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Commodity Futures Trading Commission v. Schor: Article III Finds a Home on the Slippery Slope

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COMMODITY FUTURES TRADING COMMISSION V. SCHOR: ARTICLE III FINDS A HOME ON THE SLIPPERY SLOPE

I. INTRODUCTION

The United States Constitution grants the federal judicial power to courts created under the life tenure and guaranteed salary strictures of article III.[1] But Congress has long exercised wide discretion in assigning adjudicatory powers to non-article III tribunals such as administrative agencies, federal magistrates and legislative courts. Recently, the United States Supreme Court addressed the problem of federal judicial power in the hands of one type of non-article III tribunal—an administrative agency. In *Commodity Futures Trading Commission v. Schor*,[2] the Court focused on the question of whether the Commodity Futures Trading Commission's exercise of jurisdiction over state law counterclaims brought in administrative reparations proceedings violated the Constitution. The Court concluded that the agency's exercise of jurisdiction over such common-law claims did not run afoul of article III.[3]

In making this finding, the majority of the Court adopted an ad hoc balancing approach to questions of whether congressional grants of adjudicatory powers to non-article III tribunals violate article III and the separation of powers.[4] This approach departed from a stance taken by the Court on the same issue several years earlier in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[5] In *Northern Pipeline*, the Court addressed the constitutionality of Congress' broad grant of powers to the bankruptcy courts in the Bankruptcy Reform Act of 1978.[6] The

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1. Article III, section 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

2. 106 S. Ct. 3245 (1986).

3. *Id.* at 3261.

4. *See infra* text accompanying notes 29-48.

5. 458 U.S. 50 (1982), *later proceeding*, 459 U.S. 813 (1982). For a more thorough discussion of Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., see *infra* notes 125-58 and accompanying text.

6. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-151326 (1982 & Supp. III 1985)).

Court held this grant unconstitutional[7] because the authority given the bankruptcy courts did not fall within three narrow exceptions for grants of power to territorial courts, courts-martial and legislative courts and administrative agencies adjudicating cases involving "public rights."[8] In each of these exceptions, the Court historically had recognized certain exceptional powers afforded Congress by the Constitution or by historical consensus. "Only in the face of such an exceptional grant of power [had] the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III."[9] Thus, the Court confined the federal judicial power to article III courts.

The *Schor* majority's opinion suffers from several weaknesses. The ad hoc balancing approach adopted in *Schor* as a whole is improper in the article III context. It presents the danger of incremental erosion of the important protections of article III.[10] The components of the balancing test lack principled distinctions to be applied by courts seeking in the future to define the limits of non-article III adjudicatory authority.[11] More fundamentally, inclusion of the apparently decisive factor of "legislative convenience" in the majority's analysis implicates basic issues in constitutional theory respecting the separation of powers[12] and the relevance of original intent and current values to constitutional interpretation.[13]

This Note analyzes the approach taken by the Court to reach its conclusion in *Schor*, in view of the Constitution, precedent and the lower courts' need for guidance. In addition, this Note examines the implications of the *Schor* decision within the contexts of various theories of the separation of powers and of judicial review in constitutional cases. While this Note does not contend that the *result* reached in *Schor* was incorrect, it does criticize the approach taken to reach that conclusion. Thus, in light of the needs of the "administrative state"[14] and the separation of powers concerns of article III, this Note suggests an alternative analysis which may provide better support for the Court's decision than its present approach.

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7. *Northern Pipeline*, 458 U.S. at 87.

8. *Id.* at 64-67, 70-71. For a discussion of the public rights doctrine, see *infra* notes 140-52 and accompanying text and note 154.

9. *Northern Pipeline*, 458 U.S. at 70.

10. *See infra* text accompanying notes 169-76.

11. *See infra* text accompanying notes 177-213.

12. *See infra* text accompanying notes 214-29.

13. *See infra* text accompanying notes 230-40.

14. *See infra* text accompanying notes 159-67.

II. STATEMENT OF THE CASE

A. Facts

Commodity Futures Trading Commission v. Schor[15] arose when William T. Schor filed complaints with the Commodity Futures Trading Commission (CFTC) against his commodity futures broker, ContiCommodity Services, Inc. (Conti) and a Conti employee,[16] thereby invoking the CFTC's reparations jurisdiction.[17] Schor's account with Conti contained a debit balance because his net futures trading losses and expenses exceeded the funds in the account.[18] He contended that this debit balance resulted from violations of the Commodity Exchange Act (CEA) by Conti, which were the subject of his complaints.[19] Meanwhile, prior to receiving notice of the commencement of the reparations proceeding, Conti filed suit against Schor in federal district court,[20] to collect the debit balance in his account.[21] Schor counterclaimed in that federal action, restating his charges that Conti's violations of the CEA were the cause of the debit balance.[22] Schor twice moved to dismiss or stay the federal action on the grounds that continuing that action would waste judicial resources and unduly burden the litigants.[23] According to Schor, the reparations proceedings would fully adjudicate the rights put at issue by the transactions that gave rise to the federal action.[24] Conti then voluntarily dismissed the federal action, choosing instead to counterclaim for the debit balance in the CFTC reparations proceeding.[25] Furthermore, Conti denied it had violated the CEA and instead alleged that the debit balance resulted from Schor's own trading and was, therefore, merely a simple debt.[26]

The administrative law judge that presided over Schor's reparations

15. 106 S. Ct. 3245 (1986).

16. *Id.* at 3250.

17. The Commodity Exchange Act (CEA) provides for the filing with the CFTC of complaints for the violation of the CEA or any rule thereunder against persons registered under the CEA and authorizes the CFTC to issue rules respecting the determination of such disputes. Commodity Exchange Act, Pub. L. No. 93-643, § 14, 88 Stat. 1393 (1974) (current version at 7 U.S.C. § 18 (1982)). Pursuant to this authority, the CFTC promulgated rules regarding the conduct of its reparations proceedings. *See* 17 C.F.R. §§ 12.1-12.408 (1987).

18. *Schor*, 106 S. Ct. at 3250.

19. *Id.*

20. *Id.*; Conti-Commodity Serv., Inc. v. Mortgage Serv. of Am., Inc., No. 80-C-1089 (N.D. Ill., filed Mar. 4, 1980).

21. *Schor*, 106 S. Ct. at 3250.

22. *Id.* at 3250-51.

23. *Id.* at 3251.

24. *Id.* The district court declined to stay or dismiss the suit. *Id.*

25. *Id.*

26. *Id.*

proceeding ruled for Conti and found that Conti had not violated the CEA nor had its conduct resulted in Schor's debit balance.[27] Schor then initiated a challenge to the statutory authority of the CFTC to adjudicate Conti's state law counterclaim.[28] When the case finally came before the Supreme Court for decision, the critical issue was whether the CFTC's adjudication of Conti's common-law counterclaim violated article III of the Constitution.

B. Reasoning of the Court

1. Majority

Addressing the article III question in *Schor*,[29] the Court, in an opinion by Justice O'Connor, admitted that its precedents in that area were

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27. *Id.*

28. *Id.* The administrative law judge (ALJ), bound by the CFTC's policy of exercising jurisdiction over such counterclaims and concomitant CFTC regulations, *see* 17 C.F.R. § 12.19 (1987) (corresponds to 17 C.F.R. § 12.23(b)(2) (1982)), rejected Schor's challenge. *Schor*, 106 S. Ct. at 3251. The Commission allowed the ALJ's decision to become final without review, and Schor petitioned for review with the Court of Appeals for the District of Columbia Circuit. *Id.* The court of appeals, *sua sponte*, questioned whether, in light of *Northern Pipeline*, the CFTC's adjudication of Conti's counterclaims was constitutional. *Id.*

The court of appeals ordered the ALJ's decisions on Conti's counterclaims reversed and dismissed for lack of jurisdiction on the ground that the CFTC lacked authority to adjudicate common-law counterclaims. *Id.* at 3251. Having decided that under *Northern Pipeline* the CFTC's assumption of jurisdiction of Conti's common law counterclaim caused grave constitutional problems, the court of appeals gave a limited construction to the CEA so as to avoid unnecessary constitutional adjudication. *Id.* at 3251. The court construed the CEA to empower the CFTC to adjudicate only counterclaims alleging violations of the CEA or CFTC regulations, both beyond the scope of Conti's common-law counterclaim. *Id.* at 3251-52.

The Supreme Court granted the CFTC's petition for certiorari, vacated the court of appeals' judgment, and in light of Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568 (1985), remanded the case for additional consideration. *Schor*, 106 S. Ct. at 3252. For a discussion of *Thomas*, see *infra* note 154. The court of appeals reinstated its prior judgment, concluding that *Thomas* did not alter its view that the CFTC's power to decide common-law counterclaims in reparations proceedings was of questionable constitutionality under article III of the Constitution and *Northern Pipeline*. *Schor*, 106 S. Ct. at 3252. The Supreme Court for a second time granted certiorari. 474 U.S. 1018 (1985).

29. In the first part of the *Schor* opinion, the Court rejected the court of appeals' restrictive construction of the CFTC's statutory authority to adjudicate counterclaims. It found that Congress intended to grant the CFTC broad power to define the sort of counterclaims adjudicable in reparations proceedings. Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3253 (1986). It further stated that Congress carried out this intent by clearly authorizing in section 8a(5) of the CEA, 7 U.S.C. § 12a(5) (1982), CFTC promulgation of regulations providing for agency adjudication of common-law counterclaims arising from the same transaction as an alleged CEA violation "because such jurisdiction is necessary, if not critical, to accomplish the purposes behind the reparations program." *Schor*, 106 S. Ct. at 3253. The Court emphasized the "crippling effect" that the court of appeals' restrictive reading of the CFTC's counterclaim jurisdiction would have on the reparations scheme. *Id.* Having disposed of the court of appeals' argument, the Court thus presented itself with the issue of

not amenable to "easy synthesis."[30] However, these cases did establish that the constitutionality of a congressional delegation of adjudicative power to a non-article III tribunal must be determined in light of the purposes behind article III.[31] According to the Court, article III, section 1 is intended both as a protection of the role of the independent judiciary in the constitutional scheme of tripartite government, and as a safeguard of litigants' rights to impartial adjudication in the federal courts.[32]

Looking to the "structural principle" of article III, the Court recognized that article III safeguards the role of the judiciary in tripartite government. It does so by preventing congressional efforts to grant jurisdiction to non-article III tribunals so as to emasculate article III courts.[33] The Court refused to adopt formal, inflexible rules to gauge to what extent a congressional authorization of article III power to a non-article III tribunal would violate the separation of powers. According to the Court, such rules might "unduly restrict Congress' ability to take needed and innovative action pursuant to its Article I powers."[34] Instead, the Court focused on the practical effect that congressional action would have on the constitutional role of the federal judiciary. To achieve that end, the Court would weigh a number of factors.[35] The factors enumerated by the Court were:

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[36]

In analyzing the first factor, the Court reasoned that the congressional scheme here did not impermissibly intrude on the province of the

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whether the CFTC's exercise of jurisdiction over common-law counterclaims violated article III. *Id.* at 3255.

30. *Id.* at 3256. Justice O'Connor was joined by Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist and Stevens.

31. *Id.* The Court stated that this inquiry would be "guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.' " *Id.* (quoting Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 582-83 (1985)).

32. *Id.* (citing Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 582-83 (1985); United States v. Will, 449 U.S. 200, 218 (1980)).

33. *Id.* at 3257.

34. *Id.* at 3258.

35. *Id.*

36. *Id.*

article III judiciary because the CFTC's adjudicatory powers differed from the "traditional agency model"[37] merely because of its jurisdiction over common-law counterclaims.[38] The Court, decrying any fear of "some hypothetical 'slippery slope,' " concluded there was "little practical reason to find that this single deviation from the agency model [was] fatal to the congressional scheme."[39] According to the Court, except for the authorization of counterclaim jurisdiction, the CEA left enough of the "essential attributes of judicial power" to article III courts to justify a finding that article III was not violated. The recognition that the agency's orders were not self-executing, as well as the levels of judicial review to which the agency's rulings were subject, figured heavily in this inquiry.[40]

Turning to the next factor, the nature of the right to be adjudicated, the Court acknowledged that the counterclaim asserted in this case was a "private" right for which state law provides the rule of decision. Such a claim, the Court recognized, was the sort assumed to be at the "core" of article III courts' jurisdiction.[41] But the Court found no reason to accord the state law label talismanic power in article III analysis. Instead, it analogized this state law character of a right to the characterization of certain rights as "public." The Court had previously rejected the public

37. *See infra* note 159.

38. *Schor*, 106 S. Ct. at 3258. The Court found the CFTC's exercise of jurisdiction over common-law counterclaims "not without precedent." *Id.* (citing, *inter alia*, Katchen v. Landy, 382 U.S. 323 (1966)); *but see infra* note 181.

39. *Schor*, 106 S. Ct. at 3258.

40. *Id.* at 3258-59. The Court compared and contrasted the instant case with the part of the Bankruptcy Act of 1978 found unconstitutional in *Northern Pipeline* and with the agency model found constitutional in Crowell v. Benson, 285 U.S. 22 (1931), finding the CEA more closely analogous to the *Crowell* agency model. *Schor*, 106 S. Ct. at 3258-59. For a discussion of *Crowell* in its historical context, see *infra* text accompanying notes 102-06. According to the *Schor* Court, the CFTC, like the United States Employees' Compensation Commission in *Crowell*, deals exclusively with a particularized area of the law, while the bankruptcy courts' jurisdiction invalidated in *Northern Pipeline* extended to " 'all civil proceedings arising under title 11 or arising in or *related to* cases under title 11.' " *Schor*, 106 S. Ct. at 3258 (quoting 28 U.S.C. § 1471(b) (1982) *repealed by* Pub. L. No. 98-353, § 114, 98 Stat. 343 (1984)) (emphasis in original). Moreover, the CFTC's orders, like the *Crowell* agency's, but unlike the bankruptcy courts', are enforceable only by order of the district court, *see* 7 U.S.C. § 18(d) (1982), and are reviewed, like the *Crowell* agency's, under a weight of the evidence standard, *see* 7 U.S.C. § 9 (1982), instead of "the more deferential standard found lacking in *Northern Pipeline*." *Schor*, 106 S. Ct. at 3259. Further, the majority noted, the CFTC's legal rulings, like the Employees' Compensation Commission's, are subject to *de novo* review. *Id.* Finally, the CFTC, unlike the bankruptcy courts, does not exercise " 'all ordinary powers of the district courts,' and thus may not, for instance, preside over jury trials or issue writs of habeus corpus." *Id.* (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).

41. *Id.* at 3259.

rights distinction as determinative for article III purposes.[42] The Court then asserted that where such state-created rights are in contention, it conducts a "searching" inquiry into the congressional scheme. Nevertheless, looking beyond the form to the substance of Congress' action, the Court concluded that Congress' authorization of "limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function" did not substantially threaten the separation of powers.[43]

Finally, the Court analyzed the third factor, the concerns that drove Congress to depart from the requirements of article III. The Court noted Congress' intent in authorizing the CFTC to adjudicate counterclaims: "to create an inexpensive and expeditious" forum which would facilitate customers' enforcement of the provisions of the CEA, rather than to allocate jurisdiction among federal tribunals.[44] The Court asserted that "[i]t was only to ensure the effectiveness of [the reparations] scheme that Congress authorized the CFTC to assert jurisdiction over common law counterclaims."[45] Furthermore, the Court noted that the CFTC's "adjudication of common law counterclaims is incidental to, and completely dependent upon, adjudication of reparations claims created by federal law."[46] In actuality, the Court stated, such adjudication is limited to claims arising from the same transaction as the federal reparations claim.[47] The Court concluded that under the circumstances, the extent of any intrusion on the federal judiciary was de minimis.[48]

With respect to the interplay between the structural and personal interests protected by article III, the Court reasoned that its prior discussions of article III, section 1's guarantee "intimated that this guarantee

42. *Id.* The Court found the state law character of a claim "significant for purposes of determining the effect that an initial adjudication of those claims by a non-Article III tribunal will have on the separation of powers." *Id.*

43. *Id.* at 3259-60.

44. *Id.* at 3260. The Court further noted that Congress' decision to grant the CFTC counterclaim jurisdiction was understandable in light of the CFTC's perceived relative immunity from political pressures and the CFTC's expertise. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* The Court claimed that:

> [W]ere we to hold that the Legislative Branch may not permit such limited cognizance of common law counterclaims at the election of the parties, it is clear that we would "defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."

Id. at 3260-61 (quoting Crowell v. Benson, 285 U.S. 22, 46 (1932)).

serves to protect primarily personal, rather than structural, interests."[49] The Court pointed out that article III does not grant to litigants an absolute right to the consideration of all claims by an article III tribunal; as a personal right, the guarantee of article III is subject to waiver, much like the right to trial by jury in civil and criminal cases.[50] The Court found that Schor's initial demand that the entire dispute be settled in the reparations forum indicated an express waiver by him of any right he may have had to an article III court's resolution of Conti's counterclaim.[51] But the Court qualified its waiver analysis, stating that "[t]o the extent that this structural principle is implicated in a given case, 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, § 2."[52]

Finally, the Court declared that its decision in *Bowsher v. Synar*,[53] a case involving separation of powers issues and decided the same day as *Schor*, was not inapposite. *Bowsher* concerned the propriety of the exercise of executive powers by a legislative functionary, the Comptroller General. The Court found *Bowsher* and *Schor* reconcilable since unlike *Schor*, *Bowsher* involved a question of "the aggrandizement of congressional power at the expense of a coordinate branch."[54]

In sum, the *Schor* majority adopted an ad hoc balancing approach to review the constitutionality of congressional assignments of adjudicatory authority to non-article III tribunals. In this approach, the constitutional separation of powers concerns underlying article III are weighed against a number of factors, the most dispositive of which appears to be

49. *Id.* at 3256.

50. *Id.* The majority cited *Northern Pipeline*, stating that in that case "the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication." *Id.*

51. *Id.* at 3257. Moreover, the Court stated that "[e]ven were there no evidence of an express waiver here, Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver." *Id.* The Court noted that at the time Schor commenced his reparations action, a private right of action under the CEA was recognized in the Seventh Circuit, where Schor and Conti filed suit, and the CFTC's regulations clearly stated that it had authority to adjudicate all counterclaims arising " 'out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint.' " *Id.* (quoting 41 Fed. Reg. 3995 (1976) (codified in 17 C.F.R. § 12.19 (1987) (corresponds to 17 C.F.R. § 12.23(b)(2) (1983)). Thus, the Court reasoned, Schor's election to proceed in the CFTC's reparations forum constituted an effective waiver of article III's guarantee. *Id.*

52. *Id.* (citing United States v. Griffin, 303 U.S. 226, 229 (1938)).

53. 106 S. Ct. 3181 (1986). For a discussion of *Bowsher*, see *infra* text accompanying notes 214-23.

54. *Schor*, 106 S. Ct. at 3261.

the legislative interest in convenience and efficiency. The application of this analysis seems imbued with an attention to the practical effect of each decision, rather than to the cumulative formal impact upon the separation of powers.

2. Dissent

In stark contrast to the majority's ad hoc inquiry, the dissent advocated greater respect for the separation of powers concerns of article III through adherence to a categorical approach. The dissenting opinion, authored by Justice Brennan and joined by Justice Marshall, determined that the judicial authority of non-article III tribunals should be limited to three narrow exceptions: territorial courts, courts-martial and courts which adjudicate disputes over public rights.[55]

Reviewing the purposes of the tenure and salary provisions of article III,[56] Justice Brennan noted that they function to provide judges with maximum freedom from the possible influence of the executive or legislative branches.[57] This function, in turn, maintains the checks and balances of the federal constitutional structure and protects individual litigants from decisionmakers who are susceptible to majoritarian pressures.[58] Justice Brennan maintained that "these important functions of Article III are too central to our constitutional scheme to risk their incremental erosion."[59] The dissent contended that the three non-article III tribunal exceptions were "based on 'certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus.' "[60] Justice Brennan found nothing to justify an extension of an exception to allow administrative agency adjudication of state law counterclaims.[61] The dissent was unimpressed by the majority's references "to legislative convenience; to the fact that Congress does not altogether eliminate federal court jurisdiction over ancillary state-law counterclaims; and to

55. *Id.* at 3262 (Brennan, J., dissenting). Justice Brennan thus restated the thrust of his opinion for the plurality in *Northern Pipeline*. *See Northern Pipeline*, 458 U.S. at 64-70.

56. See *supra* note 1 for text of article III, § 1.

57. 106 S. Ct. at 3263 (Brennan, J., dissenting) (quoting Toth v. Quarles, 350 U.S. 11, 16 (1955)).

58. *Id.* (Brennan, J., dissenting).

59. *Id.* (Brennan, J., dissenting).

60. *Id.* (Brennan, J., dissenting) (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70). *See also infra* text accompanying notes 130-52.

61. *Schor*, 106 S. Ct. at 3263 (Brennan, J., dissenting). Justice Brennan emphasized that the common-law character of the claims in question placed them at the core of the historically recognized judicial power. *Id.* at 3263-64 (Brennan, J., dissenting) (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982)).

Schor's consent' to CFTC adjudication."[62]

Justice Brennan also objected to the majority's reliance on the issue of "legislative convenience" as a factor in its balancing approach. According to the dissent, article III was intended to prevent judicial "abdication to claims of legislative convenience."[63] Justice Brennan urged that weighing the legislative interest in convenience and efficiency against judicial independence was improper. The dissenting justice opined that in doing so, the majority "pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case."[64] Thus, the dissent noted that in each case this balance would be inexorably weighted against judicial independence. In the dissent's view, this balancing process would, in the long run, completely erode article III's protections because of the accumulation of cases where "the Court finds that the short term benefits of efficiency outweigh the long term benefits of judicial independence."[65]

Furthermore, the dissent determined that the Court's approach to the separation of powers in *Bowsher v. Synar*[66] was irreconcilable with the *Schor* majority's approach.[67] Justice Brennan pointed out that the Court in *Bowsher* rejected the argument that legislative convenience allowed a delegation of executive functions by Congress to the Comptroller General.[68] The *Bowsher* Court found such a delegation unconstitutional.

Justice Brennan then turned to the majority's claim that the CFTC's adjudication of state law counterclaims was an insignificant encroachment upon the powers of the judiciary because the CFTC merely shares such jurisdiction with the federal district courts. He pointed out, however, that if the reparations proceeding is more convenient and efficient than federal court litigation, the complainants would overwhelmingly

62. *Id.* at 3264 (Brennan, J., dissenting). Justice Brennan noted the majority supported its holding with the fact that Congress had not given the same broad powers to the CFTC that it had granted the bankruptcy courts in the Bankruptcy Act of 1978 which were found in violation of article III in *Northern Pipeline*. *Id.* at 3264 n.* (Brennan, J., dissenting). The dissent agreed that the scope of the CFTC's judicial authority was significantly narrower than that of the bankruptcy courts. Justice Brennan, however, refused to accord this difference enough weight to cure the constitutional problems which he determined would result from Congress' grant of state law counterclaim adjudicatory authority to the CFTC. *Id.* (Brennan, J., dissenting).

63. *Id.* at 3264 (Brennan, J., dissenting).

64. *Id.* (Brennan, J., dissenting).

65. *Id.* (Brennan, J., dissenting).

66. 106 S. Ct. 3181 (1986).

67. *Schor*, 106 S. Ct. at 3265 (Brennan, J., dissenting).

68. *Id.* (Brennan, J., dissenting).

choose the reparations remedy, thus rendering the sharing of jurisdiction illusory.[69] Moreover, Justice Brennan urged, the majority's lack of concern for the slippery slope failed to take into account that Congress can impair article III's structural and individual protections by diluting the judicial power of the federal courts rather than completely reassigning the work of article III courts to non-article III tribunals.[70]

As for the majority's assertion that its decision involved only a narrow class of state law claims, Justice Brennan argued that a broader principle could emerge from the Court's ostensibly narrow holding. According to the dissent, "the *reasoning* of this decision strongly suggests that, given 'legislative necessity' and party consent, any federal agency may decide state-law issues that are ancillary to federal issues within the agency's jurisdiction."[71]

Finally, Justice Brennan attacked the majority's line drawing between the structural and personal guarantees of article III and its reliance on Schor's consent to CFTC adjudication. The dissent viewed the structural and individual guarantees of article III as inseparable: "The potential exists for individual litigants to be deprived of impartial decisionmakers only where federal officials who exercise judicial power are susceptible to congressional and executive pressure."[72] Thus, Justice Brennan asserted, because article III's personal and structural guarantees are coextensive, a litigant may not waive his right to an article III tribunal "where one is constitutionally required."[73]

The dissent thus roundly criticized the majority's ad hoc approach as unsupported by the Constitution, inconsistent with precedent and heedless of the perils of the slippery slope. In the dissent's view, the majority's approach allowed the Court to abdicate its responsibility to give effect to the separation of powers concerns underlying article III. Of course, neither the majority nor the dissent is susceptible to clear understanding or analysis without some knowledge of the historical background of article III and administrative adjudication.

III. HISTORICAL BACKGROUND

A. Article III in Constitutional History

The basic structure of American government reflects in large part

69. *Id.* (Brennan, J., dissenting).
70. *Id.* at 3266 (Brennan, J., dissenting).
71. *Id.* at 3265 (Brennan, J., dissenting) (emphasis in original).
72. *Id.* at 3266 (Brennan, J., dissenting).
73. *Id.* (Brennan, J., dissenting).

the early perceived need for adherence to a separation of powers doctrine. The framers of the Constitution were acutely aware that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[74] To insure against this risk of tyranny by one of the branches of government, the framers made the separation of powers doctrine the fundamental concept of the constitutional plan; they regarded "the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[75]

With respect to the judicial branch, history reveals that under British rule the framers were unhappy with the judiciary. The Declaration of Independence charged that the King "obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers. He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[76] The framers understood that protections of the tenure and salary of judges, as provided in the Act of Settlement of 1701, had freed English judges from the King's control before.[77] Furthermore, they recognized the importance to the constitutional plan of a judiciary independent of the other two branches of government and of the people:

> If the power of making [appointments of judges to the federal bench] was committed either to the Executive or legislature, there would be a danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.[78]

Thus, the framers provided in article III of the Constitution that the fed-

74. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

75. Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

76. The Declaration of Independence para. 10-11 (U.S. 1776).

77. *See* Pittman, *The Emancipated Judiciary in America: Its Colonial and Constitutional History*, 37 A.B.A. J. 485, 488 (1951).

78. THE FEDERALIST No. 78, at 529 (A. Hamilton) (J. Cooke ed. 1961). The significance of an independent judiciary has not been tarnished by time. *See, e.g.*, United States v. Will, 449 U.S. 200, 217-18 (1980) ("A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.").

eral judges be granted permanent tenure and undiminishable compensation.[79] They intended by these provisions to translate their general separation of powers concerns into a practice which would maintain the independence of the federal judiciary.[80]

B. History of Judicial Responses to Allocations of Federal Judicial Power to Non-Article III Tribunals

1. One hundred and fifty years of uncertainty: The haphazard development of approaches to article III questions

a. American Insurance Co. v. Canter

Against the background of the framers' desire for an independent federal judiciary, the Supreme Court in 1828 first faced a congressional grant of federal judicial power to a non-article III tribunal. In *American Insurance Co. v. Canter*,[81] the Court set its course through what in the next 150 years was to become one of the most confused areas of constitutional law. *Canter* posed the question of whether courts of the territory of Florida, not created under article III and its tenure and salary protections, could be allowed to adjudicate admiralty matters. Article III specifically made such matters the exclusive province of courts formed under that article's strictures.[82] The Court held that Congress could extend the admiralty jurisdiction to such "legislative courts" under its plenary authority over the territories of the United States.[83] Chief Justice

79. The "good Behaviour" clause of article III, Section 1 guarantees life tenure to federal judges, subject only to removal by impeachment. *See* Toth v. Quarles, 350 U.S. 11, 16 (1955). The "Compensation" clause guarantees a fixed and irreducible compensation to federal judges. United States v. Will, 449 U.S. at 218-21. As Alexander Hamilton observed, "as nothing can contribute so much to [the federal judiciary's] firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security." THE FEDERALIST NO. 78, at 523-24 (A. Hamilton) (J. Cooke ed. 1961). And Hamilton further noted with respect to compensation that "[n]ext to permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" THE FEDERALIST NO. 79, at 531 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original).

80. The tenure and salary provisions of article III perform other functions as well. They promote public confidence in judicial decisions by preserving independence from political pressure. They attract well qualified persons to the positions of federal judges, and they promote judicial individualism. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 n.10 (1982); *see also* Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979).

81. 26 U.S. (1 Pet.) 511 (1828).

82. "The judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2 cl. 1.

83. *Canter*, 26 U.S. (1 Pet.) at 546.

Marshall, writing for the Court, reasoned that in legislating for the territories, "Congress exercises the combined powers of the general and of a State government."[84] Thus, when exercising powers of both a state and the federal government, Congress is no more constrained by article III's structural concerns than is a state government.

b. Murray's Lessee v. Hoboken Land and Improvement Co.

After *Canter*, the Court devised several ways to uphold the delegation of adjudicative authority to non-article III tribunals. In *Murray's Lessee v. Hoboken Land and Improvement Co.*,[85] the Court analyzed Congress' power to delegate to executive officers the power to collect, by way of a summary procedure, a debt due the government from a customs agent. Since Congress had provided as well for judicial review of the summary procedure, the initial question presented was whether the controversy was "judicial" and thus subject to the requirements of article III.[86] The Court pointed out that the plaintiff's argument—that the provision for judicial review rendered the controversy a judicial one—rested on a faulty premise.[87] "It assumes that the entire subject matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of congress to permit it to be so; and it leaves out of view the fact that the United States is a party."[88] Because the United States could claim sovereign immunity, an article III court could not hear the suit without the United States' consent. The Court stated that the giving of such consent could not bring a matter "which may not be a subject of judicial cognizance . . . before the court."[89] Rather, the choice of tribunal was left to Congress, pursuant to its power to create "public rights" and, subject to due process,[90] to allocate the adjudication of such rights as it sees fit.[91]

c. Dynes v. Hoover

Three years after *Murray's Lessee*, the Court was faced with an exercise of judicial authority by a non-article III tribunal in quite a different context. In *Dynes v. Hoover*,[92] the issue was whether Congress could

84. *Id.*
85. 59 U.S. (18 How.) 272 (1856).
86. *Id.* at 275.
87. *Id.* at 282-83.
88. *Id.* at 283.
89. *Id.* at 284.
90. *Id.* at 275-77.
91. *Id.* at 284.
92. 61 U.S. (20 How.) 65 (1857).

grant to courts-martial—the judges of which were without tenure and salary protections—the authority to adjudicate military and naval offenses free from the requirements of article III. The Court reviewed various constitutional provisions conferring upon Congress powers respecting the military[93] and compared them with article III.[94] "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences . . . and that the power to do so is given without any connection between it and the 3d article of the Constitution."[95] Thus, as in *Canter*, Congress' ability to allocate judicial power to tribunals of its own choosing, without running afoul of article III, stemmed from a plenary power distinct from Congress' article III authority.

d. Ex Parte Bakelite Corp.

The idea of a legislative court, conceived in *Canter*, came before the Court again in *Ex Parte Bakelite Corp.*[96] In *Bakelite*, the Court considered a request to restrain the Court of Customs Appeals from reviewing findings of the Tariff Commission.[97] The argument was that an appeal from the Tariff Commission was not a "case or controversy" as required by article III, section 2, but was instead an advisory proceeding in aid of executive tariff enforcement. Thus, it was contended that the Court of Customs Appeals, as an inferior court created under article III, had no jurisdiction of such proceedings.[98] The Court disagreed and found that the Court of Customs Appeals was a legislative and not a "constitutional" court, notwithstanding that its judges enjoyed life tenure.[99] The Court reasoned that the matters brought before the Court of Customs Appeals "include nothing which inherently or necessarily requires judicial determination."[100] Rather, "all are matters which are susceptible of legislative or executive determination and can have no other save under

93. U.S. CONST. art. I, § 8, cl. 13, 14 (the powers to "provide and maintain a Navy" and to "make Rules for the Government and Regulation of the land and naval Forces"); U.S. CONST. amend. V (excepting from the requirement of presentment or indictment of a grand jury before a person may be held to answer for a capital or otherwise infamous crime, "cases arising in the land or naval forces").

94. *Dynes*, 61 U.S. (20 How.) at 78-79.

95. *Id.* at 79. *See also* Toth v. Quarles, 350 U.S. 11, 14-15 (1955) (affirming *Dynes*, but refusing to extend article I military jurisdiction to civilian ex-soldiers because federal court jurisdiction under article III would be encroached upon).

96. 279 U.S. 438 (1929).

97. *Id.* at 446.

98. *Id.* at 448.

99. *Id.* at 459-60.

100. *Id.* at 453.

and in conformity with permissive legislation by Congress."[101] Thus the Court, echoing the public rights analysis of *Murray's Lessee*, found that Congress could assign such matters susceptible to legislative or executive determination to the tribunal of its choice.

e. Crowell v. Benson

Shortly after *Bakelite*, the Court took a different approach to adjudications by non-article III tribunals, abandoning the distinction between legislative and constitutional courts. In *Crowell v. Benson*,[102] the Court upheld provisions of the Longshoremen's and Harbor Workers' Compensation Act[103] which contemplated that findings of fact by the deputy commissioner of the United States Employees' Compensation Commission "supported by evidence and within the scope of his authority, shall be final."[104] In spite of the case's status as "one of private right, that is, of the liability of one individual to another under the law,"[105] the Court concluded that the exercise of this adjudicative power by a non-article III officer did not violate article III. Indeed, the Court deemed the legislative scheme consistent with article III because it still reserved to a reviewing article III district court full authority to deal with matters of law, thus providing for "the appropriate exercise of the judicial function in this class of cases."[106]

f. Williams v. United States *and* O'Donoghue v. United States

The distinction between legislative and constitutional courts was readopted shortly after *Crowell* in *Williams v. United States*,[107] and a companion case, *O'Donoghue v. United States*.[108] These cases arose as challenges to the Legislative Appropriation Act of 1932,[109] which provided for the reduction of salaries of non-article III judges.[110] In *O'Donoghue* the Court found that the judges of the courts of the District

101. *Id.*

102. 285 U.S. 22 (1931).

103. Ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-945, 947-950 (1982)).

104. *Crowell*, 285 U.S. at 46.

105. *Id.* at 51.

106. *Id.* at 54. By implicitly labeling that officer an "adjunct factfinder" to the article III district courts, the Court thus avoided the distinction between "legislative" and "constitutional" courts and the more difficult question of whether that officer exercised the federal judicial power at all.

107. 289 U.S. 553 (1933).

108. 289 U.S. 516 (1933).

109. Ch. 314, 47 Stat. 382 (1932).

110. *Id.*, § 106, 47 Stat. 382, 401 (1932).

of Columbia were not subject to salary reductions because those courts were article III tribunals. Justice Sutherland adopted a literal approach, reasoning that if a federal tribunal receives jurisdiction over cases such as those listed in article III, section 2, then it is ipso facto an article III court.[111] "The fact that Congress, under another and plenary grant of power [to legislate for the District of Columbia], has conferred upon these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question."[112]

In *Williams*, the Court adopted an even more contrived literalism in addressing the question of whether the Court of Claims was an article III tribunal. It held that although article III states that the federal judicial power extends "to Controversies in which the United States shall be a Party,"[113] the Court of Claims was nevertheless a non-article III legislative court because article III, section 2 must be construed to read "controversies to which the United States shall be a party *plaintiff* or *petitioner*."[114] Thus, the Court reasoned that courts such as the Court of Claims, which handle only cases where the United States is a party defendant, cannot be article III tribunals.

g. Glidden v. Zdanok

This literalism and the strict division between article III authority and non-article III power were repudiated in *Glidden v. Zdanok*.[115] The controversies in *Glidden* arose when the litigants, on the basis of article III's tenure and salary provisions, challenged the decisions of judges of the Court of Claims and the Court of Customs and Patent Appeals sitting by designation on federal district courts.[116] In *Glidden*, Justice Harlan, writing for a three-member plurality, reversed *Williams* and *Bakelite*, holding that the Court of Claims and the Court of Customs and Patent Appeals are article III courts.[117] The plurality abandoned the distinction between legislative and constitutional courts, adopting instead a pragmatic approach. Justice Harlan reviewed prior Supreme Court de-

111. *O'Donoghue*, 289 U.S. at 545.

112. *Id.*

113. U.S. CONST. art. III, § 2. Section 2 of article III enumerates the types of cases to which the federal judicial power defined by section 1 extends.

114. *Williams*, 289 U.S. at 577 (emphasis added). The Court opined that since the doctrine of sovereign immunity renders the United States immune from suit as a party defendant, the framers of the Constitution could not have intended article III, § 2 to reach such cases, regardless of the United States' consent to such suits. *Id.*

115. 370 U.S. 530 (1962), *cert. denied*, 377 U.S. 934 (1964).

116. *Id.* at 532-33.

117. *Id.* at 584.

cisions sanctioning the creation of courts with judges of limited tenure. He explained that in each case the authority of the courts was justified by "[t]he same confluence of practical considerations that dictated the result in *Canter*."[118] The test proposed by Justice Harlan for discerning between article III and non-article III tribunals was whether a tribunal's business was of the sort specified in article III and its judges allowed "the independence there expressly or impliedly made requisite."[119]

h. Palmore v. United States

Glidden's pragmatic approach was reaffirmed in *Palmore v. United States*.[120] In *Palmore*, the defendant challenged the authority of the Superior Court of the District of Columbia. That court, which was created to hear local cases by the District of Columbia Court Reform and Criminal Procedure Act of 1970,[121] did not enjoy article III's tenure and salary protections. The defendant contended that the court was without authority to try a felony prosecution under the District of Columbia Code, urging that such a case could only be heard by an article III court.[122] The Court held that under its article I plenary power to legislate for the District of Columbia, Congress may provide for adjudication of such cases by non-article III tribunals.[123] The Court noted that "the requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."[124]

2. An attempt at clarity: The *Northern Pipeline* decision

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[125] the Court faced this jurisprudential background, stretching back to *Canter*, of "landmarks on a judicial 'darkling plain' where ignorant ar-

118. *Id.* at 547. The reference to *Canter* highlighted, according to Justice Harlan, Chief Justice Marshall's recognition in that case of "a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system." *Id.*

119. *Id.* at 552. The tautological character of this test is clear, as Professor Tribe notes: "This is tantamount to saying that Article III courts are those staffed by Article III judges; Article I courts are those without such judges." L. TRIBE, CONSTITUTIONAL CHOICES, 90 (1985).

120. 411 U.S. 389 (1973), *aff'd*, 440 U.S. 648 (1979).

121. Pub. L. No. 91-358, 84 Stat. 473 (1970).

122. *Palmore*, 411 U.S. at 393.

123. *Id.* at 410.

124. *Id.* at 407-08.

125. 458 U.S. 50 (1982).

mies have clashed by night."[126] In *Northern Pipeline*, a sharply divided Court considered a challenge to the constitutionality of the Bankruptcy Reform Act of 1978.[127] The argument was that the Bankruptcy Act granted article III judicial power to the bankruptcy courts, the judges of which had no life tenure or salary guarantees.[128] Justice Brennan, writing for a plurality, found that the Bankruptcy Act's jurisdictional grant violated the Constitution, stating that the grant could not "be sustained as an exercise of Congress' power to create adjuncts to Art. III courts."[129] The plurality opinion attempted to make sense of article III's confusing jurisprudential history by fashioning three exceptions to article III's strictures. The plurality insisted that all of the cases in which the Court had sanctioned exceptions to article III fit into these three categories of "exceptional" grants of power to Congress by the Constitution or by "historical consensus."[130] The opinion recited exceptions for territorial courts, courts-martial and tribunals which adjudicate matters involving public rights.[131]

The first exception, for territorial courts, stemmed from the framers' intent that Congress was to exercise the general powers of government in areas in which no state operated as a sovereign.[132] This exception accounted for *Canter*[133] and later cases respecting Congress' creation of

126. *Id.* at 91 (Rehnquist, J., concurring).

127. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

128. Section 241(a) of the Bankruptcy Act made the jurisdiction of the bankruptcy courts much broader than that which had been exercised under the previous referee system of federal bankruptcy adjudication. That section of the Act granted the bankruptcy courts jurisdiction over all "civil proceedings arising under title 11 [the bankruptcy title] or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (1982) *repealed by* Pub. L. No. 98-353, § 114, 98 Stat. 343 (1984).

> This jurisdictional grant empower[ed] bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under Title 11. Included within the bankruptcy courts' jurisdiction [were] suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy. The bankruptcy courts [could] hear claims based on state law as well as those based on federal law.

Northern Pipeline, 458 U.S. at 54.

129. *Northern Pipeline*, 458 U.S. at 87. Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment, *id.* at 92 (Rehnquist, J., concurring), and agreed with the plurality that the Bankruptcy Act's grant of judicial authority was not severable from the remainder of the statute. *Id.* at 91-92 (Rehnquist, J., concurring). For that reason, and to allow Congress to restructure the Act "to conform to the requirements of Art III in the way that will best effectuate the legislative purpose," the entire Act was struck down. *Id.* at 87 n.40, 88.

130. *Id.* at 70.

131. *Id.* at 64-70.

132. *Id.* at 64.

133. *Id.* at 64-65.

non-article III courts in the District of Columbia.[134]

The second exception, for courts-martial, derived its force from a similar plenary power in Congress to exercise control over the armed forces.[135] This exception accounted for *Dynes* and later cases sustaining the legislative and executive branches' establishment and administration of courts-martial.[136]

The third exception, for tribunals which adjudicate matters involving public rights, included *Murray's Lessee*, *Bakelite* and, ostensibly, *Crowell*.[137] However, this category was not so clearly rooted in an "exceptional" grant of power to Congress. Although the *Northern Pipeline* Court maintained that this exception was also based on such a plenary power,[138] it admitted that "[t]he distinction between public rights and private rights [had] not been definitively explained."[139] The plurality discussed several possible explanations for the existence of the public rights doctrine.[140] Thus, no single theoretical principle seems to underlie the doctrine. However, from the *Northern Pipeline* plurality's discussion of the exception, and previous cases in which the Court discussed public rights,[141] three likely bases for the public rights doctrine emerge.

First, a rationale urged by Justice Brennan in *Northern Pipeline* is that for a matter to concern public rights, it must "at a minimum" arise between the government and others.[142] "In contrast, 'the liability of one individual to another under the law as defined,' is a matter of private rights."[143] This rationale "may be explained in part by reference to the

134. *See, e.g., Palmore*, 411 U.S. at 397 (Congress has the power to exercise exclusive legislation in all cases over the District); Kendall v. United States, 37 U.S. (12 Pet.) 524, 619 (1838) (same).

135. *Northern Pipeline*, 458 U.S. at 66.

136. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); *Toth*, 350 U.S. 11.

137. *But see infra* notes 155-58 and accompanying text.

138. *Northern Pipeline*, 458 U.S. at 66.

139. *Id.* at 69.

140. *Id.* at 67-69.

141. The public rights doctrine developed initially within the Court's early attempts to discern a difference between the work of article I "legislative" courts and article III "constitutional" courts. This doctrine had its genesis in *Murray's Lessee*, 59 U.S. (18 How.) at 284. There the Court asserted that there are matters that involve "public rights," which are "susceptible of judicial determination" and which may be in an adjudicable form, but which Congress may or may not, as it sees fit, bring within the cognizance of the federal courts. *Id.* However, the Court also stated that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit *at common law*, or in equity, or admiralty." *Id.* (emphasis added).

142. *Northern Pipeline*, 458 U.S. at 69 (quoting *Ex Parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

143. *Id.* at 69-70 (citation omitted) (quoting Crowell v. Benson, 285 U.S. 22, 51 (1931)). *See also* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442,

traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued."[144] Drawing on *Bakelite* in this regard, the *Crowell* Court had noted a distinction "between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[145] The rationale is that cases of the latter variety are within an area constitutionally committed to executive or legislative control. Such authority thus carries with it the power to control the mode of determination.[146] The *Northern Pipeline* plurality, relying on *Crowell*, further refined this aspect of the public rights doctrine, extending it to matters which arise between the government and persons subject to its authority and which historically have been within the prerogative of the legislative or executive branches.[147]

Second, a distinction acknowledged by a majority in *Northern Pipeline* was that state law rights are inherently private, as opposed to rights created by federal law.[148] Such state law rights traditionally are at "the protected core" of the judicial power assigned to article III courts by the

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450 (1977) (public rights cases are those in which the government sues in its sovereign capacity to enforce rights created by statute); *Bakelite*, 279 U.S. at 451 (legislative courts may freely be created to adjudicate matters arising between the government and others). *But cf. Northern Pipeline*, 458 U.S. at 69 n.23 ("the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights' ").

144. *Northern Pipeline*, 458 U.S. at 67.

145. *Crowell*, 285 U.S. at 50; *see Bakelite*, 279 U.S. at 451.

146. *Bakelite*, 279 U.S. at 451-53. "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Crowell*, 285 U.S. at 51.

147. *Northern Pipeline*, 458 U.S. at 67-68. *See also Bakelite*, 279 U.S. at 451.

148. In *Northern Pipeline*, the notion that the public rights doctrine was determinative of the propriety of a legislative authorization of judicial power to a non-article III tribunal failed to command a majority of the Court. Notably, however, the concurring and plurality opinions agreed that the claim there in question was one for which the rule of decision was provided solely by state law. *Northern Pipeline*, 458 U.S. at 71 (distinguishing the restructuring of debtor-creditor relationships, "which is at the core of the federal bankruptcy power [and] may well be a 'public right,' " from "state-created private rights, such as the right to recover contract damages"); *id.* at 90, 91 (Rehnquist, J., concurring) (bankruptcy court adjudication of claims arising under state law, "counts which are the stuff of the traditional actions at common law" and for which no federal rule of decision is provided, is not sanctioned by any precedent). *See also id.* at 70-71 n.25 (common-law private adjudications within the states remain subject to article III); *Atlas Roofing*, 430 U.S. 442 (upholding grant of adjudicatory power over federally created public rights to non-article III tribunals where existing state statutory and common law remedies remained unaffected).

Constitution.[149]

Finally, as the Court first observed in *Ng Fung Ho v. White*,[150] a difference exists for article III purposes between constitutionally recognized and congressionally created statutory rights.[151] The argument, like article III, is based upon the separation of powers doctrine: "[s]ince the Constitution's checks and balances are designed principally to guard against 'encroachment or aggrandizement' by Congress at the expense of the other branches, the separation of powers doctrine is implicated least in those situations where Congress is providing for the adjudication of rights it has itself created."[152]

The *Northern Pipeline* plurality thus set the stage for *Commodity Futures Trading Commission v. Schor*[153] with its narrow framework of exceptions to the requirement of an article III tribunal.[154] However, it is

149. *Northern Pipeline*, 458 U.S. at 71 n.25.

150. 259 U.S. 276 (1922).

151. The Court in *Ng Fung Ho* distinguished between jurisdiction to deport a known alien, conferrable upon an executive agency, from jurisdiction to deport one claiming U.S. citizenship, conferrable only upon an article III court. *Id.* at 284-85. Regarding the danger of deprivation of constitutional rights, "[t]he difference in security of judicial over administrative action has been adverted to by this court." *Id.* at 285. *See also Crowell*, 285 U.S. at 61 (citing Ng Fung Ho v. White, 259 U.S. 276 (1922)).

152. L. TRIBE, *supra* note 119, at 93.

153. 106 S. Ct. 3245 (1986). Notably, Justice White's dissent in *Northern Pipeline* adumbrated the approach taken by the Court in *Schor*. Justice White interpreted the Court's previous article III decisions as supporting a balancing approach. *Northern Pipeline*, 458 U.S. at 113-14 (White, J., dissenting). The dissent called for a practical approach, one that would read article III "as expressing one value that must be balanced against competing constitutional values and legislative responsibilities." *Id.* at 113 (White, J., dissenting). Furthermore, the dissent provided the basis for the legislative convenience factor of the *Schor* approach. Justice White argued that *Palmore*, which he claimed exemplified the "practical" approach, "rested on an evaluation of the strength of the legislative interest in pursuing . . . one of its constitutionally assigned responsibilities." *Id.* at 114 (White, J., dissenting). This latter contention is subject to criticism. The basis for it is the statement in *Palmore* that article III's requirements must sometimes accommodate plenary legislative power in "specialized areas." *Palmore*, 411 U.S. at 408; *see supra* text accompanying note 124. But Justice White pried this statement completely out of the context of his opinion for the Court in *Palmore*. That context logically (although not explicitly) limited such plenary authority to specialized *geographic* areas, in that case the District of Columbia. *Northern Pipeline*, 458 U.S. at 76; Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 448-49 n.42 (1983).

154. The *Schor* Court's radical departure from the mode of analysis employed in *Northern Pipeline* should not have come as a complete surprise. To a certain extent, this change was foreshadowed by the failure of the categorical approach to command a majority in *Northern Pipeline* and Justice White's strong dissent in that case. *See supra* note 153. Moreover, the public rights theory espoused in *Northern Pipeline* had a cold reception in Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568 (1985). In *Thomas*, the Court averred that "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative branches,' the danger of encroaching on the judicial powers is reduced."

intriguing that analytically, *Crowell* remains unaccounted for within *Northern Pipeline*'s narrow exceptions. *Crowell* involved a suit between private parties—an employee and his employer—based upon federal statutory law; at issue was adjudication by an administrative agency.[155] Obviously the territorial courts and courts-martial exceptions are inapplicable to these facts. Although Justice Brennan's plurality opinion in *Northern Pipeline* cited *Crowell* within its discussion of the public rights doctrine,[156] it later distinguished *Crowell* and *United States v. Raddatz*[157] as cases in which the Court "approved the use of administrative agencies and magistrates as adjuncts to Art. III courts."[158]

Looking back down this jurisprudential trail, it is at once evident that the Court has searched long, and often fruitlessly, for a principled basis upon which to rest its article III decisions. The categorical approach adopted in *Northern Pipeline* may have represented the Court's only effort to lend coherence to 150 years of precedent. That effort's failure to garner a majority, and the rejection of its categorical approach by the *Schor* Court, may indicate that this area of confusing precedent simply cannot be neatly rationalized.

Id. at 589 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68 (1982)). The *Thomas* Court noted that the majority in *Northern Pipeline* did not accept the theory that the public rights doctrine provides a bright line test for determining the requirements of article III. *Id.* at 585-86. In addition, the *Thomas* Court rejected the idea that the identity of the parties alone determined the requirements of article III. *Id.* at 587. The *Thomas* majority feared that if the identity of the parties did perform such a function, "the constitutionality of many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals would be thrown into doubt." *Id.* The majority therefore limited its holding to the assertion that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 593-94.

155. *Crowell*, 285 U.S. at 36-37.

156. *Northern Pipeline*, 458 U.S. at 67-70.

157. 447 U.S. 667 (1980).

158. *Northern Pipeline*, 458 U.S. at 77. *See* L. TRIBE, *supra* note 119, at 92 n.81. The premise underlying this argument is that "even where the Constitution denies Congress the power to establish legislative courts, Congress possesses the authority to assign certain factfinding functions to adjunct tribunals." *Northern Pipeline*, 458 U.S. at 77. Thus this "adjunct" or "associate" argument is distinct from *Northern Pipeline*'s three narrow exceptions. Indeed, "Congress' power to create adjuncts and assign them limited adjudicatory functions is in no sense an 'exception' to Art. III." *Id.* at 77 n.29. *Cf. Atlas Roofing*, 430 U.S. at 450 n.7 (accepting associate factfinding by an administrative agency in cases involving only private rights).

C. *Origins of the Administrative State and Its Relationship to the Separation of Powers*

Merely because these cases are confusing, however, does not mean that the principles involved may be left to evolve at random. Agency adjudication in the modern administrative state must receive a principled vindication of its constitutionality. An understanding of the structural underpinnings of the administrative process makes this need evident.[159]

From a theoretical perspective, the justification for administrative

159. A brief survey of the historical roots of the American administrative process is illuminating as well. During the first 100 years of the Republic, laissez-faire was the dominant political and social philosophy. This concept was based on the belief that the individual freedom to make self-interested decisions of whether to buy or sell would result in the production and exchange of the greatest amount of goods at the least price. Laissez-faire effected a transfer of power from the agrarian and mercantilist society to the entrepeneurial class born of the Industrial Revolution. The feudal agrarian and mercantilist practices had derived from the control of government by the landed aristocracy and gentry. But the rapidly expanding horizons of the Industrial Revolution required a dynamic rather than a static ruling society. Thus, the competition and growth engendered by the laissez-faire attitude displaced active government and left business in control of the administration of the economy. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 5 (1965).

But laissez-faire was easily corrupted. It failed to account for the power of monopolists to manage whole markets and impede the flow of capital. It had no remedy for the independent producer who was left flapping in the gale winds of vast, completely competitive markets. Administrative regulation of private economic activity developed to fill the void left by the inadequacy of the common law to solve such complex and specialized problems. *See id.* at 6.

The prototypical federal agency, the Interstate Commerce Commission, was established in 1887. Interstate Commerce Act of 1887, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 10101-11917). According to the traditional views, *see* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY PROCESS, 26-27 (2d ed. 1985), it was created to protect shippers from the exercise of monopoly power and rate discrimination by rail carriers, and to solve the problem of destructive competition. *Id.* To be effective, the legal controls on a monopolistic carrier

> must be a) continuous, b) systematic, c) informed, and d) operative at government initiative and cost. These requirements are precisely those which are fulfilled by the . . . Interstate Commerce Commission. In the ICC we have an agency which has a broad supervising as well as rule making and adjudicatory power. . . . It is thus a vast repository of past and current information; and, ideally, the watchman and judge of the industry.

L. JAFFE, *supra*, at 6.

The configuration of the ICC did not neatly conform to the rigid nineteenth century conception of the separation of powers. The ICC was given legislative power, ostensibly limited to Congress by article I of the Constitution, *see* U.S. CONST. art. I, § 1, to regulate in the "public interest, convenience, and necessity." R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW & PROCESS, 31 (1985). It was also empowered to set rate schedules through the use of adversary hearings featuring agency administrators as judges, who thereby were exercising judicial power. Interstate Commerce Act, ch. 104, §§ 12, 13, 15, 24 Stat. 379, 383-84 (1887), *amended by* ch. 3591, § 4, 34 Stat. 584, 589 (1906). Finally, ICC commissioners were presidential appointees, making the ICC an apparent executive functionary. *Id.*, ch. 104, § 11, 24 Stat. 379, 383 (1887). However, the commissioners could not be removed except "for inefficiency, neglect of duty, or malfeasance in office." *Id.* This sort of caveat resulted in the terms

regulation lies in the vast complexity of the functions of modern government. "The performance of these functions requires elaborate administrative machinery. As a result, the bulk of what government does today is of an administrative nature. Without minimizing the significance of legislation and the role of courts of law, public administration has become more important for the general effectiveness of government."[160] This importance stems from the incapacity of the legislature and judiciary to adequately accommodate "the expansion of the range of legal intervention in complex economically organized societies."[161] Indeed, institutional and practical limits of traditional legislative and judicial action virtually require the establishment of a fourth branch of government to deal with exigencies of the new tasks of modern government.[162]

The legislature's ability to deal with these exigencies suffers from a three-fold shortfall: inadequate time; insufficient specialized knowledge necessary in new areas of legal control; and limited organizational ability to continually supervise legal development in areas where rules and poli-

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the "fourth branch," and "independent agency," describing the agency's partial independence from the President and Congress. R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra*, at 31-32.

Despite these separation of powers concerns, the ICC and similar agencies created during this period were uneventfully absorbed into the framework of government. A major factor in this ease of assimilation was that judicial review of agency action provided significant restraint on agency discretion. *Id.* at 32. This judicial review, which laid the foundations of modern administrative law, was the outgrowth of the writ system, supplemented by statutory provisions for judicial review. *See* S. BREYER & R. STEWART, *supra*, at 27-28.

During the early part of this century, the New Deal spurred dramatic growth in federal agencies and their involvement in the private economy. *See, e.g.*, Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended at 12 U.S.C. §§ 221-522) (bringing the banking system under federal control); Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77bbbb) (regulating sale of securities); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78kk) (regulating securities exchanges); National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 141-87) (regulating relations between labor and management). Then, as the crisis of the Depression faded, critics of the New Deal strengthened their calls for legislation "to respond to criticisms of the administrative process' fairness and to rationalize disparate administrative practices along more consistent lines." S. BREYER & R. STEWART, *supra*, at 32. This ultimately culminated in the passage of the Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.), which heralded the modern era of administrative law. Now new agencies are created each year; many bear major regulatory responsibilities. Although no one has yet provided a comprehensive enumeration of all the federal administrative bodies, their number likely exceeds a thousand. For discussions of the modern proliferation of administrative agencies, and the specific constraints imposed upon them by the APA, see generally S. BREYER & R. STEWART, *supra*; R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra*; and G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS (2d ed. 1980).

160. F. MARX, THE ADMINISTRATIVE STATE 1-2 (1957).

161. Stone, *The Twentieth Century Administrative Explosion and After*, 52 CALIF. L. REV. 513, 516 (1964).

162. Stone, *supra* note 161, at 518-19.

cies must evolve empirically.[163] These problems of available time and expertise, and of continuing guidance and supervision, apply to judicial capacities to accommodate the exigencies of modern government as well.[164] The need for administration thus is clear: administrative agencies devote all of their time and expertise to tasks for which they were designed and for which the legislature and judiciary are ill-equipped to deal. The agencies also are in a far better position to continually supervise regulated industries and adapt to accumulating experience.

But the separation of powers doctrine casts a shadow over the needed delegation of power to administrative bodies. The doctrine is threatened by the creation of myriad agencies which perform legislative, adjudicative and executive functions.

> Agencies have been given the authority to promulgate legislation-type rules and simultaneously to apply these rules in given cases. They have been invested with the power to investigate and prosecute, and with the power to decide individual controversies. Responsibility for resolving disputes between private parties has been shifted from courts to agencies. In some cases legislatures have sought to exclude any judicial review of agencies' actions. The traditional allocation of prosecutorial and managerial functions to the executive in the implementation of law has been challenged by the legislative creation of agencies whose members are to a considerable degree independent of control by the Chief Executive.[165]

Moreover, the numerous administrative agencies performing adjudicative functions have created vast bodies of law.[166] An overly strict reading of article III and the separation of powers would jeopardize administrative adjudication and threaten to destroy this vital development of entire fields of law.

Thus, the Supreme Court's task in *Schor* was to attempt to settle on a principled basis by which administrative adjudication could be reconciled with the separation of powers concerns underlying article III.[167] It

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163. *Id.* at 519. *See also* Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449, 470 (1957) (noting "the growing necessity both of relieving the legislature of the burden of taking care of the details of every law and of having specialized agencies adjust the law to ever-changing situations and needs"); L. JAFFE, *supra* note 159, at 37 ("Where not only technical skill but continuous judgment is demanded the legislature is helpless").

164. Stone, *supra* note 161, at 522.

165. S. BREYER & R. STEWART, *supra* note 159, at 42-43.

166. *Id.* at 1-2.

167. One principled approach might be for Congress to pass legislation providing article III

is clearly too late in the growth of the administrative state for such basic constitutional questions respecting the delegation of adjudicatory power to agencies to go unanswered.

IV. ANALYSIS

This Note contends that the Court's attempt failed. *Commodity Futures Trading Commission v. Schor*[168] does not provide a principled basis for reconciling non-article III adjudication with the separation of powers. This section will explain why *Schor*'s balancing approach is inappropriate, both in the general context of article III questions, and in the failure of its constituent factors to provide limitations on the erosion of the federal judicial power. Next, this section will examine the Court's recent inconsistent approaches to separation of powers problems, and will briefly review the theoretical implications of *Schor* regarding constitutional interpretation. Finally, this section will suggest an alternative analytical framework for use in measuring non-article III adjudicative authority. The suggested approach shares *Schor*'s implicit concern for the proper functioning of modern administrative government. But it poses less danger of eroding article III and places the separation of powers on firmer ground.

A. The Court's Balancing Approach

1. The impropriety of a balancing test in the article III context

The *Schor* majority propounded an article III analysis that tosses article III and its separation of powers concerns into the hopper, to be weighed against various other factors.[169] But a balancing approach is wholly inappropriate in the context of article III analysis and places article III and the separation of powers onto an unmarked and illimitable slippery slope.[170]

The clearest shortcoming of a balancing approach is that it is not authorized, even implicitly, by the language of article III.[171] In addition,

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guaranteed salary and life tenure for all administrative law judges. But such a blanket grant of article III protections would dilute the power and prestige of article III courts, and, in any event, would likely fail to surmount political and economic barriers.

168. 106 S. Ct. 3245 (1986).

169. *See supra* text accompanying notes 35-36.

170. *See Schor*, 106 S. Ct. at 3265-66 (Brennan, J., dissenting). Obviously, the approach of the *Northern Pipeline* plurality differs radically from the *Schor* analysis. The former adopted a highly structured, formalistic analysis with respect to the separation of powers, while the latter takes a far looser, functional stance. *See infra* text accompanying notes 249-52.

171. *See* Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 221 (1983) (criticizing the balancing approach proposed by Justice

a case-by-case balancing approach is unsuitable for the guaranteed salary and life tenure provisions of article III.[172] "A balancing approach requires the Court to weigh the legislative interest in freeing the government from the constraints of the salary and tenure protections against the competing interest in guaranteeing judicial independence. Such a balance will invariably favor the legislative interest."[173]

Moreover, the framers themselves clearly provided no exception to article III's life tenure and guaranteed salary provisions in the event Congress were to find these protections inefficient or inconvenient. Given the explicit language of article III, section 1, and the clear contemporaneous statements of the framers' intent,[174] it is probable that the framers would have rejected an approach giving Congress such free reign. Indeed, "[i]t was assuredly no secret to the framers that insertion of these protections would restrict Congress; the framers apparently decided that such a burden was justified by the need to preserve an independent judiciary."[175]

The long term effect of *Schor* on article III, section 1 is not difficult to discern. Each "reasonable" case, in which the benefits of legislative convenience are found to outweigh the protections of judicial independence, will weigh heavier on article III, pushing it farther down the slippery slope. Eventually, this skewed balancing approach will result in the gutting of article III and its underlying separation of powers concerns.[176]

2. The *Schor* approach and its lack of limitations

Even assuming, as the majority did in *Schor*, that article III could be amenable to some sort of a balancing approach, the majority's analysis

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White's dissent in *Northern Pipeline* and largely adopted by the *Schor* majority). See *supra* note 153 for a discussion of Justice White's dissent in *Northern Pipeline*.

172. Redish, *supra* note 171, at 221.

173. *Id.* at 221-22. *See also Schor*, 106 S. Ct. at 3264 (Brennan, J., dissenting). Professor Redish suggests that salary and tenure guarantees protect the judiciary from "subtle or unstated" pressure rather than "open and heavy-handed" pressure applied in either case by the legislature and executive. Redish, *supra* note 171, at 222. Thus the fashioning of article III's protections as prophylactic, rather than explicitly prohibitive of overt legislative or executive influence, was meant to protect against such subtle pressure, which is difficult to detect.

174. *See generally supra* notes 74-80 and accompanying text.

175. Redish, *supra* note 171, at 221.

176. A comparison with the balancing process used to interpret first amendment protection of free expression is instructive. The vague language of the first amendment (that Congress may not abridge "the freedom of speech") does not demand as strict a construction as the much more explicit language of article III. The framers did not contemplate a strict construction of the first amendment, in stark contrast to their well-documented contemplation of article III. Moreover, "the potentially severe harm that can result to society from total protection of expression makes the harm caused by an absolute construction of article III pale by comparison." *Id.* at 221 n.155.

rests on uncertain foundations. Perhaps more importantly, the analysis fails to specify concrete limiting principles that would forestall total erosion of article III's separation of powers concerns. Some *suggested* bases of limitation can be gleaned from *Schor*. These include: the relative allocation of powers between the non-article III tribunal and the federal judiciary;[177] the nature of the claim at issue;[178] whether the jurisdictional authorization was made to ensure the effectiveness of the legislative scheme, i.e., for "legislative convenience," rather than to allocate jurisdiction among federal tribunals;[179] and whether the parties have consented to the adjudication by the non-article III tribunal.[180] But in a stronger light, these factors wither and fail to take root in the slippery slope.

a. the allocation of "essential attributes of judicial power"

In its analysis of the relative allocation of powers between the CFTC and article III courts, the Court, while acknowledging that "wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties," chose not to prohibit such jurisdiction, disdaining any fear of "some hypothetical 'slippery slope.' "[181] Granted, as a primary inquiry, the extent to which a non-article III tribunal exercises the "essential attributes of judicial power" *is* relevant to determining the validity of the tribunal's authority.[182] But its relegation to a secondary factor in a balancing test undermines its relevance and makes unlikely any consistency in its application. After *Schor*, the likelihood is great that any limitation derived from the

177. *Schor*, 106 S. Ct. at 3258-59.

178. *Id.* at 3259-60.

179. *Id.* at 3260-61.

180. *Id.* at 3257, 3260.

181. *Id.* at 3258. The Court stated that the CFTC's exercise of such common-law counterclaim jurisdiction was not unprecedented. *Id.* Curiously however, the *Schor* Court cited, among others, Katchen v. Landy, 382 U.S. 323 (1966), for this proposition. *Schor*, 106 S. Ct. at 3258. In *Katchen*, the Court upheld a bankruptcy referee's power to adjudicate state law counterclaims arising out of the same transaction as a creditor's claims in bankruptcy. *Katchen*, 382 U.S. at 334. The *Schor* majority failed to note however, that in *Katchen* there was no discussion of the article III issue. *See Northern Pipeline*, 458 U.S. at 79 n.31.

Moreover, it is arguable that the CFTC's exercise of common-law counterclaim jurisdiction is not an importation of pendent and ancillary jurisdiction into the agency context. *Cf.* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (allowing a federal court to assert pendent jurisdiction over a state claim where the state and federal claims "derive from a common nucleus of operative fact") *with* 17 C.F.R. § 12.19 (1987) (corresponds to 17 C.F.R. § 12.23(b)(2) (1983)) (CFTC regulation providing for jurisdiction over counterclaims arising "out of the transaction or occurrence or series of transactions or occurrences" giving rise to the complaint alleging violations of federal commodity laws).

182. *See infra* text accompanying notes 255-63.

essential attributes inquiry will be overshadowed by considerations of "legislative convenience." In other words, characterizing the essential attributes inquiry as merely a part of a weighing process makes it a variable, rather than a fixed factor. The result is that what are "essential attributes" in one case may not be so in another case where the demands of legislative convenience are greater. Thus, the inquiry will not be the basis of any objectively determinable principles applicable from one case to the next. In the long run, this will effect a transfer of the "essential attributes" from article III to non-article III tribunals, resulting in the complete erosion of the federal judicial power.

b. the nature of the claim

As recently as *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[183] a majority of the Court recognized that state law claims "are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,"[184] and are matters clearly at the "protected core" of the judicial power assigned to the independent article III branch.[185] Thus, the *Schor* Court's statement that the state law character of a claim is merely "significant for purposes of determining the effect that an initial adjudication of those claims by a non-Article III tribunal,"[186] is a curious turnaround.

Moreover, after relegating state law character from "determinative" to "significant," the manner in which the *Schor* Court used the state law character of a claim in its analysis undermines the assertion that such character is even "significant." The Court stated that where state common-law rights are at stake its inquiry is "searching."[187] Ostensibly, this is because common-law actions have traditionally been tried in article III courts; congressional allocation of such matters to non-article III tribunals magnifies "[t]he risk that Congress may improperly have encroached on the federal judiciary."[188] The majority then concluded that Congress had not attempted to *remove* the article III judiciary from the determination of common-law counterclaims because the choice of the CFTC repa-

183. 458 U.S. 50 (1982).

184. *Id.* at 90 (Rehnquist, J., concurring).

185. *Id.* at 70 n.25; 94 n.2 (White, J., dissenting). It is notable that although a majority of the Court could not agree on the propriety of the public rights analysis, a majority, including Justice O'Connor, author of the *Schor* opinion, agreed as to the status of claims for which no federal rule of decision is provided, i.e., state law claims.

186. *Schor*, 106 S. Ct. at 3259.

187. *Id.*

188. *Id.* (citing Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 284 (1856)).

rations forum was left entirely to the parties and "the power of the federal judiciary to take jurisdiction of these [common-law] matters is unaffected."[189] Whether this reflects a "searching" inquiry, or even one that looks " 'beyond the form to the substance of what' Congress has done,"[190] is open to question on two bases.

First, this conclusion assumes that consent of the parties to the jurisdiction of a non-article III forum diminishes separation of powers concerns. This is a questionable assumption which the majority itself at least partially refuted elsewhere in the opinion.[191] Second, this conclusion—if it indeed looks to the "substance" of what Congress has done—fails to consider the practical effect its validation of the CFTC's counterclaim jurisdiction will have on the federal courts. The dissent was careful to note this effect: "If the administrative reparations proceeding is so much more convenient and efficient than litigation in federal district court . . . complainants would rarely, if ever, choose to go to district court in the first instance. Thus, any 'sharing' of jurisdiction is more illusory than real."[192]

This usurpation of article III power is magnified by the impropriety of considering the nature of the claim in the balancing context. The nature of the claim *is* relevant to whether its adjudication by a non-article III tribunal is proper.[193] But under the *Schor* approach each "reasonable" decision extending to non-article III tribunals jurisdiction over claims not of congressional creation will go a step beyond the previous decision. This will be particularly true where convenience and efficiency are accorded such weight as they were in *Schor*. The result will be that, over time, the character of the claim at issue will impose fewer and fewer limitations on non-article III adjudication. Eventually, the cumulative weight of these decisions will analytically validate the transfer of jurisdic-

189. *Id.* at 3260.

190. *Id.* at 3259 (citing Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 589 (1985)).

191. *Id.* at 3257-58; *see infra* text accompanying note 209.

192. *Schor*, 106 S. Ct. at 3265 (Brennan, J., dissenting). The majority, in support of its conclusion that Congress' authorization of common-law counterclaim jurisdiction to the CFTC did not represent an attempt to withdraw such claims from judicial cognizance, distinguished the CFTC scenario from a hypothetical one in which Congress creates a phalanx of non-article III tribunals equipped to handle all the work of article III courts. *Id.* at 3260. But Justice Brennan pointed out that "Congress can seriously impair Article III's structural and individual protections without assigning away 'the *entire* business of the Article III courts.'. . . It can do so by *diluting* the judicial power of the federal courts." *Id.* at 3266 (Brennan, J., dissenting) (citation omitted, emphasis in original). Thus, impairment of article III's protections can occur whether the power of article III courts is removed wholesale or piecemeal.

193. *See infra* text accompanying notes 257 and 264-67.

tion over common-law claims—which will likely occur in actual fact—from article III courts to the more attractive non-article III tribunals.

c. *"legislative convenience"*

"Legislative convenience," is characterized by the *Schor* Court as the concerns that caused Congress to authorize the exercise of judicial power by a non-article III tribunal. It suffers from the same illimitability as the nature of the claim factor. It presents a threat to the separation of powers in the long run by balancing nonconstitutional factors against the separation of powers, with the scale inherently tipped to the side of the nonconstitutional considerations.

The Court urged that for it to have held that the authorization of common-law counterclaim jurisdiction to the CFTC was a violation of article III, would have defeated " 'the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.' "[194] In other words, the Court opined that article III concerns did not compel a "degree of prophylaxis" which would have frustrated legislative convenience. However, common sense reveals that imposing quantitative limits on the need for promptness, continuity, expertise and low cost is a next to impossible task. Indeed, given that these factors are the very justification for administrative adjudication in the first place,[195] it is difficult to imagine how a court would find the legislative need for them insufficient in any case involving an administrative agency.

The Court's narrow view of its approach to legislative convenience ignores the long range implications of its holding. As Justice Brennan observed in dissent, while weighing the legislative interest in convenience and efficiency against judicial independence "creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the

194. *Schor*, 106 S. Ct. at 3260-61 (quoting Crowell v. Benson, 285 U.S. 22, 46 (1931)). This reliance on the oft-quoted language of *Crowell*, *see, e.g.*, Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 590 (1985), if it is indeed reliance, may be misplaced. The discussion from which it was taken concerned the question of whether the factual findings of the agency, *apart from cases involving constitutional rights*, should be final and was within the broader context of a discussion of whether judicial review saved the congressional scheme in question from *due process* attack. *Crowell*, 285 U.S. at 45-47. *See also* Comment, *Judicial Review of Administrative Findings*-Crowell v. Benson, 41 YALE L.J. 1037, 1041 (1932).

195. *See supra* text accompanying notes 160-64.

balance is weighted against judicial independence."[196] This inherent imbalance occurs because the benefits of convenience and efficiency are immediate, concrete and easily understood. But the benefits of judicial independence are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case.[197]

The specific idea that legislative need may influence article III analysis was supposedly recognized in *Palmore v. United States*.[198] It was observed even earlier that "necessity" may require that constitutional guarantees be interpreted flexibly.[199] But such an argument rests on the underlying assumption that the subject matter of the question implicated by legislation is one over which Congress enjoys, explicitly or implicitly, a plenary grant of power that enables it to go beyond the restrictions the Constitution imposes on the federal government. In *Palmore*, for example, the Court was concerned with whether District of Columbia courts granted judicial power by Congress had to be article III tribunals. In concluding that they did not, and that article III's requirements had to accommodate legislative need, the Court observed that Congress' authority in such areas was plenary: " 'In legislating for [the District of Columbia], Congress exercises the combined powers of the general, and of a state government.' "[200] No similar grant of plenary power exists for leg-

196. *Schor*, 106 S. Ct. at 3264 (Brennan, J., dissenting). *See also* Redish, *supra* note 171, at 221-22.

197. As Justice Brennan went on to say, the real danger of the Court's approach is that "as individual cases accumulate in which the Court finds that the short-term benefits of efficiency out-weigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated." *Schor*, 106 S. Ct. at 3264 (Brennan, J., dissenting). Admitting that in this case the extent of intrusion on the judicial branch could conceivably be characterized as de minimis, Justice Brennan reminded the Court that the reasoning of its decision "strongly suggests that, given 'legislative necessity' and party consent, any federal agency may decide state-law issues that are ancillary to federal issues within the agency's jurisdiction." *Id.* at 3265 (Brennan, J., dissenting).

198. 411 U.S. 389 (1973). The Court there emphasized that article III's requirements must, in limited circumstances, yield "to accommodate *plenary grants of power* to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.* at 408 (emphasis added).

199. *See Murray's Lessee*, 59 U.S. (18 How.) at 282 (noting that "imperative necessity" has required that summary tax procedures be yielded to).

200. *Palmore*, 411 U.S. at 403 (quoting American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828)). *See also supra* text accompanying notes 81-84 and 92-95; Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297, 308, 312 (1981).

Indeed, to read *Palmore* as supporting the weighing of legislative convenience against article III's protections would find in that case a basis for wider use of non-article III adjudication than was there at stake. Any abdication to legislative convenience which may have occurred in that case was logically limited to the extent of Congress' plenary power over the specialized *geographic* area of the District of Columbia. *See Northern Pipeline*, 458 U.S. at 76;

islation concerning most administrative adjudications, including for example, adjudication of commodity futures trading disputes.

Perhaps most disturbing of all is the Court's frequent incantation of effectiveness, promptness, workability, continuity and efficiency as the overriding legislative needs which combine to outweigh the limitations of article III.[201] First, the Court's deference to efficiency and convenience flies in the face of its language in *Bowsher v. Synar*,[202] that legislative convenience could not save a violation of the separation of powers from a finding of unconstitutionality.[203] Second, these references represent an infusion of decidedly nonconstitutional factors into the Court's constitutional interpretation. This suggests that the Court's role is expanding into the consideration of policy values versus constitutional values.[204]

d. party consent

With respect to party consent as a factor in its analysis, the *Schor* Court discussed a clear division between the personal and structural guarantees of article III. It then applied a waiver theory to the personal guarantee.[205] This is unsettling in light of the Court's later acknowledgement that consent is irrelevant to the structural concerns at issue.[206] Without question, article III's tenure and salary provisions safeguard both the role of the courts within the tripartite federal system and litigants' right to have claims decided before judges who are free from potential domination from the coordinate branches of our government.[207] Viewed in the abstract solely as a personal right, article III's guarantee seems subject to waiver.[208] However, the *Schor* majority itself admitted

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Currie, *supra* note 153, at 448-49 n.42; Redish, *supra* note 171, at 220 n.147. *See also supra* note 153.

201. *Schor*, 106 S. Ct. at 3260.

202. 106 S. Ct. 3181 (1986).

203. *See infra* text accompanying note 229.

204. *See infra* text accompanying notes 236-41.

205. *See supra* text accompanying notes 49-51.

206. *See supra* text accompanying note 52.

207. *Thomas*, 105 S. Ct. at 3334. *See also Northern Pipeline*, 458 U.S. at 58 (article III serves as "an inseparable element of the constitutional system of checks and balances. and as a guarantee of judicial impartiality").

208. *See, e.g.*, Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc. 725 F.2d 537, 543 (9th Cir.) *cert. denied*, 469 U.S. 824 (1984) (allowing waiver in civil case of personal right to article III judge, on condition that waiver is free and voluntary, instead of choice between non-article III forum or "the endurance of delay or other measurable hardships"); Wharton-Thomas v. United States, 721 F.2d 922, 925-26 (3d Cir. 1983) (allowing waiver in civil case of right to article III judge, where consent was "uncoerced and submitted pursuant to statutory safeguards"). *But see* Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947, 1952-54 (1984) (article III does not create personal right to article III judge; thus there can be no waiver of nonexistent right).

that where article III's structural 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."[209] Indeed, if one accepts Justice Brennan's more logical contention that article III's personal and structural protections are coextensive,[210] it is clear that notions of consent and waiver can *never* be dispositive in article III analysis because each article III violation implicates both individual interests and "institutional interests" that, as the majority admits, the parties cannot be expected to protect.[211] It is simply inappropriate to view article III's guarantee solely as a personal right subject to waiver. Viewed in this light, the majority's drawing of such a clear distinction between the personal and structural guarantees that article III can be said to be directed *primarily* at the protection of personal interests,[212] is mystifying.[213] One is forced to speculate that the consent discussion was intended to open the door for resolution of future article III controver-

209. *Schor*, 106 S. Ct. at 3257-58.

210. *See infra* note 213.

211. "[T]he parties cannot by consent cure the constitutional difficulty." *Schor*, 106 S. Ct. at 3257.

212. *See supra* text accompanying note 49.

213. Indeed, Justice Brennan was of the opinion that the personal and structural interests served by article III are inseparable:

> The potential exists for individual litigants to be deprived of impartial decisionmakers only where federal officials who exercise judicial power are susceptible to congressional and executive pressure. That is, individual litigants may be harmed by the assignment of judicial power to non-Article III federal tribunals only where the Legislative or Executive Branches have encroached upon judicial authority and have thus threatened the separation of powers.

Schor, 106 S. Ct. at 3266 (Brennan, J., dissenting). *Cf.* Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 312-13 (1984) ("the actual allocation of political power affects the dynamics of a system of civil liberties").

From a historical perspective, Justice Brennan's seems the better view. *See, e.g.*, Palmore v. United States, 411 U.S. 389, 410 (1973) (article III provides no constitutional right to trial before tenured judge); Toth v. Quarles, 350 U.S. 11, 16 (1955) (article III was designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches, and *included* other safeguards designed to protect defendants against oppressive governmental practices); O'Donoghue v. United States, 289 U.S. 516, 530-33 (1932) (tenure and salary provisions of article III, § 1 are essential safeguards adopted as continuing guarantee of independent judicial administration for benefit of the whole people).

Historically, article III's tenure and salary provisions were thought primarily directed at promoting:

> that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively.

Evans v. Gore, 253 U.S. 245, 253 (1920).

sies on the basis of the parties' consent, without reference to structural concerns.

3. The inconsistent approaches of *Schor* and *Bowsher* to the separation of powers

In addition to lacking limiting principles, the approach of the *Schor* majority raises questions on a more fundamental level. The *Schor* opinion presents a radically different approach to the doctrine of separation of powers from that of *Bowsher v. Synar*,[214] a case decided the same day as *Schor*. *Bowsher* involved a challenge to the recent budget legislation popularly known as the Gramm-Rudman-Hollings Act (Gramm-Rudman Act).[215] The Gramm-Rudman Act required that if in any fiscal year the federal budget deficit exceeded the stated maximum by greater than a certain amount, across-the-board cuts in federal spending were to be made.[216] The Act's "reporting provisions"[217] required the Director of the President's Office of Management and Budget and the Congressional Budget Office to submit their deficit estimates and budget reduction calculations to the Comptroller General. The Comptroller General was empowered, after reviewing the reports, to make final calculations of the spending cuts, which he was to submit to the President for enforcement.[218] A separation of powers problem arose because the Comptroller General was subject to congressional removal from office, but his powers under the Gramm-Rudman Act were "executive," making him a legislative functionary exercising executive powers.[219]

The Supreme Court, in an opinion by Chief Justice Burger, took a formal approach to the separation of powers problem. The opinion emphasized the categorical character of the tripartite form of government, drawing from Montesquieu's thesis of checks and balances.[220] The Court stressed the necessity of maintaining coequal branches and protecting each from influence of the others.[221] According to the Court, "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control

214. 106 S. Ct. 3181 (1986).

215. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1063 (1985) (codified in scattered sections of 2 U.S.C., 31 U.S.C. and 42 U.S.C.).

216. 2 U.S.C. § 902 (Supp. III 1985).

217. *Id.* § 901(a) (Supp. III 1985).

218. *Id.* § 901(b) (Supp. III 1985).

219. *Bowsher*, 106 S. Ct. at 3185-86.

220. *Id.* at 3186-87.

221. *Id.* at 3188 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935)).

what it does not possess."[222] Conversely, "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[223]

The strict, skeletal approach of *Bowsher* to the separation of powers stands in stark contrast to the ad hoc, fluctuating approach of *Schor*. Their analyses are completely inconsistent. *Schor* balances while *Bowsher* categorizes. One rationalization of the difference is that each analysis is driven by a different concern. *Bowsher*'s "formalistic" approach reflects the fear that national government has evolved beyond effective control.[224] *Schor*'s "functional" approach reflects the fear that an unnecessarily strict construction of the separation of powers will require the dismantling of the administrative state.[225] Whatever the reasons for the difference, commentators, and not the Justices, have explained them.[226] This apparent inability of the Justices to provide an explanation for the dichotomy raises an even more critical issue—the proper role of judges in general. The basis of judges' authority is that their determinations rest on consistent reasons that transcend the immediate result in any given case.[227] "A judiciary that asserts the power to impose legal obligation or sanction without recognizing the duty of coherence and explanation is one . . . we as a people have not chosen."[228]

Theoretical implications aside, specific language appears in *Bowsher* that is wholly inconsistent with the "legislative convenience" so heavily relied upon in *Schor*'s balancing approach: " '[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .' "[229]

4. *Schor* and theories of constitutional interpretation

The *Schor* majority's repetitive and dogmatic invocation of efficiency and convenience, while engaged in an interpretation of constitu-

222. *Id.*

223. *Id.*

224. *See* Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 490 (1987).

225. *See id.* at 490-91.

226. *See, e.g., id.* Professor Strauss advocates a functional approach as being more consistent with the realities of modern government and the "fourth branch."

227. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

228. Strauss, *supra* note 224, at 510-11.

229. *Bowsher*, 106 S. Ct. at 3193-94 (quoting Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983)).

tional text, adds an interesting note to the case: the ongoing controversy over the proper method of constitutional interpretation.

Often in constitutional adjudication, the question is whether the constitutional text, as the embodiment of the "original" intent of the framers, "should be the sole source of law for purposes of judicial review, or whether judges should supplement the text with an unwritten constitution that is implicit in precedent, practice, and conventional morality."[230]

Originalism posits that the meanings of constitutional provisions which are supplied by the plain language of the text and the framers' state of mind are authoritative for purposes of constitutional interpretation.[231] The argument is that "by following the plain language of a provision and by researching the proceedings and/or the legal and social context surrounding a provision's adoption," judges make reliable and authoritative decisions in constitutional cases.[232] Its proponents argue that this originalist view is

> deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law; it is, after all, the theory upon which judicial review was founded in *Marbury v. Madison*.
>
> The chief virtue of this view is that it supports judicial review while answering the charge that the practice is undemocratic. Under the pure [originalist] model . . . when a court strikes down a popular statute or practice as unconstitutional, it may always reply to the resulting public outcry: "We didn't do it—you did."[233]

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230. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984) [hereinafter Grey I]. Others have also recognized this clash of ideologies. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471 (1981).

The opposing positions often respectively are called "intentionalist" and "nonintentionalist," Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886 (1985), or even "textualist" and "supplementer," Grey I, *supra*, at 1, but will be referred to here as "originalist" and "nonoriginalist."

231. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1484 (1985).

232. *Id.*

233. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975) [hereinafter Grey II]. For more on the nexus between theories of judicial review and democracy, see J. ELY, *supra* note 230, at 73-104.

Those advocating the originalist position have much in common with Justice Black, who during his tenure on the Court, consistently urged "fidelity to the constitutional text in judicial review, and the illegitimacy of constitutional doctrines based on sources other than the explicit

The nonoriginalist theory that courts ought to apply values not articulated in the constitutional text when they decide the constitutionality of legislation derives its modern support from cases involving the rights of individuals.[234] This expanded view of judicial review articulates the courts' role as the exponents of national ideals of liberty and fairness, notwithstanding that these ideals are not explicit in the constitutional text.[235] Yet nothing inherent in the theory militates against its application in contexts beyond due process and equal protection, such as article III.

The majority in *Schor* seems to have adopted such a nonoriginalist stance by according weight in its article III analysis to nonconstitutional, contemporary values such as efficiency and legislative convenience equal to that given textually based factors such as the separation of powers. Moreover, Justice Brennan, in dissent, adopted an originalist stance by urging rigid adherence to the intent of the framers and the separation of powers doctrine. No attempt will be made here to analyze the propriety of the positions in this debate represented by the majority and dissent. Recently, it seems that such a normative assessment requires a choice between one side or the other of some political fence.[236] Instead, for present purposes it is sufficient to illustrate the irony of the respective positions taken, and to suggest possible reasons peculiar to separation of powers problems for this ironic shift in ideologies amongst the justices.

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commands of the written Constitution." Grey II, *supra*, at 703. For examples of Justice Black's jurisprudence, see *In re* Winship, 397 U.S. 358, 377-86 (1970) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting); Rochin v. California, 342 U.S. 165, 174-77 (1952) (Black, J., concurring); Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).

234. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to privacy, encompassing abortion decision); Doe v. Bolton, 410 U.S. 179 (1973) (right to privacy, encompassing abortion decision and physician's right to practice); Furman v. Georgia, 408 U.S. 238 (1972) (right against cruel and unusual punishment); Baker v. Carr, 369 U.S. 186 (1962) (right to vote); Brown v. Board of Educ., 347 U.S. 483 (1954) (right to equal protection, encompassing integrated education); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (right to conduct business free from government sanctioned private regulation); Lochner v. New York, 198 U.S. 45 (1905); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856) (right to private property, encompassing slave ownership).

235. Grey II, *supra* note 233, at 706. According to Professor Grey, the difficulty in justifying such a role for the courts explains their tendency "to resort to bad legislative history and strained reading of constitutional language to support results that would be better justified by explication of contemporary moral and political ideals not drawn from the constitutional text." *Id.*

236. This is because currently the most *visible* proponent of strict originalism appears to represent the views of the Reagan administration. *See* Meese, *The Battle for the Constitution—The Attorney General Replies to His Critics*, 35 POL'Y REV. 32 (Winter 1985); Address of the Honorable Edwin Meese III, Attorney General of the United States, before the American Bar Association, at 11, July 17, 1985.

The injection of modern mores of efficiency and legislative convenience into the majority's constitutional analysis is ironic, considering the apparently originalist attitudes of Justice O'Connor and the openly originalist philosophy of Justice Rehnquist. Justice O'Connor has stated that "the judge's role is 'one of interpreting and applying law' and it is not 'the function of the judiciary to step in and change the law because times have changed or because cultural mores have changed.' "[237] Justice Rehnquist, whose concurring opinion in *Northern Pipeline* was joined by Justice O'Connor, has attacked the nonoriginalist theory.[238] According to Justice Rehnquist, judges who supplement the constitutional text and framers' intent with contemporary values "are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country."[239]

This language stands in stark contrast to the *Schor* majority's invocation of modern values, foreign to the constitutional text and the framers' intent.[240] Why the reliance on efficiency and legislative convenience? Perhaps the answer is revealed by Justice Rehnquist's commentary above.[241] In *Schor*, no danger existed that by adopting contemporary norms, the majority would second guess Congress. Indeed, by the very consideration of these particular nontextual factors, the majority deferred to congressional judgment. Maybe a desire to reach *Schor*'s deferential result underlay the majority's citation of efficiency and legislative convenience. If so, such deference seems quite out of place in a case purporting to define the parameters of Congress' authority to assign judicial authority to non-article III tribunals.

Even more ironic is Justice Brennan's rejection of the consideration of contemporary values in favor of a line hewn close to the text of article III and the framers' underlying separation of powers concerns. In a scathing attack on the originalist position made prior to *Schor*, Justice Brennan said of this "facile historicism":

> It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact.

237. Kelso, *Justice O'Connor Replaces Justice Stewart: What Effect on Constitutional Cases?*, 13 PAC. L.J. 259, 270 (1982) (quoting Wall St. J., Sept. 10, 1981, at 12, col. 2).

238. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

239. *Id.* at 698.

240. No "administrative state" existed during the time of the Constitution's framing; thus it seems obvious that accommodating the needs of this vast machinery could never have been contemplated by the framers.

241. *See supra* text accompanying note 239.

> But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can guage accurately the intent of the Framers on application of principle to specific, contemporary questions.[242]

He continued: "Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance."[243] Justice Brennan claimed that the ultimate question in reading the Constitution is "what do the words of the text mean in our time?"[244] Thus, prior to his dissent in *Schor*, Justice Brennan was of a mind that the Constitution's genius lies in "the adaptibility of its great principles to cope with current problems and current needs."[245]

How does one explain, then, Justice Brennan's vigorous assertion in *Schor* that the "current needs" of efficiency and legislative convenience ought not receive such consideration as the *Schor* majority accorded them? The answer lies perhaps in Justice Brennan's conception of the threat to individuals posed by expanding government. He has asserted that "the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands, and this growth, in turn, heightens the need for constant vigilance at the collision points."[246] It is possible that Justice Brennan's concerns for the danger to individual rights posed by the expanding administrative state outweigh his belief that modern norms ought to inform constitutional analysis.

From a broader perspective, the role switching engaged in by the justices in *Schor* may be simply a function of the difficulty inherent in trying to reconcile modern administrative process with our country's traditional constitutional framework. This Note will not propose a model of judicial review that picks a side in or proposes a solution to the originalist-nonoriginalist debate. It will, however, propose a method for determining the propriety of non-article III adjudication that accommodates both the textual concerns of the separation of powers and the nontextual needs of the modern administrative state.

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242. W. Brennan, *The Constitution of the United States: Contemporary Ratification*, presented at Text and Teaching Symposium, Georgetown University, October 12, 1985, at 4.

243. *Id.* at 5.

244. *Id.* at 7.

245. *Id.*

246. *Id.* at 10.

B. An Alternative Rationale for Discerning the Limitations on Adjudication by Non-Article III Tribunals

1. The search for a separation of powers model

Whatever its textual or nontextual basis, any rationale for defining the limits of article III must accomodate the necessarily complex structure of modern government into the Constitution's tripartite distribution of authority. In other words, the task is to devise a working model of the separation of powers that somehow reserves a place for administrative agencies. Reaching the defensible result of preserving administrative adjudication is what the *Schor* Court attempted to do. But devising a model susceptible of consistent application is a difficult task, as evidenced by the Court's inability to settle on a single scheme to explain its results in *Bowsher* and *Schor*. "For the moment . . . the Court appears to be at sixes and sevens about the appropriate analytic technology for resolving separation-of-powers issues."[247] For years the Court has been unable to cling to either a formalistic or a functional approach. A formalistic approach is "grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), [while] a functional approach . . . stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened."[248]

Clearly though, the *Schor* analysis is as functional an approach as can be adopted.[249] The risk of a functional approach that goes to the extreme of balancing the threat to the judiciary's independence against

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247. Strauss, *supra* note 224, at 526.

248. *Id.* at 489 (footnotes omitted). Professor Strauss takes the functionalist position. Though his theory cannot be reproduced here in its entirety, essentially it is that the Constitution describes three generalist institutional heads of political and legal authority. *Id.* at 492. Each one "serves as the ultimate authority for a distinctive governmental authority-type (legislative, executive, or judicial). Each may be thought of as having a paradigmatic relationship, characterized by that authority-type, with the [administrative] government that Congress creates." *Id.* The administrative level of government exercises all three of these functions, *see, e.g.*, *supra* text accompanying note 165. Therefore, a separation of powers theory which is so strictly formalistic that it forbids these functions from being combined is unrealistic. Strauss, *supra* note 224, at 493.

The solution, according to Professor Strauss, is to examine, without placing agencies in any one branch, agencies' "relationships with each of the three named heads of government, to see whether those relationships undermine the intended distribution of authority *among those three*." *Id.* at 493-94. This type of functional analysis obviates characterizing administrative government as either "executive" or as partly executive (the nonindependent agencies, such as the State Department) and partly independent (the "fourth branch" agencies, such as the Securities and Exchange Commission). *Id.* at 494-96.

249. *See id.* at 512 (contending that *Schor* represents one pole of clash "between rigid rule and individualized judgment").

legislative convenience is too great.[250] The risk is "that the repetitive making of 'reasonable' choices by Congress will, over time, erode the independence of the judiciary. . . . The argument is that a series of small steps, each reasonable within its context, provides a means by which Congress may subordinate [the judiciary]."[251] On the other hand, the rigidly formalistic approach exemplified by *Northern Pipeline* and its narrow categorization was just as destructive. The risk posed by the *Northern Pipeline* plurality's approach is destruction of institutions—administrative agencies—that have worked well in carrying out tasks that represent a large part of modern government.[252] Thus, the search should be for an analytical approach that avoids the extremes of *Schor* and *Northern Pipeline.*

2. A proposal: The article III adjunct approach

a. the adjunct approach and its basis

The adjunct approach to article III's limitations exemplified by *Crowell v. Benson*[253] and *United States v. Raddatz*[254] provides the answer. Both cases have been distinguished as properly demonstrating the use of administrative agencies and magistrates, respectively, as adjuncts[255] to the federal judiciary.[256] The inquiry under this rationale is two-pronged: an assignment of adjudicatory power to a non-article III tribunal "is consistent with Art. III so long as 'the essential attributes of the judicial power' are retained in the Art. III court, and so long as Congress' adjustment of the traditional manner of adjudication can be sufficiently linked to its legislative power to define substantive rights."[257]

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250. *See supra* text accompanying notes 170-76.

251. Strauss, *supra* note 224, at 522.

252. *See* Redish, *supra* note 171, at 200 (noting that plurality's decision leads to conclusion "that much of the work of most federal administrative agencies is unconstitutional."); Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 593-94 (to preclude Congress from creating seemingly "private" right appropriate for agency adjudication with limited federal judicial involvement would "erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures . . . with respect to rights created by a regulatory scheme.").

253. 285 U.S. 22 (1931).

254. 447 U.S. 667 (1980).

255. The word "adjunct" is susceptible of various meanings. One definition is of appurtenance: "Something added to another, but in a subordinate, auxiliary, or dependent position." BLACK'S LAW DICTIONARY 40 (5th ed. 1979). However, this Note proposes a construction of "adjunct" which emphasizes *association* instead of appurtenance. That is, as used here, "adjunct" should be understood to mean "one who shares with another an enterprise, business, or action." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 132 (1976).

256. *See supra* text accompanying notes 156-58.

257. *Northern Pipeline*, 458 U.S. at 77 n.29 (citations omitted); *see Crowell*, 285 U.S. at 50-51. The *Schor* majority considered these two factors in its balancing approach. *See supra* text

Framing the question in this way avoids the perils of the slippery slope posed by the *Schor* balancing approach, and avoids as well the inflexibility of the *Northern Pipeline* plurality's rigidly compartmentalized approach.

The "essential attributes" inquiry in *Crowell* contained three elements that indicate those attributes remain in the article III district court: (1) the agency's findings of law are reviewed *de novo*;[258] (2) the agency's findings of fact are reviewed under a "weight of the evidence" standard, or some standard stricter than the "clearly erroneous" standard to which the bankruptcy courts' factfindings were subject;[259] and (3) the agency lacks power to enforce its own orders.[260]

Raddatz exhibited similar concerns. In *Raddatz*, the Court upheld the Federal Magistrates Act of 1978[261] which allowed district courts to refer certain pretrial motions, including those involving constitutional rights, to a magistrate for initial determination.[262] In particular, the *Northern Pipeline* plurality noted that the *Raddatz* Court had observed "that the magistrate's proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for additional evidence."[263] The overriding concern in both cases was that the ultimate decisionmaking authority remained with the article III district court.

With respect to the second prong of the adjunct inquiry, the *Northern Pipeline* plurality rejected the notion that Congress possesses as broad a discretion in assigning judicial power to adjuncts adjudicating rights not created by Congress as it does in assigning judicial power to adjuncts adjudicating congressionally created rights.[264] It asserted that "the Court's scrutiny of the adjunct scheme in *Raddatz*—which played a role in the adjudication of *constitutional* rights—was far stricter than it

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accompanying notes 36-43. However, the use of these factors in the adjunct approach is analytically distinct in two ways from their use in *Schor*'s balancing approach. First, their use generally as mere factors in a balancing test reduces their impact and makes them more prone to manipulation than if they were considered outside of the balancing context. Second, balancing them against "legislative convenience" reduces their import even further when the factor of legislative convenience is perceived as strongly dispositive—a result likely in the case of most administrative agencies. *See supra* text accompanying notes 194-97.

258. *See Northern Pipeline*, 458 U.S. at 81; *Crowell*, 285 U.S. at 49.

259. *Northern Pipeline*, 458 U.S. at 85.

260. *Id.* at 78.

261. 28 U.S.C. §§ 631-639 (1982).

262. *Id.* § 636(b)(1).

263. *Northern Pipeline*, 458 U.S. at 79 (citing United States v. Raddatz, 447 U.S. 667, 676-77, 681-83 (1980)).

264. *Id.* at 81-82.

had been in *Crowell*."[265] But the plurality then admitted that crucial to the *Raddatz* Court's decision was the fact that the ultimate decision was made by the district court;[266] thus the second prong's inquiry seems highly dependent upon the result of the first prong's inquiry. In other words, the genus of the right at issue seems only to bear on the strictness of the Court's primary inquiry into the extent of judicial power exercised by the adjunct.[267]

b. the adjunct approach and the separation of powers

The adjunct approach also avoids the extremes of the formalistic and functional approaches to the separation of powers exemplified by *Schor* and *Northern Pipeline*. It is important first to note that the lines between formalism and functionalism are not clearly drawn. Even an analysis that considers as relevant a formalistic idea such as "where" in government administrative adjudication is placed can still sustain the assignment of adjudicatory functions to administrative agencies. Indeed, *Crowell* is exactly such a decision.[268] The *Crowell* Court upheld agency adjudication of claims between private parties by placing the agency, in a metaphorical "adjunct" sense, within the judicial branch.[269] Moreover, the metaphorical character of the adjunct argument in *Crowell* "may be regarded as functional; in the end it insisted that 'regard must be had . . . not to mere matters of form but to the substance of what is required,' and that from this perspective a suitable arrangement for judicial review 'provides for the appropriate exercise of the judicial function.' "[270] Thus, the adjunct approach represents the middle ground between extreme formalistic and functional approaches to separation of powers problems under article III.[271]

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265. *Id.* at 82-83 (emphasis in original).

266. *Id.* at 83.

267. *See id.* at 84-85. As for any meaningful distinction between state law rights and constitutional rights for these purposes, there seems to be none: the *Northern Pipeline* plurality "lumped constitutional and state law rights together because they are both 'independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court.' " TRIBE, *supra* note 119, at 94 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982)).

268. *See* Strauss, *supra* note 224, at 503.

269. *Id.* at 504.

270. *Id.* at 509 (quoting Crowell v. Benson, 285 U.S. 22, 53, 54 (1931)).

271. An alternative which has characteristics of both the formalistic and functional theories could also be advanced. Where the text and legislative history of the Constitution are not helpful in providing insight into the exact scope of a constitutional provision, the Court has often turned to historical practice as an aid to interpretation. Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1773 (1984). An analysis of historical practice may reveal evidence of a "struc-

c. *the adjunct approach and the administrative state*

This Note, and much of the literature addressing the constitutionality of adjudicatory powers lodged in administrative agencies, takes the perspective that the most desirable analysis is one that protects and pre-

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tural accommodation" among the three branches of government with respect to the extent of their respective powers. *Id.* at 1777. The reasoning is that the legislature, executive and judiciary "are not hermetically sealed units with exactly defined powers." *Id.* Instead, the three branches are interlocking spheres of influence, each with a core of constitutionally assigned functions and enumerated powers. *Id.* at 1777-78 (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam); *see also* United States v. Nixon, 418 U.S. 683, 707 (1974)).

> Thus, situations arise in which it is charged that one branch's interpretation of the scope of its authority exceeds the limits imposed by either the constitutional text or structure. In such situations, it may be possible to show that similar exercises of power have occurred repeatedly in the past and have not been challenged or openly opposed by the other two branches. A court may be offered this evidence with the argument that historical practice has 'settled' the constitutional question at issue. . . .

Note, *supra* at 1778 (footnotes omitted).

The use of historical evidence of structural accommodation to prove that the judiciary should acquiesce to the exercise of judicial power by non-article III tribunals suffers, however, from two defects which prevent the judiciary from deferring to such practice. First, the passive role of the judiciary in tripartite government runs counter to the suggestion that its acquiescence to the exercise of judicial power by non-article III tribunals constitutes a structural accommodation that should be accorded constitutional significance. United States v. Woodley, 751 F.2d 1008, 1028-29 (9th Cir. 1985)(Norris, J., dissenting), *cert. denied*, 106 S. Ct. 1269 (1986). Second, judicial deference to such a structural accommodation is inappropriate when the personal guarantee of article III is at stake. *Id.* at 1030 (Norris, J., dissenting).

Under standards of justiciability, federal courts can only act when confronted with a dispute between parties with a concrete stake in the outcome. C. WRIGHT, LAW OF FEDERAL COURTS 38 (3d ed. 1976). Thus, the courts' role is a passive one. In contrast, the "political" branches—the legislature and the executive—possess the power "to initiate action to define operationally their role in the constitutional scheme of separate and divided powers." *Woodley*, 751 F.2d at 1029 (Norris, J., dissenting). Thus, as to the political branches, structural accommodation can, in theory, be "inferred from silent acceptance by one political branch in the face of action by the other." *Id.* (Norris, J., dissenting). However, due to their passive role, "silence by the courts cannot be construed as acquiescence in the constitutionality of even a longstanding practice." *Id.* (Norris, J., dissenting). Note, *supra*, cites several cases in support of the theory that courts ought to give effect to the structural accommodation evidenced by their historical acquiescence to the exercise of judicial power by non-article III tribunals. It must be noted, however, that "all of the cases cited . . . in support of the structural accommodation theory involve the relationship between the political branches . . . and not the independence of the judiciary." *Woodley*, 751 F.2d at 1029 n.12 (Norris, J., dissenting).

Even if such silence could be accorded constitutional significance as a structural accommodation with respect to the relationships between the branches of government, it "cannot be construed as a waiver of the constitutional rights of individuals." *Id.* at 1030 (Norris, J., dissenting) (footnote omitted). "The political branches cannot extinguish such rights by establishing 'adverse possession' through longstanding historical practice." *Id.* at 1031 (Norris, J., dissenting). The Court has affirmed constitutional principles and vindicated individual rights even in the face of entrenched historical practice. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (overturning previously judicially accepted practice of "separate but equal" doctrine and generations of acceptance of segregation as consistent with Constitution).

serves the indispensable role of agencies in government.[272] The adjunct approach is eminently suitable to play such a role, without going so far as to abandon the analytical process to the slippery slope, as does *Schor*. The primary prong of the adjunct approach, whether "the essential attributes of the judicial power" remain lodged in an article III court,[273] is an inquiry already well developed within the scope of review doctrine familiar in administrative law.[274]

The Administrative Procedure Act (APA)[275] provides for judicial review of most agencies' actions unless precluded by statute, or unless agency action is committed to agency discretion by law.[276] The APA

272. *See* Strauss, *supra* note 224, at 490. *See also supra* notes 160-67 and accompanying text.

273. *See supra* text accompanying notes 258-60.

274. *See generally* S. BREYER & R. STEWART, *supra* note 159, at 185-219, 257-88; L. JAFFE, *supra* note 159, at 546-653; Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986). The strictness of the primary inquiry seems to depend on the second prong of the inquiry: whether the right being administratively adjudicated is of congressional creation. *See supra* text accompanying notes 264-67. Beyond this, however, exactly to what extent the origin of the right under adjudication dictates what level of judicial review is required remains unclear. *See Northern Pipeline*, 458 U.S. at 82-84; L. TRIBE, *supra* note 119, at 96-97.

275. Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

276. 5 U.S.C. §§ 701-706 (1982); R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 159, at 135. The statutory preclusion provision, *see* 5 U.S.C. § 701, means that the APA's judicial review provisions do not apply to agencies created under organic regulatory statutes that explicitly limit judicial review. *See* Levin, *supra* note 274, at 243. If Congress has not spoken, or has spoken ambiguously on judicial review, "the courts presume that Congress intended to provide a right to judicial review unless there is 'clear and convincing evidence' that Congress intended to prohibit judicial review." R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 159, at 135; Abbott Lab. v. Gardner, 387 U.S. 136, 141 (1967).

However, even where Congress has gone to great pains to make limitations explicit, judicial review has been deemed proper when the issue under review did not concern a congressionally created right. This, of course, was precisely the sort of issue involved in *Schor*. For example, in Johnson v. Robison, 415 U.S. 361 (1974), the Court deemed judicial review appropriate in a case where a claimant challenged the constitutionality of the veterans benefits law. The statute provided that the Administrator's decisions of fact and law "shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise." 38 U.S.C. § 211(a) (1982). Notwithstanding this seemingly clear and convincing evidence of preclusion of judicial review, the Court concluded that the claimant's constitutional challenge "obviously [did] not contravene the purposes of the no-review clause." *Johnson*, 415 U.S. at 373. Thus, the Court held such a challenge was not clearly and convincingly barred from judicial review. *See also* Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) (although attorney general's deportation decisions under the 1952 Immigrations Act were "final," the Court held that this referred "to finality in administrative procedure" rather than to "cutting off the right of judicial review").

As for whether agency action is committed to agency discretion by law, judicial review is precluded if the agency's organic statute is so drawn that a court would have no meaningful

states that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[277] Questions of law fall within the "primary authority" of the courts, triggering their "independent judicial judgment."[278] Agency findings of fact in "formal" proceedings—those conducted under the APA's trial-type hearing procedures[279]—are to be set aside if "unsupported by substantial evidence."[280] Thus, with respect to the bulk of agency adjudications, the essential attributes of judicial power appear to remain in article III district courts. This relieves any fears that the adjunct approach, when applied, would disrupt adjudication by the great majority of administrative agencies.

V. CONCLUSION

The expansion of agency authority and the scope of administrative adjudication is a development that must be given a principled basis within the structure of American government. It has not of its own force diminished the Constitution's concerns for the separation of powers which were the impetus for lodging the judicial power in an independent judiciary.

The *Schor* decision fails to provide this principled basis. Instead, it represents unwarranted deference to efficiency and legislative convenience. *Schor*'s ad hoc balancing approach threatens, through the tyranny of small decisions, to erode completely article III's fundamental salary and tenure provisions, which protect the federal judicial power from

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standard against which to judge the agency's exercise of discretion. Heckler v. Chaney, 470 U.S. 821, 830 (1985). Put another way, the court's inquiry is whether in a given case there is no law to apply. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). This exception is a narrow one and the presumption is against agency discretion unless the agency action in question is a decision not to initiate investigative or enforcement proceedings. *Heckler*, 470 U.S. at 838. Even where the exception applies, judicial review of issues not concerning the agency's organic statute (for example, constitutional or common law issues) is likely to be appropriate. *See id.*; R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 159, at 140.

277. 5 U.S.C. § 706 (1982).

278. Levin, *supra* note 274, at 246, 267. This indicates that agency findings of law subject to the APA are subject to de novo review. Policies of judicial deference sometimes come into play when the law in question is the agency's organic statute, *see id.* at 268-70, but when rights not of congressional origin are involved, such as constitutional issues, deference is seldom afforded the agency's findings. *Id.* at 270.

279. Section 556 describes requirements for adjudication in the agency context. 5 U.S.C. § 556 (1982). Section 556 is invoked by Section 554, which applies in cases where adjudication is provided for by the agency's organic statute. 5 U.S.C. § 554 (1982).

280. 5 U.S.C. § 706(2)(E) (1982).

usurpation by the political branches. In addition, *Schor* represents the Court's inability to settle on a consistent separation of powers rationale, making that task all the more difficult for the lower courts.

The adjunct approach typified by *Crowell* and *Raddatz* should replace the balancing approach of *Schor*. The adjunct approach provides a more objective, principled starting point than *Schor*'s ad hoc test for delicate separation of powers questions in the judicial context. Moreover, the adjunct approach resolves the inconsistency between approaches to the separation of powers by striking a happy medium that exhibits concerns of both the functional and formalistic approaches. Finally, application of the adjunct approach will not threaten the indispensable role of agency adjudication in modern government.

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