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PATENTS AND PUBLIC RIGHTS: THE QUESTIONABLE CONSTITUTIONALITY OF PATENTS BEFORE ARTICLE I TRIBUNALS AFTER *STERN V. MARSHALL*

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The Supreme Court's recent Stern v. Marshall *decision both rekindled and revived the oft-overlooked public rights exception. In light of this development, this Article seeks to argue that patents, where subject to final, binding decisions, are unconstitutionally before Article I tribunals. Such tribunals include, for example, the Bankruptcy Court, as well as the newly-created Patent Trial and Appeal Board.*

I. INTRODUCTION

In a case that features exotic dancers, oil tycoons, and seemingly interminable disputes over vast, contested family fortunes, it may be difficult to discern, at first blush, how the recent *Stern v. Marshall*[1] decision impacts the constitutional framework dictating important separation of powers concerns. Beyond the underlying facts and cast of characters, however, at the heart of the *Stern* decision is a stark reminder from the nation's highest court that, despite a generally expansive role envisioned for modern-day administrative agencies, Article III of the U.S. Constitution still has meaning in terms of institutional boundaries.[2] At issue in *Stern* was whether the congressional grant of judicial power to the Article I Bankruptcy Courts under 28 U.S.C. § 157(b)(2)(C) passed constitutional muster in light of the Court's

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[1] Stern v. Marshall, 131 S. Ct. 2594 (2011).

[2] Article III, § 1 of the Constitution requires that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

Article III precedents.[3] Specifically, the Court sought to determine on what constitutional grounds, if any, a broad "catch-all" counterclaim provision—which provided for final adjudication by an Article I court of a common law tortious interference claim—passed important institutional safeguards.[4] In considering this question, the Court held that only counterclaims implicating "public rights" satisfied the prohibitive mandate of Article III.[5] Given that the counterclaim of tortious interference amongst private litigants did not fall within the bounds of the public rights exception, the claim was unconstitutionally before the Article I tribunal.

Given this important holding, this Article argues that patents for intellectual property, both in the invalidity and infringement contexts and where litigated between private parties, do not fall within the scope of the public rights exception. As such, and after *Stern*, it is unconstitutional for the Bankruptcy Courts to issue final, binding judgments on patent-related counterclaims. Importantly, though this Article primarily seeks to answer this narrow question as applied to the Bankruptcy Court, it is necessary to concede that an analysis that touches upon public rights cannot be restricted to any one administrative tribunal. After all, determinations of patent validity as applied to *issued* patents are only constitutionally performed by the United States Patent and Trademark Office ("USPTO") because the Federal Circuit has acknowledged that in the context of reexamination and reissue, patents are "public rights."[6] Thus, any argument to the contrary invariably operates within this broader context, given that the

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[3] 28 U.S.C. § 157(b)(2)(C) (2006) established that a bankruptcy court shall have core jurisdiction over all "counterclaims by the estate against persons filing claims against the estate." As such, all counterclaims, including those at common law, were—from a jurisdictional standpoint—properly before the bankruptcy court.

[4] *Stern*, 131 S. Ct. at 2595.

[5] *See id.* (holding, *inter alia*, that it was unconstitutional for the Article I bankruptcy court to issue a final judgment upon the common law tortious interference counterclaim).

[6] *See, e.g.*, Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 *on reh'g*, 771 F.2d 480 (Fed. Cir. 1985).

mode of analysis is necessarily not severable.[7] Of course, this point further resonates in light of the enactment of the Leahy-Smith America Invents Act, which seeks to grant additional adjudicatory power to the USPTO in the patent arena.[8]

In order to demonstrate that patents do not fall within the public rights exception, a stepwise, in-depth analysis of this highly complicated and oft-contradictory[9] brand of constitutional jurisprudence is required. Given the complexities inherent to the doctrine, only a case-by-case analysis can demonstrate the full parameters of the exception. Additionally, important Supreme Court and Federal Circuit cases that either tangentially or directly impact public rights in the patent context will be evaluated. Here, critical analysis will be provided regarding the Federal Circuit's attempt to reconcile *McCormick,*[10] a precedential Supreme Court decision that unequivocally declares that the matter of patent validity belongs to the sole discretion of the Article III courts, with its notion of what public rights should encapsulate.[11] Similarly, the Federal Circuit's interpretation of public rights law will be juxtaposed against the Supreme Court's controlling standard.

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[7] This Article does not seek to address pragmatic or political concerns. Without question, there are reasons grounded in pragmatism as to why, e.g., some level of Article I activity should be allowed with respect to the resolution of patent invalidity disputes. In many respects, these concerns form the foundation of the Federal Circuit's holding in *Patlex*, which is discussed *infra* Part II.G. Instead, this note endeavors to evaluate the public rights rule of law, as formulated by the Supreme Court, and apply it to patents for intellectual property.

[8] *See* Leahy-Smith America Invents Act, 35 U.S.C. § 6 (2006) (establishing a broad post-issuance review proceeding where all invalidity arguments may be heard before the Article I Patent Trial and Appeal Board).

[9] Justice Rehnquist once remarked, "[I]n an area of constitutional law such as that of the 'Article III Courts,' with its frequently arcane distinctions and confusing precedents . . . that this Court should decide no more of a constitutional question than is absolutely necessary accords . . . with sound judicial policy." N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 89 (1982) (Rehnquist, J., concurring).

[10] McCormick Harvesting Mach. Co. v. C. Aultman Co., 169 U.S. 606 (1898).

[11] *See Patlex Corp.*, 758 F.2d at 604; *see also* Joy Techs., Inc. v. Manbeck, 959 F.2d 226 (Fed. Cir. 1992).

In addition to synthesizing the relevant case law regarding public rights, an analysis of the Seventh Amendment right to a jury trial as applied to patents is provided. Given that the standard utilized in most forums for the determination of whether a jury trial right exists under the Seventh Amendment is either analogous to, or in some instances, identical with, the standard employed in the public rights determination, a finding of a right to a jury trial under the Seventh Amendment can necessarily be determinative.[12] In addition to the jury trial right, the historical nature of patents as property,[13] and the implications for public rights and Article III are addressed. Though intellectual property patent rights currently exist in federal statutes, they share in the bundle of rights firmly established over centuries of American jurisprudence inherent to all property obligations.[14] Given that patents for intellectual property share in the same rights as those eligible to patents for land, Supreme Court precedent addressing separation of powers in the land patent context will be discussed. Additionally, the discordant treatment of the International Trade Commission by the Federal Circuit is evaluated, and though the Circuit's chosen standard appears to mark a somewhat whimsical departure from traditional public rights rule, the implications of the ITC's limited collateral estoppel effect in patent determinations as applied to separation of powers considerations are highlighted. Lastly, and perhaps most importantly, the applicability of waiver, as applied to the Article III *institutional* safeguard, is addressed.[15] As noted during the analysis of *Stern*, waiver still plays an integral, albeit undefined, role in modern-day public rights jurisprudence. After

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[12] The standards, and any existing homologies, are discussed *infra* Part II.C.

[13] Beyond the intellectual property context; e.g., land.

[14] Judge Newman, writing for the Federal Circuit in *Patlex*, somewhat ironically proclaimed "[a] patent for an invention is as much property as a patent for land. The right rests on the same foundation and is *surrounded . . . by the same sanctions*." *Patlex*, 758 F.2d at 599 (quoting Consolidated Fruit Jar Co. v. Wright, 94 U.S. 92, 96 (1876)) (emphasis added).

[15] Compare to the *personal* right to a jury trial under the Seventh Amendment. Prior Supreme Court cases have declared that because Article III implements separation of powers schemes core to the structuring of the national government, its requirements cannot be waived by the private litigant. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

all, the common law defamation proof of claim is only saved from constitutionality concerns because the primary petitioner for bankruptcy ostensibly waived any and all Article III limitations by filing for bankruptcy in the first place.[16] However, much ambiguity still lingers regarding waiver in the Article III context. The Court's decisions regarding the legitimacy of waiver as applied to foundational separation of powers mandates will be evaluated.[17] As one may suspect, this area of constitutional law lacks delineating clarity.

This Article will synthesize the aforementioned elements and will argue that, in light of the various attributes inherent to patents, they do not comport with the public rights calculus. If patents do not fall within the public rights exception, then they are unconstitutional under the newly-limited bankruptcy counterclaim provision after *Stern*. The broader implications of such a finding, especially in light of the important matter of waiver, will be further addressed and explained.

II. ARTICLE III AND THE PUBLIC RIGHTS EXCEPTION: SUPREME COURT AND FEDERAL CIRCUIT PRECEDENT ESTABLISH THE BOUNDS OF THE EXCEPTION, AND FURTHER DEPICTS ITS COMPLEXITY

> Our discussion of the public rights exception . . . has not been entirely consistent, and the exception has been the subject of some debate . . . .[18]

During the course of public rights history, many Justices, including Chief Justice Roberts, have lamented the turbulent nature of the exception. As with most brands of constitutional law, each case, at least to some degree, represents a building block upon the last. Certainly, competing concepts arise within the developmental framework of this Article III carve-out. The goal then is to

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[16] As the *Stern* analysis will demonstrate, however, this element of the opinion did not command a majority. *See* Stern v. Marshall, 131 S. Ct. 2594 (U.S. 2011) (Scalia, J., concurring).

[17] If waiver cannot cure constitutionality concerns under Article III before an Article I bankruptcy tribunal, it cannot cure infirmities in other Article I venues as well (consider, e.g., the USPTO).

[18] *See Stern*, 131 S. Ct. at 2611 (observing that the Court's esoteric brand of jurisprudence regarding public rights has, at times, been contradictory).

evaluate each landmark case in detail; from this analysis, trends, unifying concepts, binding principles, and outlying propositions that never achieved acceptance can be identified, compartmentalized, and either utilized or discounted. With this approach in mind, and preemptively acknowledging the intrinsically complicated nature of this frequently overlooked but fundamentally important area of law, a holistic evaluation of the relevant cases is required. Once the relevant cases have been discussed, and the unifying elements have been identified, one may seek to determine whether a particular cause of action falls within the penumbra of the public rights exception. This discussion begins with an evaluation of the seminal case regarding public rights: *Murray's Lessee.*[19]

A. Murray's Lessee v. Hoboken Land & Improvement Co.

The public rights exception finds its historical roots in the Supreme Court's 1856 *Murray's Lessee* decision.[20] In this case, the Court was asked, in part, to resolve the question of whether the issuance of a distress warrant calling for the sale of private land by an Article I Solicitor of the Treasury was "sufficient, under the constitution . . . ."[21] The Court was careful to clarify that the question presented was fundamentally one of separation of powers. Given that Article III requires that "the judicial power of the United States to be vested in one supreme court and in [] inferior courts,"[22] to the extent that the Article I officer's actions affecting title to plaintiff's private property represented "an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power."[23] As such, the resolution of the dispute turned on

[19] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856).

[20] *Id.*

[21] *Id.* at 274. The plaintiff, a former collector of customs for the port of New York, had failed to the transfer the totality of the collected fees to government coffers and as such his land was sold by the Article I officer to resolve the fiscal discrepancy existing between what was collected and what was eventually turned over to the government. *Id.* at 272.

[22] *Id.* at 275.

[23] *Id.* at 272.

whether the actions of the solicitor amounted to such an "exercise of judicial power;" if the aforementioned action was found to fall within the purview of those reserved to the judiciary, then it impermissibly violated the tenets of Article III.

According to the Court, mere judgment upon law and fact alone is insufficient to bring an action within the restrictive confines of Article III, even though such judgment may be, "in an enlarged sense," an act of judicial character.[24] Instead, the defining analysis is whether the subject matter implicated by a particular congressional act constitutes a "judicial controversy."[25] The Court, though declining to provide a strict definition, held that suits specifically grounded in common law, equity, or admiralty fell within the unassailable realm of judicial cognizance.[26] However, and separate from suits expressly reserved for Article III courts, there existed a subset of matters involving "public rights," which, though susceptible to judicial resolution, were still within the grasp of congressional determination.[27] Importantly, the Court established a delineating standard that in many respects was akin to source-based analysis. Specifically, if the right at issue "depends upon the will of congress,"—i.e., if Congress is the sole creator and proprietor of a particular right, then the appropriate adjudication of that right, whether it be before an Article I or Article III tribunal, exists wholly within the discretion of the branch of government that created it.[28]

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[24] *Id.* at 280.

[25] *Id.* at 281.

[26] *Id.* at 284.

[27] *Id.* at 284–85.

[28] *Id.* at 284. Interestingly, the Court further remarked that, "[i]t is true, also, that even in a suit between *private persons* to try a question of *private right*, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive." *Id.* at 284–85 (emphasis added) (citing Luther v. Borden, 48 U.S. 1 (1849); Doe v. Braden, 57 U.S. 635 (1853)). Certainly the governance of intellectual property and, more specifically, the laws regulating patents are committed to Congressional cognizance by the Constitution. U.S. CONST. art. I, § 8, cl. 8. *But see* McCormick Harvesting Mach. Co. v. C. Aultman Co., 169 U.S. 606, 612 (1898) for the Court's conclusion that patent invalidity falls within the sole control of Article III courts. Additionally, patent infringement is certainly a dispute between private persons

Applying this newly-crafted subset of public rights to the facts before it, the Court found that, pursuant to the congressional power to collect and disburse revenues, as ordained by the Constitution, Congress had the sole capacity to determine what route, if any, the government could seek to recoup funds not transferred by a receiver of public money.[29] Given that the right was fundamentally executive in nature, congressional judgment was the sole determinant dictating whether, and under what circumstances, the plaintiff *may* have his issue determined by an Article III court. That a collector may file a bill and give security, and "thus arrest the summary proceedings, only proves that congress thought it not necessary to pursue them . . . until a decision should be made by the court . . . and *of this necessity congress alone is the judge.*"[30]

Importantly, the Court was also clear to identify that the United States was a party to the case.[31] Undoubtedly, this factor weighed heavily on the Court's analysis regarding whether the issue before it qualified as a public right.[32] However, though seemingly remarking that the presence of the United States as a party factored significantly into its public rights analysis, the Court was also careful to establish that this element alone was hardly the sole determinant. Specifically, the Court remarked that "even in a suit between *private persons* to try a question of *private right*, the action of executive power, upon a matter committed to its determination by the constitution and laws," is a public right.[33]

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regarding a private right granted by the actions of the executive power, but has it been committed to executive determination? Later Supreme Court decisions discuss the necessity of an "expertise" element in Article I tribunal public rights adjudication. *See, e.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 573, 590–91 (1985). It is unclear whether a bankruptcy court, adjudicating a claim of patent infringement, meets this heightened standard.

[29] *Murray's Lessee*, 59 U.S. at 281.

[30] *Id.* at 285 (emphasis added).

[31] *Id.* at 275.

[32] As an example of the type of action that the Court intended to fall within the scope of the public rights exception, the Court specifically identified actions for equitable claims to land in ceded territories. *Id.* at 284. In such an action, the United States would obviously be a party.

[33] *See id.* at 284–85 (emphasis added).

B. McCormick Harvesting Machine Co. v. Aultman

The Supreme Court's decision in *McCormick*[34] is of pivotal importance with respect to the constitutionality of patents in bankruptcy court. Though the case does not address the issue of public rights directly, it does discuss the proposed constitutionality of a non-Article III tribunal adjudicating the contested validity of an *issued* patent.[35] The central question in the case was whether a patent examiner, appointed per congressional authority, could reject claims in a reissue application for reasons relating to inadequate patentable novelty.[36] Though the claims were rejected during the reissue proceeding, the claims themselves still belonged to an issued patent.[37] Thus, the Court was confronted with a separation of powers question: could an Article I patent examiner, within the bounds of the Constitution, invalidate claims in an issued patent for insufficient novelty?[38]

The Court immediately established that a patent, upon issuance, is not subject to revocation or cancellation by *any* executive agent, including the President of the United States.[39] Given that an issued patent "has become the property of the patentee . . . [it] is entitled to the same legal protection as other property."[40] As a patent for invention is subject to the exact set of constitutional restrictors applicable to a grant for lands, Congress, cannot divest a patent owner of title *without* impeachment by suit

[34] McCormick Harvesting Mach. Co. v. Aultman, 169 U.S. 606, 612 (1898).
[35] *Id.*
[36] *Id.* at 606.
[37] *Id.* at 607–08.
[38] *Id.* at 611.
[39] *Id.* at 608.
[40] *Id.* at 609. The constitutionality of private property disputes in non-Article III tribunals is highly relevant to the analysis of patents before Article I tribunals. The Supreme Court has, on many occasions, analogized between patent rights and private, "other property" on many occasions. *See, e.g., id.* An analysis of the distinction between Article I and Article III in the context of property suits generally, and any issues of constitutionality implicated therein, is provided *infra* Part II.F.

in an Article III tribunal.[41] By proxy, Congress' executive tribunals—even while maintaining the power and authority to issue patents of either variety in the first instance—cannot divest a patent owner without impeachment either. Thus, issues of patent invalidity fall within the strict purview of Article III courts.

However, the Court carefully maintained the integrity of the reissue process. Specifically, the Court held that although a non-Article III tribunal could not sit on issues of patent invalidity *per se*, they still retained the ability to "reissue" an amended patent where a patentee has discovered an error, defect, accident, or mistake that undercuts the perceived validity of a particular patent. The Court precisely defined the bounds of appropriate action for the Article I patent examiner. The court explained that, "[t]he object of a patentee applying for a reissue is not to reopen the question of the validity of the original patent, but to rectify *any error* which may have been found to have arisen from *his inadvertence or mistake.*"[42] Any unilateral action by the examiner, however, at least with respect to alleged deficiencies within the issued patent, not implicated by the patentee and relating to, e.g., error and mistake, is an impermissible usurpation of authority reserved for the judiciary under Article III.[43] Stated more concisely, "[an] attempt to cancel a[n] [issued] patent . . . by the examiner . . . would be in fact an invasion of the judicial branch of the government by the executive."[44]

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[41] *McCormick*, 169 U.S. at 609. This is a critical distinction. Here, the Court clearly indicates that the power to issue is, as guaranteed by the Constitution, executive in nature. *Id.* However, this is not the sole basis of analysis. *Id.*

[42] *Id.* at 610. This concept of mistake, remedied at the behest of the patentee nonetheless, is exceptionally important. In the Federal Circuit's two decisions regarding the matter, *Patlex* and *Joy*, this notion of "mistake" forms the backbone of the Circuit's analysis regarding the applicability of patent invalidity to the public rights analysis. *Id.* However, this analysis implicates a logical discord that appears to contravene controlling Supreme Court precedent.

[43] *McCormick*, 169 U.S. at 612. Though this decision was issued in 1898, it is still precedential with respect to its applicability of patent invalidity to Article III jurisprudence.

[44] *Id.* Implicit to its holding that patent invalidity belongs within the sole discretion of Article III courts, is the Court's underlying acknowledgement that invalidity, though a right granted by the executive, did not come in under the

C. Ex parte Bakelite Corp.

Ex parte Bakelite[45] is an important case because it marks a further step in the Court's development of the public rights exception, even though it did not address the issue of patents directly.[46] *Bakelite* arose from a dispute under the Tariff Act of 1922, which in its core application, was formulated to protect U.S. domestic industry from acts of unfair importation and sale of goods.[47] Pursuant to this goal, the Act empowered a Tariff Commission, obviously executive in nature, to, e.g., make findings and recommendations relative to the rights of the accused importer. To the extent that the Commission issued findings adverse to an importer, then the importer had a right to appeal to the Court of Customs Appeals on questions of law.

Bakelite Corporation filed a complaint against a host of importers before the Tariff Commission. The Commission found the behavior of the importers injurious to domestic injury, and recommended that the identified articles be excluded from entry. The importers appealed to the Court of Customs Appeals. In response, Bakelite Corporation filed a petition for a writ of prohibition, arguing that the Court of Customs Appeals lacked constitutional authority to re-hear the importers claims.[48]

The question presented to the Court was two-fold: First, was the Court of Customs Appeals a legislative court or a constitutional court? And second, in light of the definition ascribed in part I, was the delegation of authority to the court constitutional under prevailing separation of powers jurisprudence? With respect to

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public rights exception. *Id.* The Federal Circuit, seizing upon the concepts of "error" and "mistake," utilizes this potential carve out to bring public rights into the discussion. *Id.*

[45] 279 U.S. 438 (1929).

[46] *Id.*

[47] *Id.* at 446 (identifying § 316 as the relevant section of the Tariff Act).

[48] *Id.* at 447. The Court remarked that Article III courts are "constitutional courts," i.e. courts that can participate in the exercise of judicial power, and "can be invested with no other jurisdiction." *Id.* at 449. Conversely, courts created by Congress by virtue of "the exertion of other powers" are labeled legislative courts, and are committed to the executive with such "other powers independent of Article III." *Id.*

part I, the Court first provided a stepwise definition of legislative courts. Territorial courts "created in virtue of the general right of sovereignty" did not fall within the envelope of judicial power as defined by the Article III.[49] Similarly, the Court recited that the courts for the District of Columbia are fundamentally legislative in character, as provided for by Congress.[50] Importantly, and reminiscent of *Murray's Lessee*, the Court classified special tribunals, where the chief charge was "to examine and determine various matters, *arising between the government and others*" as legislative.[51] Though such matters are susceptible to judicial determination, the mode of determination, whether based in Article I or Article III, lies wholly within congressional discretion. According to the Court, claims against the United States fall within this subset of cases "arising between government and others." As such, claimants have to no right to sue unless Congress consents; no court may take judicial cognizance of such claims without express congressional approval. Instead, where Congress deems it appropriate, it may relegate such matters to remediation in a purely executive setting.[52]

The Seventh Amendment right to trial by jury is inherently linked to the concept of separation of powers in the Federal Government.[53] Since the Seventh Amendment preserves the right

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[49] *Id.* at 450 (quoting Am. Ins. Co. v. 365 Bales of Cotton, 26 U.S. 511, 546 (1828)).

[50] *Id.* at 450. Further examples include the United States Court for China and the consular courts. Such courts are legislative in form and function and are emblematic of the executive's power, as conferred by the Constitution, to uphold treaties and maintain commerce. *Id.* at 451.

[51] *Id.* (emphasis added).

[52] *Id.* at 452. The Court provides the example of the Court of Claims: given that the court was created in the form of a special tribunal with the power to determine claims against the United States for claims for money—the power to pay debts unequivocally is the responsibility of the executive per the Constitution—it was an appropriate allocation of power to an Article I tribunal, even if, by its nature, it related to matters susceptible of judicial determination. *Id.*

[53] *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856) (holding, *inter alia*, that suits at common law fell within the strict cognizance of the judiciary). In many respects, this analysis is not meaningfully different from the one required for the determination of a jury trial

to trial by jury in suits at common law, there is an inevitable and necessary overlap in the analysis required to determine the applicability of the jury trial right guaranteed by the Seventh Amendment and the reasoning required for the public rights determination. Though the Court in *Bakelite* does not explicitly identify this correlation in its opinion, it does conduct an analysis of the applicability of the Seventh Amendment right to a jury trial.[54] The Court does this in its example of the Court of Claims. Given that suits before the Court of Claims are "not suits at common law within its true meaning," the Seventh Amendment does not control.[55] Further merging the analysis, the Court remarks that the government cannot be sued unless it consents. Thus a government has complete discretion to determine what rules, if any, apply to the tribunal of its choosing.[56] Such rules include the potential "intervention of the jury."[57] Thus, the Court of Claims was appropriately categorized as legislative.[58]

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right. *See, e.g.*, Tegal Corp. v. Tokyo Electron Am., Inc., 257 F.3d 1331, 1340 (Fed Cir. 2001).

[54] *See supra* note 42. Though not addressed currently, this merging of routes of analysis is important in the context of patents and will be addressed in later stages of this Article. *See infra* Part III. Inherent to the Court's review of the Seventh Amendment jury trial right in the Court of Claims example is the idea that, where a controlling precedent has already determined that a jury trial right applies, then the public rights analysis is then necessarily complete. *See Bakelite*, 279 U.S. at 454.

[55] *See Bakelite*, 279 U.S. at 453.

[56] *Id.*

[57] *Id.* at 454. Interestingly, the Court decided to address the jury trial issue *sua sponte*. *See id.* That the Court raised this issue, without prompting from counsel, further establishes the link between the jury trial rights and public rights, even though in the context of this decision, the Court couched its analysis in terms of legislative versus constitutional courts (with the applicability of the jury trial right weighing heavily on this determination). *Id.*

[58] In addition to the Court of Claims, the Court also provided the example of the Court of Private Land Claims. *Id.* at 456. This Court dealt exclusively with private claims to lands ceded by Mexico to the United States. *Id.* In the Court's view, this was clearly a legislative tribunal. *Id.* Similarly, the Court cited the Choctaw and Chickasaw Citizenship Court, which was created to deal with claims to membership in Indian Tribes. *Id.* at 457. At the time, the rules for membership rested wholly within the discretion of Congress, making the court legislative in nature. *Id.*

Applying the distinctions drawn between legislative and constitutional tribunals to the Court of Customs Appeals, the Court first established that Congress established the court in question pursuant to its power to lay and collect duties on import. Additionally, and as seen before, the Court highlighted the importance of the government as a party.[59] Because the Government is a party, the Court concluded that "nothing [before the Court of Customs Appeals] . . . inherently or necessarily requires judicial determination."[60] Thus, it was "very plainly" shown that the Court of Custom Appeals was legislative, and not constitutional, in character.[61]

D. Crowell v. Benson

Crowell v. Benson[62] is another case of pivotal importance with respect to the public rights exception.[63] The suit was brought to enjoin the enforcement of a judgment issued by the deputy commissioner of the United States Employees' Compensation Commission per his authority under the Longshore and Harbor

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[59] *Id.* at 458 (establishing that the Court of Customs Appeals determined matters arising between the government and others regarding the application of executive law).

[60] *Id.*

[61] *Id.* at 459. Though this decision is merely a direct analysis of one particular court and asks whether that court fits within the legislative or constitutional mold, it is still important in the broader context of the public rights analysis. The decision's detailed discussion of prior examples of legislative courts, the jury trial right, and role of government as a party was formative in the development of the public rights doctrine. *See, e.g.,* Stern v. Marshall, 131 S. Ct. 2594 (2011).

[62] 285 U.S. 22 (1932).

[63] In *Thomas* and *Schor*, Justice O'Connor, writing for the Court in both cases, crafted a public rights analysis that stepped away from the somewhat strict interpretation of *Crowell*. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 839–51 (1986). However, in later decisions, such as *Granfinanciera* and *Stern*, the Court appeared to return to the holding espoused in *Crowell*, citing and relying upon it heavily. *See* Granfinanciera v. Norberg, 492 U.S. 33, 51–53 (1989); *Stern,* 131 S. Ct. at 2598. Not surprisingly, Justice O'Connor dissented in *Granfinanciera*. *Id.* at 91. O'Connor's dissent notwithstanding, the importance of *Crowell* with respect to public rights jurisprudence cannot be understated. *See, e.g., Stern,* 131 S. Ct. at 2598.

Workers' Compensation Act.[64] The complaint alleged, *inter alia*, that the deputy commissioner's adjudication was an unconstitutional violation of the Article III mandate requiring separation of powers.[65]

The Court initially remarked that the Act related to injuries incurred on the navigable waters of the United States, and thus deals with maritime law. Given that § 2 of Article III grants exclusive jurisdiction to the judiciary governing matters related to admiralty and maritime issues, any suit governing admiralty law before an Article I tribunal represented an unconstitutional delegation of judicial power.[66] However, in its analysis of the Act, the role of the commissioner, and Article III, the Court immediately set out that the case "presents a distinct question."[67] *Murray's Lessee* had established that suits in admiralty law unequivocally fell within the sole custodianship of the Article III courts. However, the question presented by the commissioner's finding in *Crowell* related merely to the "*determination of fact.*"[68] This distinction—that the commissioner is only empowered to issue advisory, and thus not final, opinions on questions of law, whereas the resolution of questions of fact are final—is what preserved the constitutionality of the Act. In the Court's view, as the determination of a legal question is expressly reserved by the terms of the act to the Article III courts that have jurisdiction in admiralty, *Murray's Lessee*, and more foundationally, Article III, were not violated.[69] Thus, in the Court's eyes, the congressional purpose is not to usurp the role of the judiciary under Article III,

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[64] *Crowell*, 285 U.S. at 36 (noting that the Commissioner had found that Knudsen had been injured while employed by Benson during the course of his employment and service upon the navigable waters of the United States).

[65] *Id.*

[66] *See id.* at 39 (further remarking, however, that the general authority of Congress to revise maritime law is beyond dispute); *see also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856) (holding that the judicial power under Article III extended to suits at common law, equity, or admiralty).

[67] *Crowell*, 285 U.S. at 49.

[68] *Id.* (emphasis added).

[69] *Id.*

but instead to "facilitate the exercise by the court of its jurisdiction."[70]

With respect to the constitutionality of the determination of fact under Article III by a legislative court, the Court again recited the now-familiar holding from *Murray's Lessee*: A fundamental distinction lies between cases of "private right" and those arising "between the Government and persons subject to its authority in connection with the performance of [its] constitutional functions."[71] Thus, according to the Court in *Crowell*, Congress may establish legislative courts to assist with matters, though susceptible to judicial control but not necessarily requiring it per the Constitution, "arising between the government and others."[72]

At issue, however, in *Crowell* was a private right, i.e. the liability of one individual to another under the controlling law. With respect to private rights, the Court held that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all *determinations of fact* in constitutional courts shall be made by judges."[73] The Court mad clear, however, that determinations of fact in issues at common law is a role reserved, by the Constitution, for the jury.[74] Where the case is one of either equity or admiralty, then the fact finder may then appropriately be a non-Article III agent or tribunal. Further, the scope of the factual determination authorized by the Act in *Crowell* is highly restricted; the commissioner determined questions of fact related to, for example, the circumstances of the injury sustained and little more.[75]

Thus, given that the nature of the factual determination assigned to the commissioner by Congress was limited in scope, and further given that factual determination was one of admiralty, and not common law, Congress was within its constitutional

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[70] *Id.*
[71] *Id.* at 50.
[72] *Id.* (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).
[73] *Id.* at 53 (emphasis added).
[74] *Id.* at 51–52.
[75] *Id.* at 64.

mandate by assigning this issue, under the Act, to the resolution of a commissioner.[76]

E. Atlas Roofing Co. v. Occupational Safety and Health Review Commission

In 1970, in order to provide additional redress for employees injured on the job, Congress enacted the Occupational Safety and Health Act ("OSHA").[77] This Act permitted the Federal government, under the direction of the Secretary of Labor, to both obtain abatement orders and impose civil penalties.[78] To the extent an employer wished to contest a penalty issued by the Secretary of Labor, it had the option of pursuing an evidentiary hearing before the OSHA Commission.[79] If the Commission affirmed the findings of the Secretary of Labor, the aggrieved employer then had the ability to petition for judicial review before the appropriate court of appeals.[80] However, and importantly in light of *Crowell*, the Act

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[76] *Id.* at 54. The holding in this case was thus two-fold. One, it was an reaffirmation of the holding in *Murray* that where the government is a party, and the government's ability to be sued in the first place is contingent upon consent, the government may design, at its discretion, the tribunal, as well as any corresponding rules. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856). This is the first variety of "public rights" under *Crowell*. *Crowell*, 285 U.S. at 50. The second variety crafted in *Crowell* pertains wholly to private rights. *Id.* at 53. Where a determination that is fully *factual* in nature has been assigned to an executive tribunal, it may be constitutional under Article III provided that it stems from disputes in equity or admiralty. *Id.* at 51–53. Again, and as seen in *Bakelite*, the importance of the jury trial right is demonstrated by the Court. *Bakelite*, 279 U.S. at 453. Given that at common law factual determinations must, assuming the absence of waiver, be made by a jury, the Court automatically carved this subset of law out from the public rights exception. *Crowell*, 285 U.S. at 52. Thus, at least where factual determinations have been assigned to an executive tribunal, where there is a constitutional right to a jury, there cannot be public right.

[77] Williams-Steiger Occupational Safety and Health Act, 29 U.S.C §§ 651–78 (1970).

[78] *See* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 445 (1977) (remarking that the administrative remedies provided for in the Act existed independently of, and separately from, any rights that may exist in state statutes and common law).

[79] *Id.*

[80] *Id.*

provided that the Commission's finding regarding issues of *fact*, "if supported by substantial evidence on the record considered as a whole, shall be conclusive."[81] Given the terms of the statute, a penalty may be imposed, collected, and enforced as final without an employer ever being presented with the opportunity for a jury determination of the factual issues underlying the alleged violation.[82] Thus, the issue before the Court in *Atlas* was whether the Seventh Amendment prevented Congress from assigning *factual* determinations, subject only to judicial review under the substantial evidence standard, to a non-Article III administrative agency.[83]

The Court initially remarked that the determination of whether a jury trial right applies under the Seventh Amendment is well known.[84] Specifically, disputes tried at common law, as opposed to either equity or admiralty, implicate a jury trial right.[85] Importantly, where there is a public right, there cannot be a jury trial right.[86] Regarding its definition of public rights, the Court in *Atlas* was careful to distinguish its holding from *Crowell*.[87] In *Crowell*, only private rights were implicated, and the Court in *Atlas* remarked that the holding in *Crowell* established that, where private rights were in play, Congress had the authority to assign

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[81] *Id.* at 447.

[82] *Id.* at 445.

[83] *Id.* at 449. Though the issue of the case is phrased by the Court in terms of a Seventh Amendment analysis, the public rights exception factors heavily in its decision. *Id.* at 456. Therefore, like *Crowell* and *Bakelite*, the commingled nature of the Seventh Amendment and public rights is again demonstrated.

[84] *Id.*

[85] *Id.* This method of determination is indicative of the underlying history; i.e. suits at common law, before the adoption of the Seventh Amendment, were traditionally tried before a jury. *See Ex parte* Bakelite Corp., 279 U.S. 438, 453 (1929). This is contrasted against suits of equity or admiralty, where a jury was typically not present.

[86] *Atlas*, 430 U.S. at 450. To belabor the point, these concepts cannot be mutually exclusive. If there is a public right, then there cannot be a jury trial right under the Seventh Amendment according to the Court's jurisprudence. *See Bakelite*, 279 U.S. at 453 (1929). Conversely, if there is a Seventh Amendment right to a jury, then there cannot be a public right. The logic is necessarily reciprocal.

[87] *Atlas*, 430 U.S. at 457.

limited fact-finding functions to an *adjunct*.[88] Where true public rights were implicated, e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be incompatible.[89]

Thus, where the government is a party, and where the right is predicated upon a federal statute, Congress may assign the resolution of a dispute regarding such a right "exclusively to an administrative agency [for the determination of] . . . whether a violation has in fact occurred."[90] Note that with the usage of the phrase "whether a violation has . . . occurred," the Court is again placing emphasis upon the role of legislative tribunals as fact-finders.[91] This is due, in part, to the question presented by the case: is there a Seventh Amendment right to a jury trial where Congress has delegated a fact-finding function with the possibility of finality to an Article I administrative tribunal?[92]

Addressing this question broadly, the Court held that where Congress has created a new public right under federal statute, it may assign the adjudication of such a right to an Article I tribunal.[93] Given that the congressional discretion regarding such matters is complete, any Constitutional mandate to the contrary

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[88] *Id.* at 450 (citing Crowell v. Benson, 285 U.S. 22, 51–65 (1932)).

[89] *Id.* at 450.

[90] *Id.*

[91] *Id.* In *Crowell*, the Court made clear its intention that, where private rights are at issue, fact-finding at the Article I level was appropriate only where the tribunal was acting as an adjunct. *Crowell*, 285 U.S. at 54. In *Atlas*, the Court clarifies that with respect to public rights—and the Court expressly identifies the example of the Federal Government suing in its sovereign capacity—the fact-finding function of Article I tribunals is significantly broader. *See Atlas*, 430 U.S. at 450.

[92] *Atlas*, 430 U.S. at 454.

[93] *Id.* Interestingly, the Court addresses the "adjudication" of new statutory public rights broadly. *Id.* This suggests that the Court is confirming prior holdings that, where there is a true public right, Congress may delegate complete authority over that right to an Article I court. This authority transcends mere fact-finding as an adjunct. Of course, the Court was clear to define public rights existing where the government is a party. *Id.*

would be incompatible with the prevailing public rights jurisprudence.[94] Thus, where there is a constitutional right to a trial by jury under the Seventh Amendment, there cannot be a public right.[95] More directly, where suits at common law implicate a Seventh Amendment jury trial, the applicability of the public rights exception is foreclosed.

Interestingly, the Court in *Atlas* directly addressed its precedent regarding the assignment of fact-finding to Article I tribunals.[96] Because there may have been confusion after the holdings in *Bakelite* and *Crowell*, the *Atlas* Court expressly clarified that:

> [o]ur prior cases support administrative factfinding in only those situations involving "public rights," e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private *tort*, contract, and *property* cases, as well as a vast range of other cases as well *are not at all implicated.*[97]

This statement, read in light of *Crowell*, indicates that the Court in *Atlas* wanted to reaffirm that where private rights are implicated, a non-Article III tribunal may only operate in its capacity as an adjunct.[98] Any delegation of authority beyond that normally reserved for an adjunct is thus an unconstitutional violation of Article III.[99] Given that the government was involved, in its sovereign capacity, in an action relative to a dispute regarding the rights granted under the Federal OSHA, the Court held that the delegation of fact-finding function to a non-Article III tribunal was not an unconstitutional assignment of power.[100]

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[94] *See id.* at 455.

[95] *See id.*

[96] *Id.* at 458.

[97] *Id.* (emphasis added). As indicated in the quotation, the court expressly carved out private tort and property actions from the public rights exception. *Id.* An action for patent infringement is a private tort.

[98] *Id.*

[99] *Id.*

[100] *See id.* That the Commission could issue findings that 1) were susceptible to becoming final, or 2) were only eligible for a heightened standard of review, did not dissuade the Court from finding that the delegation of power under the public rights exception was constitutional. *Id.*

F. Northern Pipeline Construction Co. v. Marathon Pipeline Co.

Northern Pipeline Construction Co. v. Marathon Pipeline Co.[101] is a particularly important case given that its subject matter directly pertains to public rights within the Bankruptcy Court arena.[102] In *Northern Pipeline*, the Court addressed the constitutionality of the procedural provisions of the Bankruptcy Act of 1978.[103] The Act, by its terms, called for the creation of an adjunct to the district court.[104] This adjunct was to be known as the United States Bankruptcy Court for the district.[105] Pursuant to the power granted under the Act, the bankruptcy adjunct was to have "jurisdiction over all 'civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11.' "[106] Under this broad grant of power, the bankruptcy court was entitled to hear a wide range of matters, including claims arising under state law paradigms.[107]

Northern Pipeline Construction Co. filed a petition for reorganization and, under the broad jurisdictional grant of the Act, filed suit against Marathon alleging breaches of contract and warranty, as well as misrepresentation, coercion, and duress.[108] Marathon, in response, sought dismissal on the grounds that the Act was a constitutional conferral of power otherwise expressly reserved for Article III courts.[109] The Court was thus presented with a question, in its core application, as to whether the Bankruptcy Act of 1978 violated the bounds of Article III by conferring judicial power to adjuncts who did not enjoy the protections and safeguards guaranteed under the Article.[110]

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[101] 458 U.S. 50 (1982).

[102] *See id.*

[103] *Id.* at 57.

[104] *Id.* at 53.

[105] *See id.*

[106] *Id.* at 54 (citing 28 U.S.C. § 1471(b) (Supp. IV 1976)).

[107] *N. Pipeline*, 458 U.S. at 55. Further, under the Congressional grant of power, the bankruptcy adjuncts were allowed to issue declaratory judgments under § 2201 of the Bankruptcy Act. *Id.*

[108] *Id.* at 55.

[109] *Id.*

[110] *Id.* at 62.

Importantly in *Northern Pipeline*, the Court did not author a majority opinion. Instead, the Court's opinion was presented by a plurality, which was joined by a concurrence.[111] The plurality began its analysis of the constitutionality of the Act by pinpointing several instances where Congress may permissibly bring certain subject matter within the cognizance of Article I tribunals. According to the plurality, there are only "*three narrow situations* . . . [where] the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."[112] These narrow situations, sequentially addressed by the Court, fall within the three following categories: 1) non-Article III territorial courts,[113] 2) courts-martial,[114] and 3) cases which involve public rights.[115]

Regarding the third category, public rights, the plurality adopted the restrictive approach of *Crowell* and remarked that "[t]he doctrine extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' and only to matters that historically could have been determined *exclusively* by those departments."[116] Given that Congress retained full authority over such matters, the plurality reasoned, it retained complete discretion as to how they may or may not be resolved.[117] In determining whether a matter

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[111] The plurality opinion was joined by Brennan, Marshall, Blackmun, and Stevens, JJ. *Id.* at 52. Rehnquist, J. and O'Connor, J. concurred with the plurality. *Id.* at 89. Commonalities inherent to both the plurality and concurring opinions will be identified.

[112] *Id.* at 64 (emphasis added).

[113] *Id.* According to the Court, where no state operates as sovereign, it has been intended, "from the earliest days of the Republic," that Congress is to operate as the general government. *Id.*

[114] *Id.* at 66.

[115] *Id.* at 67.

[116] *Id.* at 67–68 (emphasis added) (citation omitted) (citing Crowell v. Benson, 285 U.S. 22, 50 (1932)). In light of *McCormick*, see discussion at Part II.B., there is a question as to whether patent invalidity is appropriately determined "exclusively" by either the legislative or executive branch.

[117] *Id.* at 80.

falls under congressional authority, a court will conduct an analysis, based on the claims at issue, and determine whether the matter had traditionally been one reserved for judicial determination.[118]

Interestingly, the plurality declined to precisely define the distinction between public rights and private rights, and further remarked that its precedents had not accomplished this goal either.[119] Instead, it was enough, in the plurality's estimation, to establish that in order for there to be a public right, the right must, at an absolute minimum, arise "between the government and others."[120] However, the plurality does remark that matters of private rights generally entail the liability of one individual to another.[121] Given that private rights "lie at the core of the historically recognized judicial power," their constitutional adjudication rests solely within the realm of the Article III courts.[122] Where there is ambiguity as to whether a particular claim falls within the public rights doctrine, the plurality remarks that "the presumption is in favor of Art. III courts."[123]

Applying its analysis of separation of powers principles to the Bankruptcy Act of 1978, the plurality held that the substantive legal rights at issue did not fall under the public rights exception. Specifically, "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights."[124] Given that the contract right in question implicates the

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[118] *See id.* at 68. As an example of the restrictive analysis required for the public rights determination, the Court quoted *Ex parte Bakelite Corp.* for the notion that the proper role of a legislative court is the determination of "matters arising between the Government and others in the executive administration and application of the customs laws." *Id.* at 69 (citing *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929)).

[119] *N. Pipeline*, 458 U.S. at 70.

[120] *Id.* at 69.

[121] *Id.* at 70.

[122] *Id.*

[123] *Id.* at 70 n.23.

[124] *Id.* at 71. Interestingly, regarding the restructuring of debtor-creditor relations, the plurality merely remarks that such activity "*may* well be a 'public right,' " leaving its status unconfirmed. *Id.* (emphasis added).

liability of one individual to another under the law defined, it is a private right not susceptible to non-Article III determination.[125] Although Congress maintains constitutional authority to establish laws on the subject of bankruptcy, and pursuant to this authority, the ability to create legislative courts charged with the enforcement of such bankruptcy laws, "where Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it."[126]

The plurality held that Article III forbids the adjudication of all bankruptcy-*related* controversies by the non-Article III adjunct.[127] If "related" is the standard for constitutionality under Article III, then nearly any specific grant of power under Article I can lead to a near-complete usurpation of Article III autonomy.[128] Such a rule, if adopted, would "effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government."[129] Thus, Congress is barred by the language of the Constitution from establishing legislative courts with jurisdiction over any and all matters pertaining to those arising under the bankruptcy laws.[130] Though Congress maintains an unassailable right to legislate pursuant to Article I, it must do so while simultaneously recognizing the equally unassailable promise of Article III for an independent judiciary.

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[125] *Id.* (citing Crowell v. Benson, 285 U.S. 22, 51 (1932)). Note that the plurality identified the liability aspect as the delineator; i.e., the fact that one private individual was potentially liable to another brought the allegation within the scope of private rights. *Id.* The fact that the right derived from state law was hardly the sole criterion. *See id.* Consider what the plurality's assessment of contract damages would be as applied to patent infringement, where private entities litigate allegations of trespasses against property.

[126] *Id.* at 73; *see* U.S. CONST. art. I, § 8, cl. 4. Thus, where there is overlap between Article III and Article I, Article III controls. *N. Pipeline*, 458 U.S. at 73.

[127] *N. Pipeline*, 458 U.S. at 76.

[128] *Id.* at 73. The plurality cites Art. I, § 8 of the U.S. Constitution and its grant of power to Congress to regulate interstate commerce as an example. *Id.* If the standard is one of some mere tangential relation to this grant of power, the bounds—and perceived relevance—of Article III become unclear. *See id.* at 73–74.

[129] *Id.* at 74.

[130] *Id.* at 76.

In addition to the arguments above, the plurality addressed whether the bankruptcy judge is, in actuality, an adjunct of the district court.[131] Prior cases, such as *Crowell*, established and approved the constitutionality of the use of true adjuncts by the Article III courts.[132] However, according to the plurality, there is a critical difference between congressional authority to create Article I legislative courts and the congressional authority to create adjuncts. Adjuncts do not serve as an exception to Article III; instead, they perform a limited adjudicatory function while all "essential attributes of the judicial power" remain with the Article III courts.[133] Conversely, Article I legislative courts are created under very limited circumstances and perform a pseudo-judicial function.[134] With respect to adjuncts, the Court had, in the past, expressly ratified their use by Article III tribunals in a fact-finding role.[135] However, the adjunct, even when merely assisting in a fact-finding capacity, must remain within the control of the assigning court.[136] *De novo* review and the ability to rehear or call for more evidence are potential hallmarks of appropriate command and control between a court and its adjunct.[137]

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[131] *Id.* at 76–87.

[132] *Id.* at 77–79.

[133] *Id.* at 77 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)). The plurality further explains several indicia for recognizing whether the essential attributes of judicial power have been maintained in the Article III court. *Id.* at 80–81. An Article III court, when interacting with its adjunct, should reserve the full authority to adjudicate upon matters of law. *Id.* at 81. Additionally, the ability to "make an informed, final decision" should rest solely with the Article III judge. *Id.* (quoting United States v. Raddatz, 447 U.S. 667, 682 (1980)).

[134] *Id.* at 64.

[135] *Id.* at 80–81 (quoting *Crowell*, 285 U.S. at 51). The plurality, however, discussed some additional limitations on Congress's ability to delegate a fact-finding function to non-Article III adjuncts. *Id.* at 80–81. Specifically, the plurality remarked that where "Congress creates a substantive federal right," or where there is a "congressionally created right[]," then "*some* factual determinations may be made by a specialized factfinding [sic] tribunal." *Id.* (emphasis added) (citation omitted). This can hardly be read as carte blanche where fact-finding is implicated. The clear limitations speak for themselves. Additionally, the plurality in *Northern Pipeline* did not seek to create new law; instead, "we simply reaffirm the holding of *Crowell*." *Id* at 81 n.32.

[136] *See id.* at 81–82.

[137] *Id.* at 82 n.33.

Given that the Bankruptcy Act of 1978 conferred to the bankruptcy adjunct all essential attributes of judicial power, it was deemed to be unconstitutional.[138] Unlike the situation before the Court in *Crowell*, where the agency in question could issue only narrow, highly specialized factual determinations related to particularized areas of law, the Act conferred upon bankruptcy adjuncts the ability to hear all civil cases "arising under or related to . . . title [sic] 11."[139] Furthermore, and again unlike *Crowell*, the Article I bankruptcy judges did not merely perform a fact-finding function under the Act.[140] Instead, they performed the same function that the Article III district court judges would be expected to perform.[141] This administrative power included "all ordinary powers of district courts."[142] Additional factors militated heavily against constitutionality: namely, the deferential "clearly erroneous" standard reserved for bankruptcy findings under the Act and the finality of the bankruptcy adjunct's order—absent an appeal, the adjunct's findings on, e.g., matters of law were subject to enforcement.[143] In light of this broad delegation of power, the bankruptcy adjuncts were not really adjuncts at all; instead, they were operating as Article III judges.[144] As such, the broad grant of jurisdiction to the bankruptcy courts by Congress was unconstitutional per the separation of powers principles inherent in Article III.[145]

Justice Rehnquist, in a concurrence joined by Justice O'Connor, identified a reluctance to decide the "broad question" of

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[138] *Id.* at 87.

[139] *Id.* at 85 (citation omitted). This is very different from modern-day bankruptcy court, which issues judgments of, e.g., invalidity on patents covering highly complex and esoteric brands of technology.

[140] *Id.*

[141] *Id.*

[142] *Id.* Inherent in this power was the ability to issue declaratory judgments under § 2201. *Id.*

[143] *Id.* at 85–86.

[144] *See id.* at 86.

[145] *See id.* at 87. It is worth noting that the Court stayed its judgment so as to allow Congress the opportunity to bring the statute in line with the requirements of the Constitution. *Id.* at 88.

constitutionality implicated by the Bankruptcy Act of 1978.[146] Instead, he argued that the Court's analysis should be restricted solely to the claims at issue in the litigation, i.e., breach of contract and the like.[147] This principle should be adhered to particularly when adjudicating issues related to Article III, given its "frequently arcane distinctions and confusing precedents."[148] However, Justice Rehnquist remarked that claims in the lawsuit before the Court "are the stuff of . . . common law."[149] Given that there were only state-based actions of common law, and further given that the federal rule did not provide for any of the issues in the law suit, adjudication of Northern Pipeline's claims could not be sustained under Article III.[150] Justice Rehnquist also agreed with the plurality's conclusion that the bankruptcy court does not in fact operate as a true adjunct of either the district court of the court of appeals.[151]

Justice Rehnquist thus concluded that the elements of the Bankruptcy Act of 1978 enabling the Bankruptcy Court to hear the claims alleged in the Northern Pipeline lawsuit were

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[146] *Id.* at 89.

[147] *Id.*

[148] *Id.* at 90.

[149] *Id.* Further, Justice Rehnquist comments that "[t]he lawsuit is before the Bankruptcy Court *only because* the plaintiff has previously filed a petition for reorganization." *Id.* (emphasis added). In other words, but for the petition for reorganization, the common law claims would not be before the bankruptcy adjunct. This statement, though indirect, in essence comports with the plurality's sentiment that a "related to" provision implicates an impermissibly broad spectrum of law under the Constitution. *See id.* at 73–74. At least with respect to the claims before the Court, the concurring Justices agreed that this was an unconstitutional grant of Article III power to an adjunct. *Id.* at 91–92. Justice Rehnquist additionally remarked that the claims were entirely state-based in nature; this characterization was utilized as a means for identifying the unconstitutionality of a non-Article III delegation. *Id.* at 90. Thus, the concurrence shares many similarities with the plurality, as well as with prior decisions on the subject. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855).

[150] *N. Pipeline*, 458 U.S. at 90–91. With respect to the public rights analysis, the concurrence merely remarks that "I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained" under the public rights exception. *Id.* at 91.

[151] *Id.*

unconstitutional as violative of Article III.[152] Interestingly, Justice Rehnquist expressly stated, "I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts."[153] Thus, while calling for a restrictive, claim-based, idiosyncratic approach with respect to the Court's analysis of Article III matters, the concurrence also unequivocally joins with the plurality that the *entirety* of the grant of power under the Act is inherently unconstitutional. Given the reasons stated in the concurring opinion regarding the unconstitutionality of the provision, it is not clear how the opinion meaningfully departs from that of the plurality.[154]

G. Patlex Corp. v. Mossinghoff

Patlex Corp. v. Mossinghoff[155] is a highly important case inasmuch as it represents the Federal Circuit's first attempt to reconcile *McCormick*,[156] as it relates to patent invalidity, with later decisions dealing with the public rights exception.[157] The Federal Circuit in *Patlex* was charged with determining, *inter alia*, whether certain provisions of the reexamination statute violated the Seventh Amendment right to a trial by jury, as well as the bounds of Article III.[158] In light of *McCormick*, Article III was implicated due to the fact that the reexamination procedure before an Article I patent

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[152] *Id.*

[153] *Id.* at 91–92.

[154] *Id.* at 90–91 (stating that the provision was unconstitutional because the claims were based in common law and did not originate from federal rule; the bankruptcy judges were not true adjuncts; the "related to" provision was problematic; and the public rights exception did not apply). Later decisions appear to identify these commonalities and many treat the plurality's opinion as controlling law. *See, e.g.*, Granfinanciera v. Nordberg, 492 U.S. 33 (1989). Note, however, that Justice Rehnquist does disclaim several aspects of the plurality's opinion: "I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes . . . ." *N. Pipeline*, 458 U.S. at 91.

[155] 758 F.2d 594 (Fed. Cir. 1985).

[156] McCormick Harvesting Mach. Co. v. Aultman-Miller Co., 169 U.S. 606 (1898).

[157] *Patlex*, 758 F.2d at 604.

[158] *Id.* at 596.

examiner carries implications regarding validity for an otherwise-issued patent.[159]

The Federal Circuit began its analysis of the constitutionality of the reexamination provision by stating that "[t]he fundamental questions are: Did Gould have *vested property . . . interests* which are protected by . . . the Seventh Amendment, or Article III, against the retrospective effect of patent reexamination?"[160] In answering these questions, the Federal Circuit adopted a form of analysis focusing on the nature of the property interests at issue.[161] It is without question, the Federal Circuit readily admitted, that patents are property.[162] Furthermore, patents for inventions are not merely property in a definitional sense, but are "as much property as a patent for land. The right rests on the same foundation and is *surrounded and protected by the same sanctions.*"[163] Thus, according to the Federal Circuit, patents fall wholly within traditional definitions of protectable property.[164] Inherent to these traditional definitions is the applicability of both Article III and the Seventh Amendment.

With respect to the reexamination statute itself, the Federal Circuit remarked that it was enacted with the important goal of allowing the Patent and Trademark Office to recapture administrative jurisdiction over an issued patent "in order to *remedy any defects in the examination* . . . which led to the grant of

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[159] *Id.* at 597 ("Under 35 U.S.C. § 301, any person may call to the PTO's attention prior art that may have a bearing on the patentability of any claim. On the basis of that prior art, § 302 provides that any person may request the PTO to reexamine any claim of the patent . . . [u]pon reexamination the PTO may confirm any patentable claim or cancel any unpatentable claim . . . .").

[160] *Id.* at 598 (emphasis added). Note that the linchpin to the Federal Circuit's analysis is whether there is a vested property interest. *Id.* This implies that, where there has been a vested property interest that has historically been guarded by various constitutional protections, any adjudication regarding that interest by an Article I tribunal is unconstitutional.

[161] *See id.* at 598–99.

[162] *Id.* at 599.

[163] *Id.* (emphasis added) (quoting Consol. Fruit Jar Co. v. Wright, 94 U.S. 92, 96 (1876)).

[164] *Id.*

the patent."[165] This, according to the court, serves an important public purpose of increasing the dependability of the patent system.[166] Prior to the enactment of the reexamination statute, new questions of patentability rested within the sole purview of Article III courts. Now, the Federal Circuit reasoned, private entities have a cheaper, quicker, and more convenient way of remedying "defects in the examination" process.[167] Such measures enhance, in part, investor confidence with respect to patent rights and the like.[168]

The Federal Circuit, in addressing the constitutionality of reexamination, repeatedly demonstrated the remedial tenor of the statute: in pertinent part, "the reexamination statute . . . [is] of the class of 'curative' statutes, designed to *cure defects* in an administrative system," and "[t]he legislative history of the reexamination statute makes clear that its purpose is to *cure defects in administrative agency action* . . . and to *remedy perceived shortcomings in the system* by which patents are issued."[169] The remedial nature of the statute, the court surmised, is indicative of the congressional purpose underlying its enactment.[170] This purpose plays an important role in the Federal Circuit's analysis of the public rights doctrine.[171]

The Federal Circuit acknowledged *McCormick* and confirmed its holding that "an issued patent [can] not be set aside other than

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[165] *Id.* at 601 (emphasis added). This is a critical element of the court's analysis, and it factors heavily into the public rights calculus. *Id.* The chief governmental purpose underlying the enactment of the statute is thus mistake-based; in other words, according to the Federal Circuit, the reexamination statute exists to allow the recapture of administrative jurisdiction solely where a mistake has been committed. *Id.* The definition of "governmental mistake," as well as the ramifications of this analysis, is discussed *infra* Part II.K.

[166] *Id.*

[167] *See id.*

[168] *Id.* at 602 ("[R]examination would reinforce 'investor confidence in the certainty of patent rights' by affording the PTO a broader opportunity to review 'doubtful patents.' " (citation omitted)).

[169] *Id.* at 603 (emphasis added).

[170] *Id.*

[171] *Id.*

by an Article III court."[172] The court further acknowledged *Northern Pipeline*, and remarked that it established the unconstitutionality of shifting "rights that traditionally had been adjudicated in Article III courts . . . to Article I courts."[173] Certainly, then, in light of the Federal Circuit's "patents as property" analysis, and its concession that Article III is traditionally applicable,[174] there cannot be shifting on this basis. However, the court identified that, under *Northern Pipeline*, there are certain "public rights" that exist between the government and others.[175] Where such public rights are present, *Northern Pipeline* demonstrated that they may be adjudicated by legislative courts.[176] The Federal Circuit then sought to determine whether the matter of patent validity fell within the bounds of the public rights exception.

The Federal Circuit, in its analysis of the public rights exception, acknowledged that questions of patent invalidity are generally brought between private parties.[177] Private rights, the court conceded, obviously exist separately from public rights, and are appropriately adjudicated before Article III courts.[178] Interestingly, the Federal Circuit adopted the plurality's restrictive definition of public rights from *Northern Pipeline* as its own: "[t]he Court observed that 'a matter of public rights must at a minimum arise 'between the government and others.' "[179] Thus, the Federal Circuit placed itself in the unique situation of rationalizing how a dispute between private parties meets *Crowell*'s restrictive requirement that the government be a party.[180]

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[172] *Id.* at 604.

[173] *Id.*

[174] *Id.*

[175] *Id.* (citation omitted).

[176] *Id.* (citation omitted).

[177] *Id.*

[178] *Id.*

[179] *Id.* at 604 (quoting N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 69–70 (1982) (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932))).

[180] Recall that *Crowell* allowed, where only private parties were implicated, a limited fact-finding function by an Article I adjunct. *Crowell*, 285 U.S. at 51. Note that this is not the case where an examiner, during reexamination, can render issued claims invalid. *Patlex*, 758 F.2d at 604. Thus, the Federal Circuit is essentially stuck harmonizing a lawsuit between private parties with a

In order to bridge this perceived gap, the Federal Circuit established that "the grant of a valid patent is primarily a public concern."[181] Though disputes regarding patent validity usually occur between private parties, the threshold issue is whether the examiner, under the authority granted to her by Congress, properly issued the patent.[182] More directly, the Federal Circuit declared that in a patent validity action between private parties, what really is "[a]t issue is a right that can only be conferred by the government."[183] Most importantly, the court was careful to distinguish its holding from *McCormick*. According to the Federal Circuit, the reexamination statute passes constitutional muster simply because the statute itself is purposed "to correct errors made by the government, to remedy defective governmental (not private) action."[184] Thus, though *McCormick*, which is Supreme Court precedent, guarantees the resolution of validity disputes before an Article III tribunal, the Federal Circuit carved out a narrow exception to this holding under the public rights doctrine of *Crowell*. Specifically, where the purpose of an invalidity contention is to resolve an error or mistake committed by the Patent and Trademark Office, then it is, according to the Federal Circuit, a matter of "public rights" and thus amenable to adjudication before a non-Article III tribunal.[185]

The *Patlex* standard for the applicability of public rights to patent validity deserves additional discussion. At the heart of the standard is this concept of correction of errors by the government. However, *any* patent issued by the government but later found to be invalid—either before an Article I or Article III tribunal—is ostensibly representative of an error made by the government. The

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standard that requires the presence of government. *Id.* (noting that this right is one "that can only be conferred by the government" (citation omitted)).

[181] *Id.*

[182] *Id.*

[183] *Id.* (citation omitted).

[184] *Id.*

[185] *See id.* It is worth noting that the court does not address the Seventh Amendment right directly. Instead, this right is simply lumped in with its Article III analysis and dismissed of summarily. Given that a Seventh Amendment right to a jury trial is, as discussed, inherent to a suit at common law, public rights necessarily cannot apply.

determination of this is holistically dependent upon how "error" is defined, and the Federal Circuit declines to provide a delineating definition. If error is interpreted broadly, and any invalid patent represents a mistake made by the government, then *McCormick* is overruled in its entirety. A decision that reserves invalidity determinations to the sole authority of Article III tribunals cannot be reconciled with a decision that allows, under the public rights exception, any Article I determination of the same validity where an "error"—the allegation of invalidity in the first place evidencing the governmental mistake—has been made. Such logic not merely threatens *McCormick*, but obliterates it completely. Thus, the holding of *Patlex* must be read in light of *McCormick.*

In order to reconcile the two cases, the holding of *Patlex* becomes necessarily narrow. *Patlex* must apply to the reexamination procedure before the Patent and Trademark Office only. Furthermore, the procedure only allows for the remedy of government mistakes. Errors beyond this, such as errors committed by the inventor, rest securely within the grasp of Article III tribunals.[186] After *Patlex*, however, questions regarding the scope of public rights exception remain. Later decisions by the Federal Circuit, such as *Joy Technologies, Inc. v. Manbeck*,[187] call into question whether the Federal Circuit appreciates the necessarily narrow nature of public rights exception as applied to patents in light of controlling Supreme Court precedent. Later portions of this Article will evaluate the Federal Circuit's position, and will further reconcile it with the Supreme Court's law. Importantly, the applicability of public rights and patents to Article I courts will be evaluated.

H. Thomas v. Union Carbide Agricultural Products Co.

Thomas marks the Court's temporary departure from *Crowell*'s strict interpretation of the public rights exception.[188] In *Thomas*,

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[186] *See* McCormick Harvesting Mach. Co. v. C. Aultman Co., 169 U.S. 606, 609–10 (1898).

[187] 952 F.2d 226 (8th Cir. 1992).

[188] *See generally* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985). *Schor*, also written by Justice O'Connor, falls inline with the analysis espoused in *Thomas*. *See generally* Commodity Futures Trading Comm'n v.

the Court considered the constitutionality of the Federal Insecticide, Fungicide, and Rodenticide Act, where the Act provided for binding arbitration with only limited possible judicial review as part of its pesticide scheme.[189]

A party subject to a binding, unfavorable decision from an arbiter alleged, *inter alia*, that the congressional grant of jurisdiction to the Article I arbitrator was an unconstitutional violation of the territory otherwise reserved for the judiciary under Article III.[190] The Court, in responding to this question of constitutionality, immediately remarked upon the commonplace nature of the procedural aspects of the Act.[191] Specifically, the Act was generally homologous with others that had passed constitutional muster; agency action is routinely employed to aid in the resolution of factual disputes between private parties. The

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Schor, 478 U.S. 833 (1986). Later Supreme Court cases, however, tend to gravitate away from O'Connor's expansive approach to the public rights doctrine, reaffirming the importance of *Crowell*. *See generally* Granfinanciera v. Nordberg, 492 U.S. 33 (1989).

[189] *See generally Thomas*, 473 U.S. 568. In order to streamline the approval of various pesticides, the Act permitted data sharing amongst various applicants. *Id.* at 571. Data sharing applied where the pesticide product in question was the same or similar. *Id.* at 572. The statutory scheme not only provided for a sharing of submitted data, but also for a remuneration scheme where one applicant shouldered the initial, financial burden of original data generation. *Id.* The amount of compensation for the data generation was to be negotiated by the parties. *Id.* In the event that negotiations broke down, the binding arbitration then took place before the Environmental Protection Agency. *Id.* Such determinations were subject to limited judicial review. *Id.*

[190] At the outset of its analysis, the Court laments that the jurisprudence underlying the public rights analysis was hardly the model of clarity; "[a]n absolute construction of Article III is not possible in this area of 'frequently arcane distinctions and confusing precedents.' " *Id.* at 583 (quoting N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 90 (1982)).

[191] "Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Id.* at 583. This statement is vague. The declaration regarding "the application of legal standards" implies the Court's prior ratification of adjudication of legal matters by Article I tribunals between private parties. *See id.* The Court in *Thomas*, however, makes no effort to reconcile statements of this variety with *Crowell*, which expressly reserved for Article I bodies a highly limited fact-finding function where wholly private entities were involved. *See* Crowell v. Benson, 285 U.S. 22, 89 (1932).

Court was quick to point out that there was no majority opinion in *Northern Pipeline*.[192] Instead, the plurality's opinion must be read in light of Justice Rehnquist's concurrence. Applying the most restrictive elements of the concurrence to the plurality's opinion in *Northern Pipeline*, the Court in *Thomas* concluded that *Northern Pipeline* merely stood for the limited proposition that "Congress may not vest in a non-Article III court the power to adjudicate . . . in a traditional *contract action* arising under *state law*."[193] Thus, given that the Act in *Thomas* was federal in nature, *Northern Pipeline* did not apply.[194]

Still, the Court expended considerable effort addressing the public versus private rights dichotomy espoused in *Northern Pipeline*.[195] Though the plurality in *Northern Pipeline*, relying on *Crowell*, remarked that a public right is a right that exists between the government and those subject to its authority, the Court expressly disclaimed any requirement that the Federal Government be a party of record in order for public rights to be implicated.[196] Conversely, and by the same logic, the Court held that Article III is not necessarily diminished where the government is a party. Instead, the analysis is one not of the parties involved, but instead of the substance of the claims at issue.[197] Though the Court

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[192] *Thomas*, 473 U.S. at 583.

[193] *Id.* at 584 (emphasis added). As mere matter of note, not all courts have adopted such a strict interpretation of *Northern Pipeline*. In, e.g., *Patlex*, the Federal Circuit identified the plurality's opinion, in light of the Court's prior precedent, as indicative of the state of the law on the public rights exception, and, further, generally emblematic of import of *Northern Pipeline*. *See* Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 (Fed. Cir. 1985). Justice O'Connor for the majority in *Thomas* disagreed with the Federal Circuit's view. *Thomas*, 473 U.S. at 584. The concurrence of Justices Brennan and Stevens stated that "[b]ecause the approach of the plurality opinion in *Northern Pipeline* is sufficiently flexible . . . I adhere to it." *Id.* at 600 (Brennan, J., Stevens, J., concurring).

[194] *Thomas*, 472 U.S. at 600.

[195] Recall that approach with respect to public rights utilized by the majority in *Northern Pipeline* was highly duplicative of what the Court set forth in *Crowell*. *See supra* Part II.F.

[196] *See Thomas*, 473 U.S. at 585–86.

[197] *Id.* at 586. The Court cited *Crowell* for this proposition. Thus, we have seen examples of where *Crowell* has been cited on both sides of the public rights

pointed to *Crowell* for support of this statement of law, it chose to ignore *Crowell*'s command that, where private parties are involved, the role of the Article I participant is restricted to that of a fact-finding adjunct.[198] Instead, "[t]he enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."[199] Specifically, where Congress has selected a quasi-judicial method for the determination of rights that can, under the Constitution, be conclusively resolved by either the executive or legislative branches, then the public rights exception applies.[200]

Applying its analysis of the public rights exception to the Act, the Court identified several aspects of the Act that save it from contravening Article III. Firstly, and most importantly, the origins of the right itself are wholly congressional in nature. As such, significant discretion rests with Congress as to the resolution of perceived wrongs stemming from the legislative right. This analysis closely mirrors that of, e.g., *Crowell*. However, the Court in *Thomas* takes it a step further. The right at issue more closely

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coin. In light of the origin-based analysis of *Thomas*, recall *McCormick*. Furthermore, recall the statements in *Patlex* regarding the property rights inherent to patents. Is it without question that property disputes—including allegations of patent invalidity—are traditionally the sort of "substance" reserved for Article III courts. Compare against *Patlex*, which declared that because the patent right is fundamentally governmental in nature, and the purpose of reexamination is to cure a government mistake, the reexamination statute was not an unconstitutional conferral of Article III power. Given the disparity in the approaches, and extremely narrow nature of *Patlex*, it is unclear what relevance, if any, *Patlex* holds for patent invalidity before, e.g., an Article I bankruptcy tribunal. In one instance, private parties are consenting to government jurisdiction to remedy a government mistake before an expert government patent administrator. On the other, private parties are litigating property rights exclusively reserved for Article III resolution before a non-expert Article I bankruptcy court.

[198] *See* Crowell v. Benson, 285 U.S. 22, 60–61 (1932).

[199] *Thomas*, 473 U.S. at 587.

[200] *Id.* at 589. Though previously limiting the holding of *Northern Pipeline* to the more restrictive aspects of Justice Rehnquist's concurrence, for this important statement as to what the public rights doctrine generally entails, Justice O'Connor, maybe somewhat paradoxically, cites to the plurality's opinion. *Id.* This reflects a sentiment that while *Northern Pipeline* was correct in some respects, other aspects were deserving of a clear carve-out.

resembles a public right—as opposed to a private right—in that it serves a public purpose, i.e. in this particular instance safeguarding public health.[201] Given that the Act serves this important public purpose, it is within the permissible scope of congressional power to assign cost-sharing determinations regarding pesticide obligations amongst *voluntary* participants to a non-Article III administrator.[202] Though the voluntary aspect of the parties' participation certainly factors into the public rights calculus in *Thomas*, the Court pinpoints on numerous occasions the importance of the public purpose at stake. Specifically, because the Act entails a "potentially dangerous product" that may directly endanger the "public health," the use of Article I binding arbitration passes constitutional muster.[203]

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[201] It is interesting that *Crowell* as well as the plurality's opinion of *Northern Pipeline* were cited to in the construction of the Court's opinion, and yet the mode of public rights analysis in *Thomas* breaks down, in part, to whether a "public purpose" is served. It is unclear how the restrictive nature of, e.g., *Crowell* comports with this chosen standard. It is worth noting, however, that the Federal Circuit's public rights analysis in *Patlex* does tend to mirror, at least in this regard, the analysis utilized in *Thomas*. *See* Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 (Fed. Cir. 1985). Consider the holding of *Thomas* against later Supreme Court decisions. This expansive view of public rights does not appear to survive further rounds of judicial scrutiny. Later decisions such as, e.g., *Stern*, tend to return to the more preclusive aspects of *Crowell*.

[202] *Thomas*, 473 U.S. at 589. The importance of the use of the "voluntary" criterion in *Thomas* cannot be understated. However, there are serious questions regarding the legitimacy of Article III waiver by a private litigant.

[203] *Id.* at 590. Thus according to the Court in *Thomas*, the public rights analysis is two-fold. Firstly, and most importantly, is the nature of the right at issue—does the right fall within the strict purview of, e.g., legislative creation and determination? Secondly, the concerns underlying the enactment of the act in question apply to the public rights determination. As *Thomas* demonstrates, where the public purpose served is important, a finding of "public rights" is more likely. The vitality of this second prong, however, post-*Granfinanciera* and *Stern* is questionable (not surprisingly, Justice O'Connor, despite authoring both *Thomas* and *Schor*, dissents in *Granfinanciera*). *See* Granfinanciera v. Nordberg, 492 U.S. 33, 72 (1989). As suggested above, a public rights prong that allows for consideration of public purpose is problematic in that it significantly muddles the bounds of Article III. Ostensibly, *any* statute as enacted by the Federal Government embodies some form of critically important issue. If this is the litmus, then the integrity of Article III's mandate erodes significantly. Later decisions by the Court appear to recognize the import of

In concluding that the Act was constitutional under the two-pronged analysis discussed above, the Court made the curious decision of quoting the passage from *Crowell* that unequivocally limited the role of the adjunct, where the rights of private parties were involved,[204] to a restricted fact-finding function subject to judicial review; "[t]o hold otherwise would be to defeat the obvious purpose of the legislation to furnish a . . . method for dealing with a class of *questions of fact* which are peculiarly suited to examination and determination by an administrative agency specially assigned."[205] In a case where an Article I adjunct, with the power to issue binding decisions, is granted the power to apply legal standards to a dispute arising strictly between private parties, it is unclear how the quoted, narrow limitation of *Crowell* comports with the Court's holding. Also curiously, the Court in *Thomas* again cited to *Crowell* for its conclusion that the judicial standard of review provided for under the Act was adequate per the requirements of Article III.[206] *Crowell*, however, provided that where an adjunct was charged with resolving questions of fact, constitutionality was preserved to the extent that the supervising court maintained *de novo* reviewing authority to either reconsider any relevant evidence, or where the provided evidence was found lacking, ask for additional production.[207] Here, fundamentally distinct from *Crowell*, the limited standard of review reserved for Article III tribunals did not extend past an evaluation of fraud, misconduct, or misrepresentation.[208] This standard not only

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subtle diminishment: "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." Stern v. Marshall, 131 S.Ct. 2594, 2620 (2011) (Scalia, J., concurring).

[204] This distinction, for the purpose of comparing with *Crowell*, assumes that the inclusion of private parties does not implicate any newly-formulated public purpose analysis.

[205] *Thomas*, 473 U.S. at 590 (emphasis added) (quoting Crowell v. Benson, 285 U.S. 22, 46 (1932)). It is unclear how the "application of legal standards" can be reconciled with *Crowell*'s strict proclamation regarding "questions of fact."

[206] *Id.* at 592.

[207] *Crowell*, 285 U.S. at 65.

[208] *See Thomas*, 473 U.S. at 592.

applied to the resolution of questions of fact in disputes between private parties, but also the application of standards of law.[209] The standards, as such, are wholly distinct.[210]

I. Commodity Futures Trading Commission v. Schor

The opinion of the Court in *Commodity Future Trading Commission v. Schor*,[211] like *Thomas*, was delivered by Justice O'Connor. Not surprising, then, is the fact that public rights espoused in *Schor* mirror, in many respects, the Court's analysis in *Thomas*. At issue in *Schor* was whether the Commodity Exchange Act, which allowed for the adjudication of state law counterclaims by an Article I authority, represented an unconstitutional grant of Article III judicial authority.[212] Specifically, the Act provided for a reparations procedure before the Commodity Futures Trading Commission (CFTC) that was dedicated to the resolution of disputes between customers and commodity brokers where the

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[209] It is important to highlight the discrepancies between what the Court in *Thomas* held and what the *Crowell* Court established as law with respect to the public rights exception, the Court's citations notwithstanding. As mentioned previously, later decisions by the Court returned to a more literal reading of *Crowell*. *Thomas* can thus be viewed as the Court's attempt, albeit temporary, to broaden the applicability to the public rights exception, presumably in the interests of preserving, at least in part, judicial economy. The Court's discussion of "public purpose" tends to support this. Furthermore, that consent of the parties factored so heavily into the Court's analysis, lends additional weight to this determination. *See, e.g.*, *Thomas*, 473 U.S. at 592.

[210] Still, the controlling standard expressed by the Court in *Thomas* is importantly honest with respect to its treatment of *Crowell*. In *Thomas*, as seen elsewhere, the determination of the nature of the right itself is the chief determinant; i.e. where rights are, e.g., wholly legislative in nature, and are subject to complete congressional discretion, they appropriately fall within the public rights exception. This foundational theme is the linchpin of *Thomas*, and appears to be one of the few unifying elements prevailing through the Court's Article III jurisprudence. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855). Compare this standard to *McCormick* and its holding regarding the applicability of patent validity to Article III. McCormick Harvesting Mach. Co. v. Aultman, 169 U.S. 606, 609 (1897).

[211] 478 U.S. 833 (1986).

[212] *Id.* at 835–36.

broker was alleged to have violated elements of the Act.[213] Pursuant to its goal of providing a means for efficacious resolution before the Commission, Congress included a catch-all provision "which allows it to adjudicate counterclaims '[arising] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.' "[214] Thus, under this broad catch-all counterclaim provision, a litany of various claims tangential to the chief alleged broker violation could come before the Commission.[215]

At the outset of its analysis of the constitutionality of the Act, the Court was clear to establish that, by the terms of the counterclaim provision, a counterclaim in the usual case will arise out of the same course of events as the primary claim and generally requires resolution of the same factual disputes.[216] Still, the Court had to consider the constitutionality of a provision that granted Article I jurisdiction over common law counterclaims.[217] As in

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[213] *Id.* at 836.

[214] *Id.* at 837 (quoting 41 Fed. Reg. 3994, 3995, 4002 (1976)). It is worth noting that there are substantial similarities between the counterclaim catch-all provisions found in both *Schor* and *Stern*.

[215] In *Schor*, a former client alleged that a particular commodity futures broker, who had overseen a client's account with extensive net futures trading losses, had violated the terms of the Commodity Exchange Act. *Id.* The broker, through a diversity action, filed a separate suit to recover the debit balance remaining on the aforementioned account. *Id.* The broker then dismissed the federal diversity action, and presented its debit balance claim through the catch-all counterclaim provision to the Commission. *Id.* at 837–38. The Article I judge, hearing the merits of the case, ruled in favor of the broker on both the claims and counterclaims. *Id.* at 838. Upon receiving the adverse ruling, the former client, for the first time, raised challenges regarding the constitutionality of the Commission's jurisdiction over the catch-all counterclaim provision. *Id.* In essence, the client now argued that the counterclaim provision enabled an impermissible allocation of Article III judicial power to an Article I commission.

[216] *Id.* at 843. This is an important limitation. Here, the Court is preserving the constitutionality of a broad counterclaim provision that allows for counterclaims that are necessarily resolved by adjudication upon the primary claim. Compare against, e.g., the resolution of a patent validity claim in a bankruptcy proceeding.

[217] Again, the Court highlights the complex nature of the jurisprudence surrounding Article III; "[O]ur precedents in this area do not admit of easy synthesis . . ." *Id.* at 847.

Thomas, the Court declared that it is the substance of the matter that controls the Article III determination; "doctrinaire reliance on formal categories should [not] inform application of Article III."[218] Where purely private litigants are involved, however, the analysis under Article III becomes more complicated.[219] Because the client selected the Commission as the appropriate venue for seeking relief regarding the violations under the Act, there was an effective waiver of any constitutional safeguards otherwise provided for under Article III.[220]

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[218] *Id.* at 848.

[219] *Id.* Interestingly, the Court, for the first time, directly addresses the concept of waiver. Specifically, Justice O'Connor remarks that, where private parties are involved, the guarantees of Article III with respect to an "impartial and independent federal adjudication" are subject to the same waiver applicable to any other constitutional right. *Id.* In support of this position, Justice O'Connor cites to waiver in the context of jury trial, both criminal and civil, and the waiver of trial altogether by virtue of the guilty plea. *Id.* at 849 (citing Boykin v. Alabama 395 U.S. 238 (1969)); Duncan v. Louisiana, 391 U.S. 145, 158 (1968); FED. R. CIV. P. 38(d). It is important to remain mindful of the distinction that Justice O'Connor is drawing here; she is not claiming that the requirement of Article III dictating separation of powers concerns is subject to waiver. Instead, "the *procedures* by which civil and criminal matters must be tried" are subject to waiver. *Schor,* 478 U.S. at 849–50 (emphasis added). Thus in actuality, the Court's discussion has little to do with separation of powers at all. Later decisions tend to confuse the role of waiver in an Article III framework. *See, e.g.*, Stern v. Marshall, 131 S.Ct. 2594 (2011). This concept of waiver with respect to Article III, and the incorrect notion that the Constitution allows a private litigant to waive important, institutional safeguards regarding the separation of powers, is discussed *infra* Part II.I.

[220] *Schor*, 478 U.S. at 850. In the context of waiver, the Court further discusses that the client had the opportunity to first resolve the counterclaim in an Article III court. *Id.* Though the client filed a motion to dismiss the counterclaim before the Federal District Court on the basis that it was, e.g., wasteful of judicial resources given the action pending before the Commission, the motion was ultimately denied by the District Court. It was the broker who voluntarily agreed to the dismissal of the claim before the Article III court. As such, it is unclear how the client truly consented to the Commission's jurisdiction over the counterclaim when it was not the direct action of the client that resulted in Commission's resolution of the debt claim. Following the course of action, it was the broker, and not the client, who consented to the jurisdiction of the Commission. This fact, left unacknowledged by the Court, turns the consent analysis on its head.

Such safeguards, however, did not include fundamental constitutional distinctions in terms of what an Article I tribunal may or may not try. Where the boundaries of Article III are implicated, the Court surmised, "the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III."[221] Thus, after expending considerable effort remarking upon the importance of waiver in the context of procedural safeguards, the Court unequivocally declares that "[w]hen these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect."[222] The determination for the Court is not whether there has been waiver, but instead whether a congressional delegation of responsibility has threatened the institutional autonomy of the Judicial Branch.

According to the Court in *Schor*, there are four key factors that merit consideration in the context of the Article III analysis. The four factors are: (1) the extent to which the essential attributes of judicial power are reserved for Article III courts; (2) the extent to which the Article I tribunal exercises power normally reserved for Article III courts; (3) the "origins and *importance*" of the right in question;[223] and (4) the concerns that motivated Congress to depart from Article III in the first place.[224] Applying these factors, the

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[221] *Id.* at 851.

[222] *Id.* Thus, the jurisdictional bounds of Article III are not subject to waiver. Matters of procedure, more appropriately catalogued under Due Process, are. Consider the context of Bankruptcy Court: If consent and waiver cannot save the constitutionality of subject matter reserved to Article III courts under the Constitution, on what basis can the Article I Bankruptcy Court hear, for example, an argument deciding patent validity?

[223] *Id.* (emphasis added). Note that here the Court is adding a consideration regarding the "importance" of the right. An analysis considering the perceived importance of an asserted right was not present in prior decisions regarding the same. In some respects, this represents a step beyond the "purpose"-based analysis espoused in *Thomas*. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985).

[224] Compare against *Thomas*. Without question, *Schor* represents a further broadening of the public rights exception. Not only should a court consider the origins of the right and the purpose of the Act, but highly subjective elements

Court conceded that the Act departed from traditional models in that it granted ancillary jurisdiction over state law counterclaims.[225] However, given that the counterclaims necessarily arose from the same transaction, they are not unconstitutional.[226] Still, the Court was careful to hedge, and stated "wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties."[227] In applying factor one, the Court remarked that the Commission under the CEA left considerably more of the essential attributes of judicial power to Article III courts than the invalid bankruptcy provision did under *Northern*.[228] This was achieved primarily because the expert Commission in *Schor* was charged with resolving a highly particularized area of law, whereas the bankruptcy provision allowed a broad range of civil proceedings under its catch-all provision.[229] Further in line with, e.g., *Crowell*, the Commission's orders under the Act were only enforceable by direct order of the supervising District Court.[230] Additionally, the District Court in *Schor* reserved the same standard of review over Commission determinations as seen in *Crowell*.[231] All legal determinations made by the Commission were subject to *de novo* review at the district court level.[232] Furthermore, the Commission did not possess the same powers as the district courts; the Act

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such as "importance" and Congressional motivation must be analyzed as well. Under this rubric, the bounds of Article III become further diluted. It is worth noting that the Court articulated these prongs in the context of a dispute arising between private litigants. Compare with Crowell v. Benson, 285 U.S. 22 (1932) and the strict parameters the Court established for the role of the Article I adjunct in that case.

[225] *Schor*, 478 U.S. at 852.

[226] *Id.* (citing Katchen v. Landy, 382 U.S. 323 (1966)).

[227] *Id.*

[228] *Id.*

[229] *Id.* (citing *Crowell*, 285 U.S. 22).

[230] *Id.* at 853.

[231] *Id.* Compare against the more deferential standard found in *Northern Pipeline*. N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 67–68 (1982). Compare further against the standard currently existing today for bankruptcy determinations. *See* Stern v. Marshall, 131 S.Ct. 2594, 2603–04 (2011).

[232] *Schor*, 478 U.S. at 583.

provided for limitations in terms of the Commission's ability to, e.g., preside over jury trials.[233] Thus, in the Court's estimation, prong two was satisfied as well.

With respect to the third prong, the Court admitted that given that the counterclaim was a private right founded in state law, it was of the variety that is generally reserved for Article III determination.[234] Still, the client's primary claim, despite being private in nature, was susceptible to conclusive determination by either the executive or legislative branches. As such, Congress had considerable discretion in terms of how it framed the resolution of such a claim. Under the Act, Congress enabled the Commission, subject to the limitations discussed above, to issue findings. That Congress provided for a catch-all counterclaim provision that granted the Commission jurisdiction "over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged adjudicative function" does not set to undermine separation of powers.[235] Importantly, this allocation of administrative power did not usurp judicial function.[236] Instead, the decision to invoke the jurisdiction of the Commission rested wholly with the parties[237] and as such, the parties had consented to

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[233] *Id.*

[234] *Id.*

[235] *Id.* at 854. Inherent to this statement, as discussed previously, is that the "narrow class" arises under ancillary jurisdiction standards. Specifically, the issue on counterclaim must arise under the same transaction or occurrence. This is further viewed against the backdrop of the limitations already discussed, i.e. the expert nature of the tribunal, the *de novo* standard of review, the non-binding nature of the decisions, etc.

[236] *Id.*

[237] *Id.* at 855. Here, the concept of consent appears to once again become muddled. In *Schor*, the Court expressly disclaimed consent as a method of curing constitutional defects with respect to Congressional allocation of power under Article III. *Id.* Consent applied only in the context of the disavowal of procedural safeguards. But in reading *Schor*, Justice O'Connor first articulates that because the private right under state common law arises from the same transaction as the primary claim, it is constitutional; furthermore, the parties *consented* to adjudication by the Commission. In light of the Court's direct proclamations on the subject, it is unclear how consent then factors into the Article III analysis in the first place, or why it is cited in support of the Court's assertion regarding ancillary jurisdiction. Additionally, the Court in *Schor*

the resolution of claims—both primary and ancillary—before the Article I tribunal.

Thus, *Schor* primarily breaks down into two important categories: on the one hand, the counterclaim arises from the same transaction or occurrence as the constitutionally-permissible Article I claim and thus, according to the guiding principles of ancillary jurisdiction, comes in under the framework of the expert Article I tribunal, and on the other, because the parties consented—though consent technically only applies in a procedural context—the resolution of the common law claim, much like where a private arbitrator becomes involved, is further saved from unconstitutionality. In many respects, this decision is confusing. It establishes one standard (e.g. consent),[238] and yet ignores it in the same breath.[239] Recognizable standards appear from prior decisions on the subject: expertise of tribunal, standard of review, judicial review; only to be comingled with additional, borderline haphazard ideas that generally lack clear definition: congressional purpose, congressional plan, demonstrated need, alternative forums, and consent.[240] And as with *Thomas*, Justice

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analogizes between the function of the Commission and the utilization of an arbitrator. *Id.* That private parties may consent to the use of a private arbitrator has no bearing whatsoever on the constitutionality of a legislative act that grants authority to a non-Article III tribunal to hear state common law counterclaims.

[238] The Court in *Schor* established in unmistakable terms that waiver has no bearing in terms of Article III separation of powers defects. *Id.* at 850.

[239] Justice O'Connor writes "[t]his is not to say . . . that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts . . . the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack." *Id.* at 855. But if Article III is unassailable, and if its safeguards regarding the power of the judiciary cannot be entrusted to private litigants in the first instance, why does the Court expend energy discussing consent in the context of its public rights analysis? The Court appears to be suggesting that consent is but a factor in the overall scheme, even though, by the Court's own admission, it has no bearing on the Article III analysis. The Court declines to reconcile these competing themes, instead leaving it to the reader to discern what importance, if any, the notion of waiver carries under the public rights rubric.

[240] *See id.* Many of these additional considerations receive little to no explanation or definition. Given the inherently nebulous character of some of the criterion (e.g. demonstrated need), the bounds of Article III were further undermined.

O'Connor again cites to *Crowell* for the assertion that where private parties are involved, the administrative adjunct serves as an "expert and inexpensive method for dealing with a class of questions of *fact*."[241] But the Act does not provide for limited determinations of fact; at issue, after all, was the determination of a claim of state common law.

The Court concludes that "due regard must be given in each case to the unique aspects of the *congressional plan* at issue and its practical consequences" in terms of the Court's Article III analysis, and thus, given the limited nature of the grant, the Act is constitutional.[242] Given that the counterclaim arose under the same transaction or occurrence giving rise to the primary, constitutional claim, and further given that private parties at issue submitted, voluntarily, the claim and counterclaim to a legislative tribunal for adjudication, the Court did not identify any infirmities with respect to the governing separation of powers principles.[243]

J. Granfinanciera v. Nordberg

Granfinanciera v. Nordberg,[244] like *Northern Pipeline*, directly addresses the constitutionality of congressional delegations of power to the bankruptcy courts.[245] Unlike *Northern Pipeline*, however, the question in *Granfinanciera* was whether a party, who had not submitted a claim against a bankruptcy estate, had a right to a jury trial under the Seventh Amendment when sued by the

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[241] *Id.* at 856 (citing Crowell v. Benson, 285 U.S. 22, 46 (1932)).

[242] *Schor,* 478 U.S. at 857 (emphasis added).

[243] *Id. Schor* represents the Court's broadest reading of the public rights exception. As discussed, many elements are thrown in with recognizable portions of prior precedents, some explained and defined, some not. In many respects, *Granfinanciera* represents a reaction to *Schor*, and its holding sought to recapture some of the more fundamental aspects of Article III otherwise eroded under *Schor*. As mentioned previously, Justice O'Connor—clearly a strong advocate for an expansive reading for Article III—authored *Thomas* (1985) and *Schor* (1986), but dissented in *Granfinanciera* (1989). That fact alone speaks volumes about the direction of the Court regarding its public rights jurisprudence.

[244] 492 U.S. 33 (1989).

[245] *See generally id.* 492 U.S. 33.

trustee to recover damages for a fraudulent money transfer.[246] Given that Congress had designated fraudulent conveyance actions as core proceedings under the Bankruptcy Court's jurisdiction, the Court had to determine whether this express delegation of power to an Article I tribunal trumped the constitutional right to a jury trial.[247]

The fraudulent transfer claim was found, interestingly, not under traditional common law, but instead under a federal statute.[248] The lower courts held that because the federal statutory right did not include an express mention of a right to a jury trial, the claim was properly before the Bankruptcy Court as a non-jury issue.[249] Importantly—especially in regard to patent property rights—the Court unequivocally disclaimed this mode of analysis under the Seventh Amendment.[250] Instead, the Court held that the "Seventh Amendment also applies to actions brought to enforce *statutory rights that are analogous to common-law causes of action* ordinarily decided in English law courts."[251] Thus, though a right may be derived wholly from federal statute, the right itself may still be subject to, e.g., jury trial limitations where the statutory right is analogous to traditional common law claims. However, even if a particular right may be legal, and not equitable, in nature, that right may still be divested of the jury trial obligation under the Seventh Amendment where the right itself is a "public

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[246] *Id.* at 36.

[247] *Id.* at 37 (citing 28 U.S.C. § 157(b)(2)(H) (1982 ed., Supp. V)).

[248] *Id.* (citing 11 U.S.C. § 548(a)(2) (1982 ed., Supp. V)).

[249] *Id.*

[250] *Id.* at 64 n.19.

[251] *Id.* at 42 (emphasis added). The importance of jury trial rights under the Seventh Amendment and their implication for the public rights analysis, as applied to patents, is discussed *infra* Part II.F. As discussed in previous cases, and in order to avoid confusion on the point, public rights may at times apply where only private litigants are implicated. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 68 (1982). In the same vein, though modern patent rights are clearly derived from federal statute, decisions of this nature demonstrate that the analysis does not stop there. Cases such as, e.g., *McCormick* demonstrate that patents for intellectual property share the same rights and privileges as patents for land. *See* McCormick Harvesting Mach. Co. v. Aultman, 169 U.S. 606, 609 (1898). The implications here regarding the constitutionality of patents as public rights are also discussed *infra* Part II.F.

right."[252] Where "a cause of action is legal in nature and it involves a matter of 'private right,' " the litigant's right to a jury trial is preserved.[253] In analyzing the applicability of the jury trial right to the fraudulent conveyance action, the Court embarked on its usual two-pronged analysis: First, the statutory action is compared to eighteenth century actions brought in courts of England prior to the merger of law and equity; second, the remedy itself is analyzed to determine whether it is legal or equitable in nature.[254] Applying the claim in question to the two-pronged analysis, the Court concluded, in part, that the remedy sought is primarily legal in nature.[255] As such, the Seventh Amendment guarantees the right to a jury trial with respect to the fraudulent conveyance claim.

Given that the remedy sought is legal in nature, and further given that the right to a jury trial is preserved, the federal statutory nature of the right notwithstanding, the Court sought to determine whether the public rights exception saved the constitutionality of the provision in question.[256] Specifically, because the provision labeled fraudulent conveyance actions as core proceedings, the applicability of the jury trial right was necessarily blocked.[257] Thus, the competing obligations could only be harmonized by virtue of the application of the public rights exception.[258] In applying the public rights exception, the Court in *Granfinanciera* immediately returned to the more restrictive views of the exception

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[252] *Granfinanciera,* 492 U.S. at 42 n.4.

[253] *Id.* Recall *Bakelite.* There, the Court remarked that suits at common law implicated the Seventh Amendment jury trial. *See Ex parte* Bakelite Corp., 279 U.S. 438, 453 (1929). Similarly, where a suit was at common law, there could not be a public right. *Id.* Thus, where a jury trial right had been found applicable by virtue of common law, the public rights analysis was necessarily concluded as well.

[254] *Granfinanciera*, 492 U.S. at 42.

[255] The Court's complicated analysis of the perceived jury trial right under the Seventh Amendment as applied, utilizing prongs one and two, to the fraudulent conveyance action is not reproduced here. For detail regarding these arguments, see *id.* at 42–49.

[256] *Id.* at 50.

[257] *Id.*

[258] *Id.* at 51.

articulated in both *Atlas* and *Crowell*.[259] In applying *Atlas*, the *Granfinanciera* Court at the outset established that administrative fact-finding is only supported in situations implicating public rights, i.e. "where the *Government is involved in its sovereign capacity* under an otherwise valid statute *creating enforceable public rights. Wholly private tort,* contract, *and property cases . . . are not at all implicated.*"[260]

Further to *Atlas*, the Court cited to *Crowell* for its definition of private rights.[261] Thus, where private entities are involved in common law disputes before a federal court, the right to a jury trial is unassailable.[262] Conversely, where public rights are involved, i.e. rights that "arise between the Government and persons subject to its authority in connection with [its] performance of the constitutional functions,"[263] Congress may assign their adjudication to administrative tribunals with or without a constituent jury trial right attached. On this distinction, the Court is unequivocal. The issue of public rights, in the Court's estimation, is not merely one of state law versus federal law; "[a]s we recognized in *Atlas Roofing*, to hold otherwise would be to permit Congress to

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[259] *Id.* Note, however, that the Court does not embark on a wholesale adoption of *Atlas*: "Our case law makes plain . . . that the class of 'public rights' whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive than *Atlas Roofing*'s discussion suggests." *Id.* at 53 (remarking that the standard for the applicability of the public rights exception is not merely one of whether the Federal government is involved in its sovereign capacity).

[260] *Id.* at 54 (emphasis added) (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 458 (1977)). Here, we see recitation of the requirement of government as a party. *Id.* at 51. Additionally, the Court in *Granfinanciera* is careful to remark that *fact-finding* at the Article I level is legitimized under the public rights exception. *Id.* Conspicuously absent is mention of the application of legal standards by the administrative tribunal. Further, the Court reestablishes that wholly private tort and property cases are immunized from the public rights exception. *Id.* In many respects, the opinions of the Court in *Schor* and *Granfinanciera* could not be any more disparate.

[261] "In *Crowell*, we defined 'private right' as 'the liability of one individual to another under the law as defined.' " *Granfinanciera,* 492 U.S. at 51 n.8 (citing Crowell v. Benson, 285 U.S. 22, 51 (1932)).

[262] *Id.* at 51 (citing *Atlas Roofing*, 430 U.S. at 450 n.7).

[263] *Id.* at 50 n.8 (quoting *Crowell*, 285 U.S. at 50).

eviscerate the Seventh Amendment."[264] Instead, true public rights can only "originate in a newly fashioned regulatory scheme"—to the extent that the right has a "long line of common-law forebears," the public rights exception cannot apply.[265]

Interestingly, after remarking in the first portion of the case that the public rights determination existed distinctly from the Seventh Amendment right to jury trial determination, the Court appears to concede, as suggested in, e.g., *Bakelite*, that the modes of analysis required for the Article III determination and the jury trial right are not mutually exclusive. Instead, the Court admits that "the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries . . . requires the same answer as the question whether Article III allows Congress to assign adjudication . . . to a non-Article III tribunal."[266] Given that the rights are intrinsically linked, the Court remarked that it will "therefore rely on our decisions exploring the restrictions [of] Article III . . . to determine whether petitioners are entitled to a jury trial."[267] Certainly, this logic is reciprocal. Thus, where the Court has already established that there is a jury trial right under the Seventh Amendment, the cause of action in question cannot fall within the public rights exception.[268]

The Court then chooses, however, to introduce another element into the public rights analysis. Despite suggesting in prior passages that it might return to "Government as a party" for its public rights mode of determination, the Court conceded that the

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[264] *Id.* at 52 (citing *Atlas Roofing*, 430 U.S. at 457–58).

[265] *Id.* This holding can apply to patents. Without question, common law property interests are implicated, even when considering that the patent dispute originates from federal statute. *Id.*

[266] *Id.* at 53.

[267] *Id.* at 54. Presumably, this only applies where the public rights determination is based on the existence of a pre-existing common law right. Where based on a right at admiralty or equity, the applicability falters.

[268] This is subject to the limitation of the Federal Government operating in its sovereign capacity. Consider the application of this rule to patents, and where jury trial rights have been ascribed in that arena.

analysis cannot be so simple.[269] Instead, in cases between private litigants, the critical question regarding the applicability of the public rights exception is whether Congress "[has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[270] More specifically, "[i]f a statutory right is not *closely intertwined with a federal regulatory program* Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it *must* adjudicated by an Article III court."[271] Thus, where private parties are involved, and where the statutory right in question does not have common law antecedent, Congress may assign the right's adjudication to a non-Article III tribunal if that right is so intertwined with a federal regulatory program "that it virtually occupies the field."[272] Cleary, the right is limited in scope, at least with respect to the participation of private parties.[273]

Summarizing the Court's analysis, the public rights calculus is simple when the Federal Government is involved in its sovereign capacity as a party.[274] However, where private parties are involved, the complexity heightens significantly.[275] Where a federal statute is applied, that statute may or may not implicate public rights depending upon whether the statute is analogous to a right that

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[269] *Granfinanciera,* 492 U.S. at 54 (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 586 (1985)).

[270] *Id.* (quoting *Thomas*, 472 U.S. at 593–94 (Brennan, J., concurring in judgment)).

[271] *Id.* at 54–55 (emphasis added).

[272] *Id.* at 54 (quoting *Thomas*, 472 U.S. at 593–94 (Brennan, J., concurring in judgment)).

[273] In the context of a jury trial analysis, the Court is careful to address the role of the adjunct where private parties are involved. In the Court's estimation, confusion bounded after *Atlas* regarding when an Article I adjunct may be used to assist an Article III court with fact-finding. *Id.* at 55 n.10 (citing Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 n.7 (1977)). In *Granfinanciera*, an adjunct in a dispute between private parties may not be used in *all* instances—such a result "[would] render the Seventh Amendment a nullity." *Id.*

[274] *Id.* at 51.

[275] *Id.* at 54–55.

traditionally existed at common law.[276] To the extent that the right does not exist at common law, public rights apply where the right itself is closely intertwined with a federal regulatory program.[277] Of course, the Court is clear to highlight the synonymous nature of the jury trial right and the public rights exception.[278] Where a determination has already been made that there is a Seventh Amendment right to a jury trial, then this is conclusive.[279] A jury trial right, traditionally existing at common law, cannot be usurped as a public right given that the public right itself must not be analogous to a common law right.[280]

Applying the analysis above to the fraudulent conveyance action, the Court concludes that the right at issue takes on the character of a private right. After all, and in further affirmation plurality's opinion in *Northern Pipeline*, the Court declared that "matters from their nature subject to a suit at common law or in equity or admiralty lie at the protected core of Article III judicial power."[281] There is little question, in the Court's opinion, that the fraudulent conveyance claim closely resembles a common law contract claim. As such, it is not a public right. Importantly, the Court further concluded that because the fraudulent conveyance is more aptly defined as a controversy *arising out* of the bankruptcy proceeding instead of constituting a *direct part* of the proceeding, it was inappropriately before that court.[282] Put another way, the claim at issue more nearly resembles common law contract claims utilized to augment an estate "than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res."[283] It is

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[276] *Id.*

[277] Interestingly, Justice Brennan, writing for the Court in *Granfinanciera*, declines to provide examples of where a statutory right might be sufficiently intertwined with a regulatory program so as to be a public right. *Id.* at 52–55. This leaves the reader with only vague indications as to what this truly means.

[278] *Id.* at 51–52.

[279] *See id.*

[280] This assumes the absence of the Federal Government as a party.

[281] *Id.* at 56 (internal quotation marks omitted) (quoting N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 70 n.25 (1982)).

[282] *Id.* (citing Schoenthal v. Irving Trust Co., 287 U.S. 92, 94–95 (1932)).

[283] *Id.* It is important to note that in so remarking, the Court was clear to establish that it was not its intention to carve out the restructuring of debtor-

true that the structuring of debtor-creditor relations is at the core of Federal Bankruptcy power and thus such matters are properly before the Article I Bankruptcy Court; however, such power does not include the court's ability to adjudicate private, common law rights.[284]

Within the context of the public rights analysis, the congressional delegation of subject matter as either core or non-core is meaningless. Instead, the key, decisive question is whether Congress created a new cause of action existing separately from and unknown to common law because "traditional rights and remedies were inadequate to cope with a *manifest public problem.*"[285] In this case, Congress merely reclassified a common law cause of action in the statutory context and sought to subvert otherwise overriding constitutional mandates by doing so. Though the right at issue was statutory in nature, it was highly analogous to preexisting rights subject to Seventh Amendment and Article III concerns, and as such, Congress was restricted from either

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creditors relations as pure public right. *Id.* at n.11. Instead, the analysis of, *e.g.*, "hierarchically ordered claims to a pro rata share" was designed to help aid the determination of whether the fraudulent conveyance action was one traditionally found at common law. *Id.* at 56. Consider in the context, for example, of patent validity before a bankruptcy court. Is this a dispute arising out of the proceeding, or is it an integral part of it? Additionally, though statutory in nature, is the right analogous to a common law right?

[284] *Id.* at n.12 (citing *N. Pipeline*, 458 U.S. at 71).

[285] *Id.* at 60 (emphasis added) (citing Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 461 (1977)). It is interesting that Justice Brennan chose, during the latter stages of the opinion, to introduce this concept of "manifest public problem" in the public rights analysis. *Id.* at 60. Viewed in light of prior portions of the opinion, manifest public problem might be reasonably interpreted to read on the public regulatory scheme concept. In essence, the elements may be read together, i.e. where private parties are involved, public rights exist where statutory claims without common law ancestors are closely intertwined with public regulatory scheme aimed at curing a manifest public problem. Clearly, and to the extent that such an opinion of Justice Brennan's opinion can be accepted, this is a narrow reading of public rights as applied to private parties. It is thus no surprise that the decision cites heavily to both *Crowell* and *Atlas*; *Thomas* and *Schor* appear, in many respects, to be overruled (though not expressly).

removing the litigant's right to a jury trial or assigning it to an Article I tribunal in the first place.[286]

K. Joy Technologies, Inc. v. Manbeck

Joy Technolgies, Inc. v. Manbeck[287] is an interesting case, and here the Federal Circuit was again charged with applying the public rights exception to patents in an administrative context.[288] Unlike the Circuit's decision in *Patlex*, however, in *Joy*, the Federal Circuit was asked to evaluate the constitutionality of the reexamination—as opposed to reissue—statute.[289] With respect to the constitutional issue before the court, the facts are relatively simple. The Board of Patent Appeals and Interferences sustained the rejection of various claims in a reexamination proceeding and the aggrieved patentee appealed alleging impermissible deprivation of the jury trial right as well as an impermissible assignment of a judicial issue to an Article I tribunal.[290]

The patentee argued, *inter alia*, that *Granfinanciera* raised serious questions regarding the vitality of *Patlex*.[291] The Federal Circuit, however, in an exceptionally short opinion disagreed, and instead held that *Granfinanciera* affirmed the basic underpinning of *Patlex*.[292] Specifically, because *Granfinanciera* confirmed that where public rights are found to apply, there cannot be a constituent Seventh Amendment right to a jury trial given the commonalities underlying the respective forms of analysis applicable to each.[293] Given that *Patlex* held that the legitimacy "of a valid patent is primarily a public concern and involves a 'right that can only be conferred by the government,' " nothing in *Granfinanciera* gave the Circuit reason to doubt that the matter of patent validity as applied in an administrative setting fell within the

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[286] *Id.* at 61.

[287] 959 F.2d 226 (Fed. Cir. 1992).

[288] *Id.* at 228. Recall the Federal Circuit's analysis in *Patlex* as it is relied upon heavily by the Circuit in *Joy*.

[289] *Id.* at 228.

[290] *Id.* at 227.

[291] *Id.* at 228.

[292] *Id.*

[293] *Id.*

public rights exception.[294] Because *Granfinanciera* re-established *Crowell* as the controlling standard with respect to the application of the public rights exception, the issue of patent validity really was not a matter of private right at all.[295] Thus, this aspect of the analysis fell out altogether; instead, the question, as posed in *Crowell*, was whether the patent right was one that arose "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[296] Given that *Patlex* had already established that a patent was primarily a public concern, the Circuit reasoned that this prong of *Crowell* was satisfied.[297]

Of the various Federal Circuit and Supreme Court decisions discussed in this Article, *Joy* is clearly the weakest.[298] The decision relies heavily upon *Patlex* and *Crowell*, and yet only gives remedial lip service to each. At the core of the holding of *Patlex* was the concept of governmental mistake.[299] At least in that decision, the Circuit attempted to reconcile its opinion with *McCormick*.[300] The decision arguably withstood scrutiny under *McCormick* to the extent that it limited its holding with its narrow carve-out. Specifically, reissue was not unconstitutional because it permitted a remedial measure to eliminate government *mistakes*.[301] However in *Joy*, the Circuit declined altogether to mention this important limitation. Instead, the CAFC portrayed *Patlex* as

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[294] *Id.* (quoting Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 (Fed. Cir. 1985)).

[295] *Id.*

[296] *Id.* at 228–29 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

[297] The Federal Circuit goes as far as to declare that, in a field of law dominated by Supreme Court precedent, "*Patlex* is controlling authority." *Id.* at 229.

[298] There are differing notions of consent as applied to reissue versus reexamination. Given that waiver is not appropriately applied to the Article III analysis, it is not addressed here. Additionally, the Federal Circuit declines to raise the issue as well. This may not be surprising given that the public rights issue before it arose from reexamination.

[299] *See Patlex*, 758 F.2d at 604.

[300] *McCormick*, though a dated decision, is still controlling Supreme Court precedent today. In *Joy*, the court declined to mention this case altogether. *See generally Joy*, 959 F.2d 226.

[301] *See Patlex*, 758 F.2d at 604.

standing for the broad proposition that the validity of a patent is fundamentally a right that exists between the government and an individual, even though it is generally litigated amongst private parties.[302] Given that the government is not participating as a party in its sovereign capacity, however, it is unclear how this mode of analysis directly applies.

Instead, the analysis should have taken the form of what was espoused in *Granfinanciera*, which the court (somewhat paradoxically) cited extensively.[303] Where private parties are involved, a court should look, in part, at the statutory right in question and determine whether it is analogous to any common law forebears.[304] In the instance of a property right granted by the Federal Government, there is no shortage of cases grounded firmly in common law that deal with this precise issue, but the Circuit declined to address them.[305] Thus, not only did the Federal Circuit take *Patlex* and meld its narrow, mistake-based analysis into something far broader, it did so while both citing to and yet ignoring the recent proclamations of the *Granfinaciera* Court.

Lastly, *Joy* must be read in light of *McCormick* and *Patlex*. In *McCormick*, the Court unequivocally established that the issue of patent validity fell within to the sole discretion of Article III courts. *Patlex* held that while *McCormick* was still law, reissue remained constitutional in that it provided the government the opportunity to remedy its mistakes committed during the patent prosecution process. *Joy*, applying *Patlex*, held that the issue of patent validity is, in all respects, a public right and thus amenable to adjudication by Article I agencies. Read together, the Federal Circuit is

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[302] The Seventh Circuit, by comparison, stated that "[t]he question of the validity of any particular patent is a private issue between the patentee and alleged infringers, and not a public issue of industry-wide or regulatory concern." Johnson & Johnson, Inc. v. Wallace A. Erickson & Co., 627 F.2d 57, 62 (7th Cir. 1980).

[303] *Joy*, 959 F.2d 226.

[304] Granfinanciera v. Nordberg, 492 U.S. 33, 42 (1989). This is in addition to determining whether the right is integral to and intertwined with some federal regulatory scheme. *Id.*

[305] Recall that in *Patlex* the Federal Circuit admitted repeatedly to the property characteristics of the patent for intellectual property and the common law rights that invariably attached. *See Patlex*, 758 F.2d at 599.

unmistakably admitting that any invalid patent is the end result of a government mistake. Mistake is not limited by the facts of *Patlex*, but instead applies in all instances where a patent is found to be invalid, irrespective of the circumstances[306] that led to a conclusion of invalidity. Because the government grants the right, and because invalidity necessarily implies governmental mistake, invalidity comes in under public rights. But this holding simply cannot be reconciled with *McCormick*. *McCormick* reserved validity to Article III; *Joy* granted it in all instances access to Article I. In many respects, *Joy* seeks to overrule *McCormick* but without expressly doing so. By virtue of being Supreme Court law, however, *McCormick* is still the controlling brand of precedent. That the Federal Circuit, in its curious finding, declined to address this important case altogether should be telling.[307]

L. United States v. Jicarilla Apache Nation

Though *United States v. Jicarilla Apache Nation*[308] does not include a highly detailed analysis of public rights precedent, the case is important in that it demonstrates the Court's adherence to the more restrictive line of cases regarding the doctrine. In this case, the Court was presented with the question of whether the fiduciary exception to the attorney-client privilege applied to the general trust relationship between the United States and the Indian tribes.[309] In making this determination, the Court considered, *inter alia*, whether the trust in question took on the characteristics of a private common-law trust, and was thus susceptible to the exception to waiver.

In determining that the general trust relationship existing between the government and the Indian tribes did not mimic a private common-law trust, the Court undertook an analysis of the

[306] A basis for invalidity may include inequitable conduct.

[307] It is undeniable that there were strong policy considerations driving the Federal Circuit's finding in this case. However, its analysis, in light of *Crowell*, *Atlas*, *Patlex*, *Granfinanciera*, and others, does not comport with the controlling standards dictating the public rights analysis. As such, there are serious questions regarding the issue of patent validity as a public right.

[308] 131 S.Ct. 2313 (2011).

[309] *Id.* at 2318.

applicability of the public rights exception. The government was free to craft the bounds of the rules per its discretion to the extent the trust relationship between the government fell within the purview of the exception.[310] The Court's public rights analysis in *Jicarilla* is not extensive. However, given the contemporary nature of the decision, its holding with respect to public rights is interesting. Namely, in light of *Granfinanciera* and compared against *Thomas*, the Court once again appears to adopt a restrictive interpretation of public rights.[311]

Given that the government may or may not consent to be liable to private parties, the Court remarked, if the government does provide consent, it may do so by its own controlling terms.[312] Thus, according to the Court, the distinction between private rights and public rights lies with the identity of the parties.[313] Specifically, cases of private rights exist amongst private parties, and cases of public rights "arise between the government and persons subject to its authority in connection with the performance of the constitutional functions."[314] In the case at bar, the management of the Indian trust "is a sovereign function subject to the plenary authority of Congress."[315] Given that Congress retains plenary authority to legislate for the Indian tribes in all matters, the power is one that exists solely with the legislative branch. As such, the public rights exception applies and Congress is free to determine how, and to what extent, any waiver of privilege might apply.

In light of the limited nature of the Court's public rights discussion in *Jicarilla*, it is unclear what precedential value might be ascribed to it in terms of defining the exception.[316] However, several important points are established in the case. It is clear in

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[310] *See id.* at 2323.

[311] *See id.*

[312] *Id.* (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 283 (1855)).

[313] *Id.*

[314] *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

[315] *Id.*

[316] *See e.g.*, Stern v. Marshall, 131 S.Ct. 2594, 2598 (2011) (discussing *Jicarilla* only briefly).

reading *Jicarilla* that the Court has adopted a restrictive view of the exception. Unlike prior decisions, the Court defined the public rights versus private rights dichotomy in simple, familiar terms.[317] For example, the Court quoted from both *Murray's Lessee* and *Crowell* to establish that the chief distinction among private and public rights is the identity of the relevant parties.[318] Where the government is a party and a dispute arises relative to the government's performance of constitutionally-mandated functions, public rights apply. Conversely, where the parties are private in nature, the dispute is one of private rights.[319]

Though the case is one where the government is in fact a party, and does not seek to define when public rights might be found where private parties are exclusively present, it does mark a return to a party-based analysis that had received criticism in prior decisions.[320] Thus, though the case itself may not mark a watershed moment in terms of public rights analysis, its restrictive application of public rights, relying solely upon *Murray's Lessee* and *Crowell*, is indicative of the Court's general tenor post-*Granfinaciera*.

III. *STERN V. MARSHALL*

Stern marks the Court's most recent, and since *Granfinaciera*, most detailed pronouncement regarding the state of public rights jurisprudence.[321] Though the decision touches upon only the constitutionality of a counterclaim catch-all provision similar in at least some respects to the one discussed in *Schor*, the decision invariably contributes to the broader principles governing public rights.[322] In addition to the Court's discussion of public rights in bankruptcy, the Court touched upon important concepts of consent, and whether it was sufficient to cure shortcomings under the

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[317] *See Jicarilla*, 131 S.Ct. at 2323.

[318] *Id.*

[319] These rights are subject to the distinctions discussed in *Crowell*.

[320] *See e.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585 (1985).

[321] *See Stern*, 131 S.Ct. at 2594.

[322] *Id.*

requirements of Article III.[323] Thus, though the Court in *Stern* only directly analyzes the constitutionality of a counterclaim provision in Bankruptcy Court, the ramifications of the Court's finding, as well as constituent commentary, are potentially far-ranging in the administrative context.

A. *The Court's Commentary on the Public Rights Exception*

The procedural history underlying *Stern* is complicated and only the relevant elements, as they relate to the constitutional issues discussed herein, will be reproduced here. Specifically, a party filed a petition for bankruptcy in the Central District of California.[324] A second party filed a proof of claim for a defamation action, marking its intentions to recover damages from the primary party's estate.[325] The primary party, in response to the proof of claim for defamation and utilizing the Bankruptcy Court's counterclaim provision, filed a counterclaim for tortious interference.[326] The Bankruptcy Court then issued a substantial judgment in the primary party's favor.[327] On appeal, the aggrieved party alleged that the statutory grant of judicial power, i.e. the Bankruptcy Court's ability to hear common law tortious interference claims, was unconstitutional under Article III.[328]

The statutory grant at issue was 28 U.S.C. § 157(b)(2)(C), which, in part, designated as "core" all counterclaims by the debtor

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[323] *See id.* at 2628.

[324] *See id.* at 2594.

[325] *See id.* at 2601. As mentioned previously, this Article does not seek to examine the constitutionality of the common law defamation claim before the Article I Bankruptcy Court. Instead, it is designed analyze the constitutionality of a proof of claim directed towards a patent matter under the counterclaim provision post-*Stern*. Given that consent appears to be the primary force underlying the constitutionality of the defamation claim, it is acknowledged that the perceived modes of analysis of constitutionality reserved for the primary proof of claim versus the counterclaim may not be readily severable. Consent as a means for curing Article III defects is discussed *infra* Part VI.

[326] *See id.* at 2601–02.

[327] *See id.*

[328] *See id.*

against any entity filing a proof of claim against the estate.[329] The Court first sought to determine whether the counterclaim was properly before the Bankruptcy Court per the text of the statute.[330] Applying, e.g., traditional canons of statutory interpretation, the Court agreed that the tortious interference claim was properly before Bankruptcy Court as a core proceeding under Title 11.[331] Interestingly, during a related discussion of bankruptcy jurisdiction over personal injury torts, the Court remarked that a party may waive an objection to the bankruptcy court issuing final judgment on a non-core claim.[332] It is unclear what relation, if any, this statement was intended to hold for the bounds of Article III. After all, the Court had declared in prior decisions that the requirements of Article III were beyond the discretion of private litigants.[333] The severability of the issues, i.e. Article III versus statutory grants, however, is unclear. On this point, the Court merely concludes that the party filing the proof of claim for defamation *consented* to the Bankruptcy Court's resolution of the claim.[334] At this stage of

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[329] To the extent that issue before the Bankruptcy Court was not core with respect to Title 11, the court could only issue *proposed* findings of fact and law. Where the issue was core, the administrative court had power to enter final judgment. *See id.* at 2596.

[330] *See id.* at 2601–02.

[331] *See id.* The Court's analysis with respect to the statutory interpretation is only tangentially related to the constitutional concerns and is not repeated here. *See id.* at 2596.

[332] *See id.* at 2605–06. In the context of the Court's statutory analysis, this comment is confusing. The Court, in so commenting, is addressing waiver with respect to perceived venue provisions of the bankruptcy grant. *Id.* (discussing further 28 U.S.C. § 157(c)(2) and its authorization of district courts with the *consent* of all parties to refer a "related to" matter to the bankruptcy court for final adjudication). Though this commentary enters the Court's opinion at the statutory phase, it is not readily severable from the Article III underpinnings.

[333] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853–54 (1986). Still, as suggested in the prior footnote, the Court appears to be indicating that waiver is a cure-all with respect to bankruptcy jurisdiction. It is unclear how this could be interpreted to mean that statutory limitations may be waived, but Article III concerns may not. The issues appear to be intrinsically linked per the Court's commentary. *Id.*

[334] *See Stern*, 131 S.Ct. at 2606. The Court cites to *Yakus v. United States* for the proposition that any right, including constitutional rights, may be forfeited.

the opinion, the Court concluded its analysis of the appropriateness of the defamation claim before the Bankruptcy Court.[335] Though Article III is not expressly mentioned, it appears to be subsumed by the Court's discussion of waiver and its general applicability to "constitutional right[s]." The Court then transitioned its analysis to a discussion of the constitutionality of catch-all counterclaim provision under Article III.[336] In ultimately deciding that Article III was violated, and that the only issues thus properly before the Bankruptcy Court per the statute were those that implicated public rights, the Court tacitly posits an important question that should be kept in mind as Article III is evaluated: why did waiver cure perceived constitutional defects in the common law defamation proof of claim before the Article I tribunal, whereas the same concept of waiver could not save a common law tortious interference counterclaim under Article III?[337]

Addressing the constitutionality of the counterclaim provision, the Court initially discussed important precedents that have shaped Article III jurisprudence.[338] Where the suit is one at common law,

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Id. at 2608. The applicability of this case to Article III is discussed *infra* note 434.

[335] *Id.* at 2608.

[336] *Id.* at 2608–10.

[337] Put another way, the Court appears to be choosing to selectively apply constitutional standards based on the stage of proceedings. If Article III is immune from waiver, and if the Bankruptcy Court is in fact an Article I tribunal, then on what grounds is a common law defamation claim between private litigants properly before the administrator? In *Stern*, the analysis with respect to defamation appears to be strictly jurisdictional and thus, in the Court's estimation, subject to waiver. *Id.* at 2606. But the issue goes beyond jurisdictional requirements and very clearly implicates separation of powers. Thus, if tortious interference falls out of the judicial equation at the Article I level because public rights are at issue, the on what ground does the Article I bankruptcy judge decide, with finality, the initial common law defamation claim? Curiously, the analysis seen in cases such as *Granfinanciera* is only applied to the counterclaim. *See generally* Granfinanciera v. Nordberg, 492 U.S. 33 (1989).

[338] *See Stern*, 131 S.Ct. at 2609. The Court cites to *Murray's Lessee* and *Northern Pipeline*. *Id.* At this stage, the concepts are well-worn: "The Constitution assigns that job—resolution of 'the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law'—to the Judiciary." *Id.* (quoting N.

equity, or admiralty, then the responsibility of deciding that suit rests solely with the Article III courts; Congress may not withdraw such matters from the cognizance of the judiciary. The Court recognized, however, that there is a class of public rights that may in fact be assigned to the legislative branch for adjudication without violating the tenants of Article III. In addressing public rights as applied to bankruptcy courts, the Court acknowledged that the *Northern Pipeline* decision failed to define the express bounds of the exception.[339] However, *Northern Pipeline* did establish that the state common law claim at issue did not qualify, and further established that in light of the various powers granted to the bankruptcy judges,[340] they were not acting as mere adjuncts.[341] Given that the tortious interference claim, much like the common law claim found to be unconstitutional in *Northern*, is grounded in state common law,[342] the Court concluded that, absent an exception, it was an unconstitutional grant of Article III power.

The Court then sought to determine whether the public rights exception saved the common law tortious interference claim before the Article I tribunal. Interestingly, the Court drew an initial,

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Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 86–87 n.39 (1982) (plurality opinion)).

[339] *See Stern*,131 S.Ct. at 2611.

[340] *See id.* at 2610 (citing *N. Pipeline*, 458 U.S. at 69–72). Recall that the analysis in *Northern Pipeline* was not centered on a question of federalism; instead, the Court couched its language, as generally seen in public rights cases, in terms of separation of powers. Thus, the finding of unconstitutionality was driven primarily by a common law character of the claim, as opposed to its origins in state law.

[341] *See id.* at 2611. The Court confirms in *Stern* that, like *Northern Pipeline*, the bankruptcy judges under the revised act are hardly operating as mere adjuncts. *See id.* The details of this analysis will not be reproduced here. Instead, it suffices to mention that the usual hallmarks abound: ability to determine matters of fact and *law*, ability to issue *final* judgments, standard of review is the usual, *limited* appellate standard, etc.

[342] *See id.* at 2611. The opinion includes repeated reference to the fact that the matter is grounded in *state* common law. *Id.* Despite these references, it is unclear what import, if any, the state-based nature of the claim carries in the public rights analysis. Instead, the public rights analysis carries in the same fashion as seen in prior cases—it is the common law nature of the claim that determines constitutional muster.

important distinction on this point: Where the proof of claim at issue is a "federal claim[] under bankruptcy law, which would be completely resolved in the bankruptcy process of allowing or disallowing claims," then that claim is properly before the Article I court.[343] However, where the claim exists "*independent[ly] of the federal bankruptcy law* and [is] not necessarily resolvable by a ruling on the creditor's proof of claim," then public rights may not apply.[344] Given that the claim at issue is one of common law, and thus exists independently of the federal bankruptcy law, this element of the public rights analysis immediately falters.[345]

Exploring the public rights exception in its broader context, the Court in *Stern* provided an analysis of the various important cases that had influenced public rights jurisprudence. Starting with *Murray's Lessee*, the Court recounted, in relevant part, that the case established that where the right in question depends wholly upon the will of Congress, then Congress could limit, by design, the availability of any judicial forum.[346] More directly, the Court declared that "[t]he point of Murray's Lessee was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all."[347] The Court further addressed the importance of the identities of the parties.[348] As has been recounted, prior public rights decisions established that where a suit arises between the government and a private party pursuant to the government's performance of its constitutional functions, then the matter is one of public right. This is contrasted against matters of private right, which the Court then defined as the liability of one private entity to another under the relevant law. Importantly, the Court cited to *Crowell* for this proposition. This is an interesting development and, like *Jicarilla*, further supports the notion that the

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[343] *Id.*

[344] *Id.* (emphasis added). Recall, however, that the original proof of claim was a claim of common law defamation. Clearly, such a claim does not exist solely in federal bankruptcy law. Read in the context of its analysis, the implicit point is that waiver cured this defect.

[345] Further consider in the context of patents which, like tortious interference, do not find their base in federal bankruptcy law.

[346] *See id.* at 2611.

[347] *Id.* at 2612.

[348] *Id.*

Court applied the public rights exception per narrow guidelines. Additionally, and in stark contrast to the public rights cases from the Justice O'Connor-era, the Court in *Stern* expressly declared that *Crowell* stood for the proposition that where private parties are involved, the determination of facts may properly be determined by an adjunct.[349] In furtherance of this point, the Court additionally cited to *Atlas Roofing* and *Bakelite*, and reaffirmed that where wholly private tort, contract, or *property* cases are at issue, public rights are not implicated.[350]

Though government as a party may be determinative, the Court noted that later decisions disclaimed this as a requirement in order for public rights to apply. Where the government is not a party, the right at issue must depend upon some form of federal regulatory scheme. Additionally, the "resolution of the claim by an expert government agency [must be] deemed essential to a limited regulatory objective within the agency's authority."[351] Thus, in order for there to be public rights amongst private parties, the right in question must be "integrally related to particular federal government action."[352] In giving what appears to be relatively short thrift to *Thomas*, the Court merely cites to it as exemplary of this concept. Specifically, because the arbitration right in question did not depend upon or replace a right already

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[349] *See id.* (citing Crowell v. Benson, 285 U.S. 22, 50–51 (1932)). Compare against later decisions, which blurred the lines in terms of when determinations of *law* may properly be before an Article I tribunal. *See, e.g.*, Thomas v. Union Carbide Agric., Prods. Co., 473 U.S. 568 (1985). With these statements, the Court appears to be, at least in part, re-establishing *Crowell* as the controlling standard.

[350] *Stern,* 131 S.Ct. at 2612–13 (citing Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 458 (1972) and *Ex parte* Bakelite Corp., 279 U.S. 438, 451–52 (1929)). The Court further reinforced the *Atlas* holding; public rights apply where the government is involved in its sovereign capacity under a federal statute. *Id.*

[351] *Id.* at 2613. Interestingly, the Court in *Stern* does not cite to *Granfinanciera* for this proposition, though there are certainly similarities in the modes of analysis where private parties are implicated. *Stern*'s requirement as applied to the concept of a federal regulatory scheme, read in light of *Granfinaciera*, appears to be more restrictive. *Id.* On this basis, the Court may have declined to cite to the prior decision here.

[352] *Id.* at 2612.

existing under state common law, it did not violate Article III.[353] In addressing *Schor*, the Court was equally tactful. Recall that in *Schor* at issue was the constitutionality of a limited counterclaim provision that related to alleged broker violations.[354] Though the counterclaim was at common law, the Court in *Stern* pointed out that it was a competing claim to the same amount already at issue before the Commission under the legislative act.[355] Put another way, given that the counterclaim was integrally related to the primary claim at issue, there was no pragmatic method available for severing them without destroying the otherwise permissible administrative process altogether.[356]

The Court then finally transitioned to a discussion of *Granfinaciera*. This case is particularly important given that it represented the Court's latest pre-*Stern* proclamation on the state of public rights in the bankruptcy context. According to the Court in *Stern*, *Granfinaciera* stood for the proposition that where only private parties are involved, public rights only apply where a statutory right, belonging solely to the Federal Government, is "closely intertwined with a federal regulatory program."[357] To the extent that these requirements are not met, then the dispute must be adjudicated by an Article III court. Given that a fraudulent conveyance action most nearly resembled a common law contract claim as opposed to "hierarchically ordered claims to a pro rata

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[353] *Id.* at 2613 (citing *Thomas*, 473 U.S at 584). Note that the more nebulous notions of public rights espoused in *Thomas*, not surprisingly in light of cases such as *Granfinanciera*, do not receive mention.

[354] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1986).

[355] *See id.* at 2613–14 (citing *Schor*, 478 U.S. at 856). Additionally, the Court pointed to other factors that were important in *Schor*: the singular nature of the dispute, the extremely narrow class of potential common law counterclaims, the highly particularized area of law, and the applicability of a specific federal regulatory scheme. *Id.*

[356] The holding of *Schor*, as demonstrated by the Court in *Stern*, is thus exceedingly narrow. *Id.* Where common law claims are integral to the resolution of administrative claims, they are properly before an Article I tribunal provided that certain requirements are met. *Id.* The applicability of this concept in the bankruptcy context is limited.

[357] *Id.* at 2614 (citing Granfinanciera v. Nordberg, 492 U.S. 33, 54–55 (1989)).

share of the bankruptcy res," it was unconstitutionally before the Article I tribunal.[358] Here, in the context of bankruptcy litigation, the Court pinpointed an important mode of analysis. Where separation of powers concerns are implicated by a particular right, a court should look to see whether the right in question more nearly resembles a claim to a share of the bankruptcy res or some form of common law claim.

B. *The Public Rights Exception Explored*

Interestingly, in commenting upon the applicability of the tortious interference counterclaim to public rights, the Court declared that the claim "does not fall within any of the *varied formulations* of the public rights exception in this Court's cases."[359] A question is thus presented: after *Stern*, is the appropriate mode of public rights analysis one where a court should look to see whether a particular claim would qualify under the exception in each and every single one of its various permutations? Clearly, and stating the idea differently, a particular claim is more likely to qualify under the broad, multi-factorial approach espoused in *Thomas* than in *Crowell*, where the approach was undoubtedly restrictive. A pre-formulation approach would ostensibly render all cases, irrespective of temporal relation to one another, superfluous but for the most broad; stated differently, if the standard was to be governed by all, then the broadest would necessarily control all determinations.[360] Thus, the answer to the primary question cannot be of the individualistic variety; the public rights analysis is not built upon a patchwork of varied opinions where the litigant's goal is to find the one piece that fits. Instead, public rights must be viewed—like most other brands of constitutional law—as evolutionary in character. To the extent that

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[358] *Id.* (citing *Granfinanciera*, 492 U.S. at 56). Importantly, the Court here is highlighting the role of common law claims that are analogous to claims that otherwise exist in federal statutes. *Id.* Where the statutory claim can be analogized to a common law claim, it is unlikely a public right. *Id.*

[359] *See id.* (emphasis added).

[360] Arguably the "most broad" might be *Thomas*, though potentially *Schor*—the notion is merely rhetorical, and an answer is not sought here.

there are inconsistencies and contradictions, the latest in time controls.

The mode of analysis actually utilized by the Court tends to reflect an evolutionary, as opposed to piecemeal, mode. In applying the facts before it to the public rights exception, the Court initially established that the claim of tortious interference is not one that can be pursued solely by the grace of executive or legislative branches.[361] Further, it is not one that historically could have been determined exclusively by either of those branches.[362] Instead, the claim exists at state common law,[363] between two private parties. Similarly, the common law claim did not flow from a federal statutory scheme,[364] nor was it completely dependent upon, and necessarily resolved by, a claim properly before an Article I tribunal under federal law.[365] These elements, when viewed in their totality, are logical and controlled. Each element is harmonized with the other; inconsistencies have been removed. As such, when viewing the body of public rights law, it is important to review *all* of the decisions, to the extent that it does not conflict with the next in time, since each contributes to some degree.

Somewhat perplexingly, however, the Court, in the body of its public rights analysis, again raises the concept of consent.[366] Here,

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[361] *See Stern*, 131 S.Ct. at 2614 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856).).

[362] *See id.* (citing N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 68 (1982)and *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929)).

[363] Again, it is important to emphasize that, against the backdrop of the relevant public rights jurisprudence, it is not the state-based nature of the claim that differentiates it from those that might be public rights. Instead, it is common law character that controls. While it is true a claim existing solely to a particular state cannot, by definition, be a right granted solely to the Federal Government, this is only the initial stage of the analysis. As demonstrated, even claims based wholly in federal statute may not be public rights where they are analogous to rights that exist at common law.

[364] *Stern*, 131 S.Ct. 2594, 2598 (2011) (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584–85 (1985)).

[365] *Id.* (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986)).

[366] Given that defamation is constitutional before the Article I judge, whereas tortious interference is not, waiver had to invariably be discussed. *Schor*, 478 U.S. at 851. Additionally, compare waiver against the other attributes of public

though the primary party apparently consented to the resolution of, e.g., common law defamation claims before a non-Article III tribunal by filing the initial petition for bankruptcy, the secondary party did not truly consent to waiver of Article III limitations by virtue of filing the proof of claim.[367] Thus, waiver in the Court's estimation is a one-way street.[368] By filing for the protections afforded by the federal bankruptcy laws, the filer forgoes any institutional safeguards provided for by Article III. As such, the entire discussion regarding public rights drops out entirely. A creditor, conversely, is forced—as held in *Stern*—into the Bankruptcy Court by the actions of the filer, and thus consent is not achieved.[369] At the heart of this discussion is the underlying idea that it is consent, or the waiver of the institutional parameters of Article III, that saves the constitutionality of the defamation claim before the Article I court. However, this idea is predicated upon the notion that important separation of powers safeguards

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rights discussed in *Stern* and in other cases—the concept of waiver has hardly received broad, uniform treatment. In some instances, it, as a cure for Article III defects, has been foreclosed altogether. *Schor,* 478 U.S. at 851.

[367] *Id.*

[368] In some regards, it is paradoxical that the safe harbor of bankruptcy thus includes certain penalties as well. A party seeking the protections afforded by the bankruptcy laws intrinsically consents to the adjudication of Article III claims by its creditors before the Article I tribunal. However, counterclaims to the proof of claims are now, in most instances, precluded from resolution before that same Article I judge. In essence, creditors may present a host of claims per the waiver logic, but the petitioner for bankruptcy is defenseless in many respects in terms of responding to them. Such defenses must come in, presumably, at a later stage, and obviously before an Article III court. This severing of claim and counterclaim builds large, inherent penalties for the primary petitioner into the bankruptcy process.

[369] At least with respect to counterclaims in bankruptcy court, it is now clear that waiver cannot be achieved. Take, for example, the following scenario: the primary party files a petition for bankruptcy, thus, per the Court's reasoning in *Stern*, waiving any and all Article III limitations. A secondary party files a proof of claim for patent infringement. The primary party then files a counterclaim for patent invalidity. Without addressing whether invalidity is necessarily determined, as described in *Schor*, by the infringement determination, and assuming that patent validity is not a public right, then the counterclaim of invalidity is improperly before the Article I court as waiver has not been achieved.

mandated by the Constitution are susceptible to waiver in the first place.[370]

Returning to the more recognizable elements of the public rights analysis, the Court further concluded that the authority reserved to the Bankruptcy Court is hardly a particularized area of law.[371] Additionally, the Bankruptcy Court is not merely dealing with issues of fact, but also matters of law. Given the broad nature of the statutory grant of power, the Bankruptcy Court can hardly be said to be an expert agency charged with determining narrow issues—after all, at issue was the constitutionality of an Article I tribunal charged with handling the federal bankruptcy laws adjudicating state common law claims.[372] Thus, according to the majority in *Stern*, the only " 'experts' in the federal system at resolving common law [claims] . . . are the Article III courts, *and it is with those courts that [the] claim must stay*."[373]

Concluding, the Court offered what might be one of the more concise statements regarding the controlling standard with respect to this highly complex brand of constitutional jurisprudence. According to the *Stern* Court, because the case involved "the entry of a final, binding judgment *by a court*, with broad substantive jurisdiction, on a *common law cause of action*, when the action neither derives from nor depends upon any *agency regulatory regime*" it is an impermissible grant of judicial power.[374] Further to this holding, the Court enumerated on the numerous aspects

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[370] This notion is discussed *infra* Part VI.

[371] *Schor,* 478 U.S. at 851.

[372] Without belaboring the point, it is clear that expertise with respect to federal bankruptcy regulation has little, if anything, to do with common law tortious interference (or defamation, for that matter).

[373] Stern v. Marshall, 131 S.Ct. 2594, 2615 (2011) (emphasis added). In light of statements of this variety, it is clear that but for the waiver analysis applied to the defamation claim by the Court, defamation would, like tortious interference, be unconstitutional before the Article I judge per the requirements of Article III. *Id.*

[374] *Id.* at 2616 (emphasis added). Further to this point, the Court remarked that any interpretation of public rights that allows for the adjudication of such a common law claim before an Article I tribunal transforms Article III "from the guardian of individual liberty and separation of powers . . . into mere wishful thinking." *Id.*

inherent in the bankruptcy judge's power that precluded the application of the "adjunct" label.[375] These aspects are not recounted here; instead, it suffices to say that the Court concluded that the bankruptcy judge was clearly not an adjunct to the District Court.[376]

C. *Waiver*

Notably, and perhaps most interestingly in *Stern*, Justice Scalia, though while joining the majority,[377] filed a separate concurrence.[378] Justice Scalia expressed his view that the analysis regarding the public rights doctrine had become needlessly complex; the number of factors alone "should arouse suspicion that something is seriously amiss with our jurisprudence in this area."[379] More importantly, however, Justice Scalia appears to directly address the issue of waiver raised by the majority. Specifically, in his view, Article III judges should be "required in all federal adjudications, unless there is a firmly established *historical practice* to the contrary."[380] On the issue of the defamation claim, Justice Scalia remarks that "[p]erhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate . . . the subject has not been briefed, and I state no position on the matter."[381] In the context of the separation of powers analysis, this is a critical development. Here, Justice Scalia is disavowing the waiver analysis provided by otherwise would-be majority. He is declaring that where public rights do not apply, then only an entrenched historical practice can save the constitutionality of a common law claim before the non-Article III

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[375] *Id.*

[376] *Id.*

[377] As a matter of note, the dissenting Justices were Breyer, Ginsburg, Kagan, and Sotomayor. *Id.* at 2602.

[378] *Id.* at 2594 (Scalia, J., concurring). Justice Scalia mentioned in part that while he agreed with the majority's analysis of the public rights doctrine, the doctrine itself had become needlessly complex. *Id.* In his estimation, the applicability of the doctrine should be based on the identities of the parties themselves; i.e. the government as a party method. *Id.*

[379] *Id.*

[380] *Id.* (emphasis added).

[381] *Id.* at 2621.

judge.[382] In the context of the counterclaim at issue, there is no such historical practice and as such, the counterclaim is not saved.

When viewed against the backdrop of the majority's opinion, Justice Scalia's concurrence really is not about the tortious interference counterclaim at all. Instead, it is an express disavowal of the waiver analysis used to save the constitutionality of the defamation claim. As such, serious questions continue to abound regarding the constitutionality of, e.g., common law claims in non-Article III tribunals. If public rights do not apply, and if waiver cannot cure the defect, on what grounds is the claim thus before the Article I judge? Obviously, there are infirmities here, and the separation of powers issue is ripe for additional challenges.

IV. PATENTS AND THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Though the analysis required for a determination of whether a jury trial right applies under the Seventh Amendment is not an exact match of the public rights calculus, there are, as discussed in some of the aforementioned public rights cases, extensive homologies. As such, a discussion of the Seventh Amendment right, as applied to the matters of patent validity and patent infringement, is meritorious to the extent that the analysis may also be applied to the public rights determination. This is especially true given the generally conclusory, unsupported nature of *Patlex* and *Joy*.[383] Where *Patlex* and *Joy* merely state a result, the Federal Circuit's decision regarding the jury trial right embarks upon an in-depth, albeit complex, analysis of patents in a common law-or-equity context.[384] As such, this analysis is "borrowed" for the purposes of being directly applied under the public rights rubric.

Historically, the Supreme Court had determined that the matter of patent validity was a legal issue and thus any determination regarding the same by reason of unpatentability must proceed in a

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[382] *Id.*

[383] *See generally* Joy Techs., Inc. v. Manbeck, 959 F.2d 226 (Fed. Cir. 1992); Patlex v. Mossinghoff, 758 F.2d 594 (Fed. Cir. 1985).

[384] *See Patlex*, 758 F.2d 594, 604; *Joy*, 959 F.2d 226, 228–29.

court of law.[385] Though acknowledging that the ancestral English writ of *scire facias* allowed for the resolution of suits brought to cancel a *fraudulently* obtained patent in courts of equity,[386] these writs had little relevance to whether claims of unpatentability should be tried. Such claims belonged in the courts of law.[387] As such, a constituent jury trial right attached.

After *Tull v. United States*,[388] the analysis required to determine whether a jury trial right attached to a particular cause of action under the Seventh Amendment became more complicated. Specifically, where presented with the question, a court must determine if a particular action entails adjudication of legal rights, or, conversely, the utilization of legal remedies.[389] Where such rights or remedies are found, a court must honor a litigant's demand for a jury trial under the Amendment.[390] In *In re Lockwood*,[391] the Federal Circuit applied this doctrine to a case where invalidity was raised as a defense to an infringement

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[385] United States v. Am. Bell Tel. Co., 128 U.S. 315, 365 (1888).

[386] *See id.* at 360. In later decisions, the writ of *scire facias* has been analogized to a claim of inequitable conduct. *See, e.g.*, Kingsdown Med. Consultants v. Hollister Inc., 863 F.2d 867, 876 (Fed. Cir. 1988).

[387] *Am. Bell*, 128 U.S. at 365. On this point, the Court declared "[p]atents are sometimes issued unadvisedly or by *mistake* . . . [i]n such cases courts of law will pronounce them void." *Id.* (emphasis added). Here, the Supreme Court declares that the fact that governmental mistakes may lead to the issuance of patents supports the finding that such issues regarding validity belong to the sole purview of the courts of law. *Id.* Compare against *Patlex*, where the Federal Circuit uses the concept of governmental mistake to create a public rights carve out. *Patlex*, 758 F.2d at 602.

[388] 481 U.S. 412 (1987).

[389] *Id.* at 417.

[390] *Id.* at 427.

[391] 50 F.3d 966, 976 (Fed. Cir. 1995), *vacated sub nom.* Am. Airlines, Inc. v. Lockwood, 515 U.S. 1182 (1995). Though the decision was vacated by the Supreme Court, the analysis expressed therein regarding the jury trial right as applied to patents was expressly adopted by the Federal Circuit in later decisions: "The Supreme Court vacated *Lockwood* without explanation. Thus, our analysis has been neither supplanted nor questioned. Although no longer binding, we find its reasoning pertinent." Tegal Corp. v. Tokyo Electron Am., Inc., 257 F.3d 1331, 1340 (Fed. Cir. 2001).

claim.[392] Though the infringement claim was accompanied by a request for damages, the infringement claim, as well as the constituent damages request, was dismissed on summary judgment, thus leaving only the invalidity defense claim.[393] Thus, the Federal Circuit sought to determine whether, under the Seventh Amendment, a jury trial right applied where damages had been removed from a lawsuit.[394]

It is not the act of filing for the declaratory judgment itself that resolves the question; it is the nature of the implicated controversies that is dispositive. Where there is a declaratory judgment action, however, the court must look at the suit from its "inverted" standpoint.[395] More precisely, if the identities of the plaintiff and defendant are reversed, and if the plaintiff would have been a defendant at common law, then there is a jury trial right associated with the declaratory judgment.[396] Thus, if according to eighteenth century English practice, a defendant to an infringement action alleging invalidity had a jury trial right, then that same party, as plaintiff in a declaratory judgment action, would enjoy the same jury right. Perhaps more clearly, and according to eighteenth century English rule, actions for patent infringement could

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[392] *Lockwood*, 50 F.3d at 968. Interestingly, the Federal Circuit conceded in a footnote that the Seventh Amendment does not entitle a party to a jury trial if Congress has assigned the adjudication of a public right exclusively to an administrative agency. On this point, the Federal Circuit declared:

> [h]owever, as '[n]o one disputes that an action for [a declaration of patent invalidity] may properly be brought in an Article III court,' this limitation on Seventh Amendment protection 'does not affect our analysis' . . . [thus] litigation concerning those patent rights in Article III courts comes with the protections provided by the Seventh Amendment.

Id. at 972 n.5 (citing Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 565 n.4 (1990)). Compare this statement against the Circuit's holding in *Joy*. If public rights, by definition, do not have a requirement regarding a jury trial obligation, then how do patent matters with a jury trial right under the Seventh Amendment comport with the Circuit's prior holdings regarding public rights?

[393] *Id.* at 968.

[394] *Id.*

[395] *Id.* at 972.

[396] *Id.*

traditionally be raised in both actions at *law* and at *equity*.[397] The patentee could sue for infringement at either law or equity depending upon the relief requested. Where damages were at issue, the relief was legal in nature and thus the issue was tried, where desired, to the jury. Conversely, where the patentee merely sought to enjoin future acts of infringement, the relief sought was wholly equitable. As such, the patentee did not have a jury trial right in this instance. In essence, then, the patentee had a choice as to whether a jury would participate in the proceedings. Applying the inversion method, and where damages are present in the action, the filer of the declaratory judgment regarding invalidity thus maintains the right to make this choice.[398]

Later decisions by the Federal Circuit further expounded upon this holding.[399] In *Tegal*, for example, a jury trial had been requested by a party alleging patent infringement and further seeking damages. The accused infringer did not file a counterclaim, and instead only asserted affirmative defenses, including invalidity. Six days before the onset of trial, the plaintiff withdrew the request for damages. The Federal Circuit was thus presented with the question as to whether the plaintiff, by voluntarily withdrawing the damages claim, had rendered the issue wholly equitable in nature.[400] The test for the applicability of the jury trial right, as seen in *Lockwood*, turns on whether the case is more similar to cases tried in courts of law than to cases tried in courts of equity. Thus, both the nature of the action involved and the desired remedy must be evaluated. To the extent that the

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[397] *Id.* at 976. Consider the importance of this statement in the context of the public rights analysis.

[398] *Id.* It is worth noting that though damages were no longer in the suit, the issue was disposed by virtue of a decision on the merits. Compare against a suit where a litigant voluntarily withdraws a request for damages. Here, the jury trial right does not attach.

[399] To a certain extent, as discussed, these later decisions render it precedential by adopting its analysis.

[400] This determines whether the plaintiff's issue precluded any right to a jury trial.

criteria are in conflict, the nature of the remedy controls.[401] With respect to the nature of the patent infringement action, the *Tegal* court again leaned on *Lockwood.* Specifically, in eighteenth-century England, patent infringement could be determined at law or equity. Thus, the infringement was, by its nature, capable of dualistic application. The determining factor thus rested with the nature of the remedy sought. As already discussed, where the desired remedy is purely equitable in nature, then there cannot be a right to a jury trial.

In light of these important cases, it should be apparent that the claims of patent validity and patent infringement fall into one of two molds, depending upon the remedy sought. Where damages are implicated, the claims are traditionally under common law and thus give rise to the right to a jury trial under the Seventh Amendment. Where the desired remedy is purely injunctive in character, then the claims were historically resolved in courts of equity. In either variant, the matters of patent validity and patent infringement have an extensive history steeped in law or equity. The Federal Circuit has conceded as much in its numerous cases discussing the issue.[402] Viewed in the framework of the public rights jurisprudence, these findings are probative.

V. PATENTS FOR LAND, PATENTS FOR INTELLECTUAL PROPERTY, AND THE CONSTITUTIONAL RIGHTS INHERENT TO EACH

> A patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by

[401] Tegal Corp. v. Tokyo Electron Am., Inc., 257 F.3d at 1340 (Fed. Cir. 2001). Given that the nature of the remedy supersedes, where the remedy unequivocally establishes a result, then the analysis is necessarily complete.

[402] Though not addressed here, other Federal Circuit cases establish the same result. *See, e.g., In re* Tech. Licensing Corp., 423 F.3d 1286, 1291 (Fed. Cir. 2005).

> the same sanctions.[403] [They share] in the bundle of rights that are commonly characterized as property.[404]

Patents for land and patents for intellectual property one critical trait—they are the highest evidence of title, conclusive against the government, of a particular property right. Unlike patents for intellectual property, however, where patents for land are concerned, there is an extensive body of Supreme Court jurisprudence discussing when, and under what circumstances, an Article I tribunal may, per the requirements of the Constitution, tamper with its perceived validity. Though many of these cases are dated, they are still controlling law today. Given that patents for intellectual property share in the same "bundle of rights" as patents for land, land cases discussing separation of powers concerns where land patents are implicated carry a special relevance. Where there is a complete absence of meaningful jurisprudence discussing separation of powers and patents for invention, there is an overabundance where patents for land are at issue. In light of the inseparable bond linking these two legal mechanisms,[405] the Supreme Court's cases discussing Article III and land patents are highly relevant in the context of the public rights analysis.

A. *Patents for Land*

In the case of *U.S. v. Stone*, the Supreme Court confronted the question of whether an Article I tribunal vested with the authority to grant a patent for land retained the ability to later void and revoke such grants where evidence of fraud, mistake, or absence of

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[403] Patlex v. Mossinghoff, 758 F.2d 594, 599 (Fed. Cir. 1985) (quoting Consol. Fruit-Jar Co. v. Wright, 94 U.S. 92, 96 (1877)) (acknowledging that patents for land and patents for intellectual property share in the same foundation and thus further share the same bundle of rights).

[404] *Id.* at 599 (citing Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1577–78 (Fed. Cir. 1983)).

[405] Compare the constitutional source of congressional authority for each variety of patent: "Congress shall have power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

legal authority was presented.[406] In resolving this question, the Court unequivocally declared, in the first line of its opinion, that "a patent is the highest evidence of title, and is conclusive as against the Government . . . until it is set aside or annulled by some *judicial tribunal*."[407] Further to this point, and of particular importance in terms of undermining the mistake-based reasoning presented by the Federal Circuit in its *Patlex* decision, the Court clarified that where:

> Patents are sometimes issued unadvisedly or by mistake . . . courts of law will pronounce them void . . . [as] one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.[408]

Thus, though while the act of issuing a patent is purely ministerial in character and hence properly subject to Article I determination, any additional act that seeks to either cancel or annul such a patent—irrespective of the nature and identity of underlying infirmity—is holistically judicial in character. As such, and according to Supreme Court precedent, actions that seek termination of a patent rest wholly within the authority of the Article III judiciary. In the context of *Stone*, this meant that the Secretary of the Interior overstepped the bounds of his constitutional authority when he revoked the patent issued by his predecessors.

The next case, *Moore v. Robbins*,[409] follows in a similar mold, and asks whether the Article I Secretary of the Interior was constitutionally competent to rescind a patent for land where multiple parties claimed ownership over the same land.[410] Here, the Court held that once:

> the patent has been awarded . . . and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title

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[406] 69 U.S. 525 (1865) (noting that the referred-to office is the Secretary of the Interior and "his predecessors").

[407] *Id.* at 535 (emphasis added).

[408] *Id.* (comparing this against *Patlex*, 758 F.2d at 601, where the Federal Circuit validated the Article I USPTO's ability to recapture administrative jurisdiction over an issued patent "in order to remedy any defects in the examination").

[409] 96 U.S. 530 (1878).

[410] *Id.* at 534.

> has passed from the land office. Not only has it passed from the land-office, but it has passed from the *Executive* Department of the government.[411]

As such, when a patent is issued, the title insulates the private party from any and all authority or control on the behalf of the executive branch. Evidence of fraud, mistake, error, or wrongdoing does not change that fact—instead, the Judiciary retains exclusive ability to present the appropriate remedy. As such, the Secretary of the Interior "is absolutely without authority" to revoke an issued patent.[412] This is true even where the Article I "officers have, *by a mistake of law*, given to one man the land which on the undisputed facts belonged to another."[413]

B. *Patents for Invention*

In a case where the U.S. government had made use of a patented invention without first obtaining a license or providing just compensation, the Supreme Court unequivocally declared "that an invention so secured is property in the holder of the patent, and that as such the right of the holder *is as much entitled to protection as any other property.*"[414] As provided for by the Constitution, all forms of private property, including patents for invention, cannot be taken for public use without just compensation.[415] Employment by the government is no defense where an employee has converted the private intellectual property of another with neither consent nor license for purposes related to

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[411] *Id.* at 532 (emphasis added).

[412] *Id.* at 534. Further to the points above, the Court in *Moore* goes on to declare that but for this rule, a patent, "instead of being the safe and assured evidence of ownership which they are generally supposed to be, would always be subject to the fluctuating, and in many cases unreliable, action of the [Article I][ ] office. No man could buy the grantee with safety, because he could only convey subject to the right of the officers of government to annul his title . . . [t]he existence of any such power in the [Article I][ ] Department is utterly inconsistent with the universal principle on which the right of private property is founded." *Id.*

[413] *Id.* at 535 (emphasis added).

[414] Cammeyer v. Newton, 94 U.S. 225, 226 (1877) (emphasis added).

[415] Exceptions include extreme necessity in time of war or immediate and impending public danger. *Id.* at 234. Neither exception applied to the patent at issue.

public use. Where private property is concerned—existing as either land or invention—agents of the government have no more right to take the land than other, private individuals.[416] Importantly, this case strongly evidences the notion that patents for land and patents for intellectual properly are, in terms of the rights at stake, essentially homologous.[417]

In the context of a discussion regarding patents for invention, patents for land, and the underlying, shared rights necessarily applicable to each, *U.S. v. American Bell Telephone Co.*[418] is a particularly important case. At issue in this case was, in part, a question of whether the circuit courts had the constitutional authority to cancel and set aside patents that were otherwise issued improperly. At the outset, the Court established—in a tenor that should now sound familiar—that the "power, therefore, to issue a patent for an invention, and the authority to issue such an instrument for a grant of land, emanate from the same source . . . are of the same nature, character and validity, and imply in each case the exercise of power of the government according to modes regulated by acts of Congress."[419] Additionally, and further synonymous with patents for land, the process governing the issuance of patents "is not the exercise of any prerogative power or discretion by the President or by any other officer of the government, but it is the result of a course of proceeding, quasi judicial in its character, and is not subject to be repealed or revoked by the President, the Secretary of the Interior, *or the*

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[416] This point is reinforced in the Court's later cases; "[t]hat the government of the United States when it grants letters-patents for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt." James v. Campbell, 104 U.S. 356, 357 (1882).

[417] Stated perhaps more clearly, the *Cammeyer* Court established that the rights available to land patents are directly applicable to patents for invention. *Cammeyer*, 94 U.S. at 226. That one pertains to physical property, whereas the other covers invention, neither separates nor distinguishes the bundle of rights applicable to both.

[418] 128 U.S. 315 (1888).

[419] *Id.* at 358–59.

Commissioner of Patents, once issued."[420] Importantly, and particularly relevant in the context of patents and public rights, the Court then declared that "[t]he only authority competent to set a patent aside, or annul it, or to correct it, *for any reason whatever*, is vested in the judicial department of the government, and this can only be effected by proper proceedings taken in the courts of the United States."[421] Thus, the circuit courts retained constitutional authority over determinations affecting the validity of issued patents for both land and invention.[422]

In *Iron Silver Mining Co. v. Campbell*,[423] a case devoted solely to addressing the rights applicable to patents for land,[424] the Court again addressed a dispute where the government had twice issued, to separate entities, a patent covering the same parcel of property.[425] Specifically at issue was the question of whether one or both parties could be called to answer with respect to the validity of the land patent before the officers of the Land Department. In resolving this question, the Court held that U.S. government lacked the constitutional ability, by the authority of its own executive or legislative officers, to invalidate a patent by issuing a second one devoted to same property. More generally, the Court reiterated "we are of opinion that [patent validity] is

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[420] *Id.* at 363 (emphasis added).

[421] *Id.* at 363 (emphasis added). This case, though dated, is Supreme Court precedent and remains controlling authority today. In the context of the public rights analysis, it's difficult, if not impossible, to reconcile the statements of *Patlex* and *Joy* with Supreme Court authority (such as *American Bell*) which very clearly reserves the adjudication of patent validity to the Article III judiciary. The concept of "governmental mistake" cannot be a carve out—it is emphatically disclaimed by the Court.

[422] Justice Bradley, writing for the Court in *U.S. v. Palmer*, related this concept in memorable fashion: "[t]he government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent [for invention] the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor." 128 U.S. 262, 271 (1888).

[423] 135 U.S. 286 (1890).

[424] The analysis extends, by proxy, to patents for invention as well. *See, e.g.*, United States v. Am. Bell Tel. Co., 128 U.S. 315, 358–59 (1888).

[425] Iron Silver Mining Co. v. Campbell, 135 U.S. 286 (1890).

always and ultimately a question of judicial cognizance."[426] Thus patent validity, irrespective of the mechanism employed, fell beyond the constitutional purview reserved for the Article I Land Department. Apparently believing that its point had not yet been understood, the Court again reminded the Executive and Legislative branches that "[w]e have more than once held that when the government has issued and delivered its patents for lands of the United States, the control of the department over the title to such land has ceased . . . and we do not believe that, as a general rule, the man who has obtained a patent from the government can be called to answer in regard to that patent before the officers of the land department of the government."[427] In light of the broadened post-issuance review power granted to the Article I Patent Trial and Appeal Board by the America Invents Act, this controlling statement holds particular relevance.

In yet another case dealing with Article I and issued patents for land, the Court in *Noble v. Union River Logging Railroad Co.*[428] held that the revocation of a granted land patent by an Article I officer "deprive[d] the plaintiff of its property without due process of law."[429] Citing to *Moore*, the *Noble* Court established that because the cancellation of patent was a judicial act that required the judgment of a court, any annulment by an Article I officer amounted to an unconstitutional deprivation of due process.[430] Once a patent has been executed and issued, "the land . . . has

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[426] *Id.* at 293. Further to this point, the Court explains that determinations impacting validity invariably are of the variety "requiring judgment, discretion, knowledge of the law and balancing of testimony, [and] are essential to the exercise of the right to grant the property." *Id.* As such, and according to the Court, patent validity determinations are incapable of Article I resolution. *Id.*

[427] *Id.* at 301–02.

[428] 147 U.S. 165 (1893).

[429] *Id.* at 176.

[430] Additional cases further explore and address due process and its role in determinations affecting patents for intellectual property. *See, e.g.*, Leesona Corp. v. U.S., 599 F.2d 958, 964 (Ct. Cl. 1979) (discussing eminent domain and due process as applied to taking of patented intellectual property by the U.S. Government); Johnson & Johnson, Inc. v. Wallace A. Erickson & Co., 627 F.2d 57, 62 (7th Cir. 1980) (holding that any order compelling a patentee to initiate a reissue proceeding and thus surrender her property right amounts to an unconstitutional taking of property without due process of law).

passed from the government, and the power of these officers to deal with it has also passed away."[431] As such, any decision made by the Article I officer affecting the validity of the issued patent not only represented an unconstitutional usurpation of judicial power, but also an impermissible deprivation of due process of law.

As these cases and others demonstrate, it is well established that patents for invention and patents for land mimic each other in terms of the controlling rights inherent to each.[432] Where patents for land are concerned, once a patent issues it forever leaves the constitutional grip of the Article I officer that promoted its ratification. Given the near conjoined nature of the various opinions, one can only surmise that at the end of the nineteenth century the non-judicial branches of American government were rapidly testing the waters in terms of attempting to identify the proverbial loophole to the judiciary's tightening grip on patent adjudication. Certainly the judiciary recognized this, and thus on this point, and as the discussion above illustrates, the Court was abundantly clear—where patents for both land and invention were concerned, once the patents issued, any further involvement by an Article I officer was constitutionally foreclosed. In the context of public rights, where the nature of the right in question is invariably linked to the determination of constitutionality, decisions of this variety are undeniably critical.

VI. WAIVER AS A MECHANISM FOR CURING SEPARATION OF POWERS DEFECTS

Where a patent is before a bankruptcy court under the aforementioned counterclaim provision, the concept of waiver as to any constitutional, Article III limitation cannot apply. However, though waiver does not apply to the counterclaim in bankruptcy, consent was the apparent anodyne that allowed the Article I

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[431] *Noble*, 147 U.S. at 177; *see also* Michigan Land and Lumber Co. v. Rust, 168 U.S. 589, 593 (1897) (remarking that "[a]fter the issue of the patent the [disputed patent validity] becomes subject to inquiry only in the courts and by judicial proceeding").

[432] *Id.*

bankruptcy court to issue a final decision on the common law defamation claim. In light of this dichotomy, this discussion of waiver and Article III does not directly implicate patents and the counterclaim provision. Instead, it signifies broader ramifications for *all* claims at common law before Article I tribunals. If the consent analysis is cleaved from the *Stern* decision, the underlying question becomes clearer: what saves defamation? Justices Roberts, Kennedy, Thomas, and Alito suggest consent; Justice Scalia, though joining the aforementioned Justices in most substantive aspects of the opinion, declines to ratify the waiver doctrine.[433] He suggests that the answer may lie in an analysis of historical practice. Neither suggested mode, however, finds support nor foundation in judicial precedent. Thus, notions of waiver and historical practice currently exist as mere, proposed remedies; the accepted cure for what has now become a near system-wide defect remains undefined.

In one of the more profound ironies existing in modern-day American jurisprudence, the extensive body of case law addressing the bounds of what qualifies under the public rights exception has failed to ratify the exact mechanism that generally saves the adjudication of judicial claims before modern-day Article I tribunals. The Court has declined to confirm that the separation of powers requirement mandated by Article III is a personal right susceptible to waiver by an individual. Thus, though the public rights exception has been addressed repeatedly—its application complex and multi-faceted—the Court has never acknowledged whether the most oft-utilized mechanism for remedying Article III defects passes constitutional muster. Instead, the issue has only been addressed by pluralities, concurrences, and dissents on both sides of the proverbial coin. To this end, the Court, both past and present, has cited to a litany of cases for the proposition that Article III limitations either can or cannot be waived. These cases, including those recently cited by Chief Justice Roberts in *Stern*, are

[433] "Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate . . . the subject has not been briefed, and so I state no position on the matter." Stern v. Marshall, 131 S.Ct. 2594, 2621 (2011) (Scalia, J. concurring). Statements of this variety appear to indicate that this issue is ripe for judicial challenge.

only tangentially related to critically important concept of waiver as applied to Article III and thus bear little relevance to the discussion.[434]

In *Stern*, four of the five Justices composing the majority appeared to agree with the notion that consent is a viable mechanism for curing Article III defects.[435] The fifth Justice, however, declined to join this portion of the otherwise-majority opinion and suggested that defamation was properly before the Article I court by virtue of a historical practice that legitimized the jurisdiction.[436] Given the lack of relevant precedent on the subject,

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[434] *See, e.g.*, United States v. Griffin, 303 U.S. 226, 229 (1938) (holding waiver inapplicable and inappropriate where private litigants sought to consent to a hearing by a federal District Court lacking subject matter jurisdiction); Buckley v. Valeo, 424 U.S. 1 (1976) (establishing that the Constitution does not include a complete, hermetic sealing off of the three branches of government); Nixon v. Admin'r of Gen. Servs., 433 U.S. 425, 443 (1977) (holding that separation of powers, as applied to Executive and Legislative branches, was not absolute and only those Acts which threatened to disrupt the constitutionally-mandated functions of the Executive Branch violated the principle); United States v. Olano, 507 U.S. 725, 733 (1993) (holding the personal right to a criminal trial is subject to waiver by a litigant); Bond v. United States, 131 S.Ct. 2355 (2011) (deciding that a private litigant has standing to challenge a law as violative of federalism and separation-of-powers limitations. That an individual has standing to challenge alleged violations of federalism has no bearing on whether that same individual can waive, where a claim has previously been found to be adverse to the requirements of the Constitution, the same federalism concerns.). The *Olano* decision confirmed that the personal right to a jury trial is amenable to waiver, in so holding the Court remarked that waiver may occur "before a tribunal *having jurisdiction* to determine [the issue]." *Olano*, 507 U.S. at 731 (emphasis added) (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)). Further, the Court held that "[w]hether a particular right is waivable . . . all depend[s] on the right at stake." *Id.* at 733. Interestingly, and despite these statements, Chief Justice Roberts cited to *Olano* in *Stern* to support his implied assertion that the requirements of Article III are subject to waiver. Stern,131 S.Ct. at 2608. However, *Olano* merely established that the personal right to a criminal trial is subject to forfeiture by consent. *Olano*, 507 U.S. at 742. That *Olano* was the chosen precedential cornerstone regarding waiver in *Stern* is illustrative.

[435] *See Stern*, 131 S.Ct. at 2608.

[436] *See id.* at 2620. Historical practice as a means of clearing Article III deficiencies, beyond whatever analogy it might have to the public rights

and further given that the Court declined to establish waiver theory as law, all that remains clear after *Stern* is that the majority approved the adjudication of the defamation claim by the bankruptcy court. What remains unclear, however, is why the defamation claim survives scrutiny—certainly, for many of the same reasons that tortious interference falls from the grasp of the public rights exception, defamation does too. Thus this exception, in all reasonable likelihood, does not apply. Further, and as discussed, waiver cannot cure the defect as it is not an established caveat to the public rights rule. Historical practice may provide a foothold, but waiver as a means for dismissing Article III is concurrence dicta and little more. In essence, the Court in *Stern* declined to provide reason or doctrinal base legitimizing why it cleared the defamation claim through the Article III filter. Thus, though it is there, we do not know why.[437] Given the vast importance ascribed to the modern-day administrative scheme and its role in assisting the judiciary, the failure to provide clear reasoning with respect to this issue continues to be surprising.

The lack of clarity on this issue is problematic. In what has become a truly startling development in this area of law, where Article III challenges arise in arbitration proceedings, judges almost uniformly cite to *Schor* for the idea that waiver cures all perceived defect under Article III.[438] But recall that *Schor* did not establish this outright; instead, consent appeared as only one factor to consider in Justice O'Connor's otherwise complicated and multi-faceted analysis.[439] Additionally, the Court in *Schor*

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exception, has not received affirmation by the Court's precedents. Instead, it suggests a standard that the Court might adopt in the future.

[437] The Court in *Stern* cites extensively to the public rights exception and expends considerable effort explaining what it is and how it applies. *See id.* at 2598. Despite these efforts, however, the Court in *Stern* somewhat paradoxically decides to apply the standard in one context while ignoring it in another.

[438] Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1200 (2008) (commenting that "many courts have rejected Article III challenges to arbitration with a simple statement about waiver and a perfunctory cite to *Schor*").

[439] Many of these factors were not adopted in later decisions on the subject. *See, e.g.*, Granfinanciera v. Nordberg, 492 U.S. 33 (1989).

unequivocally declared that "[w]hen these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect."[440] Thus, in practical application, *Schor* arguably stands diametrically opposed to what it is routinely cited for with respect to alleviating perceived Article III infractions in arbitration proceedings.[441] To the extent that this is not demonstrative of a brand of systemic judicial confusion underlying the constitutional allocation of responsibilities required by separation of powers, then little exists that is.

In the absence of clear judicial guidance on this critical issue, many scholars have opined on the matter. Some have argued that because the Article III mandate is institutional as opposed to personal, it is not susceptible to waiver.[442] Personal rights only impact the litigant who is choosing to dismiss them; institutional rights, however, carry broader organizational implications even though only an individual may choose to remove them.[443] Others have argued that by the text of the Articles themselves and the historical intent of the framers as demonstrated in *The Federalist No. 79* waiver inappropriately applies to Article III.[444] These arguments are complicated, and this Article does not seek to reproduce them here. What is clear, however, is that the courts have declined to provide controlling guidance on the subject. Where the proof of claim for common law defamation survives and the counterclaim of tortious interference does not, the Court appears to be acquiescing to predominant pragmatic concerns related to the perceived future, continued functionality of the Bankruptcy Court. Thus, the general usefulness of the Bankruptcy Court was preserved and the Court's hesitancy to confirm waiver doctrine remained intact. The end result is a defamation claim that survives on presumed common-sense underpinnings but is otherwise unsupported by the applicable constitutional law—the

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[440] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

[441] These apply to Article III, nonetheless.

[442] *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233, 259 (1990).

[443] *Id.*

[444] *See* Rutledge, *supra* note 438 at 1198–99.

role of the public rights gatekeeper, the enforcer of the separation of powers, is thus muddled.

In light of the foregoing discussion, waiver is not an established means for curing separation of powers defects. It is merely a proposed mechanism that has never received the complete blessings of the Court and currently exists as a suggested caveat to what is an exceedingly complex and conflicted doctrine. A suggested caveat, however, is not rule—though lower courts appear to apply waiver as a misguided rule under the rubric of *Schor*, a litigant cannot point to consent in a constitutional context and expect absolution. After *Stern*, what is known is that the Court approved of the adjudication of a defamation proof of claim before the Article I Bankruptcy Court without agreeing or explaining why it was there. In this capacity, the holding of *Stern* is extremely narrow.[445] Where looking to determine whether a particular claim falls within public rights, waiver is not a factor at all—or, to the extent that it may be considered, it is merely one non-dispositive factor of many.[446] Thus, it appears that where a litigant is forced into an Article I tribunal by virtue of a consent analysis, the aggrieved party may have firm constitutional foundation for challenging the holding.

VII. THE FEDERAL CIRCUIT RULES ON THE INTERNATIONAL TRADE COMMISSION'S ABILITY TO ISSUE FINAL, BINDING JUDGMENTS

Interestingly, when the Federal Circuit visited the Article I International Trade Commission's (ITC) ability to issue final, binding judgments on claims of patent invalidity and infringement,

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[445] Narrow *and* paradoxical; *Stern* only establishes that defamation is not precluded from Article I adjudication—but why? Are there attributes inherent and idiosyncratic to the claim of defamation that renders it generally immune from separation of powers constraints? Will a claim of defamation pass constitutional muster as a counterclaim in bankruptcy court? If not a public right, then what is it?

[446] This notion has received only very limited support from the Court's varied opinions on the subject.

it did not embark upon a discussion of public rights.[447] Instead, it adopted a distinct, unique standard grounded in both statutory construction and Congressional intent. In light of the somewhat spontaneous adoption of these standards governing the scope of permissible subject matter heard before Article I tribunals, the forces delineating separation of powers potentially have become, to a degree, further muddled. Still, and irrespective of the chosen mode, the Federal Circuit declared that the Article I ITC does not have authority to issue final judgments on the matters of patent validity and infringement. In the context of an analysis of the bankruptcy tribunal, this is a telling result.

The Federal Circuit first addressed the issue of the ITC's scope of authority in *Tandon Corp. v. International Trade Commission*.[448] On appeal, the court in *Tandon* was asked to overrule a final determination by the ITC Commission that a particular patent was not infringed.[449] The court affirmed, on the basis that the substantial evidence supported the Commission's determination of noninfringement.[450] In so finding, the Federal Circuit remarked that though the substantial evidence standard of review applied to ITC determinations carries less discretion and flexibility than the clearly erroneous standard reserved for review of trial court determinations, the ITC decisions themselves do not have a *res judicata* effect and thus do not estop fresh consideration by other tribunals.[451] Given that the primary responsibility of the ITC is to administer the trade laws—and not the patent laws—"[t]he Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws . . . it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel

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[447] The Federal Circuit's cases on the subject neither mention nor discuss public rights or separation of powers. As such, the reader is left to guess whether the court's discussion is intended to replace the public rights analysis or, conversely, that the public rights analysis has, in light of *Patlex* and *Joy*, already been completed.

[448] 831 F.2d 1017, 1021 (Fed. Cir. 1987).

[449] *Id.*

[450] *Id.*

[451] *Id.*

effect in cases before such courts."[452] Thus, though ITC determinations of the patent laws may be reviewed under a more restrictive brand of standard of review, the decisions themselves are not binding.

This issue was revisited by the Federal Circuit in *Texas Instruments v. Cypress Semiconductor Corp.*[453] Here, the Federal Circuit was asked on appeal to overturn a finding of noninfringement by a district court.[454] In a separate and parallel action, and prior to the district court's ruling, the ITC found that the patents in question were infringed.[455] On appeal, the Federal Circuit affirmed the Commission's finding under the substantial evidence standard.[456] Thus, the Federal Circuit was presented with the question as to whether an ITC determination of a patent-related matter that had been affirmed by the Federal Circuit carried preclusive effect relative to the district court action.[457] In answering this question, the court remarked that in order for there to be issue preclusion, there must be, *inter alia*, a valid and final judgment.[458] According to the Federal Circuit, though "[t]he decision of an administrative agency may be given preclusive effect in a federal court when, as here, the agency *acted in a judicial capacity* . . . an administrative agency decision . . . cannot have preclusive effect when Congress . . . *indicated that it intended otherwise*."[459] Given that the court had already established that Congress did not intend to grant preclusive power to the ITC determinations of patent-related subject matter, the decision of the ITC, even when affirmed by the Federal Circuit, carried no preclusive effect when applied to the parallel district court proceedings.[460] Thus, the ITC's determination was, in effect,

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[452] *Id.* at 1019 (quoting S. Rep. No. 1298, 9.3d Cong., 2d Sess. 196).
[453] 90 F.3d 1558, 1561 (Fed. Cir. 1996).
[454] *Id.*
[455] *Id.* at 1562.
[456] *Id* at 1561.
[457] *Id.* at 1568.
[458] *Id.*
[459] *Id.* at 1568 (emphasis added).
[460] *Id.*

neither valid nor final—at least as applied to the issue preclusion calculus.

Strikingly, the Federal Circuit, in its decisions of *Tandon* and *Texas Instruments*, appears to disavow the public rights dichotomy altogether.[461] Certainly, the Circuit was aware of the exception, as evidenced by its decisions in *Patlex* (1985) and *Joy* (1992). But *Patlex* and *Joy* dealt with public rights as applied to the Article I USPTO's authority to deal with issues of validity where reexamination and reissue procedures applied.[462] In *Patlex* and *Joy*, the Federal Circuit forged a narrow carve out under the public rights doctrine so as to allow these important administrative functions to continue.[463] In *Texas Instruments*, the Federal Circuit appears to simultaneously ignore both the limitations of its own public rights decisions as well as the entire body of the Supreme Court's public rights jurisprudence generally.[464] Specifically, the Circuit's declaration that any decision of an administrative agency may be granted preclusive effect where it merely "acted in a judicial capacity" both grossly misstates and directly contravenes the Supreme Court's rulings governing separation of powers.[465] If the question were merely one of whether Congress "intended" to grant judicial power to a particular administrative agency, irrespective of identity or function of the right in question, then the important separation of powers mandate guaranteed by the Constitution dissolves entirely.

Also interestingly, and aside from the perceived role of congressional intent in separation of powers determinations, the Federal Circuit curiously declared in *Texas Instruments* that "allowing prior ITC decisions on patent infringement questions to have preclusive effect would potentially deprive the parties of their Seventh Amendment right to a jury trial on the issue of

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[461] *See* Tandon Corp. v. Int'l Trade Comm'n, 831 F.2d 1017, 1021 (Fed. Cir. 1987); *Texas Instruments*, 90 F.3d.at 1568.

[462] Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604; Joy Techs., Inc. v. Manbeck, 959 F.2d 226, 228 (Fed. Cir. 1992).

[463] *Patlex Corp.*, 758 F.2d at 605; *Joy*, 959 F.2d at 229.

[464] *See generally Texas Instruments*, 90 F.3d. 1558.

[465] *See* Stern v. Marshall, 131 S.Ct. 2594, 2615 (2011).

infringement."[466] As has been discussed, the Seventh Amendment right to a jury trial is a personal right—as opposed to an institutional safeguard—and is thus subject to waiver.[467] As such, it is unclear on what basis, if any, the Circuit believes that the application of this right precludes a determination by an administrative agency over any one issue. Instead, the question as to whether a jury trial right applies in the first instance is important in that it bears on the question of whether a particular claim is or is not a public right. This statement on the relevance of the Seventh Amendment jury trial right by the court in *Texas Instruments* is perplexing, and it is indicative of a lack of clarity in this important and complex brand of law.

It must be admitted that the scope of authority[468] granted to the ITC is not directly related to the question of whether patent-related claims fall within the definition of what are "public rights." Is it, however, indicative. In *Tandon* and *Texas Instruments*, the Federal Circuit appears to have conjured a separation of powers standard of its own making, and declared that where Congress intended an administrative agency to operate in a judicial capacity, the decisions of that agency were afforded preclusive powers. It is unclear where this standard finds its roots, and it very well may be that, given the stark, obvious constitutional infirmities inherent to both *Joy* and *Patlex*, the Federal Circuit sought to devise a new standard that would serve the interests of the USPTO well. After all, it would be all but impossible to argue that the Congress did not intend the USPTO to hold adjudicatory power over of issues of, e.g., invalidity and infringement. Applying this standard[469] (maybe only provocatively, and setting speculative discussions of its origins aside) it is unclear on what basis, if any, an Article I tribunal assigned to the administration of the Federal Bankruptcy laws would have authority to issue final, binding decisions on questions related to patents. Under *Tandon*, substituting

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[466] *Texas Instruments*, 90 F.3d. at 1569 n.10.

[467] Waiver is discussed *supra* Part II.I.

[468] This refers to the scope of the ITC's authority according to the Federal Circuit.

[469] This is not a controlling standard; instead, the Federal Circuit appears to be merely proposing an alternative to the complicated public rights jurisprudence.

bankruptcy for trade theoretically yields the same result: Given that the primary responsibility of the Bankruptcy Court is to administer the bankruptcy laws—and not the patent laws—"[t]he [bankruptcy court's] findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws."[470]

VIII. ANALYSIS: PATENTS, PUBLIC RIGHTS, AND THE REQUIREMENTS OF ARTICLE III

As discussed by the court in *Stern*, any notion that the Article I bankruptcy judge operates as a mere "adjunct" of the district courts can be dispensed with at the outset. Though it is not currently certain, for many of the same reasons the bankruptcy judge is not an adjunct, one may fairly surmise that the administrative law judges assigned to the newly created Article I Patent Trial and Appeal Board—given their power to issue binding decisions related to any argument concerning the legal issue of patent validity—do not qualify as adjuncts either. As such, where the legislative branch envisions an Article I tribunal vested with the power to issue final, binding judgments on the matters of patent infringement and patent validity, the following question must be answered: are patents public rights per the Supreme Court's pronouncements regarding the exception in *Stern*?

Certainly the law governing the public rights exception is complex, and the application of the standard is not a straightforward process. Recall that the court in *Stern* appeared to have applied a test utilizing various elements distilled from the relevant prior Supreme Court decisions. Before applying the *Stern* analysis, however, it is important to first confront *McCormick*, *American Bell Telephone Co.*, and Federal Circuit's *Patlex* decision. *McCormick* established that Congress lacks the constitutional authority to divest an owner of a patent for invention of her title without first seeking impeachment by suit before an Article III court. Reissue remained a valid mechanism, but only to the extent that it allowed the *patentee* to rectify an error that may have arisen due to inadvertence or mistake committed by the same

[470] *See* Tandon Corp. v. Int'l Trade Comm'n, 831 F.2d. 1017, 1019 (Fed. Cir. 1987) (quoting S. Rep. No. 1298, 9.3d Cong., 2d Sess. 196).

patentee. Any application of the reissue process that sought to reopen the original question of patent validity before an Article I officer was unconstitutional. *American Bell* held, in a similar vein and relying upon the property for land cases of the era, that though the process governing the issuance of a patent for invention is quasi-judicial in character and subject to determinations made by Article I officers, once issued, it "is not subject to be repealed or revoked by . . . the Commissioner of Patents."[471] Any mistake committed by the government—including the particularly egregious example of the Article I department issuing multiple certificates of title for the same parcel of land—was expressly disclaimed by the Supreme Court as a means for reopening questions of validity before the granting Article I officer.

The Federal Circuit in *Patlex* thus made a curious decision when it decided that the curative nature of the reexamination statute was the attribute that saved it from unconstitutionality. According to the Federal Circuit, because a patent represents a right that may only be conferred by the government, any legislative mechanism that reopens questions of patent validity "to correct errors made by the government, to remedy defective governmental (not private) action" necessarily is a public concern and thus a public right.[472] This mode of analysis, however, had already been expressly foreclosed by *McCormick*, *American Bell*, and many other property cases addressing this precise issue. Further curiously, the Circuit cited to *Crowell* for the proposition that public rights encapsulate any right that is granted by the government—recall, however, that *Crowell* was a highly restrictive case in terms of its approach to public rights and its holding, in large part, centered around the scenario where the government itself was an active party to a litigation.[473] The court in *Patlex* also cited to the plurality's opinion in *Northern Pipeline*, but again, the plurality in *Northern Pipeline* held that public rights merely relate to rights that historically could have only been decided *exclusively*

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[471] United States v. Am. Bell Tel. Co., 128 U.S. 315, 363 (1888).
[472] Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 (Fed. Cir. 1985).
[473] *Id.*

by either the legislative or executive branches.[474] Given that the U.S. Government was not a party to the litigation in *Patlex*, and further given that—as demonstrated by an overabundance of controlling Supreme Court precedent—that once a patent for invention issues, the validity of that patent cannot be revisited by an Article I officer, the Federal Circuit's reliance on both *Crowell* and *Northern Pipeline* to legitimize its governmental mistake-based approach to public rights appears to lack merit.

Joy represented the next iteration of the Circuit's public rights analysis and here, as has been discussed, the court dropped the governmental mistake limitation in its entirety. Instead, the Circuit concluded that because a valid patent is primarily a public concern and further involves a right that may only be conferred by the government, it is a public right.[475] For this proposition, the court cited to *Granfinanciera*. *Granfinanciera* established, however, that where a right exists by the grace of government, the proper analysis is whether that right has a common law antecedent.[476] As such, the Federal Circuit in *Joy* misconstrued the requirements of the public rights exception. The analysis does not begin and end with a discussion of whether a particular right exists at federal statute; such a standard would broadly dilute the requirements of Article III. The Federal Government could rather whimsically create any right at statute as a mechanism for removing it from the grasp of the judiciary. Further, whether or not a particular right is a "public concern" has questionable, minimal relevance to the form of analysis disclosed by the *Granfinanciera* Court. Instead, where a right exists at statute, a court seeking to apply public rights must discern whether, in part, that right found its roots in the common law. At least in *Joy*, the Federal Circuit declined to resolve this question.

In other cases, however, and in the context of the court's analysis of the Seventh Amendment right to a jury trial, the Federal Circuit has evaluated the matters of patent infringement and patent

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[474] *See* Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 (Fed. Cir. 1985); *see also supra* Part II.F.

[475] Joy Techs., Inc. v. Manbeck, 959 F.2d 226, 229 (Fed. Cir. 1992).

[476] Granfinanciera v. Nordberg, 492 U.S. 33, 42 (1989).

validity in a historical framework. As applied to patents and public rights, disputes regarding patents for invention could have been traditionally raised in both actions at law or at equity. The route, according to the Federal Circuit, was ultimately determined by the nature of the sought-after remedy. Where damages were implicated, then the patent dispute was resolved at law. Conversely, where a patentee merely initiated suit to enjoin future acts of infringement, the case was properly tried in a court of equity. Thus, depending upon the remedy sought by a patent owner, a patent dispute could historically proceed in one of two potential directions—either to a court of law or a court of equity. Patents for invention are hardly a new mechanism, and the courts, including the Federal Circuit, have been apt to refer to eighteenth century English practice in the context of their discussions addressing the matter. Recall *Murray's Lessee*, which held that suits of common law, equity, or admiralty belong solely to Article III.[477] As *Stern*, *Granfinanciera*, and others have confirmed, this core principle is still controlling law. Thus, whether a patent dispute historically tracked into a court of law or equity, the result is necessarily the same. Stated differently, a patent for invention cannot be said to be a new and novel creation of the legislative branch. The principles governing its creation are age-old, and they find their roots deeply intertwined with the annals of common law and equity. To answer the question of whether the rights associated with patents include common law antecedents with a conclusory affirmation that the right currently exists at Federal Statute is to rather unceremoniously ignore the guiding requirements of the public rights exception altogether. Applying *Granfinanciera*, where a dispute takes place between private parties, as is oft the case in patent litigation, and where a dispute entails a right with common law antecedent, as is always in the case in patent litigation, that right cannot be a public right.

In looking at *Stern*, the analysis does not change meaningfully. *Stern* reaffirmed, after all, that where wholly private property cases

[477] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856).

are at issue, public rights cannot apply.[478] Both this holding and others regarding patents for land, invention, and Article III generally cannot be reconciled with the Federal Circuit's attempt to distinguish patents for invention, in the validity context, and public rights. According to *Stern*, and much like the claim of tortious interference before the Article I bankruptcy judge, the claims of patent validity and patent infringement cannot be pursued solely by the grace of the executive or legislative branches.[479] Additionally, they are not claims that could have historically been determined exclusively by either of those branches. Instead, these claims existed at either common law or equity, between private parties nonetheless. Similarly, the common law claims did not flow from a federal statutory scheme, nor were they completely dependent upon, or necessarily resolved by, a claim properly before an Article I tribunal under Federal law. In virtually all aspects, patents as applied to the law of public rights fail constitutional muster.

In its core application, the public rights doctrine looks at the nature of the right in question. Take, for example, the facts of *Thomas*. The court was asked to consider the constitutionality of an arbitration provision relating to a pesticide scheme.[480] It is easy to discern how, under these circumstances, the right in question might belong to the legislative branch of government. One may have difficulty locating common law antecedent relating to data sharing arrangements amongst pesticide manufacturers. With the matter of patents and the constituent arguments, however, the issue is equally clear, albeit on the opposite end of the spectrum. Patents for invention have been around for centuries, and their history is deeply rooted in law and equity.

Waiver, at least for the time being, is not a viable mechanism for curing separation of powers infirmities. *Schor*, a case frequently cited to for the proposition that the requirements of Article III may be waived, unequivocally declared that "[w]hen these Article III limitations are at issue, notions of consent and

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[478] Stern v. Marshall, 131 S. Ct. 2594, 2616 (2011).

[479] *Id.* at 2598.

[480] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 591 (1985).

waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect."[481] And though *Stern* came close to ratifying waiver as a means for curing Article III limitations at least in the context of a proof of claim in a Bankruptcy Court, Justice Scalia was careful not to carve out any support in his concurrence for this proposition. As such, waiver as mechanism for remedying Article III shortfalls has yet to receive the blessing of the Supreme Court. To the extent that patents do not comport with the requirements of public rights, waiver cannot be the anodyne.

Lastly, and maybe merely provocatively, it is interesting that the Federal Circuit held that the ITC's decisions regarding patent validity and infringement do not carry preclusive effect due to the fact that the ITC's primary responsibility is to administer the trade laws, and not the patent laws.[482] Thus, just as the preclusive power of the ITC is relegated to the trade laws, then the preclusive power of the Bankruptcy Court must be limited to the bankruptcy laws. Of course, assuming that the jurisdictional requirements have been met, this is not the standard—the public rights analysis controls—but it is indicative of the concept of expert agency which has been articulated by broader forms of the public rights exception in the past. Additionally, that the Federal Circuit adopted a standard of whether the administrative agency in question "acted in judicial capacity" is telling—this holding marks, to the extent that the notion had not already been demonstrated by *Patlex* and *Joy*, a complete disavowal of the Supreme Court's public rights rubric.[483]

IX. CONCLUSION

The Federal Circuit has clear, pragmatic concerns for envisioning a patent system that allows for the meaningful participation by administrative agencies. The act of granting a patent is an imprecise process, and the various administrative

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[481] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

[482] Texas Instruments v. Cypress Semiconductor Corp., 90 F.3d 1558, 1568 (Fed. Cir. 1996).

[483] *Id.*

mechanisms exist as quick, cost-efficient avenues for remedying deficient patents that might otherwise find themselves locked into costly, time-consuming litigation before an Article III court. This has the net effect of reducing case load and preserving judicial economy. However, as the Supreme Court just reminded the nation in its important *Stern v. Marshall* decision, Article III still has meaning, and its mandate dictating separation of powers still controls. The public rights exception, as anachronistic and unbending as some may have it, is still, per the high Court's directive, the gatekeeper. In light of the ever-burgeoning administrative scheme—and as applied to patents, the advent of the Patent Trial and Appeal Board under the America Invents Act—the delineating effect of the public rights exception, first conjured in 1856, upon modern U.S. Government has yet to be fully determined.

As difficult as it may be to envision a system without administrative input shaping issued patent rights, it is equally difficult to envision an argument regarding patent validity and infringement that comports with the core aspects of the public rights doctrine. As such, the issue appears ripe for challenge—many will be watching if, and when, the Supreme Court sits to review patents and public rights after *Stern v. Marshall*.