Court of International Trade); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 5 (1989) (examining the costs and benefits of specialization in the Federal Circuit).

94. *See, e.g.*, Emergency Price Control Act of 1942, ch. 26, § 204, Pub. L. No. 77-421, 56 Stat. 23, 32 (expired 1947) (Emergency Court of Appeals) (overseeing price-fixing adjudication during World War II); Mann-Elkins Act, ch. 309, 36 Stat. 539, 539 (1910) (repealed 1913) (Commerce Court) (overseeing cases involving the regulation of commerce). Expert decision makers have a long history. Even in the twelfth century, expert juries were sometimes impaneled. *See* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 94-95 (Boston, Little, Brown & Co. 1898) (describing a case involving a claim of spoiled fish that made use of a jury of fishmongers).

protections than to provide for specialized Article III courts.

3. Control

When Congress creates a regulatory program and provides that adjudication of matters arising under its provisions be done in a non-Article III court, it is likely that at least part of Congress's motive for creating such a non-Article III court is control. Regulatory matters will often have significant political content, and it is understandable that Congress would prefer to maintain political control of all aspects of the regulation, as it helps ensure that the regulatory program will be carried out. Non-Article III adjudicators could be controlled, at least to some degree, by the political appointment power.[95] This non-Article III "value," however, is in direct conflict with the Article III values reflected in our constitutional structure. Actions that are politically desirable are not necessarily constitutional, and courts are intended to be politically unaccountable so that they can prevent overreaching by the political branches.[96] Thus, we should be wary of giving effect to this "value" except as to those matters where the Constitution unequivocally gives Congress or the executive unreviewable authority.[97]

C. *Seventh Amendment Values*

Seventh Amendment values are harder to identify. While they

95. Some administrative agencies are independent of any branch of government and are less susceptible to such political control. *See* PIERCE ET AL., *supra* note 20, § 4.4.1a; 1 DAVIS & PIERCE, *supra* note 20, § 2.5. Independent agencies include the Federal Trade Commission, the National Labor Relations Board, and the Securities and Exchange Commission. *See* PIERCE ET AL., *supra* note 20, § 3.4.4.1. Other agencies, however, are controlled, usually by the executive, through the power of appointment: a new President appoints the agency heads and so can set the agency's political agenda. The cabinet departments are the primary examples of controlled agencies. *See* 1 DAVIS & PIERCE, *supra* note 20, § 2.5; PIERCE ET AL., *supra* note 20, § 4.4.1. And because some rulemaking occurs in the course of adjudication, that means adjudication is, to some degree, under the control of the political branches. *See, e.g.*, Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 610-15 (1970); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 264-65 (1968). *See generally* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965) (discussing the means employed by administrative agencies to create policy).

96. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 35-65 (2d ed. 1962); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 74-75 (1986).

97. Such matters are extremely rare and can probably be identified through the Article III court's application of the political question doctrine. *See generally* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966) (examining the Supreme Court's use of the political question doctrine).

surely include the value of an independent decision maker, numerous other justifications for the civil jury have been offered. These include that the jury is a good decision maker; that it offers protection against abuse of power by governmental and other institutional authorities; that it brings community values into the judicial process; that it checks the bureaucratization of the judiciary; that it helps to legitimate judicial decisions; and that it educates the citizenry.[98] I summarize and restate these as the values of political participation and deliberation.[99]

1. Independent Decisionmaker

Both Article III and the Seventh Amendment help to ensure independent decision makers in federal adjudication. The salience of this point has perhaps caused courts and commentators to conclude that independence is the only important Seventh Amendment value and that it is subsumed in the independence value of Article III, so that no particular attention need be paid to the Seventh Amendment.[100] This, however, is a mistake. First, as I shall show in the next subsection, there are other Seventh Amendment values[101] that should also be acknowledged and preserved. Second, the jury reflects independence values different from those of the Article III judiciary. Article III is designed to make judges independent of political pressure that could be exerted by the political branches of government and by the people. The jury, by contrast, is designed to be independent not only of the political branches, but even of the judicial branch.[102] Indeed, the civil jury in pre-Revolutionary

98. *See* REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 8-11 (1992) [hereinafter ABA/BROOKINGS REPORT].

99. *See* Ellen E. Sward, The Civil Jury in the United States (unpublished manuscript, on file with author). The ideas presented here are more fully developed in the first chapter of this forthcoming book.

100. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53-54 (1989); Young, *supra* note 5, at 781.

101. *See infra* notes 109-21 and accompanying text.

102. *See* Wolfram, *supra* note 12, at 708-10. The independence of judicial actors, including judges and juries, is of relatively recent origin. Until the late seventeenth century, juries were under the control of judges, and judges were substantially under the control of the political branches. *See* Sward, *supra* note 99, at ch. 2. Jury independence was established in 1670 in *Bushell's Case*, Vaughan 135, 124 Eng. Rep. 1006 (1670). There, an English court held for the first time that jurors could not be punished for their verdicts. *See id.* at 1010-14. For a thorough discussion of *Bushell's Case*, see THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 200-64 (1985); for a discussion of its role in the evolution of the modern jury, see John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST.

America played an important role in resisting British oppression, which was enforced through the courts, and the Seventh Amendment was justified in part on that model.[103] The jury's independence from the judicial branch is also evident from the different mechanisms by which Article III and juries maintain their independence. Article III ensures independence of the judiciary by means of the tenure and compensation provisions.[104] Juries, by contrast, are unaccountable, and therefore independent, because they are selected more or less randomly,[105] they are brought together for just one case, they disband afterward, and they have no obligation to justify themselves.[106] In

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201, 206-12 (1988). Judicial independence emerged at about the same time, in the "Glorious Revolution" of 1688. *See* Verkuil, *supra* note 65, at 305. The independence of both juries and judges was an important consideration for the Framers in constructing the new United States government, and some commentators see the independence of the decision maker as the primary value behind both Article III and the Seventh Amendment. *See, e.g.*, Young, *supra* note 5, at 781. For further discussion of the history and structure of the U.S. Constitution and its bearing on jury independence, see *infra* notes 317-53 and accompanying text.

103. *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 30-31 (1975); Wolfram, *supra* note 12, at 703-08.

104. The need for these provisions has become more obvious recently as we have seen numerous attacks on judges who have issued unpopular opinions, including some calls for impeachment or resignation. *See, e.g.*, Joan Biskupic, *A Declaration of Independence: Though Open to Criticism, Judges' Rulings Must Not Jeopardize Their Jobs, Rehnquist Says*, WASH. POST, Apr. 10, 1996, at A17; Charles W. Hall, *Lawyers Defend Va. Judge Mocked by Dole*, WASH. POST, Apr. 23, 1996, at B3; Katharine Q. Seelye, *House GOP Members Target Judges for Impeachment*, COMMERCIAL APPEAL (Memphis), Mar. 16, 1997, at A6.

105. Over the last several decades, the Supreme Court has issued several decisions that help ensure that the pool of jurors from which panels are selected are representative of the community. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 525 (1975) (holding that a state's exclusion of women from jury panels unless the women specifically registered for jury service to be unconstitutional); Ballard v. United States, 329 U.S. 187, 195 (1946) ("The sympathetic and institutional exclusion of women . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society."); Thiel v. Southern Pac. Co., 328 U.S. 217, 224 (1946) (holding that a trial court cannot remove daily wage-earners from the jury pool); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (holding that a court cannot exclude black persons from jury pool). The peremptory challenge, however, enables the parties to eliminate some jurors without giving a reason. *See* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 369 n.1 (1992). This has led to efforts by the opposing parties to seat a panel of jurors that is likely to be favorably inclined toward their respective positions. *See id.* at 411, 413-14. The Supreme Court has recently cut back on the use of peremptory challenges, holding that the parties in civil cases cannot use the peremptory challenge to eliminate jurors solely on the basis of race, *see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991), or gender, *see* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994). The Court has also held that race could not be a basis for peremptory challenges in criminal cases by either prosecutors, *see* Batson v. Kentucky, 476 U.S. 79, 89 (1986), or defendants, *see* Georgia v. McCollum, 505 U.S. 42, 58-59 (1992).

106. *See* George L. Priest, *Justifying the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL

addition, most jurisdictions, including the federal system, prohibit a court from inquiring as to the basis for the jurors' decisions.[107] These characteristics of the jury make it possible for juries to serve as a democratic check on the judicial branch, which is not itself a democratic institution.[108]

2. Political Participation and Deliberation

The jury reflects political values that are not found in any of our other federal institutions and very few of our state institutions.[109] First, the jury is an example of participatory, rather than representative, democracy. Jurors participate directly in an important governmental decision. Among other things, it has been said that this kind of direct participation has significant educational benefits, as citizens learn directly how to be functioning members of

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JURY SYSTEM, *supra* note 82, at 103, 105. Given these characteristics, jurors can suffer no ill consequences from an unpopular or erroneous decision.

107. *See, e.g.*, FED. R. EVID. 606(b) (prohibiting inquiry into the jury's deliberations, but permitting evidence of jury's overt acts such as visiting the accident scene). *See generally* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 1086-88 (6th ed. 1993) (discussing prohibition on use of juror testimony to impeach the jury verdict).

108. *See* ABA/BROOKINGS REPORT, *supra* note 98, at 9. It is this independence even from judges that allows juries, on occasion, to "nullify" the law, for example by refusing to apply laws they do not like. Jury nullification is a hotly debated topic, but it is easier to justify in the criminal context, where it may be used to temper justice with mercy, than in the civil, where its effects may be more perverse. *See* Sward, *supra* note 99, at ch. 1. On jury nullification generally, see JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 57-75 (1994); David N. Dorfman & Chris K. Iijima, *Fiction, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861 (1995); Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165 (1991). It also is harder for juries to nullify in civil cases because of the many ways judges can control juries, including evidentiary rulings, directed verdicts, and new trials. *See* United States v. England, 347 F.2d 425, 430 (7th Cir. 1965); Sward, *supra* note 99, at chs. 6-8. Nevertheless, juries do sometimes try to nullify civil laws. Indeed, jury rebellion against the doctrine of contributory negligence, which prevents a plaintiff from recovering from a negligent defendant if the plaintiff also was negligent (even slightly), led most states to adopt doctrines of comparative negligence, which allow the negligent plaintiff to recover the portion of her injuries attributable to the defendant. For discussions of the development of comparative negligence, see LEON GREEN, JUDGE AND JURY (1930); Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949). The ability of the jury to serve this democratic function of jury nullification has eroded considerably in recent years because of the devices available to judges for controlling the civil jury. *See* Sward, *supra* note 99, at chs. 6-8. The availability of these control devices may make the jury much less independent of the judges than the founders intended. If so, the jury has essentially the same level of independence as the judiciary as a whole.

109. The ideas expressed in this section are developed more fully in Sward, *supra* note 99, at ch. 1.

the polity.[110]

Second, citizens can be *required* to serve on juries, whereas all other political participation is voluntary.[111] This civic obligation reflects political values best characterized as civic republican or communitarian, in contrast to the "liberal" values that underlie our other political institutions.[112] The new civic republicans and communitarians believe that citizens have political obligations,[113] whereas "liberals"—in the classic sense—believe that participation should be strictly voluntary.[114] The knowledge that one has duties to one's country is said to be valuable in itself, because it strengthens the bond with fellow citizens and gives each citizen a stake in the health of the polity.[115]

Finally, the jury uses a consensus decision rule rather than the majority rule found in our other political institutions.[116] A consensus

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110. *See, e.g.*, ABA/BROOKINGS REPORT, *supra* note 98, at 9; *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 127-28 (Richard D. Heffner ed., New American Library 1956) (1835); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 31-32 (1970) (discussing John Stuart Mill on participation in political processes); CALEB PERRY PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 56-58 (1953). The Constitution, however, generally reflects the Madisonian view of participation, which is that direct citizen participation leads to factionalism and is "unrealistic and counterproductive." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 431 (1987). Madison preferred that direct participation in government be limited to the state and local levels. *See* Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 918 (1985). The federal jury, then, is an anomaly in the national Constitution—an anomaly that reflects the Jeffersonian view of direct citizen participation, which was much more favorable than the Madisonian view.

111. *See* 28 U.S.C. § 1866(g) (1994) (providing that persons who fail to respond to a federal jury summons may be fined or imprisoned or both).

112. *See generally* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993) (contrasting liberal and communitarian views); STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS (2d ed. 1996) (same); NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES (Amitai Etzioni ed., 1995) [hereinafter NEW COMMUNITARIAN THINKING] (same).

113. *See, e.g.*, ETZIONI, *supra* note 112, at 247-59; Thomas A. Spragens, Jr., *Communitarian Liberalism*, *in* NEW COMMUNITARIAN THINKING, *supra* note 112, at 37, 38.

114. *See* MULHALL & SWIFT, *supra* note 112, at 13-18; Pamela Johnston Conover et al., *Duty is a Four-Letter Word: Democratic Citizenship in the Liberal Polity*, *in* RECONSIDERING THE DEMOCRATIC PUBLIC 147, 164-67 (George E. Marcus & Russell Hanson eds., 1993). Classic liberalism is a philosophy of limited governmental intervention into the private lives of citizens. *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 124 (Thomas I. Cook ed., 1947) (stating that preservation of private property is the chief end of government). It is probably better described in today's jargon as libertarianism.

115. *See, e.g.*, ETZIONI, *supra* note 112, at 159-60; Spragens, *supra* note 113, at 49-50.

116. *See* FED. R. CIV. P. 48; Andres v. United States, 333 U.S. 740, 748 (1948) (holding that the Sixth and Seventh Amendments require unanimous verdicts); American Publ'g

decision rule requires more extensive deliberation about the issues than does a majority rule.[117] Citizens must come together and deliberate until they reach a unanimous verdict.[118] This requires them to listen to differing views and to search for common ground among diverse participants.

These values are fairly abstract, but in sum they show that participation in jury service is valuable per se. The jury produces secondary benefits as well. Requiring citizens to participate by deliberating to a consensus is a means of injecting community values into the decision making process.[119] It provides an opportunity for members of the community to make a statement about the kinds of behavior that will be subject to civil liability. In negligence cases, for example, jurors must decide whether the defendant acted reasonably under the circumstances.[120] Having a jury decide that issue reveals how the community expects its citizens to conduct themselves. This may well be a better measure of community sentiment than the decision of a single judge, who most likely comes from the more elite ranks of society.[121]

Co. v. Fisher, 166 U.S. 464, 468 (1897) (holding that unanimity is an essential feature of common law jury trials); ABRAMSON, *supra* note 108, at 12 (discussing the unanimous verdict requirement); JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 255 (1980) (explaining the unanimity rule in jury verdicts).

117. *See* REID HASTIE ET AL., INSIDE THE JURY 94-98 (1983); MANSBRIDGE, *supra* note 116, at 166; Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, *in* IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 235, 249-53 (Lawrence S. Wrightsman et al. eds., 1987).

118. A unanimous verdict is still required in the federal courts unless the parties consent to a non-unanimous verdict. *See* FED. R. CIV. P. 48. Many states permit non-unanimous verdicts, usually a super-majority. *See, e.g.*, KAN. STAT. ANN. § 60-248(g) (1994) (requiring verdict of 10 of 12 jurors); LA. CODE CIV. PROC. ANN. art. 1797(B) (West 1990) (requiring 9 of 12 jurors); MASS. GEN. LAWS ANN. ch. 234, § 34A (West 1996) (requiring five-sixths of jurors); *see also* Sward, *supra* note 99, at ch. 5 (discussing the unanimity decision rule and the arguments for and against nonunanimous verdicts in civil cases).

119. *See* ABA/BROOKINGS REPORT, *supra* note 98, at 9-10.

120. *See, e.g.*, Vinyard v. Vinyard Funeral Home, Inc., 435 S.W.2d 392, 395-96 (Mo. Ct. App. 1968) (holding that reasonableness is a question for a jury).

121. *See* ABA/BROOKINGS REPORT, *supra* note 98, at 10-11; Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 82, at 341, 344; Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1066-87 (1964). There also are socializing effects from a jury's bringing diverse people together and requiring them to share their varied perspectives and reach common ground. This aspect of the experience of jury service should carry over into other areas of jurors' lives, opening them up to the viewpoints and experiences of others whose backgrounds may be quite different. Thus, jurors can learn something about getting along in a multicultural society. They can learn not only about the diversity of perspectives, but about the common human experience.

D. Summary and Conclusion

Article III courts reflect the political values of separation of powers and judicial independence. Non-Article III courts, on the other hand, are generally created to take advantage of their greater efficiency or the expertise their judges can bring to the matter and for the political control they permit. The values underlying the Seventh Amendment are quite different from either of these. While the Seventh Amendment may reflect the need for independent decision makers in the adjudicatory process—a value that overlaps one of the Article III values—it primarily reflects the values of direct citizen participation in the functions of government and of deliberation and consensus-building. This brand of participatory democracy brings community values to bear on judicial decision making.

These values are not all equal. The structural constitutional values of separation of powers and judicial independence reflect the foundational principles of our government and are surely more important than efficiency or expertise. These structural values are in even more direct conflict with the "value" of political control over adjudication. Few would argue otherwise. What we have failed to recognize, however, is that the Seventh Amendment values of direct participation and deliberation are also important foundational values.[122] For the most part, the jury is the only federal governmental institution that reflects these values.[123]

IV. JUSTIFYING ADJUDICATION IN LEGISLATIVE COURTS: THE PUBLIC RIGHTS DOCTRINE AND THE BALANCING TEST

While efficiency and expertise are the values that Congress seeks to effectuate by creating legislative courts, those values are irrelevant

122. *See* DE TOCQUEVILLE, *supra* note 110, at 108-09; PATTERSON, *supra* note 110, at 56-57.

123. Seventh Amendment values, however, are more controversial than Article III values. Even the country's founders disagreed about the proper scope of the public's role in governmental functions. Jefferson favored broad public participation in government; Madison, however, feared it. *See* EDWARD MCNALL BURNS, JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION 62-65 (1938) (discussing Madison's views on citizen participation); PATTERSON, *supra* note 110, at 56-57 (discussing Jefferson's views on juries). The jury is a Jeffersonian institution. The electoral college in presidential elections is a Madisonian institution. It might be expected, then, that the Court would undervalue juries in evaluating adjudication in legislative courts. Because there is less consensus about the value of the political participation and deliberation that the jury embodies than there is about the value of separation of powers and an independent judiciary, courts may demonstrate more concern for the Article III values. A robust jury also could cut down on judges' power. While judicial control of juries is strong, it can never be complete. *See supra* note 108 (describing jury nullification).

if legislative courts are unconstitutional. The constitutional justifications that the Court has developed for legislative courts are each linked closely to a specific kind of legislative court. Perhaps because administrative agencies play such a large role in modern America, the most important justification is the public rights doctrine, along with the balancing test that has evolved from it.[124] The public rights doctrine allows Congress to assign the adjudication of regulatory and public benefit matters to non-Article III adjudicators—primarily administrative agencies, though adjuncts have also figured in the development of the doctrine.[125] The balancing test allows for adjudication of a variety of *private* rights in administrative agencies.

While these doctrines were developed to justify non-Article III adjudication rather than jury-less adjudication, the Court has also permitted jury-less adjudication in administrative agencies in all categories of cases, including those involving private rights. Indeed, the primary question for the Court seems to be not whether Congress can provide for jury-less adjudication, but whether Congress can provide for non-Article III adjudication. If Congress can permit non-Article III adjudication, it usually follows that Congress can permit such adjudication to be without a jury. In the next section, I take issue with this approach. But because the Court's legislative courts jurisprudence is so important to the Seventh Amendment issue, it is necessary first to describe and analyze that jurisprudence.

A. Development of the Justification

1. Origins of the Public Rights Doctrine

The public rights doctrine was originally founded on the notion that if Congress can, consistent with the Constitution, allow the executive or legislative branch to resolve a particular dispute between the government and a private citizen, there is no bar to its giving such dispute for resolution to a body that looks like a court but does not have the protections required by Article III. There is a historical basis for the view that some matters are inherently "public"

124. Other justifications, which will be discussed in Part VI, are waiver, sovereign immunity, and the plenary powers rationale. For discussions of the development of the public rights doctrine, see 1 DAVIS & PIERCE, *supra* note 20, § 2.8; PIERCE ET AL., *supra* note 20, § 3.7; Fallon, *supra* note 8, at 951-70; Young, *supra* note 5. Young's is the most detailed history.

125. For a discussion of the propriety of applying the public rights doctrine and the balancing test to adjuncts, see *infra* notes 235-62 and accompanying text.

and can be resolved by the political branches. At the time of this country's founding, litigation between a citizen and the sovereign, aside from criminal matters, was rare. Citizens could not sue the government because of the doctrine of sovereign immunity,[126] and the government regulation that existed was handled outside the judicial process by the political branches.[127] Disputes between citizens and the government in its proprietary capacity, such as contract disputes, were sometimes handled in the common law courts if the government brought suit,[128] but such claims both by and against the government were often handled in summary proceedings conducted by government auditors.[129]

Apparently because of this background, early Congresses thought nothing of giving executive departments the authority to perform adjudicatory acts with respect to such governmental matters.[130] The power of Congress to confer such adjudicatory authority apparently received no serious challenge until the middle of the nineteenth century.

The public rights doctrine began with *Murray's Lessee v. Hoboken Land and Improvement Co.*[131] That 1856 decision resolved an Article III challenge to an adjudication by the Treasury Department of amounts due from a collector of the customs.[132] The

126. For a discussion of sovereign immunity, see *infra* notes 416-67 and accompanying text.

127. English and early American legal theorists did not consider government administration to relate to "law" at all. *See, e.g.*, FREEDMAN, *supra* note 65, at 259; FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 1-15 (1905). Maitland, in a series of lectures in 1887-88, hesitantly referred to English administrative "law," but said it had only developed in the previous 50 years or so. *See* F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 505 (1908); *see also* FREEDMAN, *supra* note 65, at 259 (asserting that the importance of administrative law in the United States was not recognized until the early twentieth century). There was, however, more regulation than many modern opponents of regulation care to admit. *See* ARTHUR M. SCHLESINGER, JR., *Affirmative Government and the American Economy*, *in* CYCLES OF AMERICAN HISTORY 219 (1986).

128. *See* United States v. Cooper Corp., 312 U.S. 600, 604 (1941) (holding that a suit by the United States in its proprietary capacity is a suit at common law); Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850) (same); Dugan v. United States, 16 U.S. (3 Wheat.) 172, 181 (1818) (same).

129. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283 (1856). The government's debtors were often collectors of the revenue who had failed to pay to the government the taxes or other revenues that they had collected. *See id.* at 275. Such debts have a public character.

130. *See* 1 DAVIS & PIERCE, *supra* note 20, § 1.4; Fallon, *supra* note 8, at 919.

131. 59 U.S. (18 How.) 272 (1856); PIERCE ET AL., *supra* note 20, at 71-72; Young, *supra* note 5, at 769, 795.

132. *See Murray's Lessee*, 59 U.S. (18 How.) at 275. Authority for the Treasury Department's adjudication of such cases was granted by the First Congress. *See* Act of

Court, citing established practice in England and some of the states,[133] held that such an adjudication did not fall inherently within the judicial power of Article III.[134] Rather, the Court thought that it was a political matter properly assigned to one of the political branches of government.[135] The Court was persuaded in part by the fact that the United States was a party and in part by the fact that the debt sought to be enforced was a "public" debt, owed by a public servant to the government and encompassing money he had collected in connection with his public duties.[136] The Court said:

> [T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[137]

In other words, Congress has the power to assign the adjudication of public rights to non-Article III bodies if it chooses. Congress is still free, however, to assign adjudication of public rights to the Article III courts.[138] This is consistent with the historical treatment of such rights as described in *Murray's Lessee*.[139]

In *Murray's Lessee*, the Court used the term "public rights" without providing much of a definition. In a sort of negative definition, the Court suggested that public rights do not involve cases falling within the common law, equity, or admiralty jurisdiction,

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Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65-66; Fallon, *supra* note 8, at 919.

133. *See Murray's Lessee*, 59 U.S. (18 How.) at 276-80.

134. *See id.* at 281. The Court did say that Congress could give such adjudications to the courts, however. *See id.* For a discussion of how the Court's views have evolved as to whether public rights fall within the judicial power of the United States, see *infra* note 189.

135. *See id.* at 281-82.

136. *See id.* at 283. The Court suggested that ordinary contract actions between the government and a private citizen also could be seen as public rights. *See id.* The government, however, was free to sue for breach of contract in the ordinary common law courts. *See id.* That the citizen could not bring suit against the government in a common law court was due to sovereign immunity and not the public character of the debt.

137. *Id.* at 284.

138. *See id.* at 283-84; *see also* U.S. CONST. art. III, § 2, cl. 1 (stating that the federal judicial power extends to "Controversies to which the United States shall be a Party"). In *Murray's Lessee* itself, government auditors had determined the amount due from the customs collector, and the Court approved of that adjudication as a "public" right. *See Murray's Lessee*, 59 U.S. (18 How.) at 284. But the suit came before the Supreme Court because the collector challenged that administrative determination in an Article III court, relying on Congress's limited waiver of sovereign immunity for that purpose. *See id.* The waiver did not allow the court to re-determine the debt found by the government auditors, however. *See id.* at 284-85.

139. *See id.* at 283.

because such cases would concern private rights.[140] Common law, equity, and admiralty cases all typically involved disputes between two or more private parties;[141] however in *Murray's Lessee*, the government was a party to the dispute.

The Court apparently did not attempt a definition of both public and private rights until *Crowell v. Benson*,[142] almost eighty years later. In that case, the presence of the government as a party became a more explicit way to distinguish public from private rights. The Court in *Crowell* said that private rights concern "the liability of one individual to another under the law as defined";[143] public rights were "those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[144] Thus, the presence of the government as a party was an inherent part of the definition of "public rights." But by 1982, when *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[145] was decided, a mere plurality of the Court approved of the *Crowell* definitions of public and private rights.[146] Thus, the stage was set for the development of the balancing test.

2. Recent Developments in the Justification for Agency Adjudication: The Balancing Test

Both *Crowell* and *Northern Pipeline* contained the germs of this new method of justifying administrative agency adjudication. In *Crowell*, the Court approved of agency adjudication of federal workers' compensation claims under the Longshoremen's and Harbor Workers' Compensation Act.[147] Claims brought under the Act were claims by workers against their employers—two private parties. Congress had replaced the workers' rights against their

140. *See id.*; Young, *supra* note 5, at 793.

141. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69-70 & n.23 (1982) (plurality opinion). *But see supra* note 128 (showing that the government can be a party to common law civil actions).

142. 285 U.S. 22 (1932).

143. *Id.* at 51.

144. *Id.* at 50. It is not clear whether this definition would include proprietary matters, such as contract actions or torts. *See infra* notes 430-31 and accompanying text. *Crowell* itself involved a regulatory matter—specifically, an enforcement under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994 & Supp. II 1996) (now named Longshore and Harbor Workers' Compensation Act).

145. 458 U.S. 50 (1982) (plurality opinion).

146. *See id.* at 67-72 (plurality opinion).

147. 33 U.S.C. §§ 901-950 (now named Longshore and Harbor Workers' Compensation Act); *see Crowell*, 285 U.S. at 42-65.

employers under admiralty law with the administrative remedy provided by the Act.[148] The Court approved of the administrative remedy, holding that there was no unconstitutional encroachment on the Article III powers of the judiciary because the agency had to enforce its orders in an Article III court.[149] In addition, the Court required that the Article III court review constitutional and jurisdictional facts de novo.[150] Indeed, the Court viewed the agency as an adjunct fact-finder, analogizing it to the jury.[151] Thus, while clearly defining public rights as including only matters where the government was a party, the Court permitted non-Article III adjudication of an administrative remedy between two private parties, as long as the essential judicial functions of enforcement and jurisdictional and constitutional fact-finding remained with the Article III court.[152]

Northern Pipeline was a more complicated decision. The plurality found that Congress's grant of jurisdiction to the bankruptcy courts was unconstitutional because it gave the non-Article III bankruptcy courts jurisdiction that was virtually coterminous with that of an Article III court, including jurisdiction over private

148. *See Crowell*, 285 U.S. at 39-40. I call such rights "replacement rights." *See infra* notes 213-19 and accompanying text.

149. *See Crowell*, 285 U.S. at 45. Voluntary compliance with the Commission's payment orders could be expected in many cases, however, so federal enforcement was likely to be needed only when there was some dispute over the Commission's resolution of the matter. *See id.* at 43-45.

150. *See id.* at 54, 64; *infra* note 152 (discussing jurisidictional and constitutional fact doctrines).

151. *See Crowell*, 285 U.S. at 51, 61. It should be clear that the jury has a quite different constitutional position than does an administrative agency: the former is constitutionally required under some circumstances, while the latter is entirely a discretionary creation of Congress. In my schemata, I distinguish between agencies and adjuncts. *See supra* notes 20-39 and accompanying text.

152. The jurisdictional fact doctrine, which required de novo review of findings related to the agency's jurisdiction—such as a finding that an applicant for benefits was injured in connection with his employment—appears to have disappeared. *See* 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 29:23 (2d ed. 1984); PIERCE ET AL., *supra* note 20, at 123. The same is largely true of constitutional facts, *see* DAVIS, *supra*, § 29:23, except that courts still engage in non-deferential review of "constitutional" facts relating to First Amendment issues. *See, e.g.*, Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 508-09 n.27 (1984); Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 284-85 (1964). *See generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (discussing the constitutional fact doctrine).

The Seventh Amendment did not pose a problem in *Crowell* because the remedy that the federal statute replaced was a claim in admiralty, in which there was historically no right to a jury trial. *See Crowell*, 285 U.S. at 45.

common law claims.[153] Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment, providing the votes for a holding of unconstitutionality.[154] Justice Rehnquist asserted that it was unnecessary to hold the bankruptcy courts generally unconstitutional when the only problem before the Court was the exercise of jurisdiction over a common law claim.[155] He thought that a non-Article III court could not exercise jurisdiction over a common law claim, but would not go so far as to strike down Congress's entire jurisdictional scheme.[156] Nonetheless, because the jurisdiction over common law claims was so enmeshed in the bankruptcy courts' otherwise constitutional jurisdiction, Justice Rehnquist agreed that Congress needed to reconstitute the courts' jurisdiction.[157]

It is the dissent in *Northern Pipeline* that is most important, however. Justice White provided an exhaustive analysis of the Court's past approvals of non-Article III adjudication and asserted that the only way to make sense of them was to view them as balancing Article III values against the reasons that led Congress to create a non-Article III body to adjudicate the particular matter before it.[158] Justice White thought that the balance in *Northern Pipeline* favored the jurisdictional grant that Congress had made.[159]

Justice White's dissent formed the basis of a new majority that began to come together just three years after *Northern Pipeline.* In *Thomas v. Union Carbide Agricultural Products Co.*,[160] the Court upheld a mandatory arbitration provision in the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").[161] Arbitration, which is a

153. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85-87 (1982) (plurality opinion). Justice Brennan wrote the plurality opinion and was joined by Justices Marshall, Blackmun, and Stevens. *See id.* at 52 (plurality opinion).

154. *See id.* at 89-92 (Rehnquist, J., concurring in the judgment).

155. *See id.* (Rehnquist, J., concurring in the judgment).

156. *See id.* at 91-92 (Rehnquist, J., concurring in the judgment).

157. *See id.* (Rehnquist, J., concurring in the judgment).

158. *See id.* at 92-118 (White, J., dissenting). Justice White was joined by Chief Justice Burger and Justice Powell. *See id.* at 92 (White, J., dissenting). Chief Justice Burger also filed a separate dissent to point out that the Court's holding was reflected in the Rehnquist opinion. *See id.* at 92 (Burger, C.J., dissenting).

159. *See id.* at 116-17 (White, J., dissenting) (stating that the balance favored the jurisdictional grant because, among other things, there was Article III review of bankruptcy court decisions, the jurisdictional grant was not a political power grab, and the reasons for the grant were compelling).

160. 473 U.S. 568 (1985).

161. *See* 7 U.S.C. § 136a(c)(1)(D)(ii) (1982) (codified as amended at 7 U.S.C. § 136a(c)(1)(F)(iii) (1994 & Supp. II 1996)) (providing for binding arbitration); *Thomas*, 473 at 594.

form of non-Article III adjudication,[162] was required when a second manufacturer wanted to make use of data submitted by an earlier manufacturer and the two manufacturers could not agree on the amount of money that the second manufacturer had to pay the first for the use of the data.[163] In contrast to the relatively searching review of the matters at issue in *Crowell*, judicial review of the arbitrators' award was limited to claims of " 'fraud, misrepresentation, or other misconduct.' "[164]

The *Thomas* Court approved of this mandatory arbitration, relying on two distinct grounds. First, the Court devised an expanded definition of "public rights." Although the claim was one between private parties and so appeared to concern only private rights as defined in *Crowell* and the *Northern Pipeline* plurality, the Court determined that the claim had the characteristics of a public right because (1) it was created by Congress, and (2) it was invested with a public rather than private purpose in that the ability of "follow-on registrants" of the pesticide to make use of data submitted by earlier registrants "serves a public purpose as an integral part of a program safeguarding the public health."[165] Thus, rights could be "public" even if they involved claims between private parties as long as they were created by the legislature rather than the common law and were an integral part of a scheme designed to promote public health and safety. I call these rights "quasi-public."[166]

There was also a second ground for the decision, however. In words reminiscent of Justice White's dissent in *Northern Pipeline*, the Court in *Thomas* considered Article III requirements in light of "the origin of the right at issue [and] the concerns guiding the selection by

162. Arbitration is sometimes undertaken voluntarily by the parties as an alternative to judicial dispute resolution. *See* 1 EDWARD A. DAUER, MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE § 2.02 (1994). *But see* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 491 (1989) (noting that ADR processes are not frequently chosen voluntarily by litigants). When arbitration is mandatory, however, it replaces Article III adjudication and should be viewed as non-Article III adjudication.

163. *See Thomas*, 473 U.S. at 573. Manufacturers of products covered by the Act had to submit data on product safety. *See id.* at 571. Rather than duplicate expensive testing that had already been done, manufacturers seeking later approval for identical products wanted to use product safety data submitted by earlier applicants. *See id.* at 571-72. They could do so only if they compensated the earlier manufacturer. *See id.* at 572. The agency, however, was ill-prepared to adjudicate disputes over the amount of compensation, so Congress provided instead for mandatory arbitration. *See id.* at 573-75.

164. *Id.* at 573-74 (quoting 7 U.S.C. § 136a(c)(1)(D)(ii) (1982)).

165. *Id.* at 589.

166. *See infra* notes 206-12 and accompanying text.

Congress of a particular method for resolving disputes."[167] In *Thomas*, the Court found it significant that Congress had created the rights being adjudicated, so that those rights did not fall "within the range of matters reserved to Article III courts."[168] In addition, Congress was searching for a "pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product."[169] These factors outweighed any need to preserve what had to be a minimal Article III interest: because the rights at issue could have been determined by Congress or the executive, there was little encroachment on the Article III judiciary.

The Court in *Thomas* apparently had not decided whether to stay with a public rights rationale or adopt the balancing test first articulated by Justice White in *Northern Pipeline*. But a year after *Thomas*, the balancing test received a more explicit articulation in *Commodity Futures Trading Commission v. Schor*.[170] *Schor* was an Article III challenge to the power of the Commodity Futures Trading Commission ("CFTC") to hear a common law counterclaim to a regulatory dispute that was within the agency's jurisdiction. Like *Northern Pipeline*, *Schor* thus involved a purely private right. But unlike the Court in *Northern Pipeline*, the Court in *Schor* upheld non-Article III adjudication of that right.[171]

Congress had authorized the CFTC to hear claims by traders against brokers that arose under the Commodity Exchange Act or CFTC regulations in order to provide an expeditious and inexpensive alternative to litigation, though litigation in an Article III court

167. *Thomas*, 473 U.S. at 587. For general commentary on the *Thomas* decision, see Fallon, *supra* note 8, at 930; Young, *supra* note 5, at 852-56; Richard M. Thomas, Note, *Formalism and Functionalism: From* Northern Pipeline *to* Thomas v. Union Carbide Agricultural Products Co., 37 SYRACUSE L. REV. 1003 (1986). As Justice White argued in his *Northern Pipeline* dissent, balancing had always been at least an implicit part of the analysis when Congress set up non-Article III courts. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 113-15 (1982) (White, J., dissenting); Ralph U. Whitten, *Consent, Caseload, and Other Justifications for Non-Article III Courts and Judges: A Comment on* Commodities Futures Trading Commission v. Schor, 20 CREIGHTON L. REV. 11, 12-19 (1986). The balancing test seemed to become more explicit in *Thomas*, however.

168. *Thomas*, 473 U.S. at 587 (distinguishing the statute at issue in *Crowell v. Benson*, 285 U.S. 22 (1932), which involved the adjudication of state created rights that had replaced existing common law rights).

169. *Id.* at 590.

170. 478 U.S. 833 (1986).

171. *See id.* at 857.

remained open.[172] The CFTC then adopted a rule allowing the agency to hear counterclaims by the brokers against the traders if the counterclaims arose out of the same transaction or occurrence, such as a counterclaim for the debt owed to the brokers; such counterclaims would be compulsory in the federal courts.[173] The question was whether the CFTC's hearing such counterclaims comported with Article III.[174] In language reminiscent of *Thomas*, the Court identified a number of "factors" that it said helped decide whether non-Article III adjudication was permitted:

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[175]

Applying these factors, the Court held that (1) while the right being adjudicated in the counterclaim was clearly a private right with its source in the common law; (2) the encroachment on the judicial branch was minimal because the power of the agency was quite limited, especially as the parties had to go to an Article III court for enforcement of the agency's orders; and (3) Congress's intent to provide an expeditious and inexpensive alternative to litigation would be thwarted if the brokers could not assert counterclaims in the CFTC proceeding, because the desire for a single forum to resolve the entire dispute would drive the parties into courts.[176]

There are at least two ways to view these developments. One is that there are now two distinct tests for administrative adjudication: the public rights doctrine, which allows administrative adjudication of public rights, and the balancing test, which must be applied if non-public rights are at issue. Under this view, the balancing test supplements the public rights doctrine. A second way to look at these developments is that the balancing test has supplanted the public rights doctrine altogether, so that all administrative

172. *See id.* at 836.

173. *See id.* at 837; 17 C.F.R. § 12.19 (1997); *see also* FED. R. CIV. P. 13(a) (defining compulsory counterclaims).

174. The Court first determined that the CFTC had the statutory power to promulgate such a rule. *See Schor*, 478 U.S. at 842-43. The rule is found at 17 C.F.R. § 12.19.

175. *Schor*, 478 U.S. at 851.

176. *See id.* at 848-56.

adjudications are tested by its methods.[177]

Even if the balancing test is always used, pure public rights will always satisfy the test, at least under the Court's current jurisprudence.[178] The Court in *Schor* identified three factors to be weighed in the balance. The first is the degree of encroachment on the Article III judiciary.[179] Significantly, the Article III judiciary is usually thought to be adequately protected if there is Article III review of agency action.[180] A pure public right, however, could be determined by Congress or the executive, so there is no encroachment on the Article III judiciary even if Article III review is extremely deferential or even non-existent.[181] The second *Schor* factor is the origin of the right.[182] Rights that originate in the common law are more likely to require Article III adjudication than those that originate in Congress.[183] Pure public rights do not originate in the common law but in congressional enactments, so this factor weighs in favor of non-Article III adjudication. The final *Schor* factor is the reason for Congress's choice of a non-Article III court.[184] This factor is unimportant with respect to pure public rights because Congress has extremely broad discretion in its choice of an adjudicatory body for pure public rights.[185] Thus, even if the balancing test applies to all administrative adjudications, there should be no problem with administrative adjudication of pure public rights.

177. See *infra* note 362 for an argument that this second view makes more sense.

178. I question the soundness of that jurisprudence, however. *See infra* notes 186-262 and accompanying text.

179. *See Schor*, 478 U.S. at 851.

180. *See id.* at 853; Crowell v. Benson, 285 U.S. 22, 51-52 (1932); *see also* Fallon, *supra* note 8, at 917-18 (arguing that Article III review of agency decisions protects Article III values); Redish, *supra* note 16, at 199, 206-08 (same).

181. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). While Article III might not require review of agency action, the Due Process Clause probably would. *See* Wiener v. United States, 357 U.S. 349, 355-56 (1958).

182. *See Schor*, 478 U.S. at 851.

183. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (plurality opinion). *But see Schor*, 478 U.S. at 853-54 (holding that pure private rights can be heard in a non-Article III court with appropriate safeguards). This points up one irony of the public rights doctrine: Congress could not assign adjudication of state common law claims to non-Article III federal bodies, but could assign adjudication of a wide range of federal matters to such bodies. Federal courts thus could find much of their time taken up with state rather than federal matters.

184. *See Schor*, 478 U.S. at 851.

185. *See Murray's Lessee*, 59 U.S. (18 How.) at 284. Once again, there may be some due process concerns, *see supra* note 181, but there should not be any Article III concerns.

B. *Making Sense of the Supreme Court's Jurisprudence*

Courts and commentators frequently note that the Supreme Court's jurisprudence relating to the public rights doctrine and the balancing test is quite confused.[186] In this section, I will do some sorting that I hope will help to clarify some aspects of that doctrine. The task is a difficult one because it is multidimensional. It requires a consideration of the kinds of rights that the Court's doctrine embraces, the protections that are required for the various kinds of rights in order to preserve Article III values, and the characteristics of the courts in which adjudications have been justified under these doctrines. These issues sometimes overlap.

1. Kinds of Rights Adjudicated Under the Public Rights Doctrine/Balancing Test and the Scope of Review

Throughout the development of the public rights doctrine and the balancing test, the Court has continued to distinguish only two kinds of rights: public and private. In the previous section, however, I hinted at a need to break down the categories even further. I identify four categories, in order of their progression from public to private rights: pure public rights, quasi-public rights, replacement rights, and pure private rights. It is important to make these fine distinctions because, as I have shown, the nature of the right weighs heavily in the *Schor* balance. Furthermore, if we recognize the different gradations, we can better fine tune the Article III analysis: the four categories present different kinds of challenges to our constitutional principles and therefore require different kinds of responses. Finally, recognizing only two kinds of rights obscures the Seventh Amendment issues, as I will show in the next section.

a. Pure Public Rights

Pure public rights concern regulatory or public benefit adjudications between the government and a private party. These rights originate in a statute enacted by Congress, rather than in the common law, and the government is always a party, seeking to protect the public health, safety, or welfare by enforcing[187] or

186. *See, e.g.*, *Schor*, 478 U.S. at 847; *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment); Fallon, *supra* note 8, at 916; Redish & LaFave, *supra* note 17, at 417-29.

187. *See* Tull v. United States, 481 U.S. 412, 414-17 (1987) (government's suit against real estate developer in federal court seeking civil penalties for environmental damage). *Murray's Lessee* is generally thought to be the first public rights case. *See* Young, *supra* note 5, at 795. Its status as a "pure" public rights case is problematic, however. It did

defending[188] such laws. The Supreme Court has held that Congress may assign the adjudication of pure public rights to legislative courts.[189] The rationale is that if Congress could conclusively determine a matter, it can assign adjudication of that matter to tribunals that it creates, without regard for the requirements of Article III.[190] Indeed, it could even be argued that Article III does not require judicial review of public rights matters: oversight by the judicial branch could be viewed as encroachment on the constitutional powers of the legislative and executive branches.[191] Congress has not gone so far, however, perhaps because even if Article III does not require judicial review, due process probably

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involve an action between the government and a citizen with respect to customs regulation. *See Murray's Lessee*, 59 U.S. (18 How.) at 274. The claim, however, was essentially a debt collection—the government sought money collected on its behalf by one of its employees. *See id.* The fact that it was a regulatory, rather than a proprietary, debt is what gives it a public character. I question the accuracy of calling ordinary breach of contract actions between the government and a private citizen "public" rights, as there is no regulatory or public benefit element to such matters. It seems to me that such proprietary matters involving the government are more akin to private rights.

188. *See, e.g.*, 5 U.S.C. § 702 (1994) (authorizing persons aggrieved by administrative orders to challenge orders in federal court); Barlow v. Collins, 397 U.S. 159, 160-64 (1970) (tenant farmer's action for declaratory judgment against a Department of Agriculture regulation); Abbott Labs. v. Gardner, 387 U.S. 136, 138-39 (1967) (drug manufacturer's action for declaratory judgment against FDA labeling and advertising requirements); 21 C.F.R. § 10.25 (1997) (authorizing citizens to initiate administrative proceedings challenging FDA orders).

189. *See Murray's Lessee*, 59 U.S. (18 How.) at 284. It seems clear that the judicial power extends to public as well as private rights matters. *See* Redish & LaFave, *supra* note 17, at 418 (arguing that the term "suits" encompasses administrative disputes). Nevertheless, it has been argued that the traditional core of the federal judicial power is private disputes. *See Northern Pipeline*, 458 U.S. at 68-70 & n.25 (plurality opinion). Indeed, in the past the Court has suggested that at least some public rights matters may not even be cognizable in an Article III court because they do not fall within the judicial power of the United States. *See* Williams v. United States, 289 U.S. 553, 578 (1933) (interpreting the constitutional grant of jurisdiction over controversies to which the United States is a party to mean controversies to which the United States is a party *plaintiff*); *cf.* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) (saying that territorial courts are "incapable of receiving" jurisdiction over cases falling within the Article III judicial power). That position has been abandoned, however, in part because it is inconsistent with the language of Article III. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 550-51 (1962). The judicial power includes "Controversies to which the United States shall be a Party" and "Cases, in Law and Equity, arising under the Constitution, [and] the Laws of the United States," U.S. CONST. art. III, § 2, cl. 1, so public rights cases do fall within the literal language of the Constitution. Indeed, if this were not the case, Article III courts would not be able to review public rights matters decided initially in the administrative agencies. *See Glidden*, 370 U.S. at 545 n.13; Fallon, *supra* note 8, at 943-46.

190. *See Murray's Lessee*, 59 U.S. (18 How.) at 284.

191. Those who emphasize the separation of powers aspect of the constitutional structure rather than the checks and balances aspect could advocate such a view. *See* STONE ET AL., *supra* note 69, at 387-88.

does.[192] While Congress generally provides for some Article III review of public rights adjudication, that review is quite deferential.[193] To confuse the issue further, Congress often provides that public rights matters be adjudicated initially in an Article III court.[194] Thus, Congress's options with respect to public rights matters are quite broad. At one extreme, it can create a non-Article III court to hear such matters, with highly deferential review in an Article III court; at the other, it can give such matters to Article III courts in the first instance.

The public rights doctrine originated at a time when governmental administration was not thought to involve "law" at all.[195] Thus, it was easy to see Congress as having broad discretion in handling administrative or regulatory matters. There are good reasons to question that view, however. First, it is now clear that legal matters arising out of governmental administration are within the constitutional jurisdiction of Article III courts.[196] Indeed, that was implicit even in *Murray's Lessee*, in which the Court said that Congress could have given the matter before it to an Article III court[197]—an impossibility if the Constitution did not encompass jurisdiction over public rights.[198] Furthermore, we no longer view governmental administration as primarily political in nature; rather,

192. *See* Wiener v. United States, 357 U.S. 349, 355-56 (1958).

193. *See, e.g.*, Montana Power Co. v. EPA, 608 F.2d 334, 344 (9th Cir. 1979) (applying arbitrary, capricious, or abuse of discretion standard).

194. *See, e.g.*, 16 U.S.C. § 1540(g) (1994) (providing for jurisdiction of federal district courts over civil suits under the Endangered Species Act); 33 U.S.C. § 1365 (1994) (providing for jurisdiction of federal district courts over civil suits under the Clean Water Act); 42 U.S.C. § 4911 (1994) (providing for jurisdiction of federal district courts over civil suits under the Noise Control Act). Congress's ability to give citizens a right of action against government agencies to enforce congressional mandates has been undermined somewhat by developments in standing doctrine. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (holding that Congress cannot give a right to sue to citizens who do not otherwise meet the injury-in-fact, causation, and redressability requirements for standing).

195. *See supra* note 127. *Murray's Lessee*, which originated the doctrine, was an 1856 decision. *See Murray's Lessee*, 59 U.S. (18 How.) at 284.

196. *See* U.S. CONST. art. III, § 2, cl. 1 (providing federal court jurisdiction over controversies to which the United States is a party); *see also supra* note 189 (describing cases that discuss whether judicial power extends to public rights matters). In a strained attempt to accommodate sovereign immunity, this clause was at one time interpreted to include only claims involving the United States as plaintiff. *See* Williams v. United States, 289 U.S. 553, 572-78 (1933). This position was rejected in *Glidden Co. v. Zdanok*, 370 U.S. 530, 562-71 (1962). Even the *Williams* interpretation, however, would leave public rights cases subject to Article III jurisdiction, but only when the government is seeking to enforce an order—not when a citizen is challenging an order.

197. *See Murray's Lessee*, 59 U.S. (18 How.) at 284.

198. *See Glidden*, 370 U.S. at 545 n.13; Fallon, *supra* note 8, at 943-46.

we have developed a substantial body of administrative law, which regulates and restricts the government itself. To some degree, that may reflect due process rather than separation of powers concerns,[199] but this development makes it clear that administration is susceptible of judicial analysis.

Second, as both the Court and commentators have noted, separation of powers principles seem to require *more* Article III oversight of public rights matters than of private rights matters,[200] though the Court has never taken that position as a matter of constitutional law. If Congress can impose regulatory duties upon the citizens and then create its own tribunals to adjudicate and enforce those rights and duties with minimal oversight by the Article III courts, considerable governmental power will be concentrated in the hands of one branch—precisely the circumstance that the framers were trying to guard against.[201] This is an argument based on the structure of the Constitution rather than its precise language, but that approach has been advocated by commentators[202] and employed by the Court.[203]

The problem is compounded by the fact that pure public rights involve the government itself as a party. When the government sues a private citizen, there is already considerable inequality between the parties, just as there is in a criminal case.[204] That inequality is made worse when the litigation is conducted in a court whose judges are potentially under the control of the very governmental body that created the rights and duties. Administrative adjudication of public

199. *See* Wiener v. United States, 357 U.S. 349, 355-56 (1958).

200. In *Northern Pipeline* the Court stated:

> Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68 n.20 (1982) (plurality opinion); *see also* Young, *supra* note 5, at 837 ("Are not the executive and legislative branches more likely to attempt to influence judges in cases ... where the federal government is a party?").

201. *See* THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.").

202. *See, e.g.*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 68-69 (1969).

203. *See* Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 221-23 (1995).

204. The consequences are not as severe as they are in a criminal case, though civil regulatory matters can be significant for the parties involved.

rights, then, could threaten both the structural separation of powers interests and the interests of individuals in an independent adjudicator. At the very least, then, it appears that there should be meaningful Article III review of public rights matters adjudicated initially in non-Article III courts. Highly deferential review, such as often occurs today, does not adequately preserve constitutional values.[205]

b. Quasi-Public Rights

When Congress creates a new regulatory right but allows private parties to enforce that right against other private parties, the right might be characterized as quasi-public. In such cases, the private right of action substitutes for government regulatory actions. Perhaps reflecting their close relationship to pure public rights, the Supreme Court has held that quasi-public rights may be adjudicated in legislative courts with only limited Article III review.[206]

There are many examples of legislative court adjudication of quasi-public rights, including *Thomas*, where this extension of the definition of "public rights" was first articulated.[207] The original claim in *Schor*—the claim by the trader against the broker to vindicate rights granted by act of Congress—was also a quasi-public right, as it was a claim based on a regulatory law enacted by Congress and was between two private parties.[208] The rights of a debtor in bankruptcy could also be characterized as quasi-public: the debtor's rights are created by act of Congress to regulate and resolve insolvencies, and the rights are granted against other private parties.[209] Once again, Congress often provides for adjudication of

205. Congress, of course, has the power to change regulatory laws, so it would continue to have considerable control over the substantive law that applies to public rights. An independent adjudicator can help to ensure that whatever the law is, it is fairly administered.

206. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 573-74 (1985); *supra* notes 160-69 and accompanying text. In *Thomas*, a dispute that arose under a regulatory law was decided by binding arbitration, and the arbitrators' award was reviewable only for fraud, misrepresentation, and other misconduct. *See Thomas*, 473 U.S. at 573-74.

207. *See Thomas*, 473 U.S. at 588. As I noted earlier, the Court has always distinguished only public and private rights; the term "quasi-public" is not the Court's.

208. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 837 (1986). Jurisdiction over the original quasi-public right claim was not at issue in *Schor*. *See id.* at 838. Rather, the trader challenged the agency's power to hear his common law counterclaim—a pure private right—so the Court did not address the status of quasi-public rights. *See id.*

209. The Court has said that bankruptcy is arguably a public right, *see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion),

quasi-public matters in Article III courts,[210] but the Supreme Court cases suggest not only that Congress has considerable discretion in assigning quasi-public matters to legislative courts, but that legislative courts may adjudicate quasi-public rights subject to only deferential Article III oversight.[211]

As with public rights, there are reasons to question whether the Court's approach is correct. Some of the same considerations apply to quasi-public rights as to public rights—quasi-public rights are certainly as susceptible of judicial determination as public rights. Indeed, they involve classic issues of private litigation; only the source of the law makes them different from ordinary common law actions. Furthermore, as with public rights, administrative adjudication of quasi-public rights concentrates governmental power in one political branch. On the other hand, quasi-public rights neither involve the government/private citizen inequality, nor implicate the potential problem of one party controlling the court before which it has a case pending. Those differences make administrative adjudication of such rights somewhat less problematic. Nevertheless, administrative adjudication of such rights still gives Congress or the executive the opportunity to influence the outcome of particular cases in accordance with the prevailing political orientation.[212] Thus, such administrative adjudication still raises serious separation of powers concerns, which could be eased with less deferential Article III oversight. Such oversight should be sensitive

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but under the schemata I have described here, "quasi-public" is more accurate. It also might be argued that bankruptcy is really a replacement right, *see infra* notes 213-19 and accompanying text, because it replaces ordinary debtor/creditor law. I think quasi-public is more accurate, however, because bankruptcy generally had ancient statutory rather than common law origins, *see* Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 1-2, 7-8 (1919), and because there is explicit constitutional authority for Congress to create bankruptcy law, *see* U.S. CONST. art. I, § 8, cl. 4. *See generally* 1 COLLIER ON BANKRUPTCY ¶ 1.01 (Lawrence P. King ed., 15th ed. 1997) (discussing the origins of bankruptcy law); DAVID G. EPSTEIN ET AL., BANKRUPTCY §§ 1-1, 1-2 (1992) (same).

210. *See, e.g.*, Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 106 (1991) (age discrimination); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468 (1982) (employment discrimination); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 753 (1979) (age discrimination).

211. *See supra* notes 160-69 and accompanying text (discussing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985)). Review of the arbitrators' decision in *Thomas* was limited to claims of " 'fraud, misrepresentation, or other misconduct.' " *Thomas*, 473 U.S. at 573-74 (quoting 7 U.S.C. § 136a(c)(1)(D)(ii) (1982)).

212. The National Labor Relations Board ("NLRB"), for example, is well-known for bending with the prevailing winds. Indeed, the NLRB performs much of its rulemaking function through adjudication. *See* 1 DAVIS & PIERCE, *supra* note 20, § 6.8; Bernstein, *supra* note 95, at 574; Peck, *supra* note 95, at 255-56; Shapiro, *supra* note 95, at 922.

to the particular threat to Article III values that such adjudication presents.

c. Replacement Rights

Sometimes, rather than creating entirely new rights, Congress will provide a new administrative remedy that *replaces* existing common law remedies. Replacement rights are similar to quasi-public rights in that they both involve matters that arise between two private parties rather than one private party and the government and they both concern a remedy created by Congress.[213] But quasi-public rights have no direct counterpart in the common law, whereas replacement rights supplant existing private rights—usually rights created by the states. The Court appears to be more solicitous of replacement rights than of quasi-public rights, perhaps because in the absence of the replacement remedy, the parties would have had rights to an Article III court for their state law claims.[214] Thus, while the Court in *Thomas*, adjudicating a quasi-public right, permitted deferential review of the arbitrators' award,[215] the Court in *Crowell*, adjudicating a replacement right, approved the federal worker's compensation scheme only because an Article III court was required to enforce the administrative order and because that Article III court engaged in de novo review of certain administrative fact-finding.[216]

As noted, the worker's compensation scheme in *Crowell v. Benson* is one example of a replacement right. Replacement rights are also adjudicated in bankruptcy proceedings. In a decision interpreting the scope of the Seventh Amendment rather than Article III, the Court held that by filing a claim against the estate, a

213. The issue is complicated somewhat by the fact that an issue could be between two private parties in the legislative court, but between the government and one of the parties on appeal to an Article III court. Often, enforcement of the decision of a legislative court is done by the government suing the party who is resisting the legislative court's order. *See, e.g., Schor*, 478 U.S. at 838; Universal Camera Corp. v. NLRB, 340 U.S. 474, 476 (1951); Crowell v. Benson, 285 U.S. 22, 36 (1932). I am concerned here, however, only with the power of the legislative courts, so I characterize the right as a "quasi-public" or "replacement" right if the matter was between two private parties *in the legislative court.*

214. Of course, the statement in the text is only true if there is diversity of citizenship. If there is no diversity, the parties must sue in state courts, which are obviously not Article III courts. State courts, however, like Article III courts, are independent of Congress.

215. *See Thomas*, 473 U.S. at 592-93.

216. *See Crowell*, 285 U.S. at 65 (holding that jurisdictional facts and constitutional facts are reviewed de novo). The *Crowell* Court, however, allowed review of other administrative fact-finding on a substantial evidence standard, which is more deferential. *See id.* at 46. The Court called the rights at issue in *Thomas* a variety of public rights, and it said that *Crowell* involved private rights. *See Thomas*, 473 U.S. at 589.

creditor transforms his common law claim, such as a breach of contract claim, into an equitable claim for his share of the estate.[217] Thus, the federal equitable rights the creditor gains in bankruptcy replace state common law rights. Interestingly, however, Article III review of the bankruptcy courts' adjudication of such replacement rights is more deferential than the review that was approved in *Crowell*.[218] This result could possibly be justified on the ground that bankruptcy is adjudicated by an adjunct rather than an administrative agency, and thus the Article III court theoretically has more direct and frequent oversight of the non-Article III adjudication.[219] On the other hand, it could reflect confusion as to the kind of rights that are at issue and the threat to constitutional values posed by non-Article III adjudication of such rights.

Because replacement rights are created by Congress, they raise the same separation of powers problems as public and quasi-public rights and may require searching Article III review for all the same reasons. But other constitutional values could also be at issue in administrative adjudication of replacement rights. Specifically, because replacement rights generally replace common law or equitable rights arising under state law, they implicate federalism concerns. If Congress has broad authority to create such replacement rights and assign their adjudication to administrative agencies, that could be a threat to the constitutional division of power between the federal government and the states. The federalism problem is two-fold. First, Congress may exceed its authority merely by creating the replacement right: it may be beyond its Article I powers, for example. Article III courts, however, will review that question de novo, as it is a question of constitutional interpretation. This should be adequate protection for that federalism issue. Second, even if Congress has the power to create the replacement right, the state may retain considerable power over residual or related matters. Assigning adjudication of the replacement right to agencies could make it difficult for the states to develop a coherent judicial doctrine with respect to such related matters. Article III oversight is not likely

217. *See* Katchen v. Landy, 382 U.S. 323, 336-37 (1966).

218. Findings of fact by bankruptcy judges are reviewed by the district judge on a clearly erroneous standard. *See* Nationwide Mut. Ins. Co. v. Berryman Prods., Inc. (*In re* Berryman Prods., Inc.), 159 F.3d 941, 943 & n.6 (5th Cir. 1998). Conclusions of law, however, are reviewed de novo. *See* Daniels-Head & Assocs. v. William M. Mercer, Inc. (*In re* Daniels-Head & Assocs.), 819 F.2d 914, 919 (9th Cir. 1987) (reviewing bankruptcy court's conclusions of law de novo).

219. For a discussion of the differences between agencies and adjuncts, see *infra* notes 232-62 and accompanying text.

to solve this problem.

d. Pure Private Rights

Pure private rights have their origins in traditional sources of law, such as the common law, equity, or admiralty, and generally involve disputes between two private parties.[220] In its earliest decisions, the Supreme Court had suggested that pure private rights must be adjudicated in Article III courts.[221] That holding was certainly undermined by *Crowell v. Benson*, however, because the Court called the rights at issue there "private," but allowed administrative adjudication of them as long as there was sufficient Article III oversight.[222] The *Crowell* decision was, then, a precedent that made it easier for the Court to allow the administrative adjudication of pure private rights in *Schor*—again with extensive Article III oversight.[223] Despite *Northern Pipeline*, bankruptcy courts also continue to adjudicate pure private rights, as bankruptcy courts have jurisdiction over claims by the trustee, representing the debtor in bankruptcy, against alleged debtors of the estate.[224]

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220. The government can file suits at common law as well and might do so when it is acting in its proprietary capacity. While the government's presence might tempt one to call the rights thus involved "public," they are arguably more like private rights. The government, when suing in its proprietary capacity, is acting just as any private citizen would act.

221. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). Of course, pure private rights are often adjudicated in state courts, which are not Article III courts. The statement in the text applies when the matter is adjudicated in federal tribunals.

222. *See supra* notes 147-52 and accompanying text.

223. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 858 (1986). Once again, the Court talked only of public and private rights, but I have suggested four categories, so that the rights at issue in *Crowell* are different from those at issue in *Schor*. By the time *Schor* was decided, the Court essentially had abandoned the concept of jurisdictional facts. *See* Northern Pipeline Contr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982) (plurality opinion); 3 DAVIS & PIERCE, *supra* note 20, § 17.9. *Schor* did rely, however, on the fact that, like the agency in *Crowell*, the CFTC could only enforce its orders in an Article III court. *See Schor*, 478 U.S. at 836. Whether the requirement is a significant check on agency action is open to question, however. If review of the agency's fact-finding is based on a deferential standard, it may not be a significant protection. Under both *Schor* and *Crowell*, fact-finding is reviewed according to a weight of the evidence standard, which is more deferential than the de novo standard, but less so than, say, the clearly erroneous standard that federal appeals courts use in reviewing judicial fact-finding. *See* 2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW § 15.1 (1986). In addition, some litigants will not find it worthwhile to challenge the agency's orders and, therefore, will never test them in an Article III court.

224. *See, e.g.*, 28 U.S.C. § 157(b)(2)(H) (1994) (authorizing proceedings to recover fraudulent conveyances); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989) (proceeding to recover fraudulent conveyance brought in bankruptcy court against a party who had not filed a claim in bankruptcy); Miller v. BTS Transp. Servs. (*In re* Total

So far, the Court has approved of the non-Article III adjudication of pure private rights only when they bear some relationship to public or quasi-public rights already before the legislative court.[225] For the most part, this approach serves the efficiency interest in non-Article III adjudication. Thus, in *Schor*, the private counterclaim was related to the original quasi-public claim brought before the CFTC.[226] Similarly, if bankruptcy is characterized as a quasi-public right, then the adjudication of pure private rights relating to bankruptcy serves the same efficiency ideal. It is unlikely that the Court would approve of the adjudication of private rights by non-Article III courts when those private rights are unrelated to a public or quasi-public right otherwise properly before the non-Article III tribunal.[227]

The separation of powers problem with non-Article III adjudication of pure private rights is harder to see than it is with the other kinds of rights described here. Congress has not created the right at issue and presumably has no interest in it, so private rights are in a much different position than public, quasi-public, or replacement rights, which are all congressionally created. It is still possible, however, that Congress may wish to influence the outcome in cases involving private rights that are adjudicated along with a public or quasi-public right already before the non-Article III court. In such circumstances, Congress might want to influence the outcome of the related private claim as well. Article III review, especially if it were non-deferential, could help to mitigate this problem.

Federalism is also an issue with respect to private rights. Private rights are normally determined in the state courts, so Congress would be usurping some of the power of the state courts in providing for non-Article III adjudication of private rights. Of course, federal courts often hear state law claims under either diversity jurisdiction[228] or supplemental jurisdiction.[229] But the Constitution provides for

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Transp., Inc.), 87 B.R. 568, 571 (Bankr. D. Minn. 1988) (proceeding to collect pre-petition account receivable); Allard v. Benjamin (*In re* DeLorean Motor Co.), 49 B.R. 900, 903 (Bankr. E.D. Mich. 1985) (proceeding for breach of fiduciary duty).

225. *See, e.g.*, *Schor*, 478 U.S. at 850-54.

226. *See id.* at 843.

227. Whether replacement rights could, or should, support such non-Article III adjudication of private rights is a more difficult question. Arguably, they should not because the non-Article III adjudication of replacement rights is already a significant encroachment on Article III values and because replacement rights also threaten federalism values.

228. *See* 28 U.S.C. § 1332 (1994).

229. *See id.* § 1367.

those exercises of federal power, whereas it does not provide for non-Article III adjudication.[230] In addition, Article III courts not only are independent of the federal political branches, but they also have devised numerous decisional rules designed to protect states' interests in defining the contours of their laws.[231] Non-Article III courts may have less concern for state issues and certainly less experience in dealing with them. Article III review is unlikely to have much of a mitigating effect on this problem because it is the initial ouster of the state court's jurisdiction that threatens federalism—once the state court loses jurisdiction, it does not get it back.

2. Kinds of Courts in Which the Public Rights/Balancing Test Applies

The nature and scope of review that is required may also depend on the kind of non-Article III court that is being used. While the public rights/balancing test has been applied in both administrative agencies and adjuncts, it has been applied most prominently with respect to administrative agencies.[232] Indeed, the earliest statement of the public rights doctrine, in *Murray's Lessee*, involved the

230. Diversity jurisdiction is certainly explicit in the Constitution. *See* U.S. CONST. art. III, § 2, cl. 1. Constitutional authority for supplemental jurisdiction is less clear, however. The current supplemental jurisdiction statute requires that the claims for which there is no independent basis for federal jurisdiction must be part of the same "case or controversy" as the claims that do have a basis for federal jurisdiction. 28 U.S.C. § 1367(a). This ties supplemental jurisdiction to the constitutional language. Certainly non-federal claims that were totally unrelated to the federal claims would be beyond the power granted the courts in Article III. As long as non-Article III adjudication of state issues remains tied to the non-Article III adjudication of public or quasi-public rights that are federal questions, the non-Article III adjudication of state issues would be analogous to Article III adjudication of supplemental claims. This mitigates somewhat the encroachment on state power because it is no greater than the encroachment represented by supplemental jurisdiction.

231. For example, federal courts deciding state law issues must follow the state's authority as to the meaning of the state's laws. *See, e.g.*, McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 663 (3d Cir. 1980); Mason v. American Emery Wheel Works, 241 F.2d 906, 907-08 (1st Cir. 1957). In addition, federal courts sometimes abstain from hearing state law issues in deference to the state courts. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943) (upholding federal court abstention to allow state courts to formulate state policy on the allocation of oil rights). *See generally* Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59 (1981) (examining abstention doctrines).

232. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 838 (1986); Crowell v. Benson, 285 U.S. 22, 37 (1932). *Thomas* concerned arbitration, but the statute and regulations being adjudicated in *Thomas* were administered generally by the EPA. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 572 (1985). Congress ultimately selected arbitration because the valuation of research data could not be handled expeditiously by the agency. *See id.* at 572-73.

Treasury Department, an executive department of the government.[233] Given the nature of the original public rights doctrine, it is easy to see why administrative agencies would be so important in the development of that justification. The public rights doctrine as originally conceived related to the sovereign functions of government—revenue collection in *Murray's Lessee*, for example—and administrative agencies are where many of those sovereign functions are handled. Because the balancing test evolved from the public rights doctrine, it, too, is used mainly with respect to administrative agencies. The public rights doctrine and the balancing test are now the most prominent of the justifications for non-Article III adjudication, primarily because the bureaucracy has grown exponentially this century, and with it, the number of agency adjudications.[234] At the same time, of course, it is that very relationship to the sovereign function that makes administrative agencies problematic: they represent a potential threat to the structural value of separation of powers.

It is harder to see why the public rights doctrine and the balancing test might be used with respect to adjuncts, but such use of those doctrines is not especially problematic. It is interesting that the public rights doctrine and the balancing test have been used with respect to only one of the adjuncts—the bankruptcy courts.[235] That magistrate judges have not been involved in the development of these justifications may be because magistrates handle matters originally filed in Article III courts,[236] so they are more clearly seen as adjuncts to the Article III courts. Because bankruptcy courts have their own rules and procedures[237] and because the parties sometimes can file bankruptcy-related papers directly with the bankruptcy courts,[238] those courts appear more separate from the Article III courts to which they are adjuncts.

The Article III justification for magistrate judges is that they act

233. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 274-75 (1856).

234. *See* 1 DAVIS & PIERCE, *supra* note 20, § 2.8; FALLON ET AL., *supra* note 21, at 393.

235. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (plurality opinion). The doctrine also played a role in a bankruptcy court case where the Seventh Amendment rather than Article III was at issue. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51-54 (1989); *infra* notes 288-304 and accompanying text (discussing *Granfinanciera*).

236. *See* 28 U.S.C. § 636 (1994).

237. *See id.* § 2075.

238. *See* FED. R. BANKR. P. 5001.

"subsidiary to and only in aid of the district court."[239] The public rights doctrine and the balancing test never come into play. The Magistrates Act contains a list of procedural motions, such as motions for summary judgment or for injunctive relief, that magistrate judges cannot determine unless the parties consent.[240] The essence is that these motions dispose of the case or a part of it.[241] Magistrate judges may hear such dispositive motions without the parties' consent, but they merely make recommendations to the district judge, who makes a de novo determination of the matter.[242] A de novo determination does not require a de novo hearing; rather, the judge can consider the record developed by the magistrate judge, including transcripts of any hearings, and make her own decision based on those documents.[243] On the other hand, magistrate judges may hear *and determine* non-dispositive matters, such as motions for protective orders, subject to deferential review by the district judge.[244] Thus, magistrate judges have considerably more independent authority with respect to non-dispositive matters. Whether the magistrate judge is deciding a dispositive or a non-dispositive matter, however, he remains "under the district court's total control and jurisdiction."[245]

At first glance, the Bankruptcy Code seems to draw a distinction similar to that in the Magistrates Act[246] between dispositive and non-dispositive matters. But there is a significant difference between the powers of magistrate judges and the powers of bankruptcy courts. The Bankruptcy Code distinguishes between "core" and "non-core" proceedings[247] and allows bankruptcy judges to hear and determine core matters. But the list of "core" matters includes virtually every bankruptcy issue that might arise, including such ultimate issues as confirmation of plans[248] and dischargeability of debt.[249] Some of the matters that the statute defines as "core" are broad enough to encompass ordinary common law claims. For example, core

239. United States v. Raddatz, 447 U.S. 667, 681 (1980).
240. *See* 28 U.S.C. § 636(b)(1).
241. *See, e.g.*, NLRB v. Frazier, 966 F.2d 812, 817 (3d Cir. 1992).
242. *See* 28 U.S.C. § 636(b)(1).
243. *See Raddatz*, 447 U.S. at 682-83.
244. *See* 28 U.S.C. § 636(b)(1)(A).
245. *Raddatz*, 447 U.S. at 681.
246. *See* 28 U.S.C. § 636.
247. *See id.* § 157 (1994).
248. *See id.* § 157(b)(2)(L).
249. *See id.* § 157(b)(2)(I).

proceedings include "orders to turn over property of the estate,"[250] which can require the adjudication—and disposition—of a common law fraudulent conveyance action.[251] Review of a bankruptcy judge's decision on a "core" matter is much like review by appellate courts of district courts' decisions, with a de novo standard applying to questions of law and a clearly erroneous standard to questions of fact.[252] Thus, bankruptcy judges have considerable independent control over most matters that might arise in bankruptcy, with review of many matters on a highly deferential standard of review. By contrast, bankruptcy judges can only make recommendations as to non-core matters, unless the parties consent to the matter being heard by the bankruptcy judge.[253] Non-core matters are matters that are related to the bankruptcy, but do not fall within the list of core matters. An example would be a tort claim against the debtor.[254] The difference between core and non-core proceedings seems to be not that one disposes of rights and the other does not, but that core proceedings are more closely related to substantive bankruptcy rights than non-core proceedings.[255]

The upshot of this is that while the Magistrates Act requires *more* intense supervision by an Article III judge of dispositive matters that could determine the case, the bankruptcy statute requires *less* intense supervision by an Article III judge of "core" matters, which could determine the parties' rights—including common law rights—in bankruptcy. Perhaps because of these significant differences, it is more important to have a constitutional

250. *Id.* § 157(b)(2)(E).

251. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 50 (1989). I will discuss *Granfinanciera* in the next section, but it should be noted that *Granfinanciera* calls into question the bankruptcy courts' power to hear and determine matters of private law. While only the Seventh Amendment was at issue in *Granfinanciera*, the Court said that the Article III and Seventh Amendment analyses were the same, *see id.* at 53, and that a jury was required for private, common law actions heard in the bankruptcy courts, *see id.* at 55, 58-59. If the analysis is the same, it is possible that an Article III court also is required for such actions. That would be consistent with *Northern Pipeline*.

252. *See* 1 COLLIER ON BANKRUPTCY, *supra* note 209, ¶ 5.11. The issue is somewhat more complicated than this summary suggests, but the text captures the essence of the standard of review applied to bankruptcy courts' decisions on core matters. *See generally* 3 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE § 18.9(d) (6th ed. 1994) (discussing standards of review).

253. *See* 28 U.S.C. § 157(b)(1), (b)(4), (c)(1)-(2).

254. *See, e.g.*, Bokum Resources Corp. v. Long Island Lighting Co. (*In re* Bokum Resources Corp.), 49 B.R. 854, 866 (Bankr. D.N.M. 1985) (claim of tortious interference with contract). Some tort claims against the debtor must be heard in the district court. *See* 28 U.S.C. § 157(b)(5) (providing that personal injury and wrongful death claims be heard in the district court).

255. *See* 1 COLLIER ON BANKRUPTCY, *supra* note 209, § 3.01(4)(c)(ii).

check on the classification of matters as "core" or "non-core" than on the classification of matters as dispositive or non-dispositive. The Court has turned to the public rights doctrine and the balancing test to perform this check. Those tests, however, are not as good a fit with the bankruptcy courts as they are with administrative agencies. The essence of the work that administrative agencies do is public: it involves the administration of regulatory matters. But the essence of the work that the bankruptcy courts do is private: it involves the reordering of what is primarily private debt. Thus, it should not be too surprising, given the Supreme Court's public rights focus, that the only Supreme Court case that struck down non-Article III adjudication on the basis of the public rights doctrine involved a bankruptcy court rather than an administrative agency.[256]

Bankruptcy judges and magistrate judges do share one characteristic that protects them from the influence of the political branches—they are appointed by courts rather than by Congress or the executive.[257] Furthermore, they can be removed from office only for specified reasons and only by the court.[258] In addition, the district courts retain considerable discretion to refer matters to magistrate judges or bankruptcy courts and to withdraw those references at any time.[259] Thus, unlike administrative agencies, there is no separation of powers problem with adjuncts because Congress and the executive cannot control them, at least as they are currently structured. There also appears to be no federalism problem. Magistrate judges perform tasks otherwise proper to the district courts and do not encroach on state powers. The power of Congress to establish uniform

256. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52 (1982) (plurality opinion). As I will show shortly, the Supreme Court also has held that a jury is required in bankruptcy courts for private rights, *see Granfinanciera*, 492 U.S. at 55, 58-59, but it has been inconsistent as to whether an Article III court is required for such rights. *Compare Northern Pipeline*, 458 U.S. at 76 (plurality opinion) (holding that an Article III court is required to exercise jurisdiction over private rights matters arising under the bankruptcy laws), *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986) (holding that the non-Article III Commodity Futures Trading Commission may exercise jurisdiction over certain private rights matters without violating Article III). For a discussion of this inconsistency, see *infra* notes 305-14 and accompanying text.

257. *See* 28 U.S.C. § 152(a) (1994) (providing that bankruptcy judges are appointed by circuit court judges); *id.* § 631(a) (providing that magistrate judges are appointed by district court judges).

258. *See id.* § 152(e) (providing that bankruptcy judges are removable by the judicial council of the circuit only for "incompetence, misconduct, neglect of duty, or physical or mental disability"); *id.* § 631(i) (providing that magistrate judges can be removed by a majority of the district court judges only for "incompetency, misconduct, neglect of duty, or physical or mental disability").

259. *See id.* § 157(a), (d) (bankruptcy courts); *id.* § 636 (magistrate judges).

bankruptcy laws is given in the Constitution,[260] and it necessarily involves reordering of private debt created under state law; the states, in ratifying the Constitution, consented to that encroachment on their powers. Furthermore, the use of non-Article III courts to resolve bankruptcies is no more an encroachment on states' rights than would be the undoubted power of Congress to give bankruptcy jurisdiction exclusively to the district courts. Even adjudication of private matters could be justified under supplemental jurisdiction principles.[261]

In short, neither magistrate judges nor bankruptcy judges are serious threats to the structural values reflected in the Constitution. On the other hand, bankruptcy judges still seem to have considerably more independence than magistrates, and "adjunct" may not be a proper characterization of them. While bankruptcy courts may be a constitutionally acceptable tribunal, they arguably cannot be justified either as "subsidiary to and only in aid of the district court,"[262] or as adjudicators of public rights. The balancing test that has evolved from the public rights doctrine may justify them, however, especially as they represent no threat to structural constitutional values, at least as presently configured.

3. Summary and Conclusion

Recognizing four categories of rights adjudicated in legislative courts makes it possible to understand the precise nature of the threat to constitutional values—if any—that such courts pose. Contrary to the Court's holdings, adjudication of pure public rights and quasi-public rights in legislative courts does more damage to separation of powers values than does non-Article III adjudication of pure private rights. The Court seems to have it exactly backwards on this point. At the same time, however, adjudication of pure private rights in legislative courts is more a threat to federalism than to separation of powers. Adjudication of replacement rights in

260. *See* U.S. CONST. art. I, § 8, cl. 4.

261. By contrast, supplemental jurisdiction could not justify adjudication of private rights matters in administrative agencies because agencies are not a part of the Article III judiciary. Supplemental jurisdiction applies in Article III courts. *See* 28 U.S.C. § 1367 (1994). *Schor* suggests that Congress has some limited power to provide for supplemental jurisdiction in agencies as well, *see Schor*, 478 U.S. at 844-47, but such a course could be dangerous. Supplemental jurisdiction in Article III courts is constitutionally limited to matters that are part of the same "case or controversy" as the original federal matter. 28 U.S.C. § 1367. There is no similar explicit constitutional limiting principle for supplemental jurisdiction in agencies.

262. United States v. Raddatz, 447 U.S. 667, 681 (1980).

legislative courts threatens both separation of powers and federalism values. This threat to separation of powers values can be mitigated to a considerable degree by Article III oversight, but not if the courts employ highly deferential standards of review. It is hard to see how Article III oversight will cure federalism problems, however.

In addition, a more careful exploration of the differences between administrative agencies, bankruptcy courts, and magistrate judges makes it possible to explicate further the threats to constitutional values posed by administrative agencies and adjuncts. Administrative agencies pose a threat to both separation of powers and federalism values. Adjuncts, which are deemed part of the Article III district courts and under the district courts' constant control, pose a lesser risk than do agencies, which are independent of the Article III judiciary. Adjuncts pose little risk to separation of powers values because their judges are appointed and supervised by Article III judges, not Congress. And they pose little threat to federalism values because they exercise only that jurisdiction that is given to Article III courts by the Constitution—a jurisdiction that the states consented to by ratifying the Constitution. If this analysis is correct, then adjudication of private rights by an adjunct such as a bankruptcy judge poses the least significant threat to our constitutional separation of powers and federalism values. But that is precisely the kind of case in which the Supreme Court has been most solicitous of those values.

V. THE PUBLIC RIGHTS/BALANCING TEST AND THE SEVENTH AMENDMENT

In the cases discussed so far, the Seventh Amendment usually was not explicitly at issue. But because agencies operate without juries, we must ask whether jury-less administrative adjudication comports with the Seventh Amendment. The short answer is that the Supreme Court has never seemed particularly troubled by such adjudication. Over the years, the Court has upheld jury-less adjudication of public or quasi-public rights in administrative agencies on a variety of theories. Within the last twenty years, however, the Court has settled on the public rights/balancing test as the way to justify such adjudication. In this section, I will first describe the evolution of the Court's Seventh Amendment jurisprudence. I will then analyze the constitutional and policy issues that pertain to the choice between an Article III court and a jury-less non-Article III court. This analysis shows that the Court's approach ignores important Seventh Amendment values.

A. *Supreme Court Doctrine*

There are two prongs to the Supreme Court's Seventh Amendment jurisprudence. The first concerns the kinds of cases in which the Seventh Amendment applies. The doctrine as to this prong developed in the context of Article III adjudication. The second prong concerns the kinds of courts where juries will be required, and it arises in the context of legislative courts. The doctrine as to this prong is quite confused, particularly because the cases are inconsistent with the Court's statement that its Article III analysis applies to Seventh Amendment issues. In this subsection, I will describe the Court's doctrine and identify the problems with it.

1. Kinds of Cases

In *Curtis v. Loether*,[263] the issue before the court was whether a jury trial was constitutionally required in an Article III court when Congress created a new statutory right—one that had not existed at all in the common law.[264] In *Curtis*, a prospective tenant claimed racial discrimination in violation of Title VIII of the Civil Rights Act of 1968 and brought an action for damages against the prospective landlord in an Article III court.[265] The Court held that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, *if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law*."[266] This language suggests that there are two requirements for the Seventh Amendment to apply: first, the statute must create legal (as opposed to equitable) rights and remedies; and second, the action must be triable in an ordinary Article III court.[267]

To determine whether the first requirement is met, the Court in later cases developed a two-part test for deciding whether a statute created legal rights and remedies. The first step requires courts to find a common law or equitable action that is analogous to the statutory action; if the analogous action was one at common law rather than in equity, this suggests a right to a jury trial.[268] The second step, however, is more important. It requires the courts to

263. 415 U.S. 189 (1974).
264. *See id.* at 189-90.
265. *See id.* at 190.
266. *Id.* at 194 (emphasis added).
267. As I will show, the evidence as to whether this second "requirement" is really a requirement is decidedly mixed. *See infra* notes 271-314 and accompanying text.
268. *See, e.g.*, Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565, 573-74 (1990); Tull v. United States, 481 U.S. 412, 417 (1987).

determine if the *remedy* is one that would have been available in a common law court rather than a court of equity prior to the merger of law and equity.[269] For the most part, that means that the plaintiff must be seeking a damages remedy if there is to be a jury trial.[270]

2. Kinds of Courts

Curtis's second requirement—that the matter be enforceable "in the ordinary courts of law" for a jury trial to be necessary—could, if it is really a requirement, open the door wide for Congress to circumvent the jury altogether with respect to causes of action it creates.[271] Under the Article III jurisprudence discussed in the last section, rights such as those at issue in *Curtis* would be characterized as quasi-public, and adjudication of such rights could be assigned to a non-Article III court with deferential review by the Article III courts.[272] But *Curtis* was decided in 1974, before most of the development of Article III doctrine described in the last section took place, and there is some question whether that development undermines the second requirement.[273] If it does not, then the Seventh Amendment applies only in Article III courts, regardless of the kind of case being adjudicated. As I will show, that result seems inconsistent with the language of the Seventh Amendment.[274] If the second requirement is not viable, then the Seventh Amendment ought to apply in any case where the two-step process would define

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269. *See, e.g.*, *Terry*, 494 U.S. at 565; *Tull*, 481 U.S. at 417-18. The two-step analysis was implicit in *Curtis* itself. There, the Court, in a footnote, found some common-law actions that it said were analogous to the action for race discrimination in housing, *see Curtis*, 415 U.S. at 195-96 n.10, but also noted that the remedy was clearly one for damages, *see id.* at 197.

270. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.6(3) (2d ed. 1993). Other legal remedies include recovery of land and recovery of chattels. *See id.* §§ 4.2, 5.17. Replevin, for example, is a legal remedy. *See id.* § 5.17(2).

271. *Curtis*, 415 U.S. at 194.

272. *See supra* notes 206-12 and accompanying text.

273. It also could be argued that the second requirement is not a requirement at all. *Curtis* itself concerned a matter brought in an Article III court, and the Court could have been saying that a jury is always required for matters involving legal rights and remedies in an Article III court without saying anything at all about whether matters involving legal rights and remedies in non-Article III courts required a jury. Some recent bankruptcy cases seem to treat the second requirement as viable, however. Those cases first apply the two-part test to determine whether the matter is legal, then ask whether Congress can nonetheless permissibly withdraw the matter from Article III courts or juries. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 49 (1989); *In re* Clay, 35 F.3d 190, 194-95 (5th Cir. 1994). To answer the second question, the courts use the public rights doctrine and the balancing test. *See Granfinanciera*, 492 U.S. at 53; *Clay*, 35 F.3d at 194.

274. *See infra* notes 323-25 and accompanying text.

the rights at issue as legal, regardless of the court in which the adjudication takes place. Such an outcome, however, would disrupt administrative procedure, because public rights can also constitute legal rights.[275] To illustrate the dilemma we are in, a brief history of the Court's Seventh Amendment jurisprudence regarding administrative agencies is in order.

While the Court has always approved of jury-less adjudication in administrative agencies, the rationale for such adjudication has been difficult to pin down. At one point, the Court simply assumed that the Seventh Amendment was inapplicable when administrative adjudication was within Congress's power.[276] Later, the Court said that fact-finding by the National Labor Relations Board did not involve a suit at common law at all, but rather was a "statutory proceeding."[277] Still later, the Court seemed to recognize that jury trials may be incompatible with agency adjudication, which is founded on expert, rather than amateur, decision making.[278] The Court has also upheld jury-less adjudication in bankruptcy courts by deciding that bankruptcy courts were courts of equity and that one who had filed a claim against a bankrupt's estate had transformed his claim from a legal one to an equitable one.[279] These analyses are either highly conclusory and therefore unsatisfactory, or too narrow to be of general use.

In 1977, the Court finally brought these cases together under the rubric of the public rights doctrine in *Atlas Roofing Co. v.*

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275. *See, e.g.*, Tull v. United States, 481 U.S. 412, 427 (1987) (holding that liability for a civil penalty sought by the United States involves a legal right). Oddly, the Court in *Tull* decided that liability for the civil penalty was a legal issue that required a jury, but that the amount of the penalty was a question for the judge. *See id.* at 426-27. Indeed, the Court professed to find "no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." *Id.* at 426 n.9. This drew a sharp rebuke from Justice Scalia, who said that the Court's division of responsibility for liability and penalty phases was unprecedented. *See id.* at 428 (Scalia, J., concurring in part and dissenting in part).

276. *See* Block v. Hirsh, 256 U.S. 135, 158 (1921). In *Block*, the Court upheld Congress's power to establish, temporarily in wartime, a commission to determine fair rents in the District of Columbia. The commission's adjudication of rents replaced landlords' common law actions of ejectment. *See id.* at 153-54.

277. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937). This rationale was undermined by *Curtis v. Loether*, 415 U.S. 189, 194 (1974), in which the Court said that the Seventh Amendment does apply to statutory actions. *Jones & Laughlin*, however, could also be justified under the public rights doctrine.

278. *See* Pernell v. Southall Realty, 416 U.S. 363, 382-83 (1974) (discussing *Block v. Hirsh*, 256 U.S. 135 (1921)); JAFFE, *supra* note 23, at 90.

279. *See* Katchen v. Landy, 382 U.S. 323, 329 (1966). Thus, the right of the creditor in bankruptcy was a replacement right.

Occupational Safety & Health Review Commission.[280] *Atlas Roofing* was a challenge, on Seventh Amendment grounds, to fines assessed by the Occupational Safety and Health Review Commission.[281] In *Atlas Roofing*, the Court held that Congress had the power "to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries."[282] The Court's language suggests that it thought that the right to a jury trial attaches only in Article III courts, giving life to *Curtis*'s second requirement.[283]

Atlas Roofing, however, must have seemed to be a relatively easy case. It concerned the adjudication of a pure public right by an administrative agency. Historically, pure public rights would not have been heard by juries.[284] Since *Atlas Roofing*, however, the Court has applied the public rights doctrine to bankruptcy courts,[285] developed the balancing test,[286] and held that civil penalties like the one at issue in *Atlas Roofing* concern legal rights and remedies.[287] The question now before us is how these developments affect the analysis of the right to a jury trial in administrative agencies and bankruptcy courts. The Court itself has suggested that the analysis is exactly the same whether the issue is Article III or the Seventh Amendment. In *Granfinanciera, S.A. v. Nordberg*,[288] the Court said:

> [I]f a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as

280. 430 U.S. 442 (1977).

281. *See id.* at 447-48. The petitioners in *Atlas Roofing* were each fined for working conditions that had resulted in an employee's death. *See id.* at 447. One petitioner was fined $7500 for willful violation of a safety standard. *See id.* The other was fined $600 for a serious violation of a safety standard. *See id.* Both petitioners were ordered to abate the hazard immediately. *See id.*

282. *Id.* at 460. The matter at issue in *Atlas Roofing* was a pure public right as I have defined the term. *See supra* notes 187-205 and accompanying text.

283. The Court clearly thought that it was simply following long-standing law even though the public rights doctrine was a new way of justifying it. *See Atlas Roofing*, 430 U.S. at 450-56, 460 (citing cases).

284. *See supra* text accompanying note 127.

285. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71-72 (1982) (plurality opinion). The Court in *Northern Pipeline* determined that only private rights were at stake in that case. *See id.* at 71. It is not clear what the Court would have done had it determined that public rights were at stake.

286. *See supra* notes 147-85 and accompanying text.

287. *See* Tull v. United States, 481 U.S. 412, 422 (1987).

288. 492 U.S. 33 (1989).

> the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.... [I]f Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.[289]

The outcome of *Granfinanciera*, however, belies this language. *Granfinanciera*, which was decided after the Court had developed the balancing test to assess non-Article III adjudication, was a Seventh Amendment challenge to jury-less adjudication of a *private* right in a *bankruptcy court*.[290] The Court there required a jury trial for a claim by a bankruptcy trustee against a third party to whom estate property allegedly had been fraudulently transferred.[291] The third party had not filed a claim in the bankruptcy proceedings.[292] In reaching its conclusion, the Court first applied the two-part test described above and determined (1) that a fraudulent conveyance action was one that would have been tried to a jury prior to the merger of law and equity, and (2) that the relief sought was legal—money damages.[293] Thus, the action involved legal rights and remedies as required by *Curtis*,[294] but it was not assigned for adjudication to an Article III court.

The Court then considered whether Congress had "permissibly withdrawn jurisdiction over that action by courts of law and assigned it exclusively to non-Article III tribunals sitting without juries."[295] Specifically, the Court said that "[t]he sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them."[296] The answer to this question,

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289. *Id.* at 53-54.

290. *See id.* at 36.

291. *See id.* at 64.

292. *See id.* This makes *Granfinanciera* consistent with *Katchen v. Landy*, 382 U.S. 323 (1966)—the third party in *Granfinanciera* had not filed a claim in the estate, while the third party in *Katchen* had. *See Granfinanciera*, 492 U.S. at 58; *Katchen*, 382 U.S. at 325; *cf.* Langenkamp v. Culp, 498 U.S. 42, 44-45 (1990) (holding, after *Granfinanciera*, that one who files a claim in bankruptcy waives the right to a jury trial).

293. *See Granfinanciera*, 492 U.S. at 42-49.

294. *See supra* notes 263-70 and accompanying text.

295. *Granfinanciera*, 492 U.S. at 49.

296. *Id.* at 50. The Court's very statement of the issue is odd, given that the Court ultimately said that the Article III and Seventh Amendment analyses are the same. *See supra* text accompanying note 289. If a jury is required, and if the Seventh Amendment and Article III require the same analysis, it would seem that an Article III court is required as well. *See* Redish & LaFave, *supra* note 17, at 431. The Court ultimately concluded, however, that the Seventh Amendment required a jury in the case before it without deciding whether Article III required a judge with life tenure and salary

the Court thought, depended on whether the legal rights at issue were public or private.[297]

Acknowledging that its conclusion was open to debate,[298] the Court nonetheless held that only private rights were at stake in *Granfinanciera*.[299] The Court apparently believed the point to be debatable because under *Thomas*, Congress could permit non-Article III adjudication of matters between two private parties if the matters were "closely intertwined with a federal regulatory program,"[300] and bankruptcy was arguably a federal regulatory program.[301] But the fraudulent conveyance action in *Granfinanciera* was a private right because it (1) was a dispute between two private parties, (2) that had passed into the bankruptcy context virtually unaltered from its common law roots,[302] and (3) that had not been transformed into an equitable action because the transferee had not filed a claim in the bankruptcy.[303] In other words, the fraudulent conveyance action in *Granfinanciera* was not a pure public right, a quasi-public right, or a replacement right.[304] Thus, a jury was required.

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protections in that case. *See Granfinanciera*, 492 U.S. at 64. The Court explicitly said it was not considering the question of whether bankruptcy courts could conduct jury trials. *See id.* That issue remained open and generated considerable commentary and a variety of proposals for judicial or legislative action. *See, e.g.*, Anthony Michael Sabino, *Jury Trials, Bankruptcy Judges, and Article III: The Constitutional Crisis of the Bankruptcy Court*, 21 SETON HALL L. REV. 258 (1991); Skelton & Harris, *supra* note 46; Symposium, *Jury Trials in Bankruptcy Courts*, 65 AM. BANKR. L.J. 1 (1991); Ned W. Waxman, *Jury Trials After* Granfinanciera*: Three Proposals for Reform*, 52 OHIO ST. L.J. 705 (1991). Congress has since authorized bankruptcy judges to preside over jury trials, but only if the district court has designated the judge to conduct such trials and the parties all expressly consent. *See* 28 U.S.C. § 157(e) (1994). This power is similar to the power of magistrates to conduct jury trials with the consent of the parties. *See id.* § 636(c)(1); S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1045 (1988).

297. *See Granfinanciera*, 492 U.S. at 51.

298. *See id.* at 55. The Court was never very clear about the reasons for its decision, and there was a total of four opinions in the case. The opinion of the Court was written by Justice Brennan. Justice Scalia concurred in part and dissented in part, and Justices White and Blackmun each dissented. Justice O'Connor joined Justice Blackmun's dissent.

299. *See id.*

300. *Id.* at 54.

301. *See id.* I have suggested that bankruptcy itself is a quasi-public right, which *Thomas* would permit to be adjudicated by a non-Article III tribunal. *See supra* note 209 and accompanying text.

302. Fraudulent conveyance actions can be brought under either of two provisions in the Bankruptcy Code. The Code itself establishes an action for fraudulent conveyance. *See* 11 U.S.C. § 548 (1994). In addition, the bankruptcy trustee may recover fraudulently conveyed property under state law using § 544(b).

303. *See Granfinanciera*, 492 U.S. at 57-58.

304. Because the party to whom the property had been conveyed had not filed a claim in bankruptcy, waiver is also not a justification for jury-less non-Article III adjudication.

Granfinanciera muddies both the Article III and the Seventh Amendment waters to a considerable degree. This can be seen by comparing the outcome in *Granfinanciera* to that in *Schor*. In both *Schor* and *Granfinanciera*, the issue at stake was a pure private right.[305] Yet the Court allowed non-Article III adjudication of the private right in *Schor*, but did not allow jury-less adjudication of the private right in *Granfinanciera*.[306] This is so even though the Court in *Granfinanciera* asserted that the Article III and Seventh Amendment analyses are the same.[307] There are at least three possible ways to account for these different outcomes. First, the Article III and Seventh Amendment analyses are in fact different, and the Court is more solicitous of the Seventh Amendment than of Article III.[308] There are several problems with this explanation for the outcomes in *Schor* and *Granfinanciera*. One is that it is not what the Court plainly said.[309] Furthermore, *Granfinanciera* seems consistent with *Northern Pipeline*, which refused to allow a non-Article III court to hear a pure private rights matter.[310] This gives some credence to *Granfinanciera*'s statement that the Article III and Seventh Amendment analyses are the same.[311] *Schor*, however, then remains inconsistent with the cases and the doctrine. Finally, if the considerations are different for Article III and the Seventh Amendment, the Court, having held that they are not different, has given us no hint as to how to analyze those differences.

A second possible explanation for the different outcomes in *Schor* and *Granfinanciera* is that *Schor* involved an administrative

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See infra notes 395-415 and accompanying text (discussing waiver).

305. *See Granfinanciera*, 492 U.S. at 56; Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986).

306. Had the issue arisen, the Court might have found that the customer in *Schor* had waived his right to a jury trial by bringing his claim against the broker in the agency where no jury functioned rather than in an Article III court. *See infra* notes 395-415 and accompanying text.

307. *See Granfinanciera*, 492 U.S. at 42.

308. In other contexts, the Court has not seemed particularly solicitous of the Seventh Amendment. For example, it has approved of numerous devices for controlling juries, some of which significantly reduce the jury's utility. *See* Sward, *supra* note 99, at chs. 6-8.

309. *See Granfinanciera*, 492 U.S. at 53-54; *supra* text accompanying note 289.

310. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 50-51 (1982) (plurality opinion). The Article III issue was not argued before the Supreme Court in *Granfinanciera*, so the absence of a decision on the matter is not determinative. *See* Petitioner's Brief, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (No. 87-1716). Although the Court has not yet resolved whether bankruptcy courts can conduct jury trials, since *Granfinanciera*, Congress has given bankruptcy courts the power to conduct such trials with the consent of the parties. *See* 28 U.S.C. § 157(e) (1994).

311. *See Granfinanciera*, 492 U.S. at 64.

agency and *Granfinanciera* an adjunct. This would also account for the outcome in *Northern Pipeline*, which, like *Granfinanciera*, involved the adjunct bankruptcy courts. This explanation would mean that the Court is more likely to allow jury-less non-Article III adjudication of pure private rights in an administrative agency than in an adjunct. With regard to the Seventh Amendment, the logic of this could be that if adjuncts are subsidiaries of Article III courts, the right to a jury trial attaches to matters involving legal rights and remedies because they are somehow "really" in an Article III court. The logic fails with respect to the Article III issues, however, because it suggests that the Court should be less concerned about adjuncts hearing pure private rights matters than administrative agencies, but the cases go the other way.[312] This second explanation would, however, account for the Court's statement that the Article III and Seventh Amendment analyses are the same. A major problem with this explanation is that the Court has given no hint that it even considered the difference in the kind of non-Article III court that was used. And, once again, if this difference is significant, the Court has not told us why or how to analyze the issues.

A third possible explanation is that the party objecting to the mode of adjudication—whether the objection was to the non-Article III status of the court or to the lack of a jury—was voluntarily before a non-Article III court in *Schor*, but was an involuntary defendant in both *Granfinanciera* and *Northern Pipeline*. This, however, sounds more like the waiver justification for non-Article III adjudication, which I will address shortly.[313] And because the Court held in *Schor* that a party cannot waive the institutional interest in the separation of powers reflected in Article III,[314] it cannot really be said that the plaintiff in *Schor* had properly waived his interest in an Article III court by bringing his claim in an administrative agency. In other words, it did not matter that the plaintiff in *Schor* was in the administrative agency voluntarily. Neither the plaintiff in *Schor* nor the defendant in *Granfinanciera* had properly waived any objection to the mode of adjudication.

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312. *Compare Northern Pipeline*, 458 U.S. at 84 (plurality opinion) (holding that an adjunct cannot hear a claim involving a pure private right), *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 858 (1986) (holding that an agency can hear a private right claim if balancing test favors it). If an adjunct is "really" an Article III court, then the balancing test should find much less of an encroachment on Article III values when an adjunct is used than when an agency is used. *See supra* notes 232-62 and accompanying text.

313. *See infra* notes 395-415 and accompanying text.

314. *See Schor*, 478 U.S. at 851.

3. Summary and Conclusion

The Court has said that the Article III and Seventh Amendment analyses are the same, so that if the public rights doctrine or the balancing test allows Congress to assign a matter to a non-Article III court, it can do so without providing for a jury.[315] The cases, however, are not entirely consistent with that statement. In particular, *Schor* seems to have treated pure private rights differently than did *Granfinanciera* and *Northern Pipeline.* It is difficult to account for these different outcomes given the Court's explicit refusal to recognize differences. The possible explanations that I have presented all have significant problems. I think, however, that the differences between Article III and the Seventh Amendment are the most cogent, and in the next two subsections, I will try to explain why.[316]

B. *Constitutional Issues*

In the course of the legal development described above, the Court has said a number of things about the right to a jury trial in administrative agencies. First, it has said that the same analysis applies to the Seventh Amendment issues as to the Article III issues.[317] Second, it has suggested that the Seventh Amendment applies only in an Article III court,[318] but subsequently undermined that suggestion by requiring a jury trial in a bankruptcy case.[319] Third, it has said that the Seventh Amendment does not apply to "public rights" when those public rights are adjudicated in an administrative agency,[320] but it has indicated that a jury trial is required if public rights are adjudicated in an Article III court.[321]

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315. *See Granfinanciera*, 492 U.S. at 53-54.

316. It does appear that the difference between agencies and adjuncts might be easier to accommodate to the existing balancing test. My point is that the difference between Article III and the Seventh Amendment is more important than the difference between agencies and adjuncts.

317. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53-54 (1989).

318. *See* Curtis v. Loether, 415 U.S. 189, 198 (1974). The statement was relatively weak in *Curtis* because *Curtis* involved an Article III court. The statement is reinforced, however, by a comparison of *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), and *Tull v. United States*, 481 U.S. 412, 427 (1987). *See infra* notes 320-21 and accompanying text (comparing *Atlas Roofing* and *Tull*).

319. *See Granfinanciera*, 492 U.S. at 64. The *Granfinanciera* Court, however, did not say that the jury trial could be conducted in the bankruptcy court; rather, it left that issue open. *See id.*

320. *See Atlas Roofing Co.*, 430 U.S. at 460.

321. *See Tull*, 481 U.S. at 427. The Court did not explicitly address the question whether public rights matters adjudicated in Article III courts require a jury, but rested its

Taken together, these statements suggest that the kind of court in which the matter is adjudicated is a critical factor in deciding whether a jury is required.

In this subsection, I will examine the Court's pronouncements in light of the language, structure, and history of the Constitution and the values that underlie the Seventh Amendment. I conclude that it is wrong for the Court to apply the same test to the Seventh Amendment issues as to the Article III issues. While there are a number of reasons for my conclusion that are grounded in the language, structure, and history of the Constitution, I argue that the strongest evidence of the analytical distinction is that Congress has less power to abrogate the Seventh Amendment than to establish non-Article III courts. I argue further that even if Congress has some power to abrogate the Seventh Amendment, the tests for determining the constitutionality of a non-Article III court are not appropriate for determining the constitutionality of jury-less adjudication.

1. The Seventh Amendment and Article III Are Analytically Distinct

English legal history provides some evidence of an analytical link between the judicial power and the jury. Specifically, English legal history supports considerable legislative or executive power over the allocation of disputes to one kind of dispute resolution body or another, usually with the result that the chosen allocation determines the right to a jury trial. Thus, the historic power of the Chancery—the executive arm of the king—and of Parliament over the creation of common law actions could determine whether a case was heard in a common law court, where there was a jury trial, or a court of equity, where there was not.[322] Once the court was selected for resolution of a particular kind of dispute, there was no independent judgment about whether a jury trial would be available. This history is quite consistent with the language in *Granfinanciera* that Article III and the Seventh Amendment are subject to the same analysis.

The American system, however, is different in significant ways

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decision on the two-part test, which it articulated more clearly than *Curtis* had. *See id.* at 417-18; *supra* notes 263-70 and accompanying text. *Tull*, however, involved a pure public right as I have defined the term. *See Tull*, 481 U.S. at 414-15; *supra* notes 187-205 and accompanying text.

322. *See* HAROLD GREVILLE HANBURY, MODERN EQUITY 1-28 (2d ed. 1937); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 163-65, 180-81, 695-707 (5th ed. 1956).

from the English, in particular because the United States has a written Constitution and England does not. Thus, the first objection one might raise to the idea that the Seventh Amendment applies only in Article III courts is the language of the Constitution. Article III vests the "judicial Power of the United States" in the Supreme Court and any lower courts that Congress creates.[323] The judicial power extends to a wide range of matters, including common law actions between citizens of different states, controversies to which the United States is a party, and cases arising under the Constitution and laws of the United States.[324] The Seventh Amendment, on the other hand, is not coterminous with Article III: it preserves the right to a jury trial only in "Suits at common law,"[325] which comprise only a small part of the federal judicial power. The judicial power and the Seventh Amendment, in other words, are very different things.

One could still argue, of course, that because the judicial power encompasses suits at common law, an exercise of the judicial power is required before the Seventh Amendment applies. But it does not follow from the fact that the Seventh Amendment always applies in Article III courts that it does not apply in non-Article III courts. Furthermore, the language of the Seventh Amendment itself does not suggest that an Article III court is required before the Seventh Amendment attaches.[326] The amendment does not say that the right to jury trial attaches in suits at common law brought in Article III courts, but only that it attaches in suits at common law. The only reference to courts in the Seventh Amendment is in the amendment's provision that "Court[s] of the United States" cannot re-examine jury fact-finding except according to existing common law principles.[327]

More importantly, Congress has different powers with respect to the judiciary and the jury. Article III of the original Constitution is

323. U.S. CONST. art. III, § 1.

324. *See id.* § 2, cl. 1. The relevant text of Article III is as follows:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

Id.

325. U.S. CONST. amend. VII.

326. *See id.* See *supra* note 11 for the text of the Seventh Amendment.

327. U.S. CONST. amend. VII.

the judiciary article, but the Constitution gives Congress considerable authority over the creation of federal courts and the definition of their jurisdiction.[328] Congress could have declined to create lower federal courts altogether, with the result that matters otherwise within the federal judicial power would have been relegated to the state courts, which are clearly not Article III courts.[329] Because Congress can leave matters otherwise within the Article III jurisdiction of the federal courts to the non-Article III state courts, it can also create its own non-Article III courts, at least to adjudicate the matter in the first instance.[330] Thus, Congress's power to decline to create Article III courts is consistent with a power to create Article I courts.[331]

There is no indication, however, that Congress has a similar power with respect to the civil jury. Indeed, the history of the Seventh Amendment suggests otherwise. While Article III contains a guarantee of a criminal jury trial, the original Constitution did not mention civil juries at all. During the ratification debates, opponents of the Constitution feared that the failure to guarantee a civil jury meant that the civil jury was abolished.[332] Proponents of the

328. *See* U.S. CONST. art. III, § 1; *id.* art. I, § 8, cl. 9; Redish & LaFave, *supra* note 17, at 442-50. The nature and scope of Congress's power over the jurisdiction of the courts remain subjects of considerable debate and difficulty. *See* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17 (1981).

329. *See* Hart, *supra* note 328, at 1365; Martin H. Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 467 (1978); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 341 (1977).

330. *See* Palmore v. United States, 411 U.S. 389, 400-04 (1973). It is possible that either Article III or the Due Process Clause requires that there be review in an Article III court. *See* Fallon, *supra* note 8, at 933.

331. Of course, one could also argue that if Congress creates any courts at all, they must be Article III courts. The cases described in this Article make it plain that the Court has rejected that argument. Furthermore, it cannot be literally true because the doctrine of sovereign immunity gives Congress the power to dictate the mode of a citizen's proprietary suit against the government, *see infra* notes 416-67 and accompanying text, and because Congress would have to create non-Article III courts to handle local matters in the territories given that Article III courts would not have jurisdiction over such matters, *see infra* notes 483-84 and accompanying text. If Congress can create non-Article III courts in these contexts, it is a short step to acknowledge its power to create them in other contexts.

332. *See, e.g.*, Wolfram, *supra* note 12, at 679-80.

Constitution, on the other hand, argued that the civil jury was not abolished, but that Congress would have the flexibility to provide for a civil jury or not, as it saw fit.[333] But because the civil jury in colonial America had served as a buffer against the excesses of the king,[334] the absence of a civil jury guarantee was a major sticking point during the ratification debates.[335] The result was that the right to a civil jury became part of the Bill of Rights. This history suggests that the Seventh Amendment was born of an unwillingness to trust Congress to do the right thing with respect to the right to a civil jury trial and is therefore an independent check on Congress's powers to determine the mode of adjudication.

In addition, nothing in Congress's power to create courts and give them jurisdiction suggests that it encompasses a power to abrogate the right to a jury trial. Article III draws no distinction between law and equity, which in England was the primary determinant of the right to a jury trial; rather, the judicial power extends to both legal and equitable matters.[336] Congress has never provided for separate courts of law and equity in the United States, though federal courts used different procedures for legal and equitable matters until 1938, when the Federal Rules of Civil Procedure took effect.[337] When the Seventh Amendment refers to "Suits at common law," then, it cannot be referring to suits in a particular court, but rather to suits raising matters that would have been heard in a common law court, if one existed.[338] This is reinforced by the historical fact that the same Congress that drafted the Seventh Amendment also enacted the Judiciary Act of 1789, which provided for a unitary court system.[339] Thus, the right to a jury trial under the Seventh Amendment is defined not by the court in which the matter is pending, but by the nature of the matter at

333. *See* THE FEDERALIST NO. 83 (Alexander Hamilton).

334. *See* NELSON, *supra* note 103, at 31; Wolfram, *supra* note 12, at 653-55.

335. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295-99 (1966); Wolfram, *supra* note 12, at 667-73. The anti-federalists were the main proponents of a civil jury guarantee. *See* Henderson, *supra*, at 295.

336. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . .").

337. *See* 1 DOBBS, *supra* note 270, § 2.6(1), at 148 n.2.

338. This indeed is how the Court has interpreted the amendment. *See* Dimick v. Scheidt, 293 U.S. 474, 476 (1935); Wolfram, *supra* note 12, at 640-41.

339. Both were drafted by the First Congress, many of whose members also had participated in the drafting of the Constitution. *See* Resolution of 1789, 1 Stat. 97, 97-98 (Bill of Rights); Federal Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73-93; *see also* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 130-31 (1923) (discussing the Judiciary Act of 1789 and the Bill of Rights).

issue.[340]

It should be conceded that it probably never occurred to the drafters of the Seventh Amendment that "Suits at common law" would be heard in any kind of federal court other than one established under Article III. While the First Congress provided for administrative adjudication of public rights, as in *Murray's Lessee*,[341] there is no indication that it thought a jury would be required there. And the Seventh Amendment clearly did not apply to the state courts.[342] The drafters, however, also never contemplated the wide range of cases now heard by agencies, including quasi-public, replacement, and private rights as well as pure public rights. Thus, the drafters' probable understanding at best supports only the contention that public rights are not subject to a jury trial. Even that

340. The historical power of the jury at the time of ratification also lends some support to the idea that the jury is an independent check on Congress's powers with respect to the judiciary. Unlike the civil jury in England, the civil jury in America was thought to have power to decide law as well as fact. *See* Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 592 (1993); Wolfram, *supra* note 12, at 705-06 n.183. This power of the jury suggests that the jury was an independent political actor in the early United States, unlike the jury in England. It also suggests that one of the jury's constitutional roles is to check the power of government—a role arguably inconsistent with jury-less adjudication of even "public" rights. *See* Young, *supra* note 5, at 837 ("Are not the executive and legislative branches more likely to attempt to influence judges in cases . . . where the federal government is a party?"). In *Northern Pipeline*, the Court said:

> Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68 n.20 (1982) (plurality opinion).

There are two problems with relying too heavily on this historical law-making power, however. First, it was quite short-lived, as the law-making power of the jury began to erode shortly after ratification of the Constitution. *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 28-29, 84-85, 141-43 (1977); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172-83 (1964). In addition, the language of the Seventh Amendment suggests no law-making role for the jury in that the amendment prohibits courts of the United States from re-examining only a jury's *fact-finding* except in accordance with common law procedures. *See* U.S. CONST. amend. VII.

341. *See* Murray's Lessee v. Hoboken Land Improvement Co., 59 U.S. (18 How.) 272, 284-86 (1856); *see* Fallon, *supra* note 8, at 919.

342. *See* Wolfram, *supra* note 12, at 645-46. The Bill of Rights was not applied to the states until the Fourteenth Amendment imposed due process and other requirements on the states. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.2 (4th ed. 1991). The Seventh Amendment remains one of the few provisions in the Bill of Rights that has not been applied to the states. *See id.* My analysis might require that the Seventh Amendment apply to the states. *See infra* note 353.

conclusion, however, is called into question by the Court's decision in *Tull v. United States*,[343] where a jury was required in an Article III court to determine liability for a civil penalty sought by the government.[344]

Finally, the Seventh Amendment is a constitutional right, a part of the Bill of Rights, and Congress has no power to abrogate such rights. Indeed, it is the duty of the Supreme Court to protect such rights against challenges from the political branches of government.[345] A comparison with the First Amendment right to free speech is instructive. While the Court has held that the federal and state governments have the power to impose time, place, and manner restrictions on the exercise of that right,[346] it has limited their power to prevent the exercise of that right altogether to obscenity,[347] and to situations where the speech presents a clear and present danger, such as when speech is an incitement to violence.[348] Even then, the Court requires that there be no less restrictive alternative.[349] By contrast, the Court's use of the balancing test suggests that the Seventh Amendment can be abrogated whenever Congress convinces the Court that it is more expeditious to do so.[350]

The Court's treatment of these two amendments may be based on a view that the First Amendment right of free speech is more important than the Seventh Amendment right to a jury trial. Free speech, after all, is essential to the functioning of a democracy,[351] but democracies function throughout the world without a civil jury. Furthermore, the jury may be seen as simply procedural, rather than as embodying a substantive right. But the Constitution provides separately for a right to due process of law,[352] so it would be a mistake to subsume the right to a jury trial under the due process right.

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343. 481 U.S. 412, 427 (1987).

344. *See id.* at 426-27.

345. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175-76 (1803).

346. *See generally* 3 ROTUNDA ET AL., *supra* note 57, § 20.7, at 23 (discussing limits on First Amendment rights).

347. *See* Miller v. California, 413 U.S. 15, 36-37 (1973) (holding that obscenity can be banned based on community standards).

348. *See generally* 3 ROTUNDA ET AL., *supra* note 57, § 20.7 n.18 (discussing limits on First Amendment rights).

349. *See id.* § 20.10.

350. As I will show shortly, the Court's failure to protect Seventh Amendment rights is exacerbated by its failure to include Seventh Amendment values in the balancing test. *See infra* notes 355-68 and accompanying text.

351. *See* Cox v. Louisiana, 379 U.S. 536, 551-52 (1965); LOCKE, *supra* note 114, at 169; 3 ROTUNDA ET AL., *supra* note 57, § 20.2.

352. *See* U.S. CONST. amends. V & XIV.

Whatever the reason for the Court's being less solicitous of the Seventh Amendment than of other rights embodied in the Bill of Rights, I suggest here that it is a mistake. The right to a jury trial is not simply a feature of Article III courts, and it is not simply a part of due process. Rather, the Seventh Amendment is an independent constitutional right reflecting certain principles that are an important part of our political heritage.[353]

2. Even if Congress Has Some Power to Abrogate the Seventh Amendment, the Public Rights Doctrine and the Balancing Test Are Not Appropriate Tests

History provides some reason to think that a distinction between public and private rights is appropriate for analyzing the scope of both Article III and the Seventh Amendment. In England, the civil judicial power extended almost exclusively to private disputes,[354] and, because the jury trial was a part of judicial proceedings, so did the jury trial. In the course of American history, however, both the judicial power and the right to a jury trial have expanded from their English origins to encompass not only private matters, but also matters best characterized as public.[355]

Despite what might appear to be tandem development of Article III and the Seventh Amendment, however, the analytical base is different, as I have explained.[356] The scope of the judicial power is delineated in Article III and seems to include virtually any kind of case that could arise.[357] The Seventh Amendment, on the other hand, applies only to "Suits at common law." Historically, suits at common

353. This approach might result in the Court's deciding that the Seventh Amendment applies to the states. So far, the Court has rejected that suggestion, though most of the other provisions of the Bill of Rights have been held to apply to the states. *See* NOWAK & ROTUNDA, *supra* note 342, § 10.2. But if the Seventh Amendment does not depend on the kind of court in which it is asserted for its applicability, there is no reason why it should not apply to the states.

354. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68-70 (1982) (plurality opinion).

355. *See* U.S. CONST. art. III, § 2, cl. 1; *see also supra* note 189 and accompanying text (discussing the scope of federal judicial power). Any quasi-public right that allows for money damages, for example, is likely to fall within the definition. *See* Curtis v. Loether, 415 U.S. 189, 195-98 (1974). So are public rights that involve civil penalties. *See* Tull v. United States, 481 U.S. 412, 414-15 (1987). At least one commentator has argued that this expansion is not constitutionally required and that the Seventh Amendment should be limited to traditional common law actions, with any expansion beyond those actions to be purely statutory. *See* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 531 (1975).

356. *See supra* notes 322-53 and accompanying text.

357. *See* U.S. CONST. art. III, § 2, cl. 1.

law were those triable in the common law courts, as opposed to the courts of equity, in England.[358] I have already argued that the Seventh Amendment right to a jury trial is not defined by the court in which the matter is pending.[359] If the Seventh Amendment is indifferent to the kind of court in which the matter is pending, then all that is left is the two-step test that the Court recently developed to define Seventh Amendment rights.[360] All that matters under the two-step test is that the case involve matters analogous to the kind of case that would have been heard in a common law court, and that a legal remedy, usually money damages, is sought. Because public rights can be analogous to common law actions and can involve a legal remedy, this definition of "Suits at common law" brings cases within the reach of the Seventh Amendment that would not have been tried to a jury in England in 1791.[361]

If the scope of the Seventh Amendment is defined by the nature of the matter at issue and not by the court in which the suit is pending, and if that definition of "Suits at common law" comes from the two-part test, then the distinction between public and private rights has no significance for the Seventh Amendment analysis. If the court in which a matter is pending is irrelevant to a determination of one's Seventh Amendment rights, then a jury trial should be available to adjudicate even public rights in non-Article III courts whenever the two-part test is met. Under this reasoning, the public rights doctrine should have no bearing on one's Seventh Amendment rights.[362]

The balancing test is equally inappropriate, at least as it is

358. *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA, § 49 (Melville M. Bigelow ed., 13th ed. 1886).

359. *See supra* notes 322-53 and accompanying text.

360. *See* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565, 573-74 (1990); *Tull*, 481 U.S. at 417-18; *Curtis*, 415 U.S. at 194; *supra* notes 263-70 and accompanying text.

361. *See, e.g., Tull*, 481 U.S. at 425 (requiring a jury to adjudicate a public right). Public rights in England would have been considered the province of governmental administration rather than law and would have been handled administratively. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283-84 (1856); *see also* sources cited *supra* note 127 (discussing the late development of administrative law).

362. This analysis may raise questions about whether the public rights doctrine is appropriate for determining the scope of Article III as well. If Article III on its face includes matters that would be characterized as public, a distinction between public and private rights does not seem to be a viable analytic tool for determining Congress's power to create non-Article III courts. Perhaps this is a reason to view the balancing test as supplanting rather than supplementing the public rights doctrine.

currently structured. As I have shown, Article III and the Seventh Amendment both protect the independence of judicial decision makers, though the Seventh Amendment arguably goes beyond Article III as it also aims to protect the independence of juries even from judges.[363] But I have also argued that beyond that basic similarity, Article III and the Seventh Amendment protect quite different values. While Article III reflects an institutional interest in separation of powers, the Seventh Amendment reflects the value of citizen participation and deliberation.[364] The question, then, is whether the balancing test accommodates all of these values. The short answer is that it does not.

Citizen participation and deliberation cannot be preserved by allowing legislative courts to adjudicate matters without a jury. Furthermore, the solution that courts and commentators generally propose for reconciling agency adjudication with the requirements of Article III is review of agency action in an Article III court.[365] Even if Article III review is a satisfactory means of preserving Article III values, that solution simply does not vindicate the unique Seventh Amendment values: if jury-less adjudication is used in the first instance, jury-less review in Article III courts does nothing to protect citizen participation and deliberation.

One complication arises, however. The Court has not, so far, recognized the Seventh Amendment values as foundational in the sense that it regards the separation of powers value as foundational.[366] Indeed, I have suggested that the Court treats the Seventh Amendment as if it is less important than the other rights found in the Bill of Rights; the Court might also view the Seventh Amendment as merely an aspect of due process.[367] If the Court does not see the Seventh Amendment values as important in their own right, it may be unwilling to make them part of the balancing test. To ignore Seventh Amendment values when there is a Seventh Amendment challenge to non-Article III adjudication, however, is to ignore the very basis for the challenge. Those values deserve, at the

363. *See supra* notes 100-08 and accompanying text.

364. *See generally supra* notes 65-72, 109-21 and accompanying text (discussing Article III and Seventh Amendment values).

365. *See, e.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 592 (1985); Fallon, *supra* note 8, at 946-47.

366. This is reflected, for example, in the fact that Article III reflects some institutional values that cannot be waived but the Seventh Amendment does not. *See infra* notes 395-415 and accompanying text (discussing waiver).

367. *See supra* notes 351-52 and accompanying text.

least, to be weighed in the balance.[368]

C. *Policy Issues*

If my arguments so far are accepted, the result would be a radical transformation of American adjudication. Jury trials would be required in administrative agencies where civil penalties were at stake, or where one private party was seeking compensation from another. That we have not gone in this direction may be largely because the policy issues seem, at first, to favor jury-less adjudication in administrative agencies. These policy issues are both more concrete and easier to articulate than the constitutional issues.[369] If jury-less adjudication is constitutional, then, we might well choose it. Furthermore, we may be so overwhelmed by the practical reasons for jury-less adjudication that we are less inclined to look for the constitutional reasons that might point us toward requiring a jury. For these reasons, we need to consider the policy reasons for jury-less adjudication even if we believe that jury-less adjudication is unconstitutional.[370]

The policy issues tend to track the non-Article III values that I identified earlier.[371] Expertise is a strong justification for avoiding juries in administrative agencies. Many regulatory matters are quite complex and reflect legislation that is itself the result of considerable research, investigation, thought, and democratic decision making. Adjudications of such matters require decision makers who understand the rationale behind the complex regulations, and, often,

368. Many cases and commentators have noted that the Court's Article III jurisprudence is a muddle. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847-48 (1986); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment); Fallon, *supra* note 8, at 916; Redish & LaFave, *supra* note 17, at 417-29. Part of the reason for this is that the balancing test is unclear: we do not know, for example, how much weight the various factors should receive. Some commentators suggest that there is no principled way to limit the balancing test. *See* Redish & LaFave, *supra* note 17, at 417-29. In addition, Article III values tend to be abstract, such as the structural value in separation of powers, whereas non-Article III values are more concrete, meaning that courts are more likely to find that non-Article III values outweigh Article III values. *See* Fallon, *supra* note 8, at 935-43. Factoring in Seventh Amendment values could, I concede, confuse the issue even more. That possibility is no excuse, however, for ignoring important constitutional values.

369. *Cf.* Fallon, *supra* note 8, at 935-36 (noting that concrete, practical reasons for Congress's choosing non-Article III adjudication are easier to see than the somewhat abstract constitutional reasons for not doing so).

370. Of course, if jury-less adjudication of matters meeting the two-step test is unconstitutional even in administrative agencies, the policy reasons are irrelevant. I consider them here because they may obscure the constitutional issues.

371. *See supra* notes 75-97 and accompanying text.

who can sort through mounds of technical data. But the essence of a jury is that it is a body of lay decision makers who are brought together for a single case and who disperse afterward. The jury's strength is in its ability to bring common sense and community values into its decision making. These attributes are less important in adjudicating complex regulatory disputes, which depend more on technical data for their resolution.

There are some problems with the expertise rationale for administrative adjudication, however. First, not all agency adjudications involve complex matters. Some are quite routine.[372] Second, even with respect to complex matters, the view that lay adjudicators would be incompetent is undermined by the fact that juries routinely handle complex regulatory material and technical data in Article III adjudication. As I have noted, Article III courts often handle public, quasi-public, and replacement rights disputes, which often have a complex regulatory statute at their base. To be sure, there are those who argue that juries should not handle such matters, and at least one court of appeals has held that it is a violation of due process for juries to handle complex matters that are beyond their capabilities.[373] It is by no means clear, however, that juries are incapable of handling such matters; some commentators argue that juries are quite competent if given competent guidance from the bench.[374] The existing empirical evidence is not conclusive either way.[375]

Third, even if we allow jury-less administrative adjudication of public or quasi-public rights, expertise is not a sound justification for adjudicating *private* rights within administrative agencies without a jury. There is no need for expertise in the resolution of ordinary common law claims, which juries have been deciding competently for centuries.[376] Arguably, there may also be little need for expertise

372. Many Social Security adjudications would be relatively uncomplicated, for example. *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1323-24 (1997).

373. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1088 (3d Cir. 1980), *rev'd on other grounds*, 475 U.S. 574 (1986).

374. *See* ROBERT L. MCBRIDE, THE ART OF INSTRUCTING THE JURY § 2.11 (1969); Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 764-74 (1991).

375. *See* ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY 99-104 (1984); Richard Lempert, *Civil Juries in Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 82, at 181, 228.

376. There are, of course, those who argue that juries are not competent even for such

even for replacement rights, which are generally founded on common law principles. These kinds of disputes are the very essence of the jury's traditional work. Any test that allows such disputes to be adjudicated regularly in administrative agencies without a jury, then, is not justified by the need for expertise.

Efficiency may provide a better justification for allowing jury-less adjudication of private rights in an administrative agency, at least if the matter is already before the agency because of a public or quasi-public right. In such circumstances, it could be more efficient to allow private counterclaims to be asserted there as well, even if that means that no jury will determine common-law claims. It is more efficient to have the entire dispute resolved in a single forum than to split the dispute among a number of forums. The problem, however, is that Congress could, and often does, provide for the adjudication of disputes that include both public and private components in Article III courts, where there will be a jury. If Article III courts can handle both the basic public or quasi-public dispute and any private counterclaims, then the only efficiency costs will be those associated with the more extensive procedures found in Article III courts. Those are costs we have chosen to bear because we believe that they enhance fairness.

Perhaps one of the strongest policy arguments is that it is now too late to provide for juries in agencies.[377] Administrative agencies adjudicate some 350,000 matters every year,[378] and providing for jury trials in those adjudications would be a logistical nightmare and a costly undertaking. The bureaucracy is simply too big and too busy

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relatively simple matters. *See, e.g.*, JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 108-40 (1949); PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 186-87 (1988); Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 210-11 (1985); Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483-84 (1956). The evidence, however, does not bear them out. *See, e.g.*, ABA/BROOKINGS REPORT, *supra* note 98, at 8; HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 55-117 (1966); Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 82, at 248, 261-68; *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 746-50 (1989). While there are occasional incompetent jury verdicts, there are occasional incompetent decisions by judges as well. Both are correctable—the jury verdict by the judge's granting a motion for judgment as a matter of law, *see* FED. R. CIV. P. 50, or for new trial, *see* FED. R. CIV. P. 59, and the judge's decision by an appeal, *see* 28 U.S.C. § 1291 (1994).

377. *Cf.* Fallon, *supra* note 8, at 916-17, 919 (arguing that administrative agency adjudication is too entrenched in common practice to require Article III adjudication instead).

378. *See* FALLON ET AL., *supra* note 21, at 393.

to provide juries for all adjudications. It is not even clear that a non-Article III judge could preside over a jury trial,[379] so requiring a jury might move many such cases into the courts, which are already overburdened. Requiring a jury trial for agency adjudications could bring the government to a screeching halt.

At the same time, there is a much more subtle reason for supporting at least a limited access to juries for the kind of regulatory matters that are heard in agencies. It has long been noted that the jury is a tool for teaching citizens about government and about their role in government.[380] Indeed, studies have shown that citizens who have served on juries have considerably more respect for the judicial system after their service than they had before.[381] But most citizens today know little about the largest component of the federal government—the administrative agencies. If they were involved in some aspect of the agencies' work, perhaps citizens would have a better understanding of what agencies are trying to do and how they are trying to accomplish their goals. Helping an agency decide whether a civil penalty is in order for workplace safety violations, for example, could bring the agencies' work home to ordinary citizens. Thus, logistical problems aside, there might be good reasons for trying to involve citizens more directly in agency decision making.[382]

D. Accommodating an Expanded Right to Jury Trial

If I am right that the Seventh Amendment requires jury trials for "Suits at common law," even in non-Article III courts, the question remains how to deal with the substantial problems that such a holding would engender. There are several possibilities. One is that the Court could overrule its line of cases establishing the two-part test and hold that the Seventh Amendment applies only to claims that existed in 1791 in England. This has been proposed,[383] and it would

379. The issue has come up with respect to bankruptcy courts, which may now handle jury trials with the consent of the parties. *See* 28 U.S.C. § 157(e) (1994). The Supreme Court has never decided, however, whether the parties could be forced to accept a jury trial presided over by a non-Article III judge.

380. *See* ABA/BROOKINGS REPORT, *supra* note 98, at 9; DE TOCQUEVILLE, *supra* note 110, at 128.

381. *See* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 82, at 282, 284-86.

382. Regulatory matters are, of course, sometimes heard in Article III courts, with the result that a jury of ordinary citizens might see some of the regulatory effort. Those cases are relatively few in number, however, and they do not necessarily give citizens a glimpse of how the agencies work.

383. *See* Redish, *supra* note 355, at 531; Redish & LaFave, *supra* note 17, at 450-52.

certainly simplify the Seventh Amendment analysis.

This solution is unsatisfactory, however. First, it would require the overruling of a substantial line of precedent—one to which at least a majority of the members of the current Court adhere, at least to some degree.[384] Second, it would mean that the right to a jury trial would be significantly curtailed in the Article III courts as well as non-Article III courts. Whether there was a right to a jury trial for statutorily-created rights would depend entirely on Congress. Such a holding seems inconsistent with the history of the Seventh Amendment. That history suggests that the framers did not want to leave the right to a jury trial to Congress,[385] which is what such a holding would mean. One could argue, of course, that all the framers cared about was ensuring that there would be no erosion of the right to a jury trial,[386] and that they must have contemplated that any expansion of the right, such as to new statutory actions, would be made by Congress. But the framers probably never contemplated the enormous expansion of statutory rights that we have seen over the course of our history. Given the mood of the post-revolutionary times, it is just as easy to argue that the framers would have approved of the Court's two-part test, which helps to maintain the jury's position relative to the total body of law. In addition, if the framers saw the right to a jury trial as an independent check on Congress's

384. In *Terry*, all of the Justices accepted at least some part of the two-part test as determining the Seventh Amendment right to a jury trial. *See* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990). All except Justice Brennan thought that analogies between statutory actions and English common law actions from 1791 played at least some role in determining the modern right to a jury trial. *See id.* at 574-81 (Brennan, J., concurring in part and concurring in the judgment). Four of them—Chief Justice Rehnquist and Justices Marshall, White, and Blackmun—applied the standard two-part test. *See id.* at 565-73. Justice Stevens used the analogy as part of a more amorphous balancing of factors. *See id.* at 581-84 (Stevens, J., concurring in part and concurring in the judgment). Justices Kennedy, O'Connor, and Scalia thought that the analogy was the only part of the test that had to be applied in *Terry*. *See id.* at 584-95 (Kennedy, J., dissenting). If their position had prevailed, there would have been no right to a jury trial in *Terry*. Of course, three of the justices who accepted the analogy as part of the test for the Seventh Amendment have since retired, along with Justice Brennan, who thought that the remedy alone should determine the matter. *See id.* at 574-81 (Brennan, J., concurring in part and concurring in the judgment). Even so, there is no hint that the Court might reject the precedent and adopt Redish's suggestion that the Seventh Amendment should apply only to those claims that were heard in common law courts in England in 1791. *See* Redish, *supra* note 355, at 531.

385. *See supra* notes 328-35 and accompanying text.

386. The Seventh Amendment provides that the right to a jury trial shall be "preserved." U.S. CONST. amend. VII. That language is consistent with such an interpretation.

powers, as I have suggested,[387] they could hardly have approved of Congress's creating new rights and depriving citizens of the right to jury trial as to those rights.

Another possible solution to the problem is that agencies could retain full jurisdiction over injunctive and other equitable relief, but that common law relief such as penalty and damage claims would be shuttled to the Article III courts. In some cases, equitable and legal relief might be sought in the same case. It is possible, if that happened, that the agency could complete its adjudication first, because its presumably more efficient procedures would enable it to act faster. It is then possible that the agency's fact-finding would preclude further fact-finding in the courts.[388] The Court has held that a judge's fact-finding in an equity case precludes relitigation of the same issues in a later legal action, even if that means that a jury will not decide the issues in the legal action.[389] It has also held that an agency's adjudication can preclude relitigation of issues in later judicial proceedings if the agency's proceedings were sufficiently judicial.[390] Under the Court's current doctrine, if an agency determined that a regulated party was liable for a penalty, there would be nothing left for a jury to do, as the amount of the penalty would be a question for the judge.[391] The right to a jury trial would be meaningless if preclusion often prevented a jury from deciding the issues. Of course, this solution threatens to increase the burden on the courts even if preclusion would prevent relitigation of fact-finding.

A third possible solution is that legislation concerning an agency could be structured so that, while the parties had the right to bring the matter in either an Article III court or the agency, they would have an incentive to bring it in an agency that operated without a jury. This is similar to the legislation in *Schor*, in which Article III adjudication was an option.[392] If agency adjudication were sufficiently attractive, the parties might prefer to waive their right to

387. *See supra* notes 332-35 and accompanying text.

388. *See generally* COUND ET AL., *supra* note 107, at 1281-82 (discussing preclusion of Article III claims by administrative adjudication).

389. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979).

390. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982) (describing what agency proceedings must include to be sufficiently judicial); *cf.* University of Tenn. v. Elliott, 478 U.S. 788, 798-99 (1986) (discussing preclusive effect of state agency proceedings in federal court).

391. *See* Tull v. United States, 481 U.S. 412, 426-27 (1987).

392. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855 (1986).

a jury trial so as to take advantage of it. As I will demonstrate in the next section, there is no obstacle to a knowing waiver of the right to a jury trial.[393] This solution could be difficult to administer, however, because it would require the consent of both parties. Both parties have a right to a jury trial, and if one of them thought she would be advantaged with a jury and the other did not, it is likely that the matter would be heard in an Article III court with a jury.

Finally, the Court could continue to apply the Article III balancing test to the Seventh Amendment issue, but factor Seventh Amendment values into the balance. If that were to be done, however, it is hard to see that jury-less adjudication would be approved very often, especially if the Court recognizes that there are institutional values in the Seventh Amendment that are analogous to the institutional values reflected in Article III. While Article III review can preserve Article III values, there is no comparable alternative to a jury trial.

E. Summary and Conclusion

I have argued that there are good reasons for finding that the Constitution requires a jury trial regardless of the nature of the court in which the matter is pending. I have also suggested that the seemingly strong policy reasons for jury-less administrative adjudication have made it easy to ignore the constitutional infirmities of such adjudication. In any event, a self-perpetuating structure has developed making change difficult—virtually any change in direction would cause severe disruptions, and there is no perfect solution to the disruptions. It may well be that the status quo, however weak its constitutional base, at least represents a fair compromise between the right to a jury trial and the needs of the administrative state. I think, however, that the Seventh Amendment values are more important than we have acknowledged so far, and that the right to jury trial has already been seriously compromised by current doctrine—especially by the balancing test, which brings more matters into jury-less legislative courts. Any move to further curtail the right to a jury trial would be an unacceptable route to take. The structure that has developed carries the potential for further curtailment of those values, in large part because it does not recognize them.

393. *See infra* notes 395-415 and accompanying text.

VI. OTHER JUSTIFICATIONS FOR JURY-LESS ADJUDICATION IN NON-ARTICLE III COURTS

There are three other primary justifications for jury-less adjudication in non-Article III courts. These are waiver, sovereign immunity, and the plenary powers of Congress.[394] While waiver can apply in any kind of court, sovereign immunity tends to justify jury-less adjudication in special courts created to hear claims against the government, while the plenary power rationale is used to justify such adjudication in military and territorial courts. Waiver and sovereign immunity can also apply in Article III courts. In this Part, I briefly review these justifications.

A. Waiver

Waiver has been used to justify jury-less adjudication in a wide range of circumstances, from adjudication in Article III courts to adjudication in administrative agencies. It has its limits with respect to non-Article III adjudication, however, because the parties cannot waive the institutional interest in Article III adjudication. Waiver has considerably more value, however, with respect to the Seventh Amendment, as the right to a jury trial is clearly a waivable right.

1. Justification for Non-Article III Adjudication

In *Commodity Futures Trading Commission v. Schor*, the Supreme Court said that a party who takes advantage of the CFTC's administrative procedures for resolving claims against brokers thereby waives her personal interest in having an Article III court hear any related common law counterclaims asserted against her by the broker.[395] But while Article III in part protects the litigants' personal interests in an independent adjudicator, it also protects the institutional interest in separation of powers.[396] The personal interest is waivable, but the institutional interest is not.[397] Thus, to the extent that the institutional interest in preserving the separation of powers is threatened if a non-Article III adjudicator decides a particular

394. I have also pointed out that magistrates are justified as subsidiaries to the Article III court and under the Article III court's control. *See supra* note 239 and accompanying text. This justification applies to the Article I status of the magistrates, but not to the jury trial. The use of magistrates does not deprive the parties of a jury; indeed, litigants retain a right to a jury trial before an Article III judge unless they consent to have a jury trial before the magistrate. *See supra* notes 38-39 and accompanying text.

395. *See Schor*, 478 U.S.at 850.

396. *See id.* at 848-51.

397. *See id.* at 851.

matter, the parties cannot waive Article III adjudication. Some other justification is required to account for non-Article III adjudication when separation of powers is implicated, as it always will be to some extent, and in *Schor*, that justification was the balancing test.[398]

In *Schor*, the party who brought the administrative claim against his broker had the option to file suit in an Article III district court.[399] Having chosen the simpler and more expeditious agency procedures, he was bound by all of their ramifications. Indeed, the Court appeared to consider the option to sue in the federal courts as mitigating the encroachment on the judicial branch, which is part of the balancing test.[400] Thus, a clear and voluntary waiver could influence the Court in its application of other justifications for the use of a non-Article III court.[401]

2. Kinds of Issues Where Waiver Is Used

Waiver is of very limited utility in justifying non-Article III adjudication because of the parties' inability to waive the institutional interest and because some evidence of knowing waiver must be present. Thus, waiver can provide only a partial justification for any particular non-Article III adjudication. It is probably most significant with respect to private rights: in *Schor*, for example, it was important in justifying non-Article III adjudication of a private, common law counterclaim.[402] The Court has permitted legislative courts to assert jurisdiction over public, quasi-public, and replacement rights without regard to the consent of the litigants.[403] It is more difficult to justify adjudication of private rights in such courts, so any indication of consent must be welcome to the courts.

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398. *See supra* notes 167-76 and accompanying text (discussing the balancing test).

399. *See Schor*, 478 U.S. at 850.

400. *See id.* at 851.

401. Some claims against the United States may be brought in either the U.S. district courts or the Court of Federal Claims, but this concurrent jurisdiction is generally over smaller claims. *Compare* 28 U.S.C. § 1346(a)(2) (1994) (providing that district courts have jurisdiction over most claims against the United States that are for less than $10,000), *with id.* § 1491(a)(1) (providing that the Court of Federal Claims has jurisdiction over similar categories of cases with no dollar limitations). Adjudication in the Court of Federal Claims is generally justified on sovereign immunity grounds rather than waiver. *See infra* notes 417-29 and accompanying text. The statutes cited here show that there can be some overlap.

402. *See Schor*, 478 U.S. at 854-55.

403. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94 (1984) (quasi-public right); Crowell v. Benson, 285 U.S. 22, 46 (1931) (replacement right); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) (public right).

3. Waiver and the Seventh Amendment

a. Supreme Court Doctrine

It is much easier to view waiver as a justification for jury-less adjudication than as a justification for non-Article III adjudication. For one thing, we have long recognized a power to waive the right to a jury trial in both civil and criminal cases.[404] Even in the ordinary federal courts, parties who do not ask for a jury trial are deemed to have waived it.[405] In addition, the Court has not recognized an institutional interest in the right to a jury trial similar to the institutional interest in separation of powers in the Article III jurisprudence. Thus, unlike non-Article III adjudication, waiver can provide the sole justification for jury-less adjudication.

b. Constitutional Issues

There are, nevertheless, some constitutional concerns about waiver of the right to a jury trial. First, I have suggested that there might well be some institutional interests in the Seventh Amendment, which reflects the values of democratic participation and deliberation.[406] There are, however, some differences between the Article III institutional interests and the Seventh Amendment institutional interests. Separation of powers is a structural value in our federal government. It goes to the heart of how our government is organized. Democratic participation and deliberation, by contrast, are less structural because democratic theory itself accommodates many models of citizen participation and deliberation.[407] Some models provide for considerable participation and deliberation, and some are primarily representative, with little direct participation.[408]

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404. *See* Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (criminal case); United States v. Moore, 340 U.S. 616, 621 (1951) (civil case). Indeed, people have a right to waive any personal constitutional right, such as the right against self-incrimination. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969).

405. *See* FED. R. CIV. P. 38. The power to waive the right to a jury trial in federal courts dates to 1865 when Congress first permitted the parties to opt for a bench trial. *See* Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 500, 501.

406. *See supra* notes 109-21 and accompanying text.

407. *See generally* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984) (describing participatory democracy); DAVID HELD, MODELS OF DEMOCRACY (1987) (same); JAMES L. HYLAND, DEMOCRATIC THEORY: THE PHILOSOPHICAL FOUNDATIONS (1995) (describing various kinds of democratic participation); MANSBRIDGE, *supra* note 116 (same).

408. Two very different models are illustrated by Mansbridge, who calls her more participatory version "unitary democracy" and the more representative one "adversary democracy." MANSBRIDGE, *supra* note 116, at 8-22.

No one model is always best, and a democracy may well function better if different models are at work within it at the same time.[409] But if, as I suggest, the jury is the only governmental institution we have that reflects the ideal of direct citizen participation and deliberation, we may have more of an institutional interest than first appears—the interest in preserving the only governmental institution that reflects these values. If so, we should at least consider the extent to which Seventh Amendment values are compromised before we allow the parties to waive their right to a jury trial.[410]

Second, any waiver of Seventh Amendment rights must be knowing. This is standard constitutional fare: waiver of any constitutional right must be knowing and voluntary.[411] The government can, however, do things that influence the choice. It can, for example, make the choice to waive a constitutional right more attractive than the choice to assert it.[412] That is what happened in *Schor*, where the administrative proceeding was more expeditious than Article III adjudication would have been, so most litigants would be likely to choose the administrative proceeding. While *Schor* involved the waiver of the litigants' personal interest in an Article III court, the principle applies with equal force to the Seventh Amendment.

c. Policy Issues

Our use of the waiver doctrine will reflect the value we place on the jury. If we consider the jury to be an important component of our adjudicatory process, we will make waiver harder to assert; if we view the jury as more of a burden than a benefit, waiver will be easy to assert. It is certainly easy to see the jury, which is a highly inefficient

409. *See id.* at 300.

410. It may seem less palatable to foist a jury trial on unwilling litigants than to require those litigants to sue in an Article III court. This may be why we accept waiver of the right to a jury trial more easily than we accept waiver of Article III adjudication. But this reluctance may stem from our failure to recognize our institutional interest in the jury.

411. *See, e.g.*, Brookhart v. Janis, 384 U.S. 1, 4 (1966) (discussing waiver of the Sixth Amendment right to confront a witness); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (discussing the Sixth Amendment right to counsel); Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (discussing the Seventh Amendment right to jury trial).

412. *See, e.g.*, Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 661 (1990) (permitting waiver of First Amendment free speech rights to gain advantages of incorporation); Corbitt v. New Jersey, 439 U.S. 212, 219-20 (1978) (permitting waiver of Fifth Amendment right against self-incrimination in exchange for reduced sentence); Brady v. United States, 397 U.S. 742, 755 (1970) (permitting waiver of Fifth Amendment right against self-incrimination to avoid death sentence).

decision maker,[413] as a burden in an era of overcrowded dockets.[414] And our policies have long reflected a desire to diminish the jury's importance: the Federal Rules of Civil Procedure themselves are said to reflect an anti-jury bias that prevailed among their drafters.[415] But this approach devalues the institutional values reflected in the jury. Thus, even if our institutional interests in the jury do not have a constitutional dimension, I suggest that any method we adopt for allowing or encouraging waiver of the right to a jury trial should take account of those institutional values.

B. Sovereign Immunity

The public rights doctrine and the balancing test permit Congress to assign claims by or against the government in its sovereign, or regulatory, capacity to non-Article III courts. But citizens can also have proprietary claims against the government, such as tort claims or breach of contract claims. For such claims, the government is much like any private citizen. Nevertheless, under the doctrine of sovereign immunity, Congress has extremely broad power to determine the conditions of adjudication. In many instances, Congress has created specialized non-Article III courts to adjudicate such claims.[416] Congress also usually provides for jury-less adjudication, whether the adjudication takes place in a specialized court or an Article III court.

1. Justification for Non-Article III Adjudication

The doctrine of sovereign immunity holds that because the sovereign cannot be sued without its consent, the sovereign may give

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413. *See* Stephan Landsman, *The History and Objectives of the Civil Jury System*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 82, at 22, 47-50.

414. Commentators differ as to what has caused the litigation explosion. While some think that we have become more litigious, others attribute the increase in litigation to other factors, such as the increase in population and the legislatures' creation of hundreds of new causes of action. *See* HUBER, *supra* note 376; JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY (1981); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 462 (1985); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992); Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV. 857, 860 (1993).

415. *See* Douglas Laycock, *The Triumph of Equity*, LAW & CONTEMP. PROBS., Summer 1993, at 53, 66-67; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 969 (1987).

416. *See supra* notes 40-46 and accompanying text.

consent but attach conditions.[417] While the federal government has granted a sweeping waiver of sovereign immunity, Congress has generally imposed significant restrictions on the right of citizens to sue the government. One common condition is that the case be heard in a non-Article III court by judges without the tenure and salary protections provided by Article III.[418] At the same time, however, if the government in its proprietary capacity sues a private citizen, it must generally bring the suit in an Article III court.[419]

The condition that a citizen suing the government bring the suit in a non-Article III court is not particularly onerous when one considers the alternatives. First, the historical method for claiming against the government was to seek private legislation, and that method is still available.[420] It is, however, costly and time-consuming, and the claim could get lost in the political process. Alternatively, the citizen could wait for the government to sue in an ordinary

417. *See* McElrath v. United States, 102 U.S. 426, 440 (1880). Although there is no explicit basis for sovereign immunity with respect to the federal government in the U.S. Constitution, sovereign immunity was invoked early in the country's history through judicial action. *See* Rebecca Heintz, Note, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263, 267 (1994). The doctrine had "become so 'entrenched' in the decisions of American courts that by mid-nineteenth century the rule attained the 'immutability of a maxim.' " THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION 37 (1970). The only reference to sovereign immunity in the Constitution is the Eleventh Amendment, which was added to ensure the sovereign immunity of states. *See* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2240 (1996); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3 (1988).

418. The jurisdiction of the Court of Federal Claims is instructive. Among other things, that court can hear "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (1994). While many proprietary claims against the government are thus heard in specialized courts, the Federal Tort Claims Act provides a notable exception. The United States District Courts have exclusive jurisdiction over FTCA claims. *See id.* § 1346(b).

419. *See id.* § 1345 (providing that district courts have jurisdiction over claims by the United States). The Court has consistently held that suits by the government against a citizen are suits at common law. *See* United States v. Cooper Corp., 312 U.S. 600, 604 (1941); Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850); Dugan v. United States, 16 U.S. (3 Wheat.) 172, 181 (1818). The United States also could sue in state courts, which are not Article III courts. *See* United States v. Lee, 106 U.S. 196, 222 (1882) (dicta); United States v. American Ditch Ass'n, 2 F. Supp. 867, 868 (D. Idaho 1933) (dicta).

420. Without the government's waiver of sovereign immunity, this is the only alternative. *See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 635 (1985).

federal court, where Article III judges would hear the case, and then assert her claim as a counterclaim. That, however, gives the government the momentum and the opportunity to shape the suit—assuming the government would bring suit at all.[421] Under the circumstances, the Court of Federal Claims, even with its Article I status, seems to be a good alternative. Indeed, this is especially so given that there is Article III review of any decision of the Court of Federal Claims.[422] Applying something similar to the balancing test that developed for agency adjudication,[423] then, there is virtually no encroachment on Article III values because sovereign immunity would have shunted such claims to the legislature prior to the waiver of sovereign immunity and because an Article III court reviews the legislative court's judgment. Thus, Congress's determination to give citizens with claims against the government a relatively expeditious judicial determination of those claims in a non-Article III court is a reasonable one.

The sovereign immunity rationale is complicated somewhat by the fact that compulsory counterclaims can be asserted in the non-Article III courts that are created to hear claims against the government.[424] Thus, if a citizen files suit against the government in the Court of Federal Claims, she will be met with any compulsory counterclaim the government has against her, and she will not be able to litigate either her claim or the government's counterclaim in an Article III court.[425] As I noted, however, if the government were to bring that same claim independently, it generally would have to file suit in an ordinary U.S. district court.[426] The Court has never found this anomaly problematic. As the Court said in 1880 in *McElrath v. United States*:[427]

> Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the

421. *See* United States v. Rosati, 97 F. Supp. 747, 749 (D.N.J. 1951).

422. Court of Federal Claims decisions are appealable to the U.S. Court of Appeals for the Federal Circuit, which is an Article III court. *See* 28 U.S.C. § 1295(a) (1994).

423. *See supra* notes 147-85 and accompanying text. Justice White has argued that the balancing test explains virtually all of the Supreme Court's jurisprudence on Article I courts. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 92-118 (1982) (White, J., dissenting).

424. *See* 28 U.S.C. § 1503 (1994) (Court of Federal Claims); FED. CL. R. 13(a) (same).

425. *See* McElrath v. United States, 102 U.S. 426, 440 (1880).

426. *See supra* note 419 and accompanying text.

427. 102 U.S. 426 (1880).

> government, upon which judgment may go against him, without the intervention of a jury . . . .[428]

While the Court has fallen into an easy sovereign immunity justification for such conditions on suits against the government, it never questions the propriety of sovereign immunity itself. Some commentators have suggested that sovereign immunity is an odd concept in a democracy.[429] Indeed, the government's broad waiver of sovereign immunity is an acknowledgment that a democracy requires that the government be accountable. The primary effect of federal sovereign immunity, then, is to permit Congress to set the conditions for suits against the government.

2. Kinds of Issues that Government Claims Courts Hear

Because the government is always a party in government claims courts, it would be easy to conclude that such courts hear only public rights matters. But when the government acts in its proprietary capacity, it is acting like a private citizen, and claims against it are much like private claims among private citizens. Such claims do not implicate the government's regulatory power at all, and exercise of the regulatory power is part of my definition of public rights.[430] Thus, the claims heard under the sovereign immunity rubric are much more in the nature of private rights than public.[431]

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428. *Id.* at 440.

429. *See, e.g.*, Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387 (1970); Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383 (1970); Edward P. Davis, Jr., Note, *Sovereign Immunity—An Anathema to the "Constitutional Tort,"* 12 SANTA CLARA L. REV. 543 (1972).

430. *See supra* notes 187-88 and accompanying text.

431. This is so even though the government will not always be subject to the same law as other private citizens, because sovereign immunity allows it to devise its own legal principles for any suits it consents to defend. Government contracts, for example, may be governed by a federal common law of contracts rather than the ordinary state contract law that governs everyone else. *See* S.R.A., Inc. v. Minnesota, 327 U.S. 558, 564 (1946) (holding that federal common law governs contract involving real estate owned by the United States); Padbloc Co., Inc. v. United States, 161 Ct. Cl. 369, 377 (1963) (holding that federal common law governs contracts of the United States). Even when the courts create new law for government contracts, however, it is never very different from the law that the common law has evolved, and the common law is inherently concerned with private law. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (plurality opinion) (noting that the common law is concerned with private rights); EUGENE W. MASSENGALE, FUNDAMENTALS OF FEDERAL CONTRACT LAW 9-10 (1991) (noting that United States usually opts to subject itself to ordinary common law contract principles).

3. Sovereign Immunity and the Seventh Amendment

Like the requirement that actions be brought in non-Article III courts, jury-less adjudication is another of the conditions that Congress usually attaches to its consent to suit.[432] The sovereign immunity doctrine has become somewhat confusing, however, and the constitutional and policy issues are more complicated than the courts generally admit.

a. Supreme Court Doctrine

As long ago as 1880, the Court permitted Congress to condition its waiver of sovereign immunity on jury-less adjudication of claims against the government.[433] That holding was reaffirmed one hundred years later.[434] As was true with non-Article III adjudication, this makes some sense given that in the absence of a court for such claims, citizens asserting a claim against the government would have to go to Congress itself, seeking private legislation to pay the claim.[435] Obviously, no jury was involved in such private legislation. But as I have shown, courts that handle claims against the government also determine counterclaims asserted by the government. The jurisprudence of the right to jury trial in that context is more complicated.

Four scenarios will illustrate the complexity. First, suppose that the only claim in the suit is a claim by a citizen against the government. As I have shown, there is no constitutional right to jury trial when a citizen sues the government for money damages, even if the same suit between private parties would be subject to a jury trial.[436] This is true whether the claim is brought in a specialized court like the Court of Federal Claims[437] or an ordinary U.S. district court.[438] Congress can provide for a jury by statute and has occasionally done so.[439]

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432. *See* Lehman v. Nakshian, 453 U.S. 156, 160 (1981); *McElrath*, 102 U.S. at 440.

433. *See McElrath*, 102 U.S. at 440.

434. *See Lehman*, 453 U.S. at 160. The federal government has given a very wide-ranging consent to suit. *See* 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3656 (3d ed. 1998). Nevertheless, as long as such consent is required, it is likely that the courts will uphold conditions that the government deems proper, including the condition that the suit be tried without a jury.

435. *See* Shimomura, *supra* note 420, at 626-27.

436. *See supra* notes 433-35 and accompanying text.

437. *See* United States v. Sherwood, 312 U.S. 584, 587 (1941); *McElrath*, 102 U.S. at 440.

438. *See Lehman*, 453 U.S. at 160.

439. *See, e.g.*, 28 U.S.C. § 2402 (1994) (providing for no jury generally in district courts

The second scenario reverses the parties, so that the government is claiming against the citizen. In that scenario, there will be a right to a jury trial in those cases where such a right is generally applicable; in other words, either party can demand a jury for the government's claims if a jury would be available for similar claims between private parties.[440]

The third and fourth scenarios are more complicated. In the third, the government sues a citizen in a federal district court and the citizen counterclaims. While the Supreme Court has never addressed the issue, it is widely assumed that there is a right to jury trial for the government's claim against the citizen, but not for the citizen's claim against the government.[441] Principles of preclusion may prevent the government from relitigating issues found by the jury, however.[442] The rules applicable to the third scenario simply track the rules that would apply if the claim and the counterclaim had been brought separately. But in the fourth scenario, if a citizen sues the government in a legislative court and the government counterclaims, there will be no right to a jury trial for *either* the citizen's or the government's claims.[443] This does *not* track what would happen if the two claims were brought separately. This same rule apparently applies if the citizen were to sue initially in a federal district court, though there has been virtually no analysis of the issue.[444]

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for claims against the government, but allowing jury for claims for recovery of taxes and penalties).

440. *See* Austin v. Shalala, 994 F.2d 1170, 1175 (5th Cir. 1993) (citing Tull v. United States, 481 U.S. 412, 418-19 (1987)); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2314, at 114 (2d ed. 1995).

441. *See* United States v. Rosati, 97 F. Supp. 747, 748-49 (D.N.J. 1951); 8 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 38.40(2)(d) (3d ed. 1997); 9 WRIGHT & MILLER, *supra* note 440, § 2314.

442. *See* United States v. Schlitz, 9 F.R.D. 259, 261 (E.D. Va. 1949). The Supreme Court in 1959 held that when legal and equitable claims are raised in the same case, a jury must first hear the legal claims, so that any fact-finding by the jury would apply to both legal and equitable claims. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508 (1959). A suit that concerns claims for money damages both by and against the government concerns only legal issues. Thus, the rationale of *Beacon Theatres* is not directly applicable. It is not clear that the Court would require claims *by* the government to be heard before claims *against* the government, thus effectively requiring a jury for all common issues of fact, though lower courts seem to require that sequencing. *See Schlitz*, 9 F.R.D. at 260-61. Such a requirement would make sense, especially when the counterclaim is compulsory. The government, having sued first, takes the risk that a jury might determine some of the issues in the case.

443. *See* McElrath v. United States, 102 U.S. 426, 440 (1880).

444. *See* Cargill, Inc. v. Commodity Credit Corp., 275 F.2d 745, 748-49 (2d Cir. 1960) (holding that there was no right to jury trial on the government's counterclaim in Article III courts, citing *McElrath*); Terminal Warehouse v. United States, 91 F. Supp. 327, 328

b. Constitutional Issues

Two constitutional issues relating to jury-less adjudication in sovereign immunity cases deserve attention. The first is whether such cases are "Suits at common law" and therefore subject to the Seventh Amendment. The second is whether Congress can constitutionally condition such suits on jury-less adjudication.

i. "Suits at common law"

The easy answer to the question whether suits against the government are suits at common law is that they are not. At common law, a citizen could not sue the sovereign because of the doctrine of sovereign immunity, so such suits were virtually unknown. Furthermore, even when the government consents to be sued, it often provides its own set of legal rules to govern such suits, usually by a set of federal common law rules.[445] Thus, the government is often not subject to the same set of common law rules as everyone else.[446] These factors suggest that such suits are not suits at common law.[447]

On the other hand, such suits might be classified as suits at common law under the Court's current two-step jurisprudence. The first step is whether the claim would be classified as legal or equitable at common law.[448] Such suits could not have been brought in either law or equity in England in 1791 in the absence of the government's consent. The government, however, could consent to suit in either the common law courts or in equity. This means either that such suits are not suits at common law or that the first step is inconclusive, as it almost always is.[449] But the Court has repeatedly said that the second

(D.N.J. 1950) (same).

445. *See supra* note 431.

446. One exception is tort claims brought under the Federal Tort Claims Act. *See* 28 U.S.C. §§ 1346(b), 2674 (1994) (providing that FTCA claims against the government be brought in U.S. district courts, which shall apply the law of the state in which the suit is brought).

447. Indeed, the Court has so held. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 572 (1962) (holding that suits against the United States are not suits at common law because they require a waiver of sovereign immunity); *McElrath*, 102 U.S. at 439-40 (same).

448. *See* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564-65 (1990).

449. *See id.* at 574-75 (Brennan, J. concurring in part and concurring in the judgment) ("For the past decade and a half, this Court has explained that the two parts of the historical test are not equal in weight, that the nature of the remedy is more important than the nature of the right."). Some justices have argued that the first step should be determinative. *See id.* at 592-93 (Kennedy, J., dissenting). Others argue that the first step should be dropped altogether. *See id.* at 574 (Brennan, J., concurring in part and concurring in the judgment).

step—characterizing the damages as legal or equitable—is the more important one anyway.[450] If compensatory damages are sought against the government, then, the suit in which they are sought is arguably a suit at common law. If so, a jury ought to be required for such suits.

ii. Analogy to the Unconstitutional Conditions Doctrine

The Court has repeatedly said that when Congress grants consent for the government to be sued, it has virtually unlimited discretion to condition that suit.[451] In other circumstances, however, there are limits on the power of Congress to condition government benefits on a citizen's forgoing assertion of a constitutional right.[452] The question is whether there should be such limits in this context. While the analogy to cases where the unconstitutional conditions doctrine has been applied is not exact, there are at least some similarities.

The unconstitutional conditions doctrine has been said to apply when "[g]overnment offers a benefit that it is constitutionally permitted but not compelled to offer, on condition that the recipient undertake (or refrain from) future action that is legal for him to undertake (or refrain from) but that government could not have constitutionally compelled (or prohibited) without especially strong justification."[453] The doctrine generally arises when the government seeks to condition a benefit, such as a tax exemption or a subsidy (including welfare benefits), on accepting limits on a constitutional right.[454]

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450. *See, e.g., id.* at 565; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989); Tull v. United States, 481 U.S. 412, 421 (1987).

451. *See* Lehman v. Nakshian, 453 U.S. 156, 160-61 (1980); Honda v. Clark, 386 U.S. 484, 501 (1967); United States v. Sherwood, 312 U.S. 584, 587 (1941); *McElrath*, 102 U.S. at 440.

452. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (holding that government cannot condition the right to unemployment benefits on beneficiary's willingness to work on Saturday in violation of religious tenets); FCC v. League of Women Voters, 468 U.S. 364, 395 (1984) (holding that government cannot condition federal funding on a ban on political editorializing); Elrod v. Burns, 427 U.S. 347, 359 (1976) (holding that the government cannot condition a public job on the relinquishment of the right to free association). *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (discussing the unconstitutional conditions doctrine); Symposium, *Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 175 (1989) (same); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (same).

453. Sullivan, *supra* note 452, at 1427.

454. *See, e.g., League of Women Voters*, 468 U.S. at 395 (holding that government cannot prohibit television stations receiving federal grant money from editorializing);

Conditioning consent to being sued on forgoing the right to jury trial is somewhat different, but there are similar elements. The government "benefit"—which the government is permitted but not compelled to grant—is the privilege of suing the government in a judicial proceeding, rather than having to assert claims directly in Congress. The future action that the citizen must refrain from is making a demand for a jury trial, both for the citizen's claims against the government and for any claims the government may assert by counterclaim in the same proceeding. This means that the citizen must give up a constitutional right in order to avail itself of the government benefit. This is certainly so as to the government's claims against the citizen, but if my arguments about the applicability of the two-step test are correct, it may also be true as to the citizen's claims against the government. Arguably, the government could not constitutionally prohibit a jury trial on demand in such circumstances without "especially strong justification."[455]

Even if the Court were to accept that the unconstitutional conditions doctrine applied in such a circumstance, however, it is not clear that the Court would find the condition unconstitutional. The Seventh Amendment, despite occasional odes to its glory,[456] is a relatively weak constitutional right.[457] Over the more than two

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Wyman v. James, 400 U.S. 309, 317 (1971) (holding that government can condition the receipt of welfare benefits on consent to home visits); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969) (holding that government can condition broadcast licenses on licensees' airing both sides of an issue).

455. Sullivan, *supra* note 452, at 1427. Despite some superficial similarities, I do not see the waiver doctrine as implicated in the government's conditioning consent to suit on forgoing the right to a jury trial. Waiver must be knowing and voluntary. *See* Milone v. Camp, 22 F.3d 693, 704 (7th Cir. 1994). In *Schor*, for example, the parties had a choice between jury-less non-Article III adjudication and adjudication in an Article III court with a jury. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854-55 (1985). The only time the claimant has anything resembling a choice to accept or reject a condition on the right to a jury trial is when the claimant and the government are claiming against one another. In that circumstance, the choice that a claimant has is between suing in a non-Article III court—and giving up the right to a jury trial even as to the government's claims against her—and waiting to be sued by the government. *See supra* notes 420-22 and accompanying text. While choice is not completely eliminated in that context, it is more coercive than if there is a free choice, as in *Schor*, between an Article III court and a non-Article III court. The line between conditions and waiver is an uncertain one, however.

456. *See, e.g.*, ABA/BROOKINGS REPORT, *supra* note 98, at 2; DE TOCQUEVILLE, *supra* note 110, at 127-28; Kalven, *supra* note 121, at 1075; Prentice H. Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1991 U. CHI. LEGAL F. 147, 159.

457. Among other indicia of this weakness is the fact that the Seventh Amendment is one of the few amendments from the Bill of Rights that have not been incorporated into the Fourteenth Amendment and applied to the states. *See* Melancon v. McKeithen, 345 F. Supp. 1025, 1040 (E.D. La. 1972), *aff'd per curiam sub nom.* Davis v. Edwards, 409 U.S.

hundred years of this country's constitutional history, it has been redefined and eroded to the point where it is in danger of losing much of its value.[458] The Court could well find, explicitly or implicitly, that the right to a jury trial is not a constitutional right that can only be abrogated with "especially strong justification."[459]

c. Policy Issues

It is easy to understand why Congress might fear giving the determination of claims against the United States to a jury. Just as private entities that might be thought of as "deep pockets" sometimes fear a jury, so might the government.[460] The fear may not be altogether justified, however. There are a number of studies suggesting that juries generally do a good job of sorting out liability and damages issues without regard for whether the defendant is rich.[461] There are, of course, occasional verdicts that seem extreme and that grab headlines, but most jury verdicts are within a predictable range and are quite reasonable.[462]

Neither expertise nor efficiency provides a strong justification

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1098 (1973); ROTUNDA ET AL., *supra* note 57, § 17.8, at 256 n.12; *see also* Balzac v. Porto Rico, 258 U.S. 298, 306 (1922) (holding that the Seventh Amendment does not apply in territorial courts in Puerto Rico even if all the other amendments of the Bill of Rights do); *supra* notes 341-53 and accompanying text (discussing the Court's treatment of the Seventh Amendment).

458. *See generally* Sward, *supra* note 99 (documenting the erosion of the Seventh Amendment).

459. Sullivan, *supra* note 452, at 1427.

460. *See* Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 82, at 61, 71; Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1127 (1992).

461. *See, e.g.*, STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 10-12 (1995); NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY 11-22, 191-220 (1995); Clermont & Eisenberg, *supra* note 460, at 1124-77; Galanter, *supra* note 460, at 71-72; Saks, *supra* note 414, at 1274-77.

462. One of the most notorious recent cases concerned a woman who bought a cup of coffee at a drive-through window at a McDonald's restaurant and suffered severe third-degree burns when she spilled the coffee on herself. The jury awarded her $2.9 million, $2.7 million of which was in punitive damages. *See Here's a McHot Verdict*, USA TODAY, Aug. 19, 1994, at B1. The punitive damage award was later reduced to $660,000. *See McDonald's Coffee Award Reduced 75% by Judge*, WALL ST. J., Sept. 15, 1994, at A4. The jury's verdict, however, may not have been as unreasonable as it seemed. McDonald's officials testified that they knew they were selling coffee at a temperature that was unfit for consumption, that others had been burned by the coffee, and that they had no intention of changing their practices. *See* S. Reid Morgan, *McDonald's Burned Itself*, LEGAL TIMES, Sept. 19, 1994, at 26 (Morgan was the plaintiff's attorney). The jury's award of $2.7 million in punitive damages represented two days' gross sales of coffee for McDonald's. *See id.*

for jury-less adjudication of claims by or against the government. Even when there is specialized law, such as government contract law, the principles are not greatly different from ordinary common law contracts.[463] No special expertise is required, as juries routinely determine common law contracts claims. Furthermore, while jury-less adjudication is undoubtedly more efficient than adjudication with juries,[464] the Seventh Amendment reflects an understanding that the benefits of the jury outweigh some loss in efficiency.

Even if the Court continues to hold that claims against the government are not subject to the Seventh Amendment, efficiency alone does not justify depriving a litigant of a jury trial for a counterclaim by the government. Article III courts regularly handle the reverse situation, requiring a jury for claims by the government while providing no jury for counterclaims by the citizen,[465] and there is no reason why legislative courts could not do the same.[466] Indeed, the current rules make it apparent that the government is unwilling to subject itself to the same adjudicatory procedures that govern ordinary citizens.[467]

C. *Extraordinary Plenary Powers of Congress*

The justification for territorial courts and military courts seems to be that Congress can create those courts to adjudicate matters arising under some extraordinary plenary power that it possesses. But because the precise nature of the plenary power under which Congress is acting will vary, the precise rationale for non-Article III adjudication will also vary. Furthermore, unlike the other rationales, the rationale for jury-less adjudication in territorial courts does not track that for non-Article III adjudication.[468]

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463. *Compare* Beatty v. United States, 168 F. Supp. 204, 206-07 (Ct. Cl. 1958) (defining duress with respect to government contracts), *with* Wolf v. St. Louis Pub. Serv. Co., 357 S.W.2d 950, 954-55 (Mo. Ct. App. 1962) (defining common law duress).

464. *See supra* note 82 and accompanying text.

465. *See supra* notes 441-44 and accompanying text.

466. That should not be difficult for the Court of Federal Claims. While that court is based in Washington, D.C., it hears claims arising throughout the United States, *see* 28 U.S.C. § 173 (1994), and holds hearings on those claims in the locales where they arise.

467. That, unfortunately, is not unusual. It was only in 1995 that Congress subjected itself to various federal employment laws that have long applied to everyone else. *See* Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified at 2 U.S.C.A. §§ 1301-1438 (1997)).

468. Military courts do not hear civil matters, *see* 1 GILLIGAN & LEDERER, *supra* note 63, § 2-11.00, so the Seventh Amendment is not implicated in their use. I will discuss military courts briefly in connection with Article III issues, but my main interest is in the territorial courts, where both Article III and the Seventh Amendment are at issue.

1. Justification for Non-Article III Adjudication

Military courts are justified as necessary and proper to Congress's exercise of its extraordinary plenary power over military matters.[469] Because military discipline and order have serious implications for our national defense, military courts are thought to be necessary to enforce military discipline.[470] Indeed, the Supreme Court has upheld a wide range of departures from the judicial norm in the military courts, including the use of judges with no fixed term of office,[471] and the use of summary courts-martial where the accused is not permitted to have counsel.[472] In addition, unlike their civilian counterparts, service personnel are not permitted to sue their superior officers for violation of constitutional rights.[473] While acknowledging that the military is bound by the due process clause, the Court in these cases generally bows to Congress's authority to decide what process is due in the military context.[474] This deference to Congress extends to Congress's decision that military crimes must be adjudicated in non-Article III courts.[475]

Territorial courts are justified as necessary and proper to Congress's plenary power to provide for local as well as national governance in the territories.[476] In the absence of state government, Congress must create the territorial institutions, including courts, that handle local matters. The Supreme Court has held that Congress need not provide Article III courts to handle territorial judicial

469. *See* U.S. CONST. art I, § 8, cl. 14 (granting Congress the power "To make Rules for the Government and Regulation of the land and naval Forces"); Weiss v. United States, 510 U.S. 163, 177 (1994); Chappell v. Wallace, 462 U.S. 296, 301 (1983); Dynes v. Hoover, 61 U.S. (20 How.) 65, 78-79 (1857).

470. *See, e.g., Chappell*, 462 U.S. at 300 (discussing the need for a special system to enforce military discipline).

471. *See Weiss*, 510 U.S. at 181.

472. *See* Middendorf v. Henry, 425 U.S. 25, 48 (1976). Summary courts-martial are used for minor offenses where the penalties are not very severe. *See id.* The accused can elect to be tried instead in a special or general court-martial, where he would have a right to counsel, but risks a more severe penalty if he does. *See id.* at 46-48.

473. *See Chappell*, 462 U.S. at 305.

474. *See, e.g., Weiss*, 510 U.S. at 177 (deferring to Congress's decision that military judges are not required to have a fixed term of office); Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (deferring to Congress's choice to exclude females from the selective service); *Middendorf*, 425 U.S. at 43 (deferring to Congress's decision not to provide counsel in summary court-martial hearings).

475. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857); *see also* Burns v. Wilson, 346 U.S. 137, 140 (1953) (holding that the Constitution gives Congress power to establish procedures for military justice).

476. *See* U.S. CONST. art. IV, § 3, cl. 2; Palmore v. United States, 411 U.S. 389, 397 (1973); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).

matters.[477]

While the plenary power justification so far has been most prominent for military and territorial courts, it is potentially much broader. For example, adjudication in administrative agencies is arguably necessary and proper to the administration of most of Congress's powers under Article I. In other words, Congress's power to eliminate Article III adjudication could be limited only by its Article I powers. Even if its Article I powers are not as sweeping as was once thought,[478] they are formidable. If this justification were given a broad reading, it could be used to permit adjudication in administrative agencies and adjuncts without going through the balancing test. A plenary powers justification would require only that the means chosen be necessary and proper to the exercise of the power—in other words, all that would matter would be the reasons for Congress's choosing non-Article III adjudication.[479] Article III values would no longer be relevant. This is an odd result given that the plenary powers rationale is designed to justify non-Article III adjudication. Thus, I suggest some alternative rationales for military and territorial courts.

As to military courts, the balancing test that justifies administrative adjudication of a wide range of issues could also justify adjudication in military courts. Military crimes, which are the subject matter of military courts, are created by Congress rather than the

477. *See Palmore*, 411 U.S. at 397-404.

478. Until recently, it had been thought that those powers were almost unlimited. A wide variety of legislation has been upheld, for example, under the Commerce Clause. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (upholding civil rights legislation); United States v. Sullivan, 332 U.S. 689, 697-98 (1948) (upholding labeling requirements for medications). In the last few years, however, the Supreme Court has begun to cut back on Congress's Commerce Clause power. *See, e.g.*, Printz v. United States, 521 U.S. 98, 116 (1997) (holding that some aspects of gun control legislation exceed Congress's powers under the Constitution); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down legislation prohibiting guns within proximity of schools as exceeding Congress's power under the commerce clause); *cf.* City of Boerne v. Flores, 521 U.S. 507, 522 (1997) (holding that Congress, in enacting the Religious Freedom Restoration Act, exceeded its enforcement power under § 5 of the Fourteenth Amendment).

479. Even if the rationale did not sweep so broadly, some powers of Congress might fall within it. For example, the Court has long held that Congress has plenary power over the definition of citizenship (beyond the constitutional minimum) and immigration matters. *See* United States v. Wong Kim Ark, 169 U.S. 649, 672 (1898). The Immigration and Naturalization Service, then, might be justified under the plenary powers rationale rather than the public rights doctrine. If some Article I powers of Congress are "extraordinary plenary powers" and some are not, however, distinguishing between them could be quite difficult.

common law.[480] There is some Article III review of military courts, at least as to constitutional claims.[481] And Congress's reason for creating such courts—the maintenance of military discipline[482]—is particularly strong, as it implicates the national defense. Thus, on balance, non-Article III courts seem to be justified for trial of military claims.

The strongest rationale for territorial courts is that Congress has no alternative to creating non-Article III courts to handle local territorial matters. As a practical matter, Congress is bound to create judicial institutions in the territories to handle local judicial matters, but Article III courts would have no jurisdiction to hear local matters. As to disputes between citizens of the territory, there would be no diversity jurisdiction. Furthermore, unless Congress is legislating directly in the territory, matters arising under local law could not be said to arise under federal law.[483] Thus, Congress has no power to create Article III courts to handle local territorial matters between citizens of the territory.[484]

Even if Congress had the power to give such local territorial matters to Article III courts—perhaps because it was legislating directly—the analogy to state courts suggests that it should not do so.

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480. *See* 1 GILLIGAN & LEDERER, *supra* note 63, § 2-31.00.

481. *See* 28 U.S.C. § 1259 (1994) (providing that the Supreme Court has jurisdiction by writ of certiorari over certain cases decided by military courts); Burns v. Wilson, 346 U.S. 137, 142 (1953) (holding that Article III courts have jurisdiction over collateral attacks on military convictions involving constitutional claims). *See generally* Major Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 50-57 (1985) (discussing judicial review of courts-martial).

482. *See supra* notes 469-75 and accompanying text.

483. *Cf.* Boe v. Fort Belknap Indian Community, 642 F.2d 276, 279 (9th Cir. 1981) (holding that a claim arising under laws promulgated by an Indian tribe pursuant to the federal Indian Reorganization Act ("IRA") does not arise under federal law unless the validity or construction of IRA is at issue).

484. The constitutional status of a district court's jurisdiction over claims between citizens of a territory and citizens of a state is itself uncertain. While Congress has provided for such jurisdiction by statute, *see* 28 U.S.C. § 1332(d) (1994) (providing that the word "state" as used in the diversity statute includes territories), the constitutional basis for such jurisdiction is uncertain. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (plurality opinion), the Supreme Court held such jurisdiction constitutional, but no theory supporting such jurisdiction garnered a majority of the Court. *See id.* at 583-604 (plurality opinion); *id.* at 604 (Rutledge, J., concurring). Three justices held that citizens of the District of Columbia were not citizens of states within the meaning of Article III, but that because the government of the District was within Congress's Article I power, Congress had the power to give such controversies to the Article III district courts. *See id.* at 588, 596-600 (plurality opinion). Two justices thought that the term "State" in Article III encompassed the District of Columbia, thus forming a 5-4 majority for the constitutionality of such jurisdiction. *See id.* at 623-26 (Rutledge, J., concurring).

State courts are not bound by the strictures of Article III, and the states have devised a wide range of procedures for selecting their judges and for determining their terms of office. State judges may be elected, appointed, or appointed with the requirement that they undergo a retention election at periodic intervals.[485] Some have life tenure, but most are appointed or elected for fixed terms.[486] By analogy, territorial courts fulfilling the same functions as state courts need not be treated as Article III courts with the full range of Article III protections.[487]

In short, there are justifications for territorial courts that do not depend on the mere existence of a plenary power in Congress. Because the plenary power rationale, standing alone, has the potential to undermine Article III values, these other justifications are better. The strongest justification for territorial courts is that Congress has no choice but to create non-Article III local courts.

2. Kinds of Issues Heard Under the Plenary Powers Rationale

Local territorial courts generally have the same jurisdiction as the state courts, which is to say that they can hear any matter not given exclusively to another court.[488] The non-Article III United States district courts that exist in some of the territories hear both local matters and matters that are within the Article III jurisdiction.[489] Thus, both kinds of non-Article III territorial courts could hear private rights matters as well as public, quasi-public, and replacement rights cases.[490]

3. Plenary Powers and the Seventh Amendment

The plenary powers rationale for the creation of territorial courts says that Congress can create such courts if they are necessary for the execution of some extraordinary plenary power of

485. *See* MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE §§ 2.2-2.8 (1987).

486. *See* IDAHO CONST. art. 5, § 6 (six year term); R.I. CONST. art. 10, § 5 (life tenure); S.D. CONST. art. 5, § 7 (eight year term); Palmore v. United States, 411 U.S. 389, 409-10 (1973).

487. *See Palmore*, 411 U.S. at 390-91.

488. *See* 48 U.S.C. § 1424-1(b) (1994) (establishing legislative authority for the creation of local courts in Guam); *id.* § 1611(b) (establishing legislative authority for the creation of local courts in the Virgin Islands).

489. *See, e.g.*, 48 U.S.C. § 1424 (Guam); *id.* §§ 1611-1612 (Virgin Islands); *id.* § 1821-1822 (Northern Mariana Islands).

490. Military courts hear only criminal matters arising under the Uniform Code of Military Justice. *See* 10 U.S.C. § 817 (1994).

Congress.[491] The Supreme Court, however, has not justified jury-less adjudication in local territorial courts on that basis. Rather, it bases the right to a jury trial on how well integrated the territory is into the United States.

a. Supreme Court Doctrine

As I have shown, three kinds of courts operate in the territories: Article III courts, non-Article III local courts, and non-Article III federal courts.[492] There is a right to a jury trial in the Article III courts in the territories.[493] The right to a jury trial in the other two kinds of courts depends on whether the territory is integrated into the United States.[494] A non-integrated territory is one that had a well-developed legal system when the United States acquired it, such as Puerto Rico and the Philippines.[495] By contrast, the Court, disregarding native populations, thought that integrated territories were simply territories that offered "opportunity for immigration and settlement by American citizens,"[496] who took the full rights of citizenship, including the right to a jury trial, with them into the newly settled territory. Examples include Alaska and Louisiana.[497]

The rationale for the distinction between integrated and non-integrated territories is quite democratic:

> Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.[498]

Thus, there is no right to a jury trial in non-integrated territories

491. The Seventh Amendment does not apply at all in criminal matters, so it is not implicated in military courts, which hear only criminal matters. *See* 1 GILLIGAN & LEDERER, *supra* note 63, § 2-11.00. Thus, I will discuss only territorial courts in this section.

492. *See supra* notes 47-59 and accompanying text.

493. *See* Marshall v. Perez Arzuaga, 828 F.2d 845, 849 (1st Cir. 1987).

494. *See* Balzac v. Porto Rico, 258 U.S. 298, 304-05 (1922).

495. *See id.* at 304-10. Many laws relating to Puerto Rico implied integration. For example, the congressional legislation establishing a government for Puerto Rico provided most of the protections of the Bill of Rights and allowed Puerto Ricans to become U.S. citizens. *See id.* at 305-08. The Court, however, rejected that implication. *See id.* at 313.

496. *Id.* at 309.

497. *See id.*

498. *Id.* at 310.

unless the citizens themselves choose one.[499]

It appears that the only integrated territory in the United States today is the District of Columbia.[500] There is a Seventh Amendment right to a jury trial in the local courts in the District of Columbia,[501] but it is the only territory where that is so. Thus, for example, Puerto Rico has a civil law rather than a common law heritage, and its local courts do not use juries.[502] Some of the other territories have chosen, by statute, to use juries for at least some cases in their local courts.[503]

At least one lower court has said, following Supreme Court precedent, that the Seventh Amendment does not apply in the non-Article III federal territorial courts.[504] But because the non-Article III federal courts in those territories are bound by any local decision to use juries, and because most territories require juries, there will, as a practical matter, generally be juries.[505] Thus, the right to a jury trial in most modern territorial courts is statutory, not constitutional. But because there is usually a statutory right to a jury trial, there is very little litigation over the Seventh Amendment in those courts.

To summarize these principles, there is a constitutional right to a jury trial in all *Article III courts* in the territories. There is no constitutional right to a jury trial in the *local* courts of *non-integrated territories*, such as Puerto Rico, Guam, and the Virgin Islands, but

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499. *See id.*

500. In addition to the District of Columbia, American territories today include Puerto Rico, Guam, The U.S. Virgin Islands, the Northern Mariana Islands, and American Samoa. Statutes related to the territories are found in Title 48 of the United States Code.

501. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 370 (1974); Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899). This doctrine survived a reorganization of the District's courts that was designed to give the courts a structure similar to that of the states. *See Pernell*, 416 U.S. at 367. Prior to the reorganization, the District had courts with overlapping local and federal jurisdiction similar to that of the so-called U.S. District Courts in Guam and the Virgin Islands. *See id.* The old structure, then, consisted of a single court system, in an integrated territory, having both local and Article III jurisdiction. *See id.* It is understandable that a jury would be required in those courts: in the absence of a right to jury trial in those courts, citizens living in the territory would have no Seventh Amendment right in any court in the territory. Now, however, there is a local court system consisting of the superior court and the court of appeals, as well as trial and appellate Article III courts. *See id.* That is much more similar to the state systems. The Court does not require juries in the state courts, and one wonders why they should be constitutionally required in the analogous courts in the District of Columbia.

502. *See* Marshall v. Perez Arzuaga, 828 F.2d 845, 849 (1st Cir. 1987). The Seventh Amendment is applicable, however, to the Article III federal court in Puerto Rico. *See id.*

503. *See supra* note 57.

504. *See* American Pac. Dairy Prods., Inc. v. Siciliano, 235 F.2d 74, 78 (9th Cir. 1956) (holding that the Constitution does not require jury trials for civil cases in the District Court of Guam).

505. *See supra* note 57 and accompanying text.

there could be a statutory right. There is, however, a constitutional right to a jury trial in the *local* courts in *integrated* territories, such as the District of Columbia. Furthermore, while there is no constitutional right to a jury trial in *non-Article III federal courts* in *non-integrated territories*, those courts are bound by any local statutes conferring a right to a jury trial. These principles make sense of the case law; the question now is whether the case law makes sense.

b. Constitutional Issues

If a territory has only one kind of court to hear both local matters and matters within the Article III jurisdiction, the Court's integration model makes considerable sense. Citizens moving into integrated territories would lose one of their constitutional rights if there were no court in the territory that was required to provide a jury trial. Non-integrated territories are defined, however, as territories with established populations using established judicial institutions and procedures. If they do not use juries, their citizens are not losing a well-established right if the Seventh Amendment does not require juries in their local courts.[506]

The integration model makes less sense today, however. First, the District of Columbia is the only integrated territory today and thus is the only territory where the model protects the right to a jury trial. But the integration model results in a Seventh Amendment right to a jury trial in the local courts in the District of Columbia as well as the Article III courts; citizens in the District of Columbia, then, have a constitutional right to have a jury hear local matters when citizens in the states have no such right.[507]

Second, citizens in most territories, integrated or non-integrated, have access (or could have access) to both local courts and some kind of federally created court.[508] The varieties of access to federal courts include a territory's having its own Article III court,[509] a territory's

506. The Court, in distinguishing between integrated and non-integrated territories, has always ignored native populations. But Native Americans had well-developed dispute resolution procedures within their own tradition, even if those procedures did not look like courts in the common law or civil tradition. *See* AUERBACH, *supra* note 80, at 128; James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 69-71, 73-75 (1997).

507. See *supra* note 501 for a discussion of how the model may have made more sense when the District had only one kind of court.

508. Federal Article III courts, of course, will have limited jurisdiction.

509. Puerto Rico and the District of Columbia use this model. *See supra* note 53 and accompanying text.

having its own non-Article III federal court,[510] and an Article III federal district court located in a nearby state having jurisdiction over claims arising in the territory.[511] Thus, most territorial judicial systems have a structure similar to the court structure in the states, with local courts and federal courts. This suggests that the right to a jury trial should track the doctrine as to the states. The reasoning would be that local courts in the territories are the functional equivalent of state courts, and as long as the Seventh Amendment does not apply to state courts, it should not apply to local territorial courts either. I call this the state analogy model. The state analogy model would not require juries in the local courts in the District of Columbia or any other territory, but there would be a constitutional right to a jury trial in the federal territorial courts, whether they were established under Article I or Article III.

There are potential problems with the state analogy model, however. First, I suggested earlier that if the right to a jury trial is defined solely by the two-part test, which determines whether the right and the remedy at issue existed at common law or had common law analogues, the Seventh Amendment should apply to the states.[512] If this suggestion were to be accepted, it would also apply to local courts in the territories, even if the citizens of those territories had never used juries. The Court so far has shown no inclination to apply the Seventh Amendment to the states, however.

Second, the non-Article III federal courts, which hear both local and Article III matters, do not have a precise analogue in the state systems, so it is not clear how the state analogy model would work with these courts. But if, as now, there is no Seventh Amendment right to a jury trial in these courts, some serious constitutional problems could result. Persons bringing civil suits in such courts based on Article III jurisdiction will not have a constitutional right to a jury trial even if they would have had such a right in any other federal court.[513] And if there is no Article III court in the territory, that means that the Seventh Amendment right could be lost altogether. This would be true even though the territorial court may

510. Guam and the Virgin Islands use this model. *See supra* notes 54-55 and accompanying text.

511. For example, the District of Hawaii has jurisdiction over claims arising on several islands in the vicinity of Hawaii. *See* 48 U.S.C. § 644a (1994). The statute providing for such jurisdiction explicitly says, perhaps unnecessarily, that the right to a jury trial applies to claims arising on those islands. *See id.* Such an arrangement could certainly be made for all U.S. territories.

512. *See supra* note 353 and accompanying text.

513. *See* Balzac v. Porto Rico, 258 U.S. 298, 309 (1922).

be the only place the case could be brought.[514] And the loss of the right would affect not only citizens of the territories, but also, potentially, citizens of the states who had business before the local federal court. This problem could be resolved by the Court's holding that the right to a jury trial applies in the non-Article III federal territorial courts to the same extent as in any other federal court; that is, to matters within the Article III jurisdiction.

These are interesting and potentially troublesome issues, but they are rarely addressed in the courts and commentary. For the most part, that is because citizens of most territories have access to at least one court where juries function, whether constitutionally or by statute. Thus, there is at present little practical effect from the absence of a constitutional guarantee.

c. Policy Issues

The Court's concern in *Balzac v. Porto Rico*[515] that citizens of non-integrated territories might choose not to use a jury if a jury was not part of their tradition is the strongest policy reason for not mandating juries in territorial courts.[516] Leaving it to the territorial citizens means giving them the one thing that is the essence of a democracy: choice.[517] This is precisely the choice we give the states. But to carry the state analogy model one step further, all of the states provide for a civil jury, suggesting that, to the extent practicable, the territories should, too. Indeed, there may be particularly strong reasons for favoring a jury in the territories, especially if their citizens do not come from a strong democratic tradition. As de Tocqueville said, "[T]he jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well."[518]

VII. CONCLUSION

The Supreme Court has held that juries are constitutionally required in only two kinds of legislative courts: the adjunct

514. Personal jurisdiction limitations, for example, might prevent the litigants from suing in another federal district court.

515. 258 U.S. 298 (1922).

516. *See id.* at 309-10.

517. Americans chose the jury trial in federal civil and criminal cases by ratifying the Constitution.

518. DE TOCQUEVILLE, *supra* note 110, at 128. I also understand the potential for chaos if citizens of a territory have no experience with formal judicial institutions or democratic institutions. That is no longer the case, however, with any of the territories currently under U.S. jurisdiction.

meant to be an independent check on the power of Congress to select adjudicatory methods. The Seventh Amendment exists because the American people were unwilling to leave a right so important to them as the civil jury in the hands of Congress. To allow Congress to avoid the Seventh Amendment by assigning adjudication of certain matters otherwise meeting the constitutional test for the Seventh Amendment to non-Article III courts is tantamount to informally amending the Constitution to limit the reach of the Seventh Amendment. Finally, the Seventh Amendment reflects the important structural values of political participation and deliberation, and the jury is the only federal governmental body that reflects those values. The jury is a triumph of Jeffersonian republicanism in the midst of a largely Madisonian constitutional structure.[524] There is no way to preserve that value without preserving the jury itself. Indeed, I have suggested that using a jury trial in administrative agencies could have the salutary effect of educating the citizenry about governmental programs and their administration.[525]

I have also questioned the Court's jurisprudence as to waiver, sovereign immunity, and the territorial courts. First, while I acknowledge that parties to litigation ought to be able to waive their Seventh Amendment right to a civil jury trial, I have suggested that if the jury does reflect structural values, as does Article III, then waiver rules should protect those values. That could mean making waiver harder to achieve. For example, instead of the presumption in favor of a bench trial that now exists in Article III courts,[526] there might be a presumption in favor of jury trials. That presumption should then carry over into non-Article III courts where a jury is required. Second, I have suggested that allowing Congress to condition its consent to suit as to proprietary claims against the government on jury-less adjudication is constitutionally suspect. It is possible, using the Court's two-step test for determining the right to jury trial, to find that claims for damages against the government are subject to the Seventh Amendment. Conditioning such suits on jury-less adjudication might also violate the principles behind the unconstitutional conditions doctrine. Finally, while I agree that local territorial courts should not be required by the Seventh Amendment to use civil juries as long as state courts are not so required, I think this rule should apply to integrated as well as non-integrated

524. *See supra* note 123.
525. *See supra* notes 380-82 and accompanying text.
526. *See* FED. R. CIV. P. 38(d).

bankruptcy courts and the local courts in integrated territories. As to the bankruptcy courts, a jury is only required when those courts are adjudicating pure private rights.[519] This means that there is no constitutional right to a civil jury trial in administrative agencies, courts that adjudicate claims against the government,[520] local courts in non-integrated territories, or bankruptcy courts when they are adjudicating pure public, quasi-public, or replacement rights.[521] In this Article, I have questioned the Court's rationale as to both Article III and the Seventh Amendment, even when I occasionally agreed with its conclusion.[522]

My argument as to the most prominent justification for jury-less adjudication in non-Article III courts—the public rights doctrine/balancing test—is based on the Seventh Amendment language, the constitutional structure, and the values that underlie the Seventh Amendment. First, the language says that the right to jury trial is preserved in "Suits at common law."[523] If we accept the Court's interpretation of that language to include new statutory rights when those rights are analogous to common law rights and the statutory remedy is legal (the two-part test), then "Suits at common law" encompasses at least some rights from each of the four categories that I identified: pure public, quasi-public, replacement, and pure private. The language gives no hint that the nature of the court in which the matter is heard is a factor. Second, the history and structure of the Constitution suggest that the Seventh Amendment is

519. Juries are undoubtedly constitutionally required for matters heard by magistrate judges as well, but Congress has not attempted to shuttle civil jury trials to magistrates except with the consent of both parties. *See* 28 U.S.C. § 636(c)(1) (1994). At the time that *Granfinanciera* was decided, jury trials were statutorily required in bankruptcy proceedings only for personal injury and wrongful death actions. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 37 (1989). The Court in *Granfinanciera*, of course, held that the Constitution nonetheless required a jury trial for matters involving private rights. *See id.* at 54-55. Bankruptcy courts can now conduct jury trials as to all matters triable to a jury with the consent of the parties. *See* 28 U.S.C. § 157(e) (1994).

520. There is also no right to a jury trial when claims against the government are adjudicated in Article III courts. *See* Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981).

521. This conclusion follows from the Court's statement in *Granfinanciera* that the Article III and Seventh Amendment analyses are the same. *See Granfinanciera*, 492 U.S. at 53-54. Pure public, quasi-public, and replacement rights can all be adjudicated in non-Article III courts; therefore, they can be adjudicated without a jury. I have, of course, questioned the soundness of this conclusion. *See supra* notes 317-68 and accompanying text.

522. For example, I agree that the Seventh Amendment need not apply to the local territorial courts, at least as long as it does not apply to state courts. I have some reservations, however, about the integration model that the Court uses. *See supra* notes 506-14 and accompanying text.

523. U.S. CONST. amend. VII.

territories. There is no reason why the local courts in the District of Columbia should be subject to the Seventh Amendment if the local courts in Maryland are not. It may well be that all local courts should be subject to the Seventh Amendment, but I leave that argument for another day.

These conclusions could, if given effect, be quite disruptive. For one thing, most non-Article III courts are not equipped to handle jury trials. Jury trials in those courts could cause delays and could disrupt those courts' efforts to administer government policy. The disruption, while real, may not be as serious as feared, however. Equitable relief ordered by agencies would be unaffected because the Seventh Amendment does not apply to equitable actions. Most quasi-public rights litigation is probably already in the Article III courts. Even as to public rights actions where civil penalties were sought, under the Court's two-step test, only the liability for civil penalties would be subject to the jury's determination; the amount of the penalty could be left to the agency.[527]

Another problem with the conclusions I have reached is that they could undermine the parties' choices as to the mode of adjudication. Since 1865, litigants in common law actions in courts of the United States have had a choice between a bench trial and a jury trial.[528] That reflects our assumption that the right to a jury trial is largely a personal right that the parties should be able to waive. My suggestion that the Seventh Amendment reflects structural values that should be protected from waiver could limit the choices that litigants have, and such a result could undermine their confidence in the judicial system. Litigants are more likely to accept the results of litigation, even if they lose, when they feel that the process is a fair one. This strongly suggests that the parties should retain the ability to waive the right to a jury trial, whether they are litigating in an Article III court or a non-Article III court. On the other hand, applying the Seventh Amendment to non-Article III courts would actually increase the litigants' ability to choose: at present, they cannot choose a jury trial for litigation that can only be pursued in an administrative agency, even if that same litigation in an Article III court would be subject to the Seventh Amendment.

While I have not worked out the details, then, perhaps the solution that would best reflect both our structural interests in a jury trial and the parties' personal rights to choose between a jury trial

527. *See* Tull v. United States, 481 U.S. 412, 427 (1987).
528. *See* Act of March 3, 1865, ch. 86, § 4, 13 Stat. 500, 501.

and a non-jury trial is one that would rely on a modified waiver. There would be two parts to such a solution. First, the Seventh Amendment would be made to apply to cases heard in non-Article III courts. This could be done by applying the two-part test to matters tried in such courts, and if the matter were subject to the Seventh Amendment and both parties chose not to waive the right to a jury trial, either impaneling a jury within the agency or shuttling cases subject to a jury trial to the Article III courts. Second, the parties could opt to waive their right to a jury trial, whether in an Article III court or a non-Article III court, but in the absence of an explicit waiver, there would be a jury trial. Creating a presumption in favor of a jury trial would reflect the importance we attach to the structural values reflected in the Seventh Amendment and would send that message to the litigants. Permitting a waiver acknowledges that the parties should have some control over the mode of adjudication.

I am well aware that many members of the legal profession do not have a favorable opinion of the jury and that the arguments I have made here will seem like heresy to them. I am concerned, however, that the right to a jury trial is eroding before our eyes and that we seem neither to recognize it nor to care. The creation of non-Article III courts that operate without juries is just one way that Congress facilitates this erosion.[529] In this article, I have argued that the jury reflects important constitutional values that are not found in any other federal institution. I have also argued that the constitutional doctrines that make erosion of the right to jury trial possible are not well-founded. These are issues that can no longer be ignored. Neither neglect nor habit should be permitted to serve as a convenient rationalization for the deterioration of a fundamental constitutional right.

529. For others, see Sward, *supra* note 99.