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Public Rights and the Federal Judicial Power: From *Murray's Lessee* Through *Crowell to Schor*

GORDON G. YOUNG*

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I. INTRODUCTION

*Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifted by useless shadows.*¹

In the last five years, the Supreme Court has shown intense interest in the Constitution's requirements for separation of powers between the branches of the Federal Government. In particular, the Court has been occupied with a reappraisal of the relatively new arrangement of governmental powers approved by predecessor Courts under the banner of "administrative law."² Occasionally, the Court has shown its concern by dramatically striking down acts of Congress on highly controversial grounds. The Court's decisions against the Bankruptcy Act of 1978,³ the Gramm-Rudman-Hollings Act,⁴ and the "legislative vetoes" contained in hundreds of federal laws,⁵ make clear that the Court has been troubled by possible departures from the original scheme of balanced powers.

In a subset of these cases, the Court has interpreted and applied provisions of the Constitution providing for an independent judiciary. This Article is concerned with those cases and their historical background. Specifically, the subject of this Article is the development, from 1789 onward, of increasingly broad exceptions to the Constitution's requirement that federal judicial cases be tried by an equal and independent federal judicial branch of government.

The 1982 case, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁶ illustrates the Court's intensified concern with in-

1. A. WHITEHEAD, *SYMBOLISM* 88 (1927), *quoted in* Frankfurter, Book Review, 77 U. PA. L. REV. 436, 438 (1929) (reviewing B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928)).

2. *See, e.g.*, *Commodities Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986); *Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *Thomas v. Union Carbide Agric. Prod. Co.*, 105 S. Ct. 3325 (1985); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

3. *See Northern Pipeline*, 458 U.S. 50.

4. *See Bowsher*, 106 S. Ct. 3181.

5. *See Chadha*, 462 U.S. 919.

6. 458 U.S. 50 (1982).

cursions upon the Constitution's guarantee of an independent judiciary. In *Northern Pipeline*, the Court considered the constitutionality of a statute creating a federal bankruptcy court staffed by judges serving for a fixed term of years.⁷ The Court determined that the creation of such an institution did not comply with article III, the Constitution's provision governing the judiciary.⁸

Article III vests "the judicial power of the United States . . . in one Supreme Court and in such inferior federal Courts as the Congress may from time to time ordain and establish."⁹ Additionally, it provides that the judges of those courts, which have come to be known as "article III courts" or "constitutional courts,"¹⁰ shall have tenure for life and salaries that cannot be reduced once fixed.¹¹ The aim of these provisions is to establish the judiciary as an independent branch of government, insulated from grosser forms of political pressures transmitted through the other branches.¹² The judicial power covers all cases arising under the Constitution and under the laws and treaties of the United States.¹³ This grant allows article III courts an expandable judicial jurisdiction to meet the output of the federal lawmaking processes.

In short, article III commands that the judicial power is to be vested in article III courts. Most literally, this means that federal judicial bodies hearing cases under federal law must be politically insulated article III courts. It is not clear, however, to what extent the framers intended article III to be applied in a relentlessly lit-

7. *Id.* at 60-62.

8. *Id.* at 76, 87 (Brennan, J., plurality opinion); *id.* at 91-92 (Rehnquist, J., concurring in the judgment).

9. U.S. CONST. art. III, § 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.

10. *See* 458 U.S. at 57-60.

11. U.S. CONST. art. III, § 1.

12. "Next to permanency in office, nothing can contribute more to the independence of the 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." 458 U.S. at 60 (quoting THE FEDERALIST No. 79, at 491 (A. Hamilton) (H. Lodge ed. 1888) (emphasis in original)).

13. U.S. CONST. art. III, § 2, cl. 1.

eral way to every judicial-style decision of a federal officer applying federal law to specific facts. What is clear is that article III has been applied in an increasingly flexible way. The Supreme Court has allowed some adjudication under federal law to be conducted at the trial level by federal courts that are not protected by article III. These courts have come to be known as "article I courts" or "legislative courts."¹⁴ Similarly, the Court has allowed some federal adjudication to be conducted at the trial level by administrative agencies outside the aegis of article III.¹⁵

Exceptions permitting non-article III federal judicial bodies to operate in the territories¹⁶ and to try court martial cases¹⁷ came early, but, because of the rationales advanced to support these exceptions, they can be read quite narrowly.¹⁸ More cryptic, and, hence, more potentially generative, is an exception to article III's scope recognized in the 1855 case, *Murray's Lessee v. Hoboken Land Co.*¹⁹ There, the Court concluded that what it called "public-rights cases," unlike "private-rights cases," could be determined by non-article III bodies.²⁰

Under one interpretation of *Murray's Lessee*, public-rights cases constituted a closed and rather small category defined by reference to eighteenth century British practice.²¹ Another interpretation of *Murray's Lessee* sees public-rights cases as those involving federally created privileges such as land grants.²² This broader

14. See *Northern Pipeline*, 458 U.S. at 60-62.

15. See *Thomas v. Union Carbide Agric. Prod. Co.*, 105 S. Ct. 3325, 3334 (1985) and authorities cited therein.

16. See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). An exception for courts, sitting in the District of Columbia and applying acts of Congress solely for the governance of the District, was not established beyond doubt until 1973. *Palmore v. United States*, 411 U.S. 389 (1973). Despite this, there were early suggestions of such an exception. *Id.* at 405.

17. See *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

18. In the opinion of the *Northern Pipeline* plurality, these exceptions were justified by the constitutional grants to Congress of plenary power that enable it to legislate for the District of Columbia and the territories. 458 U.S. at 70.

19. 59 U.S. (18 How.) 272. See *infra* Section I(B).

20. 59 U.S. (18 How.) at 284.

21. This was apparently Louis Jaffe's view. See *infra* note 143 and accompanying text. In fact, in considering a due process challenge to a statute that authorized tax sales prior to an adjudication of indebtedness, the *Murray's Lessee* Court referred to pre-revolutionary English procedures. 59 U.S. (18 How.) at 276-82.

22. Cf. *Thomas v. Union Carbide Agric. Prod. Co.*, 105 S. Ct. 3325, 3336-37 (1985) (noting that the congressionally created cause of action in issue did not displace preexisting rights).

interpretation prevailed and, at times, seemed to broaden still further.²³ In 1932, in *Crowell v. Benson*,²⁴ the Court read article III even more flexibly. It allowed non-article III tribunals substantial powers, even in the formerly sacrosanct domain of private-rights cases, which involve contests between two private parties such as were traditionally determined at common law, in equity or in admiralty.²⁵

I believe that it was the cumulative effect of the series of exceptions to article III described above that moved most of the Justices participating in *Northern Pipeline* to go beyond the case before them and to attempt a clarification of the scope and status of the Constitution's provisions for an independent judiciary. These Justices apparently wanted to make clear that the tenure and salary protections had not been, and would not be, effectively read out of the Constitution.²⁶

Going on record in favor of a meaningful article III was most obviously an aim of the plurality of Justices in *Northern Pipeline*, including Brennan, Marshall, Blackmun, and Stevens.²⁷ Writing for the plurality, Justice Brennan attempted to draw a detailed map of article III that would accommodate and clarify existing exceptions while carefully limiting them.²⁸ Among the exceptions acknowledged by the plurality was the one for public-rights cases that originated in *Murray's Lessee*.²⁹ The plurality concluded that, in public-rights cases, the Constitution permits the use of an article I court.³⁰ Still, the plurality was not certain precisely what sorts of cases were to be included in the public-rights category:

The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." In contrast, the liability of one individual to another under the law as defined . . . is a matter of

23. See *infra* Section II(E)(3).

24. 285 U.S. 22.

25. *Id.* at 51-52.

26. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71-76, 80-86 (1982) (Brennan, J., plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment); *id.* at 113-16 (White, J., dissenting).

27. *Id.* at 52, 64-86 (Brennan, J., plurality opinion).

28. *Id.* at 64-86.

29. *Id.* at 67-70.

30. *Id.*

private rights.³¹

For other cases involving the assertion of rights created by Congress, but not falling within the public-rights category,³² the plurality allowed non-article III adjudication under somewhat more stringent safeguards.³³ The plurality left the line between the congressionally-created-rights category of cases and its public-rights subset unclear at best.³⁴

In 1985, in *Thomas v. Union Carbide Agricultural Products Co.*,³⁵ and again, in 1986, in *Commodities Futures Trading Commission v. Schor*,³⁶ the Court struggled with the present-day significance of the public-rights and private-rights categories and with the proper general approach to article III exceptions.³⁷ As a result, a majority of the Court, including some defectors from the *Northern Pipeline* plurality,³⁸ chose to deemphasize the public rights/private rights distinction and to approach article III protections in a different way. This new approach substitutes a case-by-case balancing test for formulaic sub-rules in determining the validity of instances of non-article III adjudication.³⁹ Thus, it aims directly at an accommodation between the demands of modern dispute resolution and the protection against the recurrence of the dangers that called for an insulated judiciary in 1789.⁴⁰ This Article will return to *Northern Pipeline*, *Thomas*, and *Schor* for a more complete description, some criticism, and some praise.⁴¹

The history of the public rights/private rights distinction has never been fully explored in scholarship or in court opinion. The primary purpose of this Article is to trace the history of the

31. *Id.* at 69-70 (footnote omitted) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929), and *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

32. Such rights might be seen to include statutory causes of action that Congress confers in substitution for pre-existing causes of action at common law or in admiralty. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22 (1932).

33. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-86 (1982).

34. *See id.* at 67-70, 76-86.

35. 105 S. Ct. 3325.

36. 106 S. Ct. 3245.

37. *Id.* at 3255-61; *Thomas*, 105 S. Ct. at 3333-39.

38. In *Schor*, Justices Stevens and Blackmun deserted Justices Brennan and Marshall. 106 S. Ct. at 3245.

39. *Id.* at 3256-61; *Thomas*, 105 S. Ct. at 3336-37.

40. *See Schor*, 106 S. Ct. at 3256-61.

41. *See infra* Section III.

Court's flexible approach to article III's protections and, in particular, to trace the history and influence of the exception for public-rights cases.

What follows deals with the development of a technical exception for such public-rights cases, originating with, among other sources, *Murray's Lessee*. It is also concerned with how the Court came to allow considerable room for non-article III adjudication in private-rights cases.

One thesis of this Article is that a shift in the way judges perceived the appropriate line between the public and private spheres of action caused them to see many formerly private cases as public. This, I believe, led to a similar relaxation of the requirement that an independent article III judge hear cases still nominally termed private.

At its conclusion, this Article, will turn somewhat critically to the Court's current approach toward the validity of non-article III federal adjudication.

II. THE EVOLUTION AND INFLUENCE OF THE "PUBLIC RIGHTS" EXCEPTION: FROM *MURRAY'S LESSEE* TO *CROWELL*

A. *The Second Life of Crowell v. Benson*

Although it might be thought that attempts to vest adjudicatory powers in non-judicial hands necessarily violate the separation of powers principle, courts have not often invalidated statutes on this basis.

At the federal level the validity of such [transfers of powers] has long been settled by *Crowell v. Benson*.⁴²

I will begin with *Crowell v. Benson*,⁴³ the case bridging the old and new article III jurisprudence and providing the basis for expansion of non-article III adjudication. In *Crowell*, the Supreme Court considered administrative agency adjudication of a workers' compensation case brought against an employer by his alleged employee.⁴⁴ A majority of the Court concluded that, because the underlying dispute concerned the liability of one private party to another, it was a private-rights case. The majority formally

42. W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, *ADMINISTRATIVE LAW* 105 (8th ed. 1987).

43. 285 U.S. 22 (1932).

44. *Id.* at 36-37. For a complete description of *Crowell*, see *infra* subsections 1 and 2 of this Section.

recognized that private-rights cases,⁴⁵ tried federally, must be disposed of only in a federal court.⁴⁶ In so concluding, the majority perpetuated the analysis of *Murray's Lessee v. Hoboken Land Co.*⁴⁷

Yet, even though formally perpetuating the notion that private-rights cases must be tried in an article III court, the majority in *Crowell* hastened the erosion of judicial protection in such cases.⁴⁸ While the majority did require court involvement in private disputes, the required involvement was quite restricted. According to *Crowell*, in a wide variety of private rights disputes, the article III courts' only role is to review for errors of law, including gross inadequacy in the fact-finding process. In other words, Congress can require initial submission to an administrative agency whose findings of facts must be treated as final by the courts, absent any error of law. Thus, Congress functionally has great freedom to employ agencies instead of article III trial courts.⁴⁹ *Crowell* reached this conclusion despite the Constitution's clear language vesting the judicial power in tenured article III judges.⁵⁰ In *Crow-*

45. *Id.* at 51.

46. *Id.* at 50-51. *Murray's Lessee v. Hoboken Land Co.*, 59 U.S. (18 How.) 272 (1855), does this by distinguishing cases of public rights from cases of common law, equity, or admiralty, the latter three being cases of private right. *Id.* at 284-85. The Court also may intend that all suits between private parties are private-rights suits. *See id.* As discussed extensively in Section III(B) of this Article, the Court nowhere makes clear precisely how private-rights suits are to be defined. It simply makes clear that ordinary actions at law, in equity and in admiralty between purely private parties are included in the category. The majority in *Crowell* views suits between private parties, brought to establish the monetary liability of some of them to others, as squarely within the private-right suit category. *Crowell*, 285 U.S. at 51. Whether such suits were seen as subsuming the private-rights category is not clear.

47. 59 U.S. (18 How.) 272 (1855). *See infra* subsection B of this Section.

48. Indeed, in his dissenting opinion in *Northern Pipeline*, Justice White, joined by the Chief Justice and Justice Powell, stated that the article III public rights/private rights distinction had appeared to receive its "death blow" in *Crowell*. 458 U.S. at 109. The plurality of Justices in that case thought otherwise. *Id.* at 67-70.

49. That *Crowell* was a case of private right, by the majority's own standards, is not in doubt. 285 U.S. at 51. The characterization of *Crowell* as allowing an agency to function substantially as a trial court is a fair one. *See* D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 144 (3d ed. 1982); D. CURRIE, JURISDICTION IN A NUTSHELL 37-38 (1976).

That the dispute in *Crowell* would have been within the judicial power if brought in a court is not in doubt. Virtually any conceivable federal agency or executive branch adjudication involves matters that, if placed in a court, would come squarely within the judicial power as defined in article III. The judicial power includes, among other things, suits arising under federal law and those in admiralty. U.S. CONST. art. III, § 2, cl. 1. The dispute in *Crowell* fell, without question, into each of those categories.

50. For the text of article III, section 1, see *supra* note 9.

ell, the agency's personnel enjoyed no article III tenure and salary protection.⁵¹ The judicial power clearly includes the power to conduct trials as much as the power to hear appeals. Consequently, *Crowell* effectively permitted, though not in formal terms, substitution of federal administrative agencies for regular trial courts.

All eight participating Justices agreed that, even in many private-rights cases, such a substitution of an agency for an article III trial court could be made. The eight Justices included three dissenters (Brandeis, Stone, and Roberts) who would have gone even further in allowing agencies to displace the courts. Felix Frankfurter, then professor of public law at Harvard Law School, concluded that Congress' power to make such a substitution should have been clear to those steeped in federal public law.⁵² With the exception of the lower courts in *Crowell*, none of the lower federal courts that had applied the Longshoremen's Act, which was at issue in *Crowell*, found constitutional difficulties.⁵³ None of the law review commentary on *Crowell* takes issue with, or even finds novel, *Crowell's* conclusion allowing executive branch trials in many cases involving private rights.⁵⁴ Despite this consensus, the conclusion that article III permitted such adjudication was significantly, if not entirely, unprecedented and required an extremely flexible reading of the Constitution's judicial power provisions.

To me, the mystery has always been how the view advanced in *Crowell* became so clear to such distinguished Justices and scholars by 1932, months before the New Deal and years before Court-packing pressures. What follows is an effort to solve that puzzle and to further examine the origins and development of the related category of public-rights cases. The puzzle's solution is to be found partly in a series of technical doctrinal developments.

51. The Deputy Commissioners were appointed by the Commissioners. Longshoremen's and Harbor Worker's Compensation Act, Pub. L. No. 69-803, §§ 39, 40, 44 Stat. 1424, 1442-43 (1927) (codified as amended at 33 U.S.C. §§ 901-50 (1982)) [hereinafter Longshoremen's Act]. The Commissioners themselves had but six year terms. Act of Sept. 7, 1916, ch. 458, § 28, 39 Stat. 742, 748 (codified as amended in scattered sections of 5 U.S.C.).

52. See *infra* note 55 and accompanying text.

53. See cases cited in Justice Brandeis's *Crowell* dissent, 285 U.S. at 68 n.3; see also *infra* notes 58 & 61 and accompanying text.

54. See Dickinson, *Crowell v. Benson*, *Judicial Review of Administrative Determinations of Constitutional Fact*, 80 U. PA. L. REV. 1055 (1932); Note, 46 HARV. L. REV. 478 (1933); Comment, 30 MICH. L. REV. 1312 (1932); Comment, 41 YALE L.J. 1037 (1932); Recent Decision 32 COLUM. L. REV. 738 (1932).

These developments, however, are fully explainable only in terms of changes in the relative domains of public and private law and in terms of changes in the ways judges and scholars viewed the Constitution when it blocked desired modernization.

1. *A Brief Look at the First Life of Crowell v. Benson.*

February 29, 1932

Dear Stone:

I am again in mourning. Indeed, the decisions in the *Standard Nut* case and in *Crowell v. Benson* make me wonder whether law is really my beat That the Chief should have . . . determined the result in *Crowell v. Benson* [makes me say to myself] "Either his mode of legal reasoning or mine is without warrant." Truly, but for the dissents in both cases, I should feel I had no business to spend my life in public law, since my own understanding of those matters is so different from that of the Court.⁵⁵

The first life of *Crowell v. Benson*⁵⁶ is that of the "jurisdictional facts" and "constitutional facts" doctrines discussed immediately below. Those doctrines are now nearly extinct, and Professor Frankfurter's position has been vindicated.⁵⁷

The essentials of the *Crowell* case are simple. The United States Employees' Compensation Commission had the authority to determine, in the first instance, certain employee compensation claims.⁵⁸ Crowell, Deputy Commissioner of the agency, had made

55. Letter from Professor Frankfurter to Mr. Justice Stone (Feb. 29, 1932) (available in The Papers of Felix Frankfurter, General Correspondence File, Harlan F. Stone sub-file, microfilm reel no. 64 at Manuscript Division of Library of Congress). The *Standard Nut* case referred to was presumably *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932). The Court allowed an injunction against tax collection, although prohibited by the language of a federal statute. Apparently Professor Frankfurter agreed with his correspondent's dissent which was joined by Justice Brandeis. Presumably all *Crowell* and *Standard Nut* have in common, from the professor's perspective, are an unnecessarily stingy view of the power of the federal government to conduct public business, and the dissents by his friends, Stone and Brandeis.

56. 285 U.S. 22 (1932).

57. By this, I mean that the constitutional and jurisdictional facts doctrines are largely moribund. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 339-40 & nn.14-17 (2d ed. 1973) [hereinafter *HART & WECHSLER*]. For a more extensive discussion of the demise of the jurisdictional facts doctrine and of the paring down of the constitutional facts doctrine, see *infra* note 76 and accompanying text.

58. 285 U.S. at 42-44. The Commission was created by Act of Sept. 7, 1916, ch. 458, § 28, 39 Stat. 742, 748 (codified as amended in scattered sections of 5 U.S.C.), and its functions and relationship to the federal courts were defined in the Longshoremen's Act, *supra* note 51.

an award against Benson and in favor of Knudsen, his alleged employee.⁵⁹ Benson brought suit in federal district court, requesting that the award be set aside and that its enforcement be enjoined as contrary to law. In particular, Benson alleged that the requisite employer-employee relationship did not exist at the time of the accident.⁶⁰ Read in the most plausible way, the enabling Act required the federal courts, on judicial review, to defer to the agency's findings of fact as if those courts were appellate courts reviewing findings made by a federal district court.⁶¹

Under this interpretation of the judicial review provisions, there was a strong claim that Congress had violated the Constitution's command that the judicial power be vested in article III courts. This was a forceful argument, because the Constitution defines the judicial power as including cases in admiralty and cases arising under the laws of the United States.⁶² The proceedings in *Crowell* fit easily into each of these categories⁶³ and, because they involved the application of law to fact and the entering of an order, they were of a judicial, as opposed to a legislative nature. There was thus a question as to why any federal body to which such a matter was consigned did not need to qualify as a fully-protected article III court.

59. 285 U.S. at 36-37.

60. *Id.* at 37.

61. The relevant portions of the Longshoremen's Act were not completely clear on the proper scope of review:

If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District)

Longshoremen's Act, *supra* note 51, § 21(b), at 1436 (dealing with proceedings brought by a party seeking to overturn a Commission award). "If the court determines that the order was made and served in accordance with law, and that such employer . . . [has] failed to comply therewith, the court shall enforce obedience to the order *Id.* § 21(c), at 1436-37 (dealing with employers' contesting awards in proceedings brought by the Commission or by employees to enforce an award). "Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section or section 18." *Id.* § 21(d), at 1437. Section 18, referred to in section 21(d), deals with collection from employers of payments with respect to which they are in default. Section 18 also provides that the federal courts are to honor Commission awards if made "in accordance with law."

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

63. 285 U.S. at 39.

The district court permitted itself *de novo* reconsideration of the facts, as found by the agency, bearing on the existence of the employment relationship.⁶⁴ Indeed, as *de novo* consideration permits, it heard evidence which was not presented to the agency.⁶⁵ The court determined, contrary to the agency's findings, that the requisite employment relationship did not exist.⁶⁶

Despite the statute's language restricting review to errors of law, the district court had allowed itself *de novo* review because of its concern for the constitutionality of the administrative scheme if it did not permit *all* facts found by the agency to be redetermined by an article III court.⁶⁷ The Supreme Court affirmed on a much narrower rationale. It required *de novo* judicial review only of the facts bearing on employment. Its theory was that employment was a special sort of fact, a "jurisdictional fact," whose establishment was prerequisite to the agency's having jurisdiction. As to such special facts, but not as to ordinary facts such as the existence or the extent of injury, the Court held that the Constitution required *de novo* fact-finding by an article III court.⁶⁸ Likewise, the Court acknowledged that certain other special facts underlying constitutional claims were fundamental and must, therefore, be subject to redetermination in an article III Court.⁶⁹ Having drawn these conclusions, the majority in *Crowell* interpreted the statute to allow *de novo* review of the facts underlying the agency's conclusion that Knudsen was Benson's employee.⁷⁰ Thus, by adroit statutory interpretation, the Court avoided having to act on its constitutional dictum.⁷¹ The story of the statements in *Crow-*

64. *Id.* at 37.

65. *Crowell v. Benson*, 45 F.2d 66, 67 (5th Cir. 1930).

66. 285 U.S. at 37.

67. *Benson v. Crowell*, 33 F.2d 137, 141-42 (S.D. Ala. 1929), 38 F.2d 306 (supplemental opinion), *aff'd*, 45 F.2d 66 (5th Cir. 1930). The court of appeals, in affirming the decision of the district court, had given some weight to the facts in question in *Benson*. The facts were, in its view, those "upon which [the] official's . . . power to act at all is dependent." 45 F.2d at 68-69. In other words, they were jurisdictional in the schema of Hughes' opinion.

68. 285 U.S. at 54-65.

69. *Id.* at 60-61.

70. *Id.* at 62-63. While the district court made clear its view that the Constitution required the court be free to redetermine all contested facts, the only fact-finding contested before the federal district court was the fact of employment, characterized by the Supreme Court as fundamental. Again, this is revealed in the opinion of the court of appeals. 45 F.2d at 67.

71. Interpretations of statutes to avoid serious constitutional doubt produce state-

ell requiring de novo review of constitutional facts and jurisdictional facts is the story of the first life of *Crowell v. Benson*. It was the only feature of that case found noteworthy by the law journals of its day.⁷² Those statements were attacked by friends of the emerging bureaucracy, including not only Justices Brandeis, Stone, and Roberts, but also Frankfurter, and, with great intellectual power, John Dickinson.⁷³

Today, some fifty years after *Crowell*, all of these dissenters have largely won. While the Court has never expressly overruled *Crowell*, it has limited the jurisdictional and constitutional facts doctrines almost out of existence.⁷⁴ Those fundamental facts that must be redetermined by a court, though properly determined by an agency in the first instance, seem limited to a very few civil contexts.⁷⁵ Examples of this can be found in some immigration and first amendment cases, where important civil liberties are at stake.⁷⁶

ments about the Constitution which occupy a middle position on what might roughly be called the dictum-holding continuum. Somewhat closer to pure holding are clear statements of the hypothetical unconstitutionality of the most plausible interpretation of a statute, which are then used to justify a somewhat strained interpretation. The *Crowell* majority's pronouncements on constitutional requirements for de novo review of jurisdictional facts are in the latter category of semi-holding.

72. See *supra* note 54 and accompanying text.

73. See Dickinson, *supra* note 54. For a description of Dickinson's professional accomplishments, see *infra* notes 285-86 and accompanying text. In my estimation, and based solely on a comparison of the quantity and quality of his published work with that of others, Dickinson's thinking on administrative law was by far the best of those who focused on the subject in the 1920's and 1930's.

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

75. By "redetermine" I mean either that a court can make new findings of fact after hearing new evidence, as did the district court in *Crowell*, or that a court can make new findings of fact based upon the record established by the agency. Both involve a complete substitution of judgment by a court as to the facts found. They differ only as to the body of material from which conclusions can be freely drawn.

76. See Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: an Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1375 (1953). Henry Hart concluded in 1953 that, in the field of civil liability, the doctrine of jurisdictional facts was seriously in question. He did conclude that, in areas where liberty is at stake, something resembling the doctrine continued to require careful court review. For example, in suits to expel alleged aliens who claim citizenship, the basic facts determined originally by the immigration authorities were subject to de novo examination in a federal trial court. *Id.* at 1389 (citing *Ng Fung Ho v. White*, 259 U.S. 276 (1922)). Hart's legal-literary successors make clear that the doctrine has withered in the years since Hart wrote. See *supra* note 57 and accompanying text; see also D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 144 (3d ed. 1982). The exception for at least some liberty interests has survived. See, e.g., *Agosto v. Immigration and Naturalization Serv.* 436 U.S. 748, 752-53 (1978). For a description of what may be a limited, but

What survives of *Crowell*, in robust form, is its conclusion that non-article III tribunals can be used extensively by Congress to finally determine most facts, even in purely private controversies. This portion of *Crowell* and its pedigree are described in the next Section.

2. *The Second Life.*

Well, the solid or apparently solid thing about *Crowell* is the holding that administrative findings of non-constitutional and non-jurisdictional facts may be made conclusive upon the courts, if not infected with any error of law, as a basis for judicial enforcement of a money liability of one private person to another.⁷⁷

It is Henry Hart's "apparently solid thing about *Crowell*" that has allowed it a second life, this one successful. *Crowell* has been correctly viewed as the first case that broadly approved transfers of trial jurisdiction from courts to agencies.⁷⁸ Indeed, with the demise of *Crowell's* holding, its statements about nonjurisdictional and nonconstitutional facts have taken on new importance. They have been used in civil disputes to justify final agency determination of virtually any fact, whether fundamental or not.⁷⁹

By the time of *Crowell*, the general legitimacy of final fact-finding by agencies was widely recognized among sophisticated lawyers. The positions of the Justices in that case, and of Frankfurter, John Dickinson, and other legal scholars, make that clear.

Because article III vests the judicial power, trial and appellate,⁸⁰ in the tenured judiciary, the developments described above require explanation. Do the opinions in *Crowell* adequately explain its pedigree?

a. *The Opinions.* The most striking feature of the opinions in *Crowell*—majority and dissent—is the weakness of the reasoning supporting their one shared conclusion: that ordinary (i.e. non-

important, revival in first amendment cases, see Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

77. Hart, *supra* note 76, at 1375. Because *Crowell* involved only the fact of employment, found by the Court to require special procedures, its statements permitting ordinary fact-finding by agencies are dictum from the very strictest point of view. Those statements, however, are most clear and forceful. Hart is not alone in treating them as an important declaration. See D. CURRIE, *supra* note 76, at 144.

78. D. CURRIE, *supra* note 76, at 144.

79. *Id.*

80. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

constitutional and nonjurisdictional) issues of fact, in at least some cases of private rights, can be determined finally by an administrative agency. After making a plausible case that such adjudication suffices in public-rights cases,⁸¹ Hughes, for the majority, turns to private-rights cases:

The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself [I]t is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners . . . to pass on certain classes of questions While [their] reports . . . are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law.⁸²

These arguments exhaust the majority's efforts at reconciling the questioned provisions of the Longshoremen's and Harbor Workers' Act with the requirement of article III that the judicial power of the United States be vested in article III courts. The arguments against each justification asserted—the institutional precedents of (1) fact-finding by juries and (2) the fact-finding by aides to courts such as magistrates—are so strong and, in the case of juries, so plain, that Hughes seems to feel the need to acknowledge the weaknesses in his own arguments.

As the Chief Justice points out, in the case of juries, the Constitution itself embodies a decision to preserve that ancient institution.⁸³ This, of course, rules out a conclusion that article III judges must find all facts in all federal adjudications, but it hardly compels the inference that other institutions not expressly recognized by the Constitution are to have power resembling that of juries.

Even if the Constitution is read liberally as allowing fact-finding by any institution similar to a jury, administrative agencies are

81. For the majority's view of what constituted a private-rights suit, see *supra* text accompanying note 46. For the seeds of such a definition in *Murray's Lessee*, see *supra* note 46 and subsection B of this Section.

82. *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

83. *Id.* ("[T]he aid of juries is not only deemed appropriate but is required by the Constitution.").

unlike juries in crucial ways. Juries, like article III courts, are insulated from congressional and presidential tenure and salary pressures. Administrative agencies, however, do not enjoy such constitutionally guaranteed insulation.⁸⁴ Consequently, if the right to a jury trial has any bearing on the issue of administrative fact-finding, its unique nature affords the basis for an implication that agencies cannot be granted the same fact-finding powers.

Again, in presenting his second precedent—that of special masters—Hughes seems compelled to recognize the weakness of his point. These aides to courts make findings of fact that, unlike the findings by the agency in *Crowell*, do not bind the courts.⁸⁵ The statute in *Crowell*, as interpreted by the Court, made agency fact-finding final. Courts, however, were free to disregard the findings of masters.⁸⁶ That they rarely did so may well have been a product of the courts' control over masters. The decision to appoint a master, and that of whom to appoint, were judicial decisions.⁸⁷ While such a pattern of judicially self-imposed deference to masters could conceivably raise issues under article III, they would be of a different magnitude from the issues raised, as in *Crowell*, by a congressionally compelled requirement of deference to officials not selected by the judiciary.⁸⁸ Thus, the opinion of the majority rests on two institutions that are allegedly analogous to federal administrative agencies but that are, in fact, sharply distinguishable.⁸⁹ Indeed, the analogies are so inapposite that they

84. Of course, Congress can confer statutory insulation upon members of agencies in the form of life tenure and undiminishable salaries. Unless Congress has engaged the constitutional trip wire by creating an article III tribunal, article III does not prohibit a repeal. While the fifth amendment may require compensation for breach of a purely statutory guarantee of life tenure if property rights have vested, sovereign immunity provides a defense if Congress chooses to invoke it. See *Schillinger v. United States*, 155 U.S. 163, 166-68 (1894). Whether sovereign immunity trumps article III salary protection is not so clear.

85. See *Crowell*, 285 U.S. at 51.

86. See J. ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS § 570, at 498-99 (1931).

87. Rule 68, Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627, 669 (1912) (effective 1913).

88. Justice Brandeis makes a similar argument in an earlier case permitting judicially appointed and controlled assessors to find facts. *Ex parte Peterson*, 253 U.S. 300, 312-13 (1920).

89. I am not the first to find weakness in the majority opinion in *Crowell*. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 88 (1965). Jaffe limits his comments to the suggestive question, "But is [Hughes'] analogy [to jury and master] convincing? The jury and master have long been traditional as adjuncts." *Id.*

amount to virtually no explanation of the institution they are invoked to justify.

Justice Brandeis wrote a dissent in *Crowell*, which Justices Roberts and Stone joined. These Justices did not, however, dissent on the issue I am considering. The dissenters agreed with the majority that Congress is free, in a wide variety of cases, to have facts finally determined by federal bodies other than article III courts. The dissenters' support for this proposition is also transparently weak:

The "judicial power" of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.⁹⁰

First, the fact that Congress can consign federal cases to non-article III courts—the state courts—is not a convincing argument. As with the jury trial argument made by the majority, Brandeis argues from an exception clearly made by the Constitution to one neither mentioned nor remotely suggested by analogy. The policy permitting state-court adjudication does not also support agency adjudication. It was not a drafting mistake by the framers to provide both that federal judicial officers shall have tenure and salary protection and that Congress may consign cases under federal law to the state courts. It was, rather, their deliberate compromise between mandating the existence of lower federal courts, on the one hand, and prohibiting them, on the other, which led to allowing them at Congress' option.⁹¹ Once accepted by the framers, this compromise⁹² entailed the possibility of one form of jurisdiction—that of state courts⁹³—exercised by non-article III tribunals

90. 285 U.S. at 86-87 (footnote omitted).

91. See HART & WECHSLER, *supra* note 57, at 11-12.

92. *Id.*

93. Before the creation of general federal question jurisdiction in 1875 under the forerunner of current 28 U.S.C. § 1331, state courts were the sole available forums for

over federal cases. This does not suggest that another form of such jurisdiction—that of federal administrative agencies—would have been equally acceptable. For one thing, the compromise was produced by conflicting political pressures and seems to have little bearing on the determination of issues not actually compromised.

Even if I were to speculate about whether those who compromised would have found the question of federal agency adjudication easy, it is clear that agency adjudication is a different thing entirely from state court jurisdiction. The weakness of the state court argument resembles that of the jury trial argument rejected above. State courts, like juries and article III courts, are insulated from federal legislative and executive pressures in a way that neither a federal administrative agency, nor any other article I tribunal, can be.⁹⁴

Beyond the weakness of his state-court jurisdiction analogy, the scope of Brandeis's assertion is breathtaking. A most distinguished commentator said of a similar argument that it would, despite the clarity of article III to the contrary, make the provisions protecting tenure and salary apply only to federal appellate courts and judges.⁹⁵ In other words, it would permit Congress to substitute agencies or legislative courts for article III trial courts. Indeed, article III, as Brandeis reads it, does not require that the inferior federal trial courts be article III courts. For Brandeis, it is mainly the due process clause of the fifth amendment that requires that federal trial judges be article III judges, and then only for certain compelling types of cases.

Unlike the majority, however, Brandeis did not rely solely on weak interpretative arguments that had never been advanced previously. His opinion attempted to justify final agency adjudication by means of case precedents, in addition to the institutional precedents advanced by the majority. He first cited statutes that had

most private actions under federal law. See HART & WECHSLER, *supra* note 57, at 844-47.

94. Of course, state court judges may be susceptible to local political pressures. Nevertheless, article III, in keeping judicial power from the federal legislative and executive branches, insures that the power to make the laws and the power to apply them are not in precisely the same hands. The exceptions to article III discussed in this Article do, however, permit concentration. The creation of independent federal agencies with highly specialized and fragmented jurisdiction, while creating centers of power not contemplated by the framers, functionally helps reduce the risks of this concentration of power.

95. See D. CURRIE, *supra* note 76, at 144.

been upheld by courts despite deference to agency fact-finding.⁹⁶ The only roughly analogous set of statutes cited by Brandeis, however, were those dealing with the Interstate Commerce Commission ("ICC") and a few other federal agencies. Furthermore, as the legislative history shows, the ICC statutes were ambiguous on the availability of, the procedure for, and the scope of judicial review.

It is well accepted that the courts developed a doctrine of deference to facts found in certain ICC proceedings. However, as will be shown,⁹⁷ in "reparations cases" where the ICC acted most judicially, passing on the lawfulness of past railroad conduct in an action for damages, the commission's awards could be enforced only through court proceedings. In such proceedings, by clear statutory provision, the decisions of the ICC were not conclusive as to facts, but were merely prima facie evidence of them. Thus, in the ICC cases most clearly analogous to *Crowell*, both parties were free to present their entire legal and factual case to an article III court. Like the ICC, none of the other agencies cited by Brandeis had nonreviewable fact-finding powers in private-rights cases. Indeed, none of the other agencies had *any* jurisdiction over such disputes.⁹⁸

A year before *Crowell* was decided by the Supreme Court, Professor Sharfman, a scholar specializing in the Interstate Commerce Commission, offered a reason why reparations cases deserved the different treatment they received under the laws governing the ICC's jurisdiction and proceedings.⁹⁹ Such cases, he

96. 285 U.S. at 70-71 n.5. The Supreme Court cases cited by the dissenters are mainly suits brought by the government to enforce public norms. A few of the cases are private-party suits, such as those brought under antitrust laws to enforce public norms by injunction. The only Supreme Court case cited that involved a suit brought before an agency by one private party seeking money from another private party for past wrongs entailed proceedings before a District of Columbia rent board. *Block v. Hirsch*, 256 U.S. 135 (1921). *Block* is an extremely limited precedent for several reasons. First, even before *Palmore v. United States*, 411 U.S. 389 (1973), made it clear, the cases strongly suggested that the District of Columbia courts, applying federal statutes of local application, need not be article III courts. Second, the *Block* Court stressed that the administrative scheme was created to meet an emergency posed by the First World War. 256 U.S. at 154. Finally, the Court did not expressly consider argument that the administrative scheme conflicted with article III.

97. See *infra* subsection E of this Section.

98. See *supra* note 96.

99. 2 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 387 n.64 (1931).

said, involve past wrongs and "are designed to afford private redress to particular parties, rather than to further general public ends."¹⁰⁰ Sharfman quoted Ernst Freund, a leading administrative law scholar,¹⁰¹ who concluded that such cases were the ordinary stuff of adjudication, appropriate for adjudication only by the regular courts:

[P]ublic benefit attaches, however, only in the remotest sense (in the same sense in which all administration of civil justice is for the public benefit) to an order which attempts to deal with controversies as to amounts due or losses suffered by reason of past transactions, and which gives pecuniary redress to one of the parties to the controversy. *This is no longer public administration but remedial [i.e., private] justice.*¹⁰²

In using the ICC cases as precedents, Brandeis refers to sections of Sharfman's book, including those portions containing the Freund quotation. Surprisingly, however, he ignores the public/private distinction in his presentation of these cases and sources. The ICC cases and the commentary upon them do not strongly support the constitutionality of final agency adjudication of facts in private-rights cases. The Interstate Commerce Act, unlike the Longshoremen's Act at issue in *Crowell*, provided for de novo fact-finding by a court in those cases that most clearly involved private rights. Because the ICC's findings were not to be final in private-rights cases, the ICC case law provides no test of the constitutionality of final agency fact-finding. While not proving him wrong, neither do the ICC cases prove Brandeis right, contrary to the claim in the text of his opinion.¹⁰³

In sum, the *Crowell* majority thought that the private-rights nature of the case raised special problems requiring special justification for non-article III adjudication.¹⁰⁴ Hughes attempted to justify such irregular adjudication of private rights cases by means

100. *Id.* (quoting E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 12-13 (1928)).

101. See *infra* note 281 and accompanying text.

102. 2 I. SHARFMAN, *supra* note 99, at 387 n.64. (quoting E. FREUND, *supra* note 100, at 12-13 (1928) (emphasis added)).

103. 285 U.S. 69-70 & n.5. The non-ICC examples cited by Brandeis are also inapposite. Of the Supreme Court cases cited, only one involves a proceeding by one private party against another in which damages or the equivalent are sought. *Block v. Hirsch*, 256 U.S. 135 (1921). *Block*, an unusual case for the time, is highly distinguishable. See *supra*, note 96.

104. The majority feels the need to attempt a special justification for agency adjudication of private-rights cases. 285 U.S. at 51.

of the two unconvincing analogies criticized above.¹⁰⁵ Hughes makes no further arguments and cites none of the cases invoked by Brandeis, as he certainly would be expected to do if he thought that they supported his argument. Beyond this, the excerpts from Sharfman and Freund suggest that private parties' cases were recognized as sufficiently distinct to require special caution and clear justification in applying to them reasoning from other sorts of cases.

Despite this, Brandeis cites the ICC cases, and other enforcement cases in which the government is a party, as supporting similar results in the very different case before him.¹⁰⁶ Nowhere does he, or any other Justice, refer to a truly analogous case of unreviewable agency fact-finding determinative of the monetary liability of one private party to another.¹⁰⁷ Nowhere in the main text of his opinion does he acknowledge that he either rejects the majority's notion of private-rights cases as mistaken constitutional history, or that he accepts the majority's constitutional history as accurate, but simply proposes a departure. It is only toward the end of his opinion that Brandeis acknowledges, in a footnote, that some might see the cases he invoked as inapposite.¹⁰⁸

Perhaps Brandeis could have constructed a strong, but nonetheless disputable, chain of reasoning from the ICC cases¹⁰⁹ and the earlier cases that influenced them. Instead, he rested content with an assertion that new ground had not been broken.

105. See *supra* text accompanying notes 81-89.

106. See *supra* note 96.

107. The closest case is *Block v. Hirsch*, 256 U.S. 135 (1921). While that case did involve the liability of one private party to another, it is an extremely limited precedent. See *supra* note 96.

108.

So far as concerns the question here presented, it is immaterial whether the controversy is wholly between private parties or is between the Government and a citizen. The fact that litigation under the Longshoremen's Act is, in substance, between private parties . . . does not warrant the inference that the administrative features of the Act present a question not heretofore decided.

285 U.S. at 87 n.23.

109. Perhaps Brandeis's best argument would have been that, with *Phillips v. United States*, 283 U.S. 589 (1931), the Court had allowed non-article III adjudication in subject matter areas even more important and sensitive than that of private-rights disputes. See *infra* notes 332-43 and accompanying text. Perhaps this was true. Still, Brandeis buries in a footnote his response to the position of the majority, and that of scholars such as Ernst Freund, that private-rights cases are a core area for article III protection. See 285 U.S. at 87 n.23.

b. Crowell's *Break with the Past*. Read at a level of generality chosen for its congeniality, legal history can often be made to justify a wide range of visions of the future. With carefully selected arguments, one could see the views expressed by Justices Brandeis, Stone, and Roberts in *Crowell*, simply as a natural extension of the ICC cases. From a fairer perspective, *Crowell* represents a chosen discontinuity, whose offered pedigree rested on two sharply distinguishable institutions and on government-instituted regulatory and enforcement cases that, unlike *Crowell*, were not contests between private parties. *Crowell* was, I believe, the product of a number of convergent forces and events. These forces and events are the subject of the remainder of this Section. Before exploring them in detail in the ensuing Sections of this Article, I will briefly summarize them here.

There were, of course, the practical pressures on the *Crowell* Court toward allowing expert determination in cases of specialized complexity and other pressures toward conserving judicial resources in frequently recurring cases.¹¹⁰ Working with these practical pressures was a series of developments which accustomed judges to administrative adjudication. The Supreme Court first became accustomed to non-article III adjudication through what might be called federal executive-action cases or, in a broad sense, government-benefits cases, that functioned under rubric of "exec-

110. For some sense of the potential judicial caseload problems that might have resulted from reading article III to require that all facts found by the agency in *Crowell* be open to de novo judicial review, see the majority opinion, 285 U.S. at 45 n.10 and Brandeis's dissenting opinion, *id.* at 94-95 nn.31-32. Justice Brandeis speculates about the potential great increase resulting from the majority's opening up only jurisdictional and constitutional facts to de novo review. *Id.* at 94-95 nn.31-32. If all findings of fact had been so reviewable as well, presumably the increase in the district courts' case load would have been even greater. A very crude, conservative gauge may be the annual number of compensation hearings conducted by the agency as noted in *Crowell*. For the fiscal year 1931, these amounted to 905; cases before the agency not requiring a hearing totaled 29,584. *Id.* at 45 n.10. The total number of cases commenced in federal district court in 1931 was 49,332. AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS PART II, at 111 (1934) (detailed table 1). While perhaps some of the cases that were contested in the agency might not have been contested in the courts, it is also true that some of the other 29,584 cases before the agency in 1931, but not involving a hearing, might have taken the courts' time in other ways—for example, in the form of summary judgment-style "paper hearings" involving affidavits. Thus, on the reasonably conservative assumption of 900 new court cases, making the district court a de novo finder of all facts for just the single agency involved in *Crowell* would have effected roughly a two percent increase in the caseload of the lower federal courts. See also Dickinson, *supra* note 54, at 1062.

utive action."¹¹¹ A second factor acclimating judges to administrative adjudication was the series of Supreme Court decisions involving state administrative boards, and particularly workers compensation boards, holding that the due process clause of the federal Constitution does not necessarily require judicial process, even in private-rights cases.¹¹² There were also some state cases involving state administrative boards and state separation of powers doctrine.¹¹³ Some of these latter cases held that largely final administrative findings of fact did not violate state constitutional provisions that were similar to article III and the related jury trial protection of the seventh amendment.¹¹⁴

The decisions extending rules developed and applied in public-rights cases—those involving government-created benefits—to other sorts of cases were a third influence favoring agency adjudication. These rules were extended to cases brought by the government that involved the somewhat private rights of railroads.¹¹⁵ This was a natural progression, because railroads, although “private,” were “affected with a public interest.”¹¹⁶ The next step occurred with the creation of the Federal Trade Commission and its enabling act, which permitted final agency fact-finding in governmental actions against ordinary business corporations.¹¹⁷ At least to some degree, this was the product of the view that such corporations’ activities implicated the public interest, if to a lesser degree than railroads. Shortly before *Crowell*, the rules of extreme deference to agency fact-finding were extended to suits brought by the government to enforce civil liabilities owed to it by its citizens.¹¹⁸

A fourth influence on deference to administrative adjudication was the somewhat expanded view of legitimate public interest then in the air. This was true despite the Court’s general rejection of the view held by Holmes, Brandeis, and John Dickinson, that the category “affected with a public interest” extended virtually to the horizon of the legislative beholder. I believe this expanded

111. See *infra* Section II(C).

112. See *infra* note 311 and accompanying text.

113. See *infra* note 242 and accompanying text.

114. See *infra* notes 241-42 and accompanying text.

115. See *infra* Section II(F)(3)(a).

116. See *infra* notes 262 & 269 and accompanying text.

117. See *infra* notes 270-76 and accompanying text.

118. See *infra* notes 332-43 and accompanying text.

view of legitimate public interest moved even the most resistant, at least slightly, toward extending some procedures formerly restricted to public-rights cases to cases formerly viewed as entirely private matters.¹¹⁹ Although *Crowell* was cast as a private-rights case, another reading suggests that the public interest was seen as now extending legitimately this far in respect of judicial review. Surely the most conservative members of the Court might not have agreed with that characterization. Nevertheless, their concurrence in *Crowell's* dictum had the effect of making most cases of real public interest functionally public-rights cases, as that category had been defined in the earlier, seminal judicial-power case, *Murray's Lessee v. Hoboken Land Co.*¹²⁰

Finally, the tradition of ignoring inconvenient separation of powers problems, where not catastrophic (as exemplified by the territorial cases,¹²¹ if not the court martial cases¹²²), eased the way for the Court to ignore the article III problem presented in *Crowell*.¹²³ That tradition was more easily applicable by judges, some of whom accepted Pound's, Holmes's, Cardozo's, and Frankfurter's view that law could be made to adjust to perceived needs.¹²⁴ I shall now look more closely at the events and ideas that made *Crowell* possible.

B. *The Origins of Non-Article III Adjudication.*

1. *The Potential Breadth of Federal Judicial Power.* Article III vests the judicial power of the United States in a politically insulated judiciary. As further defined in article III, the federal judicial power encompasses all "cases arising under" federal law, as

119. Note that Justice Van Devanter concurred in Justice Brandeis's opinion for the Court in *Ex parte Peterson*, 253 U.S. 300 (1920). For the views expressed in that opinion as to adapting the demands of the seventh amendment to changing circumstances, see *infra* note 309 and accompanying text.

120. 59 U.S. (18 How.) 272, 280 (1855).

121. For a description of the development of an exception to article III's coverage for territorial courts, see the opinion of the plurality of Justices in *Northern Pipeline*, 458 U.S. at 64-65.

122. For a description of the development of an exception to article III's coverage for courts martial cases, see the plurality opinion in *Northern Pipeline*, 458 U.S. at 66-67.

123. The recognition of specialized, nationwide, non-article III tribunals in the 1920's exemplifies the point. See *infra* Section II(H).

124. See *infra* subsections D, F, G & H of this Section.

well as certain other cases and controversies.¹²⁵ What is the full meaning of "case" or "judicial power"? Did the Constitution use these terms in their broadest senses? The lawfulness of federal adjudication outside of the article III courts depends upon the answers to these questions.

In 1833, sitting as a circuit judge, Chief Justice John Marshall glimpsed, but then avoided, problems of definition that would, for a time, confuse the later age of administrative law. *Ex parte Randolph* involved a party arrested pursuant to a distress warrant issued by a Treasury official who acted after ascertaining the facts and applying the law to them:

If this ascertainment of the sum due to the government, and this issuing of process to levy the sum so ascertained to be due, be the exercise of any part of the judicial power of the United States, the law which directs it, is plainly a violation of the first section of the third article of the constitution¹²⁶

Twenty-three years later, the Court itself recognized the potential vastness of the judicial power in the well-known *Murray's Lessee v. Hoboken Land Co.*, a case involving facts similar to those Marshall faced as circuit judge in *Ex parte Randolph*:

That [this auditing of the accounts] may be, in an *enlarged* sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under [a federal statute] or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial.¹²⁷

This enlarged possible meaning of judicial action, recognized by Justice Curtis for the Court, suggests the need for practical narrowing. His examples show that separation of powers is an ideal not realizable in pure form.¹²⁸ In connection with the judicial power, his examples dramatize the need of the nonjudicial branches, even within their undoubtedly appropriate spheres, to act as dictated by their determination of the law and facts. To

125. For the relevant text of article III, see *supra* note 9.

126. 20 F. Cas. 242, 254 (C.C. D. Va. 1833) (No. 11,558).

127. 59 U.S. (18 How.) 272, 280 (1855) (emphasis added).

128. Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts — A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1012-23 (1924).

Justice Curtis, the problem seems one of line drawing: what shall be treated as centrally "judicial," requiring adjudication by an article III court and an appropriately insulated judge? His sketchy solution draws a distinction between cases involving public rights and others.

2. *The Origins of an Article III Public/Private Distinction in Murray's Lessee.* Justice Curtis' opinion is the origin of a private rights/public rights distinction bearing on the meaning of article III. Immediately before the Court was the validity of a sale by a United States marshal under a distress warrant issued by a Treasury official.¹²⁹ Upon auditing the accounts of Samuel Swartwout, the federal tax collector for the port of New York, the Treasury official discovered a discrepancy of over one and one-third million dollars.¹³⁰ Swartwout "attempted to meet this shortage by sailing to England."¹³¹ The shortfall was a considerable sum in those times, and the government made an intensive effort to reach what was left of Swartwout's assets in this country.

In accordance with a federal statute, the Treasury official issued a warrant commanding the marshal to sell the tax collector's property and to apply the proceeds to the debt due the United States.¹³² The federal sale was challenged on the ground, among others, that it violated the due process clause of the fifth amendment¹³³ and article III's requirement of adjudication in article III courts by article III judges.¹³⁴ The Court rejected the argument that due process required judicial process for assessing and compelling the payment of taxes.¹³⁵ The Court noted that it was accepted practice, both before and after the framing of the fifth amendment, for the executive to act without making use of the judiciary.¹³⁶ The validity of pure executive action under the due

129. 59 U.S. (18 How.) at 274-75.

130. *Id.* at 275.

131. XVIII DICTIONARY OF AMERICAN BIOGRAPHY 239 (D. Malone ed. 1936).

132. 59 U.S. (18 How.) at 274-75.

133. *Id.* at 275.

134. *Id.*

135. *Id.* at 275-80. For the view that the *Murray's Lessee* Court decided the due process issue incorrectly in light of constitutional history, see Taylor, *Due Process of Law: Persistent and Harmful Influence of Murray v. Hoboken Land & Improvement Co.*, 24 YALE L.J. 353 (1915). For a recent discussion of the due-process holding of *Murray's Lessee*, see Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 463, 469 (1986).

136. See 59 U.S. (18 How.) at 277-80.

process clause having been determined first, the article III challenge was completely separate analytically. The argument was that, because the statute in question provided for recourse to the regular federal courts after the executive had acted, Congress had thereby brought the whole matter within the judicial power.¹³⁷ Curtis responded directly to this argument:

[The argument] 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.¹³⁸

The Court then makes it clear that a judicial remedy for unlawful collection by the executive branch was accorded those claiming injury as a matter of legislative grace, by means of waiver of sovereign immunity. In allowing itself to be sued, the United States may do so "to such extent, and with such restrictions, as may be thought fit."¹³⁹ To the extent Congress has waived sovereign immunity in a case otherwise fit for judicial determination, it has brought a dispute within the judicial power. Having thus disposed of the plaintiff's argument,¹⁴⁰ the Court, in a key passage recognizing a public/private rights distinction, continued:

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public

137. The argument suggests that the controversy was inherently judicial, but may suggest, alternatively, a conceptual estoppel:

It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject-matter under its cognizance, it was not for the government to say that the subject-matter was not within the judicial power. That if it were not in its nature a judicial controversy, congress could not make it such, nor give jurisdiction over it to the district courts.

Id. at 282.

138. *Id.* at 283.

139. *Id.* at 284.

140. The response was one that, if borne in mind by a twentieth-century Supreme Court, would have avoided much confusion. See *Williams v. United States*, 289 U.S. 553 (1933). For a discussion of *Williams*, see *infra* notes 359-64 and accompanying text.

rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.¹⁴¹

Stated as narrowly as possible, the ascertainment of sums due the United States from a customs official is in the latter category of public right. It is a judicial matter, or not, as Congress pleases.

The broader implications of this passage, however, need drawing out. Its opening clearly is designed to blunt any difficulties created by possible "misconstruction" of earlier passages of the opinion. The Justices' concerns are with harmonizing the permissibility of some adjudication outside of article III with a meaningful role for that portion of the Constitution. Justice Curtis wants to dispel any concern that his opinion, in effect allowing adjudication by a Treasury official, might be read as inviting the substantial circumvention of article III. His approach is to first define the clearly invalid, then the valid.

The clearly invalid includes non-article III adjudication of suits at common law, and those in equity and in admiralty—the basic stuff of Anglo-American adjudication both at that time and at the framing of the Constitution. The set of valid non-article III adjudications is less clear. It includes at least those matters that Congress may dispose of itself or delegate to the executive branch, but which are capable of being structured as judicial matters.¹⁴²

Aside from negatively disposing of law, equity, and admiralty jurisdiction by requiring article III adjudication, Justice Curtis' opinion tells us only that some other matters can be disposed of by Congress, either judicially or by other means. He gives no clear formula for determining what, besides other customs' inspector cases, falls into the optionally judicial category. His examples and explanations are susceptible of several readings.

One such reading is that the areas in which Congress is free to determine a case itself or to assign it to a non-article III tribunal are established by reference to English law institutions at the time of the Constitution's framing.¹⁴³ A second reading is that almost any civil decision affecting an individual's relationship to the

141. 59 U.S. (18 How.) at 284.

142. *See id.*

143. This is apparently Jaffe's view. L. JAFFE, *supra* note 89, at 88, 90.

government, as opposed to another private party, can be made either by Congress or a delegate.¹⁴⁴ The third major possible interpretation is that Congress is free to so dispose of individual matters only when such matters involve privileges dispensed by Congress as opposed to vested rights. Cases building on *Murray's Lessee* adopted this third interpretation.¹⁴⁵ How that interpretation was applied and gradually extended to new categories of cases is a large part of the story of non-article III adjudication within the federal system.

It is only by strong implication that *Murray's Lessee* might be seen, as it was seen later, to bear on the constitutionality of federal bodies designed by Congress in the image of courts, but avowedly set up outside of article III and its protections. *Murray's Lessee* itself makes clear that Congress, or delegates of the executive branch, can perform certain adjudications. It does not make clear that Congress has the option to use a court-like body in doing so. Nevertheless, if Congress can itself dispose of a matter involving the application of law to fact or can use an executive branch delegate, it is difficult to construct a good, prudential argument prohibiting Congress from using a non-article III court,¹⁴⁶ and only slightly less difficult to construct a convincing constitutional argument to the same effect.¹⁴⁷

With *Murray's Lessee*, the notion of the quasi-judicial was legitimated¹⁴⁸ within the federal system, although not under that label. The potential effect of *Murray's Lessee* upon the shape of the judi-

144. This seems to have been Justice Brandeis's view. *Crowell v. Benson*, 285 U.S. 22, 86-87 (1932). An exception would clearly exist for criminal matters. *Id.* at 87-88 (Brandeis's reference to "civil matters").

145. See *infra* subsection C(1) of this Section.

146. The best prudential argument against allowing Congress, by statute, to delegate to a non-article III court matters that it may decide itself, would be that doing so may give the false impression of article III-style impartiality and insulation.

147. The constitutional argument might involve strict construction of article III's language coupled with a wooden application of the unconstitutional conditions doctrine, forbidding Congress from ever granting a privilege, while conditioning its grant on claimants' consent to adjudication in a non-article III court. Of course, sometimes such conditioning needlessly threatens constitutionally protected interests and should be condemned as an unconstitutional condition. My point is that not all instances of such a pattern seem worthy of condemnation. See *infra* note 500.

148. Perhaps that notion was born unnoticed in cases such as *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840), discussed *infra* note 156. *Murray's Lessee* is the first case to address, although inferentially, the constitutional underpinnings and consequent limits of the quasi-judicial.

cial power was not realized for some eighty years.¹⁴⁹ The Court still struggles with the meaning of *Murray's Lessee*, as evidenced by the three most recent decisions of the Supreme Court involving article III.

C. *Judicial-Style Executive Action from 1789 to the Formation of the Interstate Commerce Commission.*

This Section deals with the bulk of non-article III adjudication from the framing of the Constitution to the formation of the first independent administrative agency. Not covered is adjudication by courts martial, and by territorial and District of Columbia courts. What remains are decisions by executive branch officers known primarily as "judicial officers." As Justice Marshall noted in *Ex parte Randolph*, these federal matters were judicial in an "enlarged sense": in them action affecting individuals is taken after applying law to the facts of their particular situations.¹⁵⁰ This Section will also deal with some later executive branch cases, those after the creation of the Interstate Commerce Commission ("ICC") in 1887, but having more in common with the earlier cases than with the product of the new commissions. The ICC cases constitute a new phase of non-article III adjudication, one in which the old rules for executive-branch cases are applied to substantially different sorts of cases. As a result, the ICC cases will be discussed in a separate section.

1. *Judicial Deference to Executive Action: Murray's Lessee as Rationale.* While the majority opinion in *Murray's Lessee* is the first Supreme Court opinion¹⁵¹ explicitly to approve non-article III adjudication based on a hazily defined exception for public-rights cases, it is closely connected with an earlier line of cases involving executive action. That line of cases, firmly established by about 1840, came to be seen as forming a category separate from the truly judicial, a category termed "executive," or "administrative," action.¹⁵² Whatever their theory, those cases ignored the issue

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

150. See *supra* note 126 and accompanying text.

151. I know of no lower federal court opinion suggesting such an exception.

152. Some of the early cases simply ignore the resemblance of executive action to adjudication. See, e.g., *Commissioner of Patents v. Whiteley*, 71 U.S. (4 Wall.) 522, 534 (1866); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 304 (1854); *Brashear v. Mason*, 47 U.S. 92, 100-01 (6 How.) 92, 101-02 (1848); *Decatur v. Paulding*,

raised by Justice Marshall seven years earlier in *Ex parte Randolph* concerning encroachment on federal judicial power.¹⁵³ They simply viewed the actions as executive action and treated them as valid activity by that branch of government.¹⁵⁴ Perhaps the reason for this was the one suggested by Justice Marshall's opinion in *Ex parte Randolph*: the impracticability of the executive branch acting

39 U.S. (14 Pet.) 497, 515-16 (1840). Many cases, however, do recognize that executive action bears some of the attributes of adjudication. *See, e.g.,* *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324-25 (1903); *Orchard v. Alexander*, 157 U.S. 372, 375 (1895); *Noble v. Union River Logging R.R.*, 147 U.S. 165, 175-76 (1893); *United States ex rel. Redfield v. Windom*, 137 U.S. 636, 644, 646 (1891); *United States v. Lynch*, 137 U.S. 280, 286 (1890); *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 48 (1888); *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 58, 67 (1884); *Smelting Co. v. Kemp*, 104 U.S. (14 Otto) 636, 640 (1881); *United States v. Schurz*, 102 U.S. (12 Otto) 378, 395-96 (1880); *The Secretary v. McGarrahan*, 76 U.S. (9 Wall.) 298, 312 (1869); *Barnard's Heirs v. Ashley's Heirs*, 59 U.S. (18 How.) 43, 44 (1855); *Lytle v. Arkansas*, 50 U.S. (9 How.) 314, 333 (1850); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 129 (1849); *Wilcox v. McConnell*, 38 U.S. (13 Pet.) 498, 511 (1839). Paradoxically, perhaps, in the numerous executive-action cases that involved the writ of mandamus, the judicial features of executive decision making permitted the Court to proceed as if executive action was beyond the judicial power. Because of its quasi-judicial character, executive action involved the exercise of discretion. Mandamus, therefore, would not lie. *See, e.g.,* *Riverside Oil*, 190 U.S. at 324-25; *Redfield*, 137 U.S. at 644, 646; *Lynch*, 137 U.S. at 286; *Schurz*, 102 U.S. (12 Otto) at 395-96; *McGarrahan*, 76 U.S. (9 Wall.) at 312. In other cases, however, the Court, in the course of holding executive decisions unreviewable, flatly asserted that executive action was not judicial. *See, e.g.,* *Union River*, 147 U.S. at 175-76; *Craig v. Leitensdorfer*, 123 U.S. 189, 210-211 (1887).

153. *See supra* note 152 and authorities cited therein. The Court's reluctance to review executive action is perhaps the best evidence that it did not perceive executive action as an encroachment upon the federal judicial power. In fact, the cases suggest that judicial review of executive action was beyond the power of the courts and would, therefore, constitute an encroachment upon the executive power. This is due in part to the limitations of the writ of mandamus, which would lie only if the challenged action could be termed "ministerial." The Court, however, typically classified executive action as discretionary. *See, e.g.,* *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324-25 (1903); *United States v. Lynch*, 137 U.S. 280, 286 (1890); *The Secretary v. McGarrahan*, 76 U.S. (9 Wall.) 298, 312 (1869); *Commissioner of Patents v. Whiteley*, 71 U.S. (4 Wall.) 522, 534 (1866); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 304 (1854); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 8 (1849); *Brashear v. Mason*, 47 U.S. (6 How.) 92, 101-02 (1848); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515-16 (1840). *But see*, *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 68 (1884) (once officer decided to issue patent, signing and delivery to secretary for countersignature purely ministerial); *United States v. Schurz*, 102 U.S. (12 Otto) 378, 395-97 (1880) (once title to land vested in patentee, delivery of patent purely ministerial). At least one case emphasized that review of executive action would undermine the doctrine of separation of powers. *See* *Craig v. Leitensdorfer*, 123 U.S. 189, 210-11 (1887).

154. *See supra* note 153.

in the first instance without finding facts and applying law.¹⁵⁵ The Court's attitude, however, goes beyond toleration of such judicial-style executive action affecting individual interests to an acceptance of it as largely unreviewable by the courts.

In one of the earliest cases in this line, a case reviewing the Secretary of the Navy's denial of certain death benefits to the wife of Admiral Stephen Decatur, the Court made clear not only that such decisions could be determined initially outside of the courts, but, more significantly, that courts should be reluctant to overturn them: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given them."¹⁵⁶

The development of the line of executive-action cases, and the relationship of that line to the public-rights category recognized in *Murray's Lessee*, is a complex, but important, part of the story of the evolution of article III.

Within the province of the executive-action cases were matters involving privileges created by the federal government.¹⁵⁷ There was little opportunity for other sorts of disputes between the federal government and individuals, because, under the then prevailing views of the commerce clause and the proper sphere of federal activity, the general government did not regulate individual conduct on a large scale.¹⁵⁸ Where the federal government did directly touch the interests of individuals was mainly in those few areas in which it dispensed something in the nature of benefits. Proceedings against the government for damages required a granted privilege of suing the government.¹⁵⁹ Aliens seeking admission to our shores or to extend a stay sought what was then

155. Cf. Frankfurter & Landis, *supra* note 128, at 1012-23.

156. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840).

157. For a similar later view of the nature and unity of such cases, see *Crowell v. Benson*, 285 U.S. 22, 89 (Brandeis, J., dissenting).

158. The views of the Court as to the commerce clause were complex and shifting, but Congress passed little commercial legislation. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 134-38 (1978).

159. The Court in *Murray's Lessee* made this quite clear. 59 U.S. (18 How.) at 283-84. For later and more comprehensive discussion, see *United States v. Lee*, 106 U.S. 196 (1882).

viewed as a privilege.¹⁶⁰ The same was true of those seeking federal lands,¹⁶¹ veteran's benefits, patents,¹⁶² and use of the mails.¹⁶³ During this period these matters were the stuff of the federal quasi-judicial executive determinations involving individuals.¹⁶⁴

By employing such a definition of executive-action cases it is possible to clarify their relationship to *Murray's Lessee*. Executive-action cases decided after *Murray's Lessee* and before about 1884¹⁶⁵ do not clearly rely on *Murray's Lessee*, pointing one ini-

160. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893).

161. J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 277 (1927); McClintock, *The Administrative Determination of Public Land Controversies*, 9 MINN. L. REV. 638, 650 (1925). McClintock applied this analysis only to suits involving government and individual claimants, noting that in suits between private parties, after the government has conveyed away its interest, the legality of the government's disposition can be reviewed in equity. *Id.* As to such equitable suits, McClintock later makes clear that the facts found by the land department were treated as unreviewable except in certain unusual circumstances. *See id.* at 653. It seems likely that the governmental origin of the interests made easier the justification of a judicial inquiry much more limited than that in pure private property contests. In light of the fact that the land cases were part of the fabric of a set of rules common in cases involving veteran's benefits, immigration, etc., the plausibility of such a view increases. I am not asserting a general, conscious, and carefully worked-out view that government land was granted on the condition that executive determinations be generally dispositive as to facts concerning the grant so much as an unconscious sense that government land cases were different.

162. *See McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843). For an example of a veteran's benefits case, see *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840).

163. *See Public Clearing House v. Coyne*, 194 U.S. 497, 506-08 (1904); E. FREUND, *supra* note 100, at 291. Still, by this time there seem to have been some doubts. The Court was reluctant to take a stand on this issue in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 107 (1902), and two Justices seemed to think otherwise. *Id.* at 111 (White and McKenna, JJ., dissenting). *See Hoover v. McChesney*, 81 F. 472 (C.C.D. Ky. 1897); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

164. I am not asserting that, under such benefit schemes, vested rights were never created. Certainly at some point, by interpretation of the statutes involved, an official act would transfer title to formerly government land or rights to a patent. *See Butterworth v. United States ex rel. Hoe*, 112 U.S. 50 (1884); *United States v. Schurz*, 102 U.S. (12 Otto) 378 (1880). I am asserting that courts conceded a great amount of unreviewable discretion to officials who were finding facts and applying law in order to determine whether to do the act that would trigger vesting.

Occasionally, a court would speak as if the decision of whether or not to vest a right was not entirely up to Congress, given its decision to launch a benefit program. In one remarkable case, a federal circuit judge anticipated Charles Reich by some sixty years. *Compare Hoover v. McChesney*, 81 F. 472 (C.C.D. Ky. 1897) with Reich, *supra* note 162. The judge there concluded that a citizens' interest in the use of the mails, apparently regardless of the intent of Congress to vest a right, is in the nature of a property right. He based this view on the government's monopoly position and its use of the taxing power to maintain the postal service. 81 F. at 480-81.

165. *See Hilton v. Merritt*, 110 U.S. 97 (1884); *see also United States v. Duell*, 172 U.S.

tially toward the belief that its public-rights category was seen as conceptually separate. A careful look at *Murray's Lessee*, however, reveals that there was a connection between it and the executive-action cases during this period, even though the connection was vaguely understood and not clearly expressed.

In *Murray's Lessee*, Justice Curtis suggested that public-rights cases are those involving a dispute over a government benefit. He further stated that Congress can provide for the resolution of such controversies either by means of an article III court or otherwise. In *Murray's Lessee*, the benefit involved was Congress' consent to be sued. While alternative readings of the private-rights category were possible, the government benefit interpretation was supported by the only two cases Curtis cited in his opinion. Both cases recognized the finality of decisions of a federal executive officer dealing with land grants.¹⁶⁶ The relevant passage of Curtis' opinion reads: "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts."¹⁶⁷ This passage was preceded by language emphasizing that Congress' consent to suit was a privilege. It was followed by a citation to land grant cases. As a result, Curtis' notion of disputes that could be determined by Congress itself almost certainly refers to disputes involving privileges created by the federal government.

While *Murray's Lessee* was not mentioned in the executive-action cases for nearly another fifty years,¹⁶⁸ this is not surprising, because there was very little cross reference between the various

576 (1899); *Fong Yue Ting v. United States* 149 U.S. 698 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). The earliest clear indication that *Murray's Lessee* formed the underpinning of the executive-action cases came in *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 338-39 (1909) (citing both *Decatur*, and its line of cases, and *Murray's Lessee* for the validity of final executive-action of a judicial sort).

166. *Burgess v. Gray*, 57 U.S. (16 How.) 48, 64-65 (1853); *Foley v. Harrison*, 56 U.S. (15 How.) 433, 450-51 (1853). In each, the issue had arisen, not in a suit against the federal authorities, but in a later suit to settle conflicting private claims. These cases are complex. For the conclusion of a commentator on the land department cases that, in equitable suits, ordinary findings of most facts made earlier by the land department were to be treated as final, see McClintock, *supra* note 161, at 650.

167. 59 U.S. (18 How.) at 284.

168. See *supra* note 165 and accompanying text.

sorts of executive-action cases themselves.¹⁶⁹ This compartmentalization of the case law may be taken as a hallmark of an era before the recognition of an even somewhat unified administrative law.¹⁷⁰ Nevertheless, it is apparent that, at least in a semiconscious way, the Court came to observe such a category. Whatever the explanation, the categorization was most often conscious but unrecorded; the Justices preferred to cite, in an opinion dealing with one executive-branch officer or structure, cases dealing with that particular federal authority. The typical case dealing with any federal authority identifies the action as "executive," "administrative," or "special," and then proceeds to make clear the great finality of such action. Specifically, the courts would stress how little such actions were open to redetermination, either by extraordinary writs or in later related common law actions, as in the land department cases.¹⁷¹

Beyond this, although played down by later scholars who sought to unify an administrative law they saw as lacking order,¹⁷² there was some explicit cross fertilization within the executive-action cases. *Bartlett v. Kane*,¹⁷³ an 1853 case approving great finality for the decision of federal customs appraisers, concludes:

It is a general principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their [sic] discretion, the acts so done are in general binding and valid as to the subject-matter. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person, denying their validity, are power in the officer and fraud in the party; all other questions are settled by . . . the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for . . . by some appellate or supervisory tribunal prescribed by law.¹⁷⁴

Referred to after this passage is a land department case and then

169. See *infra* note 170 and accompanying text.

170. J. DICKINSON *supra* note 161, at 56. As exceptions, Dickinson refers to *United States v. Ju Toy*, 198 U.S. 253 (1905), and *American School of Magnetic Healing v. McAnulty*, 187 U.S. 94 (1902). There was more cross-fertilization at a much earlier stage than Dickinson records. See *infra* notes 172-78 and accompanying text.

171. See *supra* notes 152-53 and accompanying text.

172. I believe this is a fair characterization of the aim of both of the great administrative law treatise writers of the late 1920's, Ernst Freund and John Dickinson. See *infra* subsection F of this Section. It must, however, be understood that each was too thoughtful to believe that reduction of the entire field to a few simple principles was a possibility.

173. 57 U.S. (16 How.) 263 (1853).

174. *Id.* at 272. See *Belcher v. Linn*, 65 U.S. (24 How.) 508, 522 (1860).

Decatur v. Paulding,¹⁷⁵ a veteran's benefits case. The Court in *Bartlett* quoted *Decatur*'s admonition against interference with executive action. In 1869, *Decatur* was referred to in Justice Miller's opinion for the Court ascribing great finality to decisions of federal land officers.¹⁷⁶ Two years later, Justice Miller decided a seminal case dealing with the finality of land department cases.¹⁷⁷ He cited no cases from other departments, but did write a passage that seems to borrow from *Bartlett*,¹⁷⁸ and refers without citation to general principles of deference to executive action.¹⁷⁹ Thus, there was to some degree a federal common law of judicial review of administrative action.

2. *Limited Judicial Scrutiny of Executive Action: From the Requirements of Writs to a Federal Common Law of Judicial Review.* The discussion above makes clear not only the Court's general deference to some judicial-style action by the executive, but also that some degree of judicial review was available. The courts viewed themselves as responsible for assuring that the executive had acted within its statutory mandate—the question of “power in the officer” referred to in *Bartlett v. Kane* discussed immediately above. Occasionally, courts claimed the power to strike down arbitrary, and not merely erroneous, fact-finding, but such fact-finding seems to have been viewed as per se beyond the executive's power.¹⁸⁰ Within the framework created by the enabling acts, the courts conceded to executive officers great freedom to find facts finally and to make policy. The courts also allowed executive-branch officials some degree of control over the interpretation of the laws they administered.

Review in the executive-action cases was generally obtained by means of common law writs.¹⁸¹ Indeed, the exacting requirements of the writ of mandamus played some role in shaping the

175. 39 U.S. (14 Pet.) 497, 516 (1840).

176. *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 350 (1868).

177. *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 83 (1871).

178. Compare *id.* with *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 272 (1853).

179. 80 U.S. (13 Wall.) at 87.

180. “A finding without evidence is beyond the *power* of the Commission.” *ICC v. Louisville & N.R.R.*, 227 U.S. 88, 92 (1913) (emphasis added).

^o 181. J. DICKINSON, *supra* note 161, at 39. Of course, I am speaking of review in the context of an action brought directly to challenge executive action. Review in some sense was also available by means of civil or criminal proceedings against such officers in their private capacities, or by means of defense in suits brought by the government to enforce executive decisions. See *id.*

ultra vires-oriented theory of judicial review, as the courts came to see gross departures from statutory mandates as beyond discretion, and virtually all else as within it. It may be telling that until 1913, in none of the cases described above, was review sought by means of certiorari, the common law writ used by an appellate court to call before it the proceedings of an inferior tribunal.¹⁸² When at last this writ was sought for review of executive action, the Supreme Court found it inapplicable.¹⁸³ Had certiorari been attempted by those challenging executive action, it might have at least somewhat undercut the federal courts' position that executive action, applying law to fact in ways affecting individual interests, was not centrally judicial.¹⁸⁴ While the statements from an early Marshall opinion and from *Murray's Lessee* reflect an understanding that such cases were, in many respects, like adjudication,¹⁸⁵ the language of the later cases and the failure of litigants to seek review by means of certiorari, reflect a perspective from which executive adjudication in benefits cases had come to be seen as legitimate executive action and truly a thing apart from the judicial in its constitutional sense.¹⁸⁶

The use of certiorari, by the writ's own requirements, would

182. *Degge v. Hitchcock*, 229 U.S. 162 (1913). The Court acknowledged that this was "the first instance" in which a federal court had been asked to review an executive decision on a writ of certiorari. *Id.* at 169-70.

183. *Id.* at 171-72.

184. State practice offers no clear test of this proposition. The uses to which the writ was put under the laws of the several states varied greatly, at least before the end of the nineteenth century. L. JAFFE, *supra* note 89, at 165-76. In some states the writ was unavailable for review of administrative decision making, as it was under federal practice. *Id.* Some states, however, apparently reached a different conclusion. *Id.* at 170-71.

185. *See supra* notes 150-51 and accompanying text.

186. Most of the early cases simply ignore the resemblance of executive action to adjudication. *See, e.g.,* *Commissioner of Patents v. Whiteley*, 71 U.S. (4 Wall.) 522 (1866). There are exceptions, of which *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 511 (1839) (analogizing the decision of an executive branch officer to the judgment of a court), is the most explicit. My point is not that the cases form a neat pattern. It is that, with few exceptions, starting around 1840, the courts deemphasized the judicial nature of the executive-action cases. The Court saw the issue raised in *Murray's Lessee* not because of the judicial style of executive decision making, but because Congress, by providing for judicial review, had arguably brought the matter within the judicial power. Despite this difference, I believe the government benefits justification for the executive action in *Murray's Lessee* provided, *sub silentio*, the justification for the executive-action cases. Generally, it was more convenient for the courts to ignore the issue, as they did, where possible. *See United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 304 (1854); *Brashear v. Mason*, 47 U.S. (6 How.) 92, 101-02 (1848); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515-16 (1840).

have limited the reviewing court to the record made before the administrative body and entailed great deference to factual conclusions drawn by that body, and even deference to some conclusions of law.¹⁸⁷ Instead of certiorari, mandamus and injunction provided the usual means of review.¹⁸⁸ Mandamus was the writ first, and most often, used in federal executive-action cases.¹⁸⁹ In theory, it lay to correct violations of law committed by officials outside the scope of matters committed to their discretion.¹⁹⁰

As a practical matter, the writ of mandamus was used to distinguish between clear departures from statutory mandates and possible, but not so clear, departures.¹⁹¹ Even in the early mandamus cases, the Court made clear that, aside from the requirements of the writ, the need for noninterference with executive enforce-

187. Although common law certiorari was not generally available in the federal courts, a local District of Columbia case provides us with a statement by the Supreme Court on how limited review was under that writ. The case concluded that certiorari tests only the jurisdiction of the tribunal below. *Harris v. Barber*, 129 U.S. 366, 372 (1889). According to this view, of course, ordinary questions of fact were not before the reviewing court. See *People ex rel. Folk v. Board of Police & Excise*, 69 N.Y. 408, 411 (1877) (only errors of law materially affecting rights of parties reviewable); *California & Or. Land Co. v. Gowen*, 48 F. 771, 775 (C.C.D. Or. 1892) (court will not consider facts below on writ of review, statutory equivalent to certiorari). The complete absence of evidence in the record to support a finding was correctable, at least in some circumstances. 11 C.J. *Certiorari* § 365 (1917). For a general description of the theory and scope of review on certiorari, see *id.* §§ 341-75 (1917); see also L. JAFFE, *supra* note 89, at 174-76.

188. E. FREUND, *supra* note 100, at 245-47. The use of the writ of mandamus was, by interpretation of the Judicial Code, restricted to federal cases brought in the District of Columbia where the common law of Maryland had some force. See *United States v. Schurz*, 102 U.S. 378, 393 (1880); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 615-27 (1838). While this was a serious restriction, a great many of the potential executive branch defendants were subject to process within the district. For an example of the successful use of mandamus, see *United States v. Schurz*, 102 U.S. 378, 405 (1880); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 614 (1838). For examples of cases in which an injunction was sought, see *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109 (1904); *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324 (1903); *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 352-53 (1868).

189. Compare the Court's discussion of the mandamus precedents with its discussion of the single injunction precedent. *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 348-53 (1868). The injunction precedent, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), involved a challenge to the administration of Reconstruction and is not part of the body of case law under consideration.

190. See *Reeside v. Walker*, 52 U.S. (11 How.) 272, 289 (1850).

191. "[Mandamus] would seem to be peculiarly appropriate to the present case. The right claimed is just and established by positive law; and the duty required to be performed is clear and specific." *Kendall v. United States* 37 U.S. (12 Pet.) 524, 614 (1838). For later cases reaching a similar conclusion, see *United States ex rel. Alaska Smokeless Coal Co. v. Lane*, 250 U.S. 549, 555 (1919) and cases cited therein.

ment of the law justified a standard of deference in areas where Congress intended much discretion.¹⁹²

It was not, however, until 1868, in *Gaines v. Thompson*, that the Court cut the requirements for deference completely away from those limited to mandamus by requiring a like deference in a case seeking an injunction against the federal land department.¹⁹³ In my view, *Gaines* constitutes a major advancement toward explicit unification of the American law of judicial review of administrative action.¹⁹⁴ At this point, there was an incipient federal common law of judicial review: the major focus was no longer on the technical requirements of common law writs, but on the nature and effects of the action reviewed.

Unlike certiorari, the writs of mandamus and injunction allow a federal court de novo determination of relevant facts.¹⁹⁵ Despite this, the deferential standard of review was worked out by a determination that Congress had intended great agency discretion, and great judicial tolerance for error. As a result, where an agency had acted within its general "jurisdiction" and not arbitrarily, the actually correct state of facts was not legally relevant to the legitimacy of the executive action.¹⁹⁶

3. *The Policy Underlying the Law Governing Review: Essentially Modern Problems Described in Yesterday's Vocabulary.* Despite the vocabulary and doctrines used to decide executive-action cases, earlier courts struggled with the same fundamental conflict between private interest and public administration that confronts contemporary courts. Translated into today's terms, the courts dealt with two intricately related problems. First, they were concerned with the problem of action committed to agency discretion by law, i.e., action that is unreviewable, despite possible administrative error, because the potential harm of judicial intervention

192. See, e.g., *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840).

193. 74 U.S. (7 Wall.) 347, 352-53 (1868).

194. *Id.*

195. They were, after all, original judicial proceedings and in this respect unlike certiorari.

196. See *Degge v. Hitchcock*, 229 U.S. 162, 171 (1913); *United States ex rel Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324-25 (1903) (citing *Decatur* and *Gaines*); *Shepley v. Cowan*, 91 U.S. 330, 339-40 (1875). For the views of a later commentator who saw these cases as quasi-judicial, see P. LOUGHRAN, *JUDICIAL REVIEW OF FEDERAL EXECUTIVE ACTION* § 54 (1930).

outweighs the value of error correction.¹⁹⁷ *Decatur* and subsequent cases make clear that noninterference with matters committed to the executive branch is a major policy that the courts sought to advance.¹⁹⁸

Second, the courts were concerned with problems of standing, or with what constituted a sufficient personal interest to justify considering a claimant's request for judicial interference with executive decision making. Although the term standing is not used, the decisions make clear that only a party with a significant personal interest may challenge administrative action:

If the Secretary is charged by law with the performance of such a duty, he is bound to fulfil it. It is imperative, not discretionary. . . . [W]henever a private person acquires by law a *personal interest* in the performance by the Commissioner of any act, he thereby also acquires an individual interest in the direction and supervision of the Secretary, to correct any error, or supply any omission or defect in its performance, tending to his injury. It is a maxim of the law, admitting of few if any exceptions, that every duty laid upon a public officer, *for the benefit* of a private person, is enforceable by judicial process.¹⁹⁹

In the early cases, the courts sought to determine whether the interest under consideration was a vested property right or something close to it.²⁰⁰ This, in turn, facilitated non-interference with executive action, because, by statute, rights to such typical benefits as government land and patents were not deemed to pass or to vest until a formal official decision had been made in the claimant's favor. As a result, an official's decision against formally granting a benefit was often unreviewable.

The language of the *Butterworth* excerpt quoted immediately above is somewhat distinct from the earlier cases. The essence of the quotation is that "whenever a private person acquires by law a personal interest" in the performance of an official duty, he may

197. See generally Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968) (need for system of judicial scrutiny attentive to relief for claimant without unduly burdening agency discretion).

198. See *supra* note 156 and accompanying text; *Commissioner of Patents v. Whiteley*, 71 U.S. (4 Wall.) 522, 534 (1866).

199. *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 57 (1884) (emphasis added). See *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109-10 (1902).

200. See *United States v. Schurz*, 102 U.S. 378, 394-95 (1880); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610-14 (1838); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157-66 (1803).

enforce that duty by judicial process. That statement takes on a different cast in light of the language immediately preceding it: "Each case must be governed by its own text, upon a full view of all statutory provisions intended to express the meaning of the legislature."²⁰¹ Read together, the two passages seem precursors of the modern view that whether one has acquired a personal interest turns upon a reasonable construction of the statute. Put another way, a presumption of reviewability should exist in favor of narrowly defined classes of intended beneficiaries.²⁰²

By about 1900, the Court confronted cases involving rights to the use of the mails. In these cases, nothing was involved which resembled the traditional vesting of a discrete right to a *thing*.²⁰³ Sometimes the Court resorted to the language of property, but in a new way. The essence of this approach was to find a property right based on a conclusion that Congress would have intended relief for persons in plaintiffs' class who had been injured by gross errors of certain statutory provisions.²⁰⁴

To summarize, by the technical use of the vocabulary of writs, property rights, and, occasionally, language resembling the vocabulary of standing or intended beneficiaries, the nineteenth century Court mediated the conflict of personal interest and public administration.²⁰⁵ The terms it developed reflected a deference to executive action not clearly exceeding the statutory mandate and, particularly, deference to facts found in the administration of law.

The material of these early cases provided the foundation for the development of legislative and judicial standards of review of decisions of the Interstate Commerce Commission. With passage of the Hepburn amendments to the Interstate Commerce Act in

201. *Butterworth*, 112 U.S. at 56-57.

202. Jaffee places this development slightly later than *Butterworth*, relying instead on *Magnetic Healing*. L. JAFFEE, *supra* note 89, at 339-53.

203. I use the word *thing* to mean both tangibles and intangibles, such as patent rights that had come to be recognized as capable of ownership in some form.

204. See *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109-10 (1902). The Court did not determine that Congress had to grant plaintiff access to the mails—it dodged the issue. *Id.* at 107. As a result, the best explanation is that Congress intended, in the broadest legal process sense of that word, a personal interest that included a right to judicial review. By the time of *Crowell*, at least Justice Brandeis was clear on the shift from a property-like requirement to one more resembling the demands of the statutory standing or intended beneficiary doctrines. 285 U.S. at 91 (Brandeis, J., dissenting).

205. See *supra* notes 197-204 and accompanying text.

1906,²⁰⁶ the administrative exercise of quasi-judicial power moved into new and somewhat more private realms.

In understanding the influence of the public-rights category on the ICC cases and, ultimately, on *Crowell*, it is important to see how legal scholars and judges viewed the more general boundary between the sphere of appropriate public action and that of private enclaves safe from such action.

D. *The Public and the Private: Juristic Thought, The Industrial Revolution, and Social Dissatisfaction*

The police power has some pretense for its invocation. Regarding alone the words of its definition, it embraces power over everything under the sun, and the line that separates its legal from its illegal operation can not be easily drawn. But it must be drawn. To borrow the illustration of another, the line that separates day from night cannot easily be discerned or traced, yet the light of day and the darkness of night are very distinct things.²⁰⁷

1. *Origins of the Affected with a Public Interest Doctrine in the 1870s.* A number of state legislatures passed regulatory measures during the 1870's in an attempt to curb concerns about big business. In a series of cases decided in 1876, the Supreme Court justified governmental interference with certain business property on the grounds that such business was affected with a public interest.²⁰⁸ The best known of these cases was *Munn v. Illinois*, which approved, under the due process clause, maximum rate legislation as it applied to charges for storage at major grain warehouses.²⁰⁹

The phrase "affected with a public interest" was apparently used by Chief Justice Waite in *Munn* at the suggestion of Justice Bradley,²¹⁰ and dates back to Lord Hale's *De Portibus*.²¹¹ Waite writes: "when private property is 'affected with a public interest it

206. Hepburn Act, ch.3591, §5, 34 Stat. 584 (1910). See *infra* subsection E of this Section.

207. *Block v. Hirsch*, 256 U.S. 135, 167 (1921) (McKenna, J., dissenting).

208. These regulatory measures eventually gave rise to the Granger Movement and, later, to the original Interstate Commerce Act. See Fairman, *The So-called Granger Cases, Lord Hale and Justice Bradley*, 5 STAN. L. REV. 587, 592-630 (1953).

209. 94 U.S. 113 (1876).

210. Fairman, *supra* note 208, at 587-88, 652.

211. M. HALE, *DE PORTIBUS MARIS*, in HARGRAVE LAW TRACTS (1787). For a description of *DE PORTIBUS*, its origins, its posthumous publication, and the use to which it was put in English and American jurisprudence up to 1930, see McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930).

ceases to be *juris privati* only.' ”²¹² It becomes so affected when “used in a manner to make it of public consequence, and affect the community at large.”²¹³ When private property is devoted to a public use, the owner “in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good.”²¹⁴

Waite applies the same reasoning to common carriers, asserting that the power to regulate the charges of such carriers comes from “the same source,” and stating that such businesses “exercise a sort of public office.”²¹⁵ But could common carriers be compared to grain elevators? In a passage sounding decades ahead of its time, Waite says:

It is conceded that the business is of recent origin. . . . And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.²¹⁶

At the time Waite wrote, the Court had not yet taken the fateful turn, exemplified by *Lochner v. New York*,²¹⁷ of protecting much business activity from burdensome social legislation. In *Munn*, the Court may have intended to abjure responsibility for determining the validity of legislation enacted by state legislatures and reasonably calculated to enhance the common good. This was most likely the view of concurring Justice Bradley, whose memorandum to Waite seems to be the inspiration for the latter’s opinion.²¹⁸ It was, of course, a view later pressed strongly by Holmes and Brandeis, in dissent.²¹⁹ Still, Waite departed from Bradley’s proposed language in potentially significant ways.²²⁰ As a result, the opinion reads more like an invitation to classify businesses in

212. 94 U.S. at 126.

213. *Id.*

214. *Id.*

215. *Id.* at 129-30.

216. *Id.* at 133.

217. 198 U.S. 45 (1905).

218. Fairman, *supra* note 208, at 587-88, 652.

219. *Id.* at 657.

220. *Id.* at 657-58. Waite’s language indicates a categorizing of business according to whether it is “clothed” in or “devoted” to public use, while Bradley speaks of regulating any business “affecting” the general public. *Id.*

two categories—those affected with a public interest and those not so affected—rather than a statement that to the extent any business is so affected it can be closely regulated.

As the composition of the Court and the views of some Justices changed, the doctrine of *Munn* was read rigidly, requiring that any particular business be characterized one way or the other.²²¹ Additionally, the public interest category was interpreted sparingly, encompassing very few businesses.²²² As a result, it was used negatively, and the due process clause came to insulate all but the clearest instances of business affected with a public interest from rate regulation.²²³

Although the affected with a public interest doctrine, and the public-rights doctrine of *Murray's Lessee* are analytically distinct, they are related at a greater level of generality. As more activity becomes a legitimate object of regulation, it is tempting to assume such matters are public in the *Murray's Lessee* sense. This might be defended on a view that within its regulatory province much of what the federal government chose to do for those regulated was analogous to a benefit, the price for which was the surrendering of any rights to traditional adjudication. As we shall see when we turn to judicial review of Interstate Commerce Commission decisions, some of the proponents of the Interstate Commerce Act seem to have held a similar view.

2. *Roscoe Pound and the Turn of the Century.* By the turn of the century, the Interstate Commerce Commission began to exercise its weak regulatory powers.²²⁴ While the states continued to attempt to regulate the maximum rates of a variety of business, the Court viewed the affected with a public interest doctrine as prohibiting most such regulation.²²⁵ Though that doctrine was not used to test other social legislation, such as that specifying minimum hours and wages, the Court did use the doctrine of state police power in a similar way. Property, including ordinary prop-

221. *Id.* at 588, 657-58.

222. *See id.* at 657-58.

223. *See id.*

224. I I. SHARFMAN, *supra* note 99, at 11-23.

225. Fairman, *supra* note 208, at 657. This negative use of the doctrine began in 1923. Comment, *The Use of the "Public Interest" Concept in Price-Fixing Cases*, 39 YALE L.J. 256, 259 (1929). There is a suggestion that the appointment of Justices Taft, Sutherland, Butler, and Sanford, within a brief period, tipped the balance. *Id.* at 258 n.12, 259-60.

erty not affected with a public interest, was said to be subject to regulation under state police power only to protect the public health, safety, morals, and general welfare.²²⁶

Regulation not within the police power was seen as forbidden by due process. In a series of cases of which *Lochner v. New York*²²⁷ has come to be the emblem,²²⁸ the Court struck down industrial regulation of wages and hours on due process grounds.²²⁹ Holmes's dissent in *Lochner* is congruent with Bradley's view in *Munn* that, short of the wildly irrational, state legislators are free under the due process clause to pursue their view of the common good. Holmes' statement that the fourteenth amendment did not enact any particular view of the government's relationship to private property was the first clear judicial response to the Court's shift toward constitutionally-imposed laissez faire.

Roscoe Pound, founder of the school of sociological jurisprudence, saw Holmes's dissent as the best example of that jurisprudence in action.²³⁰ Pound, who was influenced by Maine, the continental legal and moral philosophers, sociologists, and the emerging American pragmatists,²³¹ articulated and justified premises that, through Holmes, had just begun to re-exert some force in American law.²³² Pound's view of law was quite different from the mid-nineteenth century view summed up by Rufus Choate, who said of law: "The judge does not make it. Like the structure of the State itself, we found it around us at the earliest dawn of reason."²³³

226.

The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment . . . There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the *public*.

Lochner v. New York, 198 U.S. 45, 53 (1905) (emphasis added).

227. 198 U.S. 45 (1905).

228. G. GUNTHER, *CONSTITUTIONAL LAW* 454 (10th ed. 1985).

229. *Id.* at 453-54.

230. Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 480-81 (1909).

231. For a discussion of Maine's influence on Pound's generation, which rejected timeless law in favor of relativism, see Howe, *The Positivism of Mr. Justice Holmes*, 64 *HARV. L. REV.* 529, 538 (1951).

232. See *infra* note 293 and accompanying text.

233. Howe, *supra* note 231 (quoting 1 *WORKS OF RUFUS CHOATE* 436 (1862)) (representen-

Pound, in the same year as the *Lochner* decision, made one of the clearest statements in American legal literature of the tension between the late nineteenth century common law system of exalting defined property rights and the demands of an integrated industrial American economy:

To-day . . . the common law finds itself arrayed against the people . . . they know it chiefly as something that continually stands between them and what they desire. . . . Commissions . . . with summary administrative and inquisitorial powers are called for, and courts are distrusted. . . . [I]n large part this dissatisfaction . . . is well founded. No amount of admiration for our traditional system should blind us to the obvious fact that it exhibits too great a respect for the individual . . . and too little . . . for the needs of society, when they . . . conflict with the individual, to be in touch with the needs of our present age²³⁴

Pound saw in the Anglo-American legal system a residuary power to do justice similar to the powers exercised by the Crown in the creation of equity and, indeed, of the common law itself.²³⁵ Pound felt American law likewise adaptable by means of deft constitutional interpretation informed by current needs. In some rough sense it is a metaconstitutional legal principle that permits and requires dealing with the Constitution's text in flexible ways. Pound continued:

To-day, when the sovereign people stands in the shoes of the sovereign king as *parens patriae*, this residuary authority has given us the police power. Not yet one hundred years old, and scarcely mentioned in the books until the last twenty-five years, this doctrine has been worked out slowly at the same time that the common law has been gaining its firm footing in our constitutional law. It is furnishing the antidote for the intense regard for the individual which our legal system exhibits.²³⁶

Pound recognized that the residuary power, the police power, was ill defined and stated that the common law was "jealous of all indefinite power."²³⁷ In his opinion, a compromise was necessary

tative of attitudes before the Civil War and for a while afterwards).

234. Pound, *Do We Need A Philosophy of Law?*, 5 COLUM. L. REV. 339, 344 (1905).

235.

The residuary power of the crown to do justice among his subjects has served to meet two crises in our legal history. When the old polity of local courts became impossible, it gave us the king's courts and the common law. When the common law was in danger of fossilizing, it gave us equity.

Id. at 350.

236. *Id.* at 350-51 (footnote omitted).

237. *Id.* at 351.

and it had to come from reason as applied to the circumstances of society at particular times.²³⁸ Pound was a nonradical reformer. Property, in its constitutional sense and as protected by the judiciary, was to be preserved because of its relative stabilizing effect on society. Its meaning must, however, shift under pressure. The chief mechanism for such change was the elastic concept of the police power, which shapes the notion of property for due process purposes. Through judicial control, sensitive to the needs of both individuals and society, Pound felt that the definition of the police power must be flexible enough to reflect changing private and public needs.

Writing three years later, and obviously influenced by contemporary American philosophy, Pound made clear his view that law should be scientific and that only in a pseudoscientific jurisprudence do the premises never change:

We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of to-day, theories are "instruments, not answers to enigmas. . . ."

. . . .
The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles²³⁹

As a result of such views, championed by Louis Brandeis, counsel in *Muller v. Oregon*,²⁴⁰ the Court softened somewhat the position it had taken in *Lochner* on state regulation of business. While the immediate effect of the views of Pound and those in his camp were somewhat limited and short lived, the long-term effect

238. *See id.* at 351-53.

239. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608-10 (1908) (quoting W. JAMES, PRAGMATISM 53 (1907)). Pound also revealed a preoccupation with law matching the progress of science and its philosophy:

The substitution of efficient for final causes as explanations of natural phenomena has been paralleled by a revolution in political thought. We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs We have, then, the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics. We have to rid ourselves of this sort of legality and to attain a pragmatic, a sociological legal science.

Id. at 609.

240. 208 U.S. 412 (1908). Brandeis was certainly part of the sociological jurisprudence movement. *See P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 335 (1984).

was to legitimate a more flexible view of the use of legal texts under social pressure.

The impact of the new jurisprudence on the legitimation of nonjudicial adjudication of private rights can be seen at an early stage. In a 1911 decision, the Wisconsin Supreme Court upheld a workman's compensation scheme.²⁴¹ The charge was that the scheme conferred judicial power on a body that was not a court. In his opinion for the court, the Chief Justice said:

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of [a constitution's] adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation.²⁴²

Change was at work within the federal system as well. The ICC cases under the Hepburn Act provided an intermediate stage of evolution from principles formerly applicable only in the public rights/benefits cases discussed above.

E. *The 1906 Hepburn Amendments to the Interstate Commerce Act*

1. *Background.* For approximately the first two decades of its existence, orders of the Interstate Commerce Commission were not binding when issued.²⁴³ This was true for both major types of Commission proceedings: those brought by the Commission declaring future rates unreasonable, and those brought before the Commission by private parties seeking damages from carriers for wrongs committed in the past, so-called reparations proceedings.²⁴⁴ In both types of cases the Commission's order could be ignored with few ill consequences until enforcement was ordered by a federal court.²⁴⁵ By statute, in any judicial proceeding to en-

241. *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911).

242. *Id.* at 349-50, 133 N.W. at 216. The opinion goes on to state, however, that such principles of constitutionalism are not new. Of course, part of Pound's point was that such principles were old but lately forgotten. For a description of the fate of state workers' compensation statutes when challenged as non-judicial adjudication, see 71 C.J. § 35, at 290-92. Most survived. *Id.*

243. 2 I. SHAREMAN, *supra* note 99, at 385-87.

244. *Id.* at 387 n.64.

245. *Id.* at 386.

force an order of the Commission, that agency's report of its findings of fact was to be considered "prima facie evidence of the matters therein stated" ²⁴⁶

Because the statute said no more than this as to judicial review, the courts read it as permitting a *de novo* rehearing of all legal and factual issues determined by the Commission.²⁴⁷ This meant, of course, that a losing party was free to submit his version of the facts and supporting evidence to the courts just as if the Commission had never acted. The loser, however, would need to make a convincing case to overcome the presumption in favor of the agency's findings.²⁴⁸

In 1906, the Hepburn Act enlarged the substantive powers of the Commission and altered the statutory formula for judicial review of its decisions.²⁴⁹ The *prima facie* evidence standard was eliminated for all proceedings except reparation proceedings, which were those brought by a private party against a carrier seeking monetary compensation for past wrongs.²⁵⁰ Instead, for most proceedings, the Hepburn Act provided that the courts would enforce orders of the Commission "if regularly made and duly served."²⁵¹ A leading scholar of the ICC has said, "It was open to the courts, under the obscure language of this direction, to assert either very broad or very narrow powers of review."²⁵²

An alternative to judicial review in an enforcement proceeding was a preemptive equitable action seeking to restrain enforcement of the Commission's order.²⁵³ Although the legislative debates on the Hepburn Act reflect a knowledge of the possibility of such a challenge, the Act itself recognized it "only incidentally"

246. Act of Feb. 4, 1887, ch. 104, § 16, 24 Stat. 379, 384-85.

247. See *Cincinnati, N. O. & Texas Pac. Ry. v. ICC*, 162 U.S. 184, 196 (1896).

248. See *id.* at 154.

249. Ch. 3591, §5, 34 Stat. 584 (1910); see 2 I. SHARFMAN, *supra* note 99, at 387 (describing regulatory problems under old standard of review); MCFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 1920-1930*, at 107 (1933) (discussing ICC's view of its relationship with courts under new standard).

250. 2 I. SHARFMAN, *supra* note 99, at 387.

251. Hepburn Act, §5 (amending section 16 of the 1887 Act as previously amended). See paragraph 2 of section 5's substitute language for treatment of reparations cases, and paragraph 10 for the new treatment of all other cases.

252. 2 I. SHARFMAN, *supra* note 99, at 388.

253. *Id.* at 388-89.

and left the scope of review "entirely undefined."²⁵⁴

The Hepburn Act left untouched, however, provisions for judicial review of private party reparations actions seeking money damages for past wrongs committed by carriers.²⁵⁵ Parties to these proceedings could still obtain de novo review of the Commission's findings of fact, which were considered prima facie evidence of the facts so found.

To understand the development of federal adjudication outside of the article III courts, it is important to comprehend how the federal courts responded to the Hepburn Act's ambiguities concerning judicial review of non-reparations cases. It is even more essential to keep firmly in mind that the Act provided for de novo judicial review of reparations cases, which closely resemble the private-rights cases.

2. *Non-Reparations Cases: The Judicial Development of Deferential Standards for Review.* Before passage of the Hepburn Act, courts had little room to contribute to the basic structure of judicial review. Their principle task was to determine precisely what weight was to be given various Interstate Commerce Commission determinations in light of the statute's command that they be treated as prima facie evidence. The Supreme Court, in attempting to determine a standard of review, seemed to recognize, if somewhat elliptically, its debt to a broader body of law dealing with administrative review: "[T]he findings of the Commission are made by law *prima facie* true. This Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience."²⁵⁶ In support of this proposition, the Court cited earlier ICC cases, none of which referred to executive-action cases such as *Decatur v. Paulding*²⁵⁷ or the federal land cases. Despite this lack of explicit mention, the Court was most probably referring to *Decatur* and other executive-action cases as providing precedents for the proper scope of review in ICC cases.

The indebtedness of the law governing review of most ICC decisions to executive-action precedents became greater and clearer under the 1906 Hepburn Act. The ambiguity of that law as to the standard of review for non-reparations cases invited

254. *Id.* at 389.

255. *Id.* at 387-88.

256. *Illinois Cent. R.R. v. ICC*, 206 U.S. 441, 454 (1907).

257. 39 U.S. (14 Pet.) 497 (1839).

greater judicial contribution, which in turn led to rummaging the past for analogies. Under the Hepburn Act, no longer were ICC determinations to be simply prima facie evidence of the matters determined, rather they were to be conclusive if "regularly made." The Court gave meaning to this vague standard in its first major opinion under the Hepburn Act, the second *Illinois Central* case:

Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power . . . ; *b*, . . . whether the administrative order is within the scope of the delegated authority . . . ; and, *c*, . . . whether, even although the order be in form within the delegated power [it was made so unreasonably as to be in substance outside of it]. . . . Plain as it is that the powers just stated are the essence of judicial authority . . . it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions

Power to make the order and not the mere expediency or wisdom of having made it, is the question.²⁵⁸

While this Court, like virtually all that commented on the scope of review in ICC cases, makes no explicit reference to the earlier executive-action cases, there are indications that those cases were influential.²⁵⁹ First, the broad references to perennial powers and administrative functions suggests a sense of the existence of a larger body of analogous cases: the executive-action cases. Second, the Court's theory of review is one of power or ultra vires in the broadest sense, precisely the theory employed in the executive-action or benefits cases.²⁶⁰

258. *ICC v. Illinois Cent. R.R.*, 215 U.S. 452, 470 (1910) (citation omitted).

259. A later ICC case, quite uncharacteristically, does refer to federal executive-action and state administrative cases in condemning arbitrary fact-finding:

A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. . . .

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if . . . the finding was contrary to the "indisputable character of the evidence"

ICC v. Louisville & Nash. R.R., 227 U.S. 88, 91 (1912).

260. A close look at the quotation reveals its ultra vires focus. As for point "a," what Congress cannot authorize is, of course, ultra vires. Point "b" directly addresses ultra vires. Point "c" deals with arbitrary decision making, but the Court emphasizes that its concern is with decisions that, in form but not in substance, are within the delegated powers. For

Third, the *Illinois Central* Court had before it a brief that urged it to apply the federal common law rule of judicial review developed in the executive-action cases. Citing cases from a variety of executive departments, the brief stated that

the rule appears to be settled that where the decision of a question of fact is accorded by Congress to the judgment and discretion of the head of a department his decision thereon is conclusive

We believe the foregoing to be the true rule to be observed by all courts in determining questions as to the lawfulness of the Commission's orders in suits brought to enjoin such orders in accordance with section 16 of the act to regulate commerce.²⁶¹

Fourth, in some of the debate on the Hepburn bill, it was asserted that the ICC's power to dispose of cases in a final and largely unreviewable way found precedents in what I have described as the executive-action or benefits cases, the immediate offspring of the reasoning of *Murray's Lessee*. While none of the benefits cases involved purely private rights, but rather were suits concerning government benefits, the ICC cases often involved nominally private railroads pitted against other private parties. The debate on the Hepburn Act indicates, however, that the railroads were seen as sufficiently public to support the application of

example, if the ICC were to find as fact that the corner grocer was a railroad, the Commission would formally have jurisdiction based upon its completely baseless fact-finding. The arbitrariness doctrine was theoretically designed to deal with this and less virulent forms of jurisdictional overreaching: *Union Pacific*, the first ICC case to clarify the connection between arbitrariness and evidentiary matters, was also the origin of the arbitrariness test for ICC cases in the 1910 *Illinois Central* case. *ICC v. Union Pac. R.R.*, 222 U.S. 541, 547 (1912). Compare this approach with the standards of review developed in the executive-action cases in subsection C of this Section *supra*. For example, in *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, the Court made clear that, in suits to overturn executive action, the issues are whether the official acted within the scope of this authority as defined by the legislature and whether he refused to perform a ministerial duty. Ministerial duty seems to have been understood as meaning a duty that was "exceedingly clear to the reviewing court." *Id.* at 353.

261. Reply Brief for Appellant at 13-14, *ICC v. Illinois Cent. R.R.*, 215 U.S. 452 (1910) (No. 233). For the entire argument that the standard of review used in the executive-action cases should apply to ICC cases other than reparations cases, see *id.* at 9-14. An examination of briefs in earlier significant cases dealing with judicial review found no such argument, but rather an emphasis upon according decisions of the ICC prima facie validity. See, e.g., Brief for Appellee at 166-69, *Illinois Cent. R.R. v. ICC*, 206 U.S. 441 (1907). This should not be surprising, since, as discussed above, the 1887 Act permitted a de novo trial at which the Commission's decision would be treated as prima facie correct. See *supra* notes 188-92 and accompanying text. After 1906, the decisions were to be enforced if "in accordance with law." See *supra* notes 193-96 and accompanying text. The Court needed to determine what that meant. The executive-action cases were the closest analogue.

standards of review drawn from the executive-action cases:

The first serious objection that is made to this bill is that [it] does not itself provide for a trial somewhere in a court of justice. . . . [W]e have created tribunals. We have clothed those tribunals with power to determine those acts necessary to be determined in administering the affairs of the Government [citing authority given to the Postmaster General, and immigration officers]. . . . Those laws operate as a finality, so far as the Government goes, but beyond that those upon whom those laws operate have the same right to appeal to a court of equity which any citizen of this country has.

In order to understand the full scope of a review of the act of the Commission we should look back to the source of this subject and see what it is proposed to review. *The relation of the common carrier to the public is a peculiar relation. It differs from an ordinary vocation.*²⁶²

Thus, the hybrid public/private nature of the railroads invited the application, in ICC cases, of rules permitting agency adjudication subject to limited judicial review. Such rules had previously been applied, in the federal system, only in the executive action-government benefits cases discussed above. Later, the ICC cases were to be the medium of further mutation. As we shall see in the next subsections, the rules applied in the ICC cases were extended to actions brought by the government against ordinary business corporations. The Federal Trade Commission's ("FTC") enforcement powers, created in 1914, are the first clear instance of this extension.²⁶³ In 1918, in a case involving similar enforcement powers of the Department of Agriculture, the Supreme Court upheld the limitations on the courts' powers to overturn departmental fact-finding, and cited the executive-action cases.²⁶⁴ The ICC, FTC, and Agriculture Department cases extend the principles of the executive-action cases to new areas. Unlike those earlier cases, which were limited to disputes over government-created privileges, the new cases accorded finality to government reg-

262. 40 CONG. REC. 3446 (1906) (citations omitted) (emphasis added) (remarks of Senator Clapp).

263. See *infra* notes 270-76 and accompanying text.

264. *Houston v. St. Louis Independent Packing Co.*, 249 U.S. 479, 484 (1918). Strictly speaking, the action challenged in *Houston* was legislative, or the sort we would type as rule making. *Id.* at 479-81. Still, without qualification, the Court cited *Decatur* and other judicial-style executive-action cases in support of the departmental action. This case, like the ICC cases, went beyond regulation of privileges created by the federal government to recognize the finality of agency determinations regulating private enterprise. Unlike the opinions in the ICC cases, *Houston* expressly acknowledges its use of the principles enunciated in the executive-action cases. *Id.* at 484.

ulatory action constricting private activities. Despite this extension, even these cases do not address the issue later decided by *Crowell*, the propriety of final agency determination of what is in essence a damage suit between two private parties. Thus, the federal enforcement cases had to be extended to support the review scheme in *Crowell*,²⁶⁵ though the dissenters cited those cases as supporting agency adjudication in purely private party litigation.

3. *The Mutation: From Benefits to Enforcement of Public Law Schemes, Stopping Short of Private Damage Suits.*

a. *From Benefits to Enforcement.* It is important to make clear to what extent the Hepburn Act arguably did and clearly did not depart from existing practices. Up to the time of the Hepburn Act, all of the precedents for judicial deference to the decisions of administrative agencies come from the *Murray's Lessee*/executive-action line of cases. All such public-rights cases involved litigation over interests that had been created by the federal government as matters of privilege. The cases, however, formed two subsets.

The first subset included actions attempting to overturn the decisions of executive officers. In this group, a person claiming an interest brought a proceeding against the federal government seeking its recognition. The scope of review of action by executive officers denying benefits in these cases was extremely limited.²⁶⁶

The second subset concerned actions between two private persons for what had originated as a grant from the federal government.²⁶⁷ In such cases, issues previously determined by an executive branch officer were, to a certain degree, determinative of the outcome. While the conclusions of the executive branch officer could be reexamined for fraud or mistake sufficient at equity, the decision of the executive branch was, in many respects, as final as in the suits brought directly against the government.²⁶⁸

From the foregoing, some conclusions can be drawn as to the similarities and differences between the ICC cases and the executive-action cases taken as a whole. The main similarity between the old executive-action cases and the ICC cases is that both occa-

265. This is precisely what Justice Brandeis sought to do in *Crowell v. Benson*, 285 U.S. 22, 69-70 & n.5 (1932).

266. *E.g.*, *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515-16 (1839).

267. *See supra* note 166.

268. Many of these cases involved land grants. *See, e.g.*, *Shepley v. Cowan*, 91 U.S. 330 (1875); *see supra* text accompanying note 173 (excerpt from *Bartlett v. Kane*).

sionally involved disputes between private parties. Some of what I term executive-action cases were private disputes in which finality was accorded an earlier determination of an executive department, such as the land department. Likewise some of the ICC cases and the later FTC cases were brought by private parties invoking a regulatory scheme against other private parties.

The main difference between the old executive-action cases, on the one hand, and the ICC cases, on the other, is unrelated to whether the actions involved the government as a party. In all the executive-action cases, the finality of non-article III decision making can be justified as the price one pays for enjoyment of a privilege ultimately emanating from the government. In the ICC cases no privilege is at issue, but rather the enforcement of regulatory schemes restricting private activity. Therefore, the explanation of the executive-action cases found in *Murray's Lessee* is not easily extended to the newer cases.

It is possible, of course, that the language of *Murray's Lessee* can be conceptually expanded to control ICC cases by equating cases involving a business affected with a public interest with the public-rights category. However, the logic of *Murray's Lessee* and the executive-action, or benefits, cases is another matter. Their logic can control non-reparations cases only if stretched considerably. If Congress's power over federal common carriers is seen as so broad that their very existence is a federal privilege, one might argue that the price of the privilege is surrender of any right to an article III trial court.²⁶⁹

269. For the Supreme Court's mid-twenties view of common carriers, see *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923). Of particular interest are those passages distinguishing ordinary businesses from businesses affected with a public interest, *id.* at 537-41, and passages indicating that, even among businesses affected with a public interest, common carriers were objects of more sweeping legitimate regulation. *Id.* at 540-44. As to the latter, the court said:

The theory is that of revocable grant [The most sweeping regulatory power] can arise only when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers. . . .

A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public

Id. at 541-43. This view may help explain why the Court was comfortable reviewing ICC cases under standards formerly applicable only to government benefits cases and that permitted minimal judicial review of agency decisions involving privileges. Despite the fact that the privilege came from the chartering state, the federal government had ultimate regulatory authority where a railroad operated among two or more states. S. BALDWIN,

However it might have been rationalized under article III, the railroads were seen, I believe, as sufficiently public to permit non-reparations actions to be tried before an agency, the fact-findings of which would be final.

Congressional approval of agency fact-finding expanded along with its view of the public interest. In 1914, statutory authority to bring ICC-type actions against ordinary business corporations acting in interstate commerce was extended to the FTC; facts found by the FTC in such cases were conclusive.²⁷⁰ In the legislative debates on the FTC's enabling act, that body's quasi-judicial powers were attacked on the grounds that (1) they encroached upon article III,²⁷¹ and (2) the FTC heard cases against "ordinary trading corporations," not common carriers like those within the ICC's jurisdiction.²⁷² Despite these arguments, the FTC received final fact-finding power and the ICC non-reparations cases were seen as a precedent.²⁷³

The FTC's powers were an extension of ICC principles to permit not just regulation of common carriers, but regulation of ordinary business corporations, at least in an area of pervasive and intense public interest: fair competition. The Court's response to these new FTC powers was curious; it did not strike them down, despite its view that ordinary business corporations were not sufficiently affected with a public interest to warrant serious forms of interference such as price regulations.²⁷⁴ The Court did, however, largely ignore the statute's requirement that the FTC's factual findings were to be conclusive.²⁷⁵ While the FTC's powers, at least theoretically, represented a further extension of the standard of review granted to most ICC cases and originating in the executive-action cases, it is important to stress that the scope of the FTC's authority did not include the determination of controversies in which one private party sought money damages from

AMERICAN RAILROAD LAW 18 (1904).

270. Federal Trade Commission Act of 1914, ch. 311, §5, 38 Stat. 717 (1914).

271. 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4311-12, 4477 (E. Kintner ed. 1982).

272. *Id.* at 4336, 4478.

273. *Id.* at 4452, 4463.

274. *See supra* note 269.

275. *See* C. McFarland, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 1920-1930, at 25-38 (1933).

another.²⁷⁶

b. *Stopping Short: Reparations Cases—The Rationale for Special Treatment.* Unlike the ICC non-reparations cases and similar cases before the FTC, ICC cases in which a private party sought to establish another such party's monetary liability for past wrongs were not granted the deferential review established by the executive-action/benefits cases. The ICC's legal and factual conclusions in the latter sort of case, termed "reparations cases," were subject to full relitigation in the courts. Although a mid-twentieth century lawyer would have had no difficulty in finding strong public interest in the disposition of such cases, Congress viewed the reparations cases as private law matters.

As we have seen, in a comprehensive study published in 1931, ICC scholar Professor Sharfman explained clearly why reparations cases had been treated differently from others.²⁷⁷ In his view, the reparations cases involved past wrongs and "afford private redress to particular parties, rather than to further general public ends . . ."²⁷⁸ He quoted Ernst Freund, perhaps the foremost administrative lawyer of the day, who seemed to conclude that such cases were the ordinary stuff of private adjudication properly consigned to the regular courts:

[P]ublic benefit attaches, however, only in the remotest sense (in the same sense in which all administration of civil justice is for the public benefit) to an order which attempts to deal with controversies as to amounts due or losses suffered by reason of past transactions, and which gives pecuniary redress to one of the parties to the controversy. This is no longer public administration, but remedial justice.²⁷⁹

We cannot know what the courts would have done, at the time of the Hepburn Act, had Congress attempted to treat reparations cases as appropriate subjects for administrative justice, sub-

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Under the Clayton Act and Trade Commission Act, all that the Commission's order can do is to direct the respondent to "cease and desist" the unfair method or other practice in question Of course, no damages can be awarded, or mandatory order entered. Where, therefore, the unfair act has already accomplished its purpose, and there is no occasion for repeating it, the Commission cannot give relief

G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 71 (1924).

277. See *supra* note 102 and accompanying text.

278. 2 I. SHARFMAN, *supra* note 99, at 387 n.64.

279. E. FREUND, *supra* note 100, at 12-14; see *supra* text accompanying note 102.

ject only to the limited review of the benefits cases. Perhaps the reason the reparations cases were excepted by Congress is that they too closely resembled suits at common law, the untouchable core of article III according to *Murray's Lessee*. On any other view, the Court would have had to subscribe to the proposition that Congress, by fiat and mere labeling, could metamorphose a suit at common law into a public law proceeding, thereby eliminating a right to an article III hearing on the facts. If the courts had been willing to endorse that proposition, they would still have had to decide how much public interest warranted such a metamorphosis. Had they agreed with the excerpt from Freund, agency adjudication of reparations cases might still have been found to violate due process.

During the second decade of the twentieth century, questions about the distinction between the public and the private, and questions regarding the reach of judicial power, were pressed upon the Court in various forms. Kindred questions concerning the relationship of bureaucracy to private rights were a major concern of the new public lawyers.

F. *Administrative Law Scholarship and the Public/Private Distinction in the Late 1920s*

During the 1920s, concerns mounted about the increasing power of the new bureaucracy over individual lives and interests, particularly in realms widely regarded as private enclaves. Hardly coincidental was the appearance in 1927 and 1928 of two books by distinguished authors, having similar titles and overlapping concerns, but reflecting somewhat disparate viewpoints.

One of these, Ernst Freund's *Administrative Powers over Persons and Property*, was a comparative study of the emerging regime of administrative justice and policy making in several large American states, the federal government, and Germany.²⁸⁰ Freund was arguably the dean of American administrative lawyers.²⁸¹ Freund's viewpoint certainly was not that of the school of mechanical jurisprudence. Like Pound, he believed that legal institutions must ul-

280. E. FREUND, *supra* note 100.

281. Indeed, the dedication page of Felix Frankfurter's first administrative casebook read: "to Ernst Freund, Pioneer in Scholarship." F. FRANKFURTER & J. DAVISON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* (1932).

timately respond to social fact. Writing in 1912 about the validity of state workers' compensation laws under the due process clause, Freund said:

[R]ules may well be laid down for the application of the guaranty of due process In establishing new canons of justice, the legislature is neither bound by every historical limitation of the common law, nor is it free to advance so far beyond prevailing ideas as to make law utopian or even socialistic or communistic; in other words, the law may be in its reasonableness, progressive; and it must be in its progressiveness, reasonable.²⁸²

Despite this, Freund seems, in many respects, rather conventional. For instance, his 1928 view of the public/private distinction, as it related to defining the province reserved solely for judicial action, is rather black and white. In a section entitled "Directory Powers of a Purely Judicial Type," Freund finds "anomalous" and of questionable constitutionality agency adjudication of private controversies, such as reparations proceedings seeking damages before the Interstate Commerce Commission, and workers compensation proceedings before various state and federal commissions.²⁸³ It is in this context that Freund made the statement, quoted in full above, that in such cases "public benefit attaches only in the remotest sense," and that such cases involve not "public administration but remedial justice."²⁸⁴

The end of the 1920s also saw publication of John Dickinson's brilliant *Administrative Justice and the Supremacy of Law in the United States*.²⁸⁵ A student and one time protege of Professor Frankfurter, later a New Dealer, and later still Professor of Politics at Princeton, and of law at the University of Pennsylvania, Dickinson had unusual powers of analysis and foresight. Although generally influenced by Pound, Freund, Frankfurter, and others,²⁸⁶ his is, I believe, the first widely published, clear statement of the fully modern consciousness concerning the public and the private. This consciousness, as well as Dickinson's distinctive attitude toward the judicial/administrative dichotomy, are revealed in a 1927 passage challenging Freund's conventional dis-

282. Freund, *The Constitutional Status of Workmen's Compensation*, 6 ILL. L. REV. 432, 436-37 (1912).

283. E. FREUND, *supra* note 100, at 12-14.

284. *Id.*

285. J. DICKINSON, *supra* note 161.

286. *Id.* at ix.

inction between powers of the government concerning "maintenance of right and justice" versus those concerning "public welfare."

Procedurally . . . a line can be drawn, coinciding . . . with the distinction taken above between regulation by law alone and regulation by government. This seems to be the distinction Professor Freund has in mind when he says that "no community confines its care of the public welfare solely to the enforcement of the principles of the common law." But functions which are the same in substance will in the course of time pass from one side to the other of the procedural line. . . . Every matter of private law may, and generally does, involve some issue of public policy. There is merely a difference of remoteness. . . . [I]n many fields of regulation public welfare or policy first makes its appearance in common-law adjudications of differences between individuals. This policy in the course of time may come to be enforced directly by an administrative agency or in criminal proceedings. But it would seem that the function of government performed in both instances is the same, namely that "of promoting the public welfare by restraining and regulating the use of liberty and property."²⁸⁷

Freund and Dickinson, then, believed in legal change driven by social evolution, both as historical fact and as something normatively desirable. As contrasted with what might be termed the *Lochner* mentality, the two positions may not seem very different. There were differences, however, and of such a great degree that they approached differences in kind. Recognizing the presence of public interest in all matters to come before the courts, Freund believed that the degree of remoteness in some cases justified treating them as private law matters in some fundamental sense.²⁸⁸ Dickinson recognized the varying degrees of public interest in such matters, but believed it a matter of legislative judgment precisely where to preempt formerly private matters with a public law scheme. For Freund, the velocity of legitimate change was more geological; for Dickinson, change could be swifter and

287. *Id.* at 28 n.49 (citations omitted). Dickinson is here responding to Freund's classification of the functions of government made in a book written before Freund's *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY*. See *supra* text accompanying notes 280-84. In that earlier work, Freund classified the functions of government as comprising three types: (1) those pertaining to the maintenance of national existence, (2) those having to do with the maintenance of justice and right, and (3) those concerning public welfare. E. FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 3-17 (1904) (particularly §4, at 3). By 1940, recognition of the arbitrariness of the public/private distinction had become a "sign of sophistication" among lawyers. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426-27 (1982).

288. See *supra* text accompanying note 280.

less deferential to established categories.

Administrative adjudication provides the best example of the differences between these two positions. Freund, as revealed in the quotation above, sees disputes between private parties as a firmly established and exclusively judicial province. Perhaps years of social erosion might change that fact, but such province was, from his viewpoint, a relatively fixed feature of the legal system.²⁸⁹ Dickinson, in other sections of his 1927 work, makes clear that the decision to use an agency instead of a court is a policy choice to be made within wide bounds by the legislature.²⁹⁰

Dickinson's solution to the central problem of his book—reconciling individual rights with the new bureaucracy—was judicial review. In his view, however, appellate-style review of agency action was all that was required by the Anglo-American doctrine of the supremacy of law and the related requirements of due process.²⁹¹ Such review did not permit redetermination of facts found by an agency, but only correction of errors of law and of gross distortions of the factual record. For Dickinson, like Brandeis, who certainly knew of Dickinson's scholarship,²⁹² due process in many civil contexts permitted a trial before an agency as long as appeal could be lodged in the courts.

G. *Due Process: 1920s*

In the early days of the Republic there was some tradition of far-reaching state governmental powers over people and their property,²⁹³ and, of course, there was no due process clause to be

289. See Brown, *Administrative Commissions and the Judicial Power*, 19 MINN. L. REV. 261, 295 (1935); see also *The Political Function of the Supreme Court*, THE NEW REPUBLIC, Jan. 25, 1922, at 237 (Professor Frankfurter's characterization of Freund as conservative). The editorial is unsigned but attributed to Frankfurter by Professor Kurland. P. KURLAND, FELIX FRANKFURTER AND THE SUPREME COURT 49 (1970).

290. For Dickinson's views as to agency adjudication of workers' compensation cases, see J. DICKINSON, *supra* note 161, at 6, 21-22, 258-60.

291. *Id.* at 150-56, 331-32. For Dickinson's possible influence on Justice Brandeis's views, see *Crowell v. Benson*, 285 U.S. 22, 89 n.24 (1932) (Brandeis J., dissenting). For Brandeis's similar view of the requirements of the doctrine of supremacy of law, expressed in 1936, see *infra* note 337.

292. *Crowell v. Benson*, 285 U.S. 22, 93 n.30 (1932) (Brandeis, Stone and Roberts, JJ., dissenting).

293. F. McDONALD, *NOVUS ORDO SECLORUM* 12-24 (1985); O. HANDLIN & M. HANDLIN, *COMMONWEALTH—A STORY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861*, at x-xi (rev. ed. 1969); McAllister, *Lord Hale and Business Affected*

interpreted as a general limitation on such regulation. From the time of the fourteenth amendment in 1868 to the early days of the New Deal, the Court hardly steered a straight course in cases dealing with the line or lines between governmental power and private enclaves.

The first half of this roughly sixty-year period was one of ambiguity. *Munn v. Illinois*,²⁹⁴ the decision reworking Lord Hale's doctrine into American constitutional law, exemplifies this ambiguity. The need to provide constitutional justification for state regulation of prices by demonstrating that the business in question was affected with a public interest shows recognition of the enclaves where the test would not be satisfied. The potential pliability of the test itself left in doubt just how restricted state government was under federal law protecting private property and transactions.

It was not until 1923, in *Charles Wolff Packing Co. v. Court of Industrial Relations*,²⁹⁵ that the Court first invoked the "affected with a public interest" doctrine in an opinion condemning state regulation. However, eighteen years earlier, at roughly the turn of the century, the Court began to show hostility to state regulation of property under a due process-based doctrine of freedom of contract, limited only by police power permitting protection of public health and safety.²⁹⁶ While, as suggested above, the Court did not follow a straight anti-regulation course, it had established a general level of hostility toward state interference with business' freedom to contract as to such matters as the length of the work week.²⁹⁷

with a Public Interest, 43 HARV. L. REV. 759, 766-67 & n.36 (1930).

294. 94 U.S. 113 (1876); see *supra* subsection D(1) of this Section.

295. 262 U.S. 522 (1923).

296. See *Lochner v. New York*, 198 U.S. 45 (1905).

297. See *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917); *Adams v. Tanner*, 244 U.S. 590 (1917); *Coppage v. Kansas*, 236 U.S. 1 (1915); cf. *Adair v. United States*, 208 U.S. 161 (1907) (Congress without power to make discharge of employee on ground of union membership criminal offense). Both the Court's changing personnel and the fact that the issues were seen as complex, and not simply as pro or anti-regulation, account for the irregularity of the course followed by the Court as seen from a simplified binary perspective. For example, both Holmes and Brandeis, the most consistently pro-regulation members of the Court, sometimes found a state measure violative of due process as an unwarranted interference with private property. Nevertheless, it is not only a standard, but a fair, generalization to characterize the Court as anti-regulation during this pe-

Consequently, by 1923, when the Court first struck down a regulation after considering whether the business in question was affected with a public interest, it had already determined, in a series of due process cases, that the states' constitutionally legitimate interests did not extend so far as to generally permit regulation of the terms on which businesses contracted with employees or customers. In effect, but not in terms, the *Lochner* line of cases decided that, to a significant degree, the activities of businesses could not be regarded by the states as involving matters of public right.

Throughout this period, Justice Holmes seemed willing to allow the states any regulatory measures reasonably calculated to advance their legislatures' view of the public good:

We fear to grant power and are unwilling to recognize it when it exists. . . . [A]nd when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. . . .

I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State²⁹⁸

In the 1920s, Justice Stone agreed with the majority that fixing prices was generally beyond the legitimate police power permitted by the due process clause. He seems, however, more willing than the majority to find a business affected with a public interest on the ground that it enjoys a monopoly or severe competitive edge.²⁹⁹ Justice Brandeis, at this time, presents a confusing picture. Having concurred with Holmes in the opinion from which the quotation immediately above was taken, he seems to have moved to the Stone position by 1929.³⁰⁰

riod. See G. GUNTHER, *supra* note 228, at 453-54.

298. *Tyson & Brother v. Banton*, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting) (citation omitted).

299. *Id.* at 451-52 (Stone, J., dissenting).

300. See *Williams v. Standard Oil Co.*, 278 U.S. 235, 245 (1929). A careful reading of the majority opinion shows that the issue of whether a state could regulate gasoline prices was inevitably presented. It seems inconceivable that Brandeis's and Stone's concurrence in the result did not reflect agreement that the state could not constitutionally regulate the price of gasoline under the prevailing circumstances. From Brandeis's perspective, this is puzzling, because of his concurrences in Holmes's opinions offering virtual *carte blanche* to state legislatures. At this stage it is clear that, on issues of pricing, as opposed, for example,

By early 1932, within a month or so of the decision in *Crowell*, there had been some shift in the thinking of the Justices. In *New State Ice Co. v. Liebmann*,³⁰¹ Justices Brandeis and Stone had clearly moved to the Holmes's position. They found, in the frightening economic emergency of that time, reason to abandon their apparent view that the absence of competition itself was the only justification for state-regulated prices. First, there is a repudiation of the affected with a public interest doctrine:

The notion of a distinct category of business "affected with a public interest," employing property "devoted to public use," rests upon historical error. . . . In my opinion, the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.³⁰²

Phrased differently, there is virtually no constitutionally mandated public/private meridian, but rather the legislature determines the mix of private autonomy and public control in each setting.

Second, that the Great Depression caused the dissenters shift is not seriously in doubt:

The economic emergencies of the past were incidents of scarcity. . . .

. . . .

[We] are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. . . . Some people believe that the existing conditions threaten even the stability of the capitalist system. . . . [R]ightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. . . . Many insist there must be some form of economic control

. . . .

Whether that view is sound nobody knows

. . . .

Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science. . . . There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive

to those of working conditions, Brandeis placed great faith in truly competitive markets. Perhaps Brandeis had become convinced that where competition prevailed its answer ought to govern. Still, his apparent elevation of this bit of prudential reasoning to due process status is generally puzzling, and particularly so in light of the earlier concurrences in Holmes's opinions.

301. 285 U.S. 262 (1932).

302. *Id.* at 302-03 (Brandeis, J., dissenting) (footnotes and citation omitted).

us of the power to correct [these] evils³⁰³

In *Nebbia v. New York*, barely two years after *Crowell*, a majority of Justices clearly embraced the view that regulation was a matter of a continuum of degrees of public interests and correlative degrees of permissible regulation.³⁰⁴ In approving New York legislation regulating the prices charged by milk producers, Justice Roberts, writing for the majority, including Chief Justice Hughes, and Justices Brandeis, Stone, and Cardozo, seemed to echo Dickinson:

No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.³⁰⁵

While the majority agreed that any regulation reasonably promoting public welfare met due process requirements, at least for a while even the *Nebbia* majority could disagree about the content and stringency of that requirement.³⁰⁶

In fact, the *Nebbia* view may well have been that of a majority at the time of *Crowell*. According to his biographer, Hughes, in voting to strike down the state regulation in *New State Ice*, a case decided the same term as *Crowell*, found that regulation very close to the public interest side of the continuum.³⁰⁷ It seems likely that Hughes did not at that time reject the continuum view of matters affected with a public interest, but rather disagreed about where on the continuum *Nebbia* was situated.³⁰⁸

303. *Id.* at 305-11 (footnotes omitted).

304. 291 U.S. 502, 525, 531-39 (1934).

305. *Id.* at 524-25.

306. Compare *Nebbia* with *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). Justice Roberts, who had voted with the *Nebbia* majority, again voted with the majority in *Morehead* to strike down state wage legislation as violative of due process. Justice Roberts seems to have later joined his former *Nebbia* colleagues in a broad view of the restrictions of substantive due process. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). His was, of course, the vote said to be the famous "switch in time that saved nine" from Roosevelt's Court-packing proposals.

307. 2 M. PUSEY, CHARLES EVANS HUGHES 698 (1951).

308. Hughes, father of New York's public utility regulatory agency, held fairly modern views as early as 1903:

Will anyone suggest to an intelligent audience that American citizens are in revolt against their own prosperity? . . . What they are in rebellion against is favoritism which gives a chance to one man to move his goods and not to an-

H. *The Federal Judicial Power and the Related Issue of the Right to a Jury Trial in the 1920s and Early 1930s*

In Suits at common law, where the value in Controversy exceeds twenty dollars, the right to trial by jury shall be preserved

United States Constitution, Amendment VII

The command of the Seventh Amendment . . . does not require that old forms of procedure be retained. . . . New devices may be used to adapt the ancient institution to present needs. . . .

*Ex parte Peterson*³⁰⁹

1. *The Courts' and Scholars' Views.* While the issues of due process, the right to a jury trial under the seventh amendment, and the right to a full-fledged federal court under article III, are analytically distinct, they are, nevertheless, related in a number of ways. The first goes to the heart of the matter of fairness; the other two are designed primarily to assure fairness for private interests, by means of prophylactic procedures.³¹⁰ It was early established that due process itself did not, in many contexts, require judicial process.³¹¹ I believe that, having determined that administrative trials meet due process standards of fairness, the Court felt

other; which gives to one man one set of terms and another set to his rival It is a revolt against all the influences which have grown out of an unlicensed freedom, and of a failure to recognize that these great privileges, so necessary for public welfare, have been created by the public for the public benefit and not primarily for private advantage.

1 M. PUSEY, CHARLES EVANS HUGHES 206 (1951) (quoting address by Charles Evans Hughes delivered in Elmira, New York, on May 3, 1903).

309. 253 U.S. 300, 309-10 (1919) (citations and footnote omitted) (Mr. Justice Brandeis, writing for the conservative Mr. Justice Van Devanter and four other Justices, to approve use of court-appointed auditor to assist in fact-finding in case at law).

310. I do not mean to rule out other secondary policies served by these provisions, including the public interest in the appearance of fair treatment of private interests and in accuracy. The latter two policies seem to have less force in purely private cases not commenced, maintained, or significantly supported by the federal government.

311. See *Reetz v. Michigan*, 188 U.S. 505, 506-510 (1903) and cases cited therein. *Reetz* fairly attributes such a holding to *Murray's Lessee*. *Id.* at 507. As discussed earlier, to what category of cases the *Murray's Lessee* opinion is addressed is a difficult question. *Reetz* seems to go quite far in allowing states to use nonjudicial tribunals, as long as due process is otherwise satisfied. These developments seem unsurprising, since article III clearly applies only to federal courts, and the federal Constitution nowhere else defines what state bodies constitute "courts" for federal purposes. To require states to use the label would have accomplished nothing. Whatever tribunal is employed is of course subject to federal due process-based fairness standards.

freer to approach article III and the seventh amendment as somewhat technical provisions, easily adjusted around their outer edges to meet practical problems. Support for this view follows.

Starting in about 1918, there was significant scholarly pressure on the Court to reform civil procedure, and, in particular, to pare down the scope of the right to a jury trial.³¹² Professor Scott's particular proposals seem tame enough. For example, he heavily criticized the Supreme Court's decision finding violative of the seventh amendment the procedure of entering judgment notwithstanding a jury verdict.³¹³ His more generalized statements suggest the need for a flexible interpretation:

If the ancient institution of trial by jury is to survive, as our ancestors intended that it should, it must be capable of adaptation to the needs of the present and of the future. This means that it must be something more than a bulwark against tyranny and corruption: it must be an efficient instrument in the administration of justice.³¹⁴

The impact of Scott's statements can be seen in the 1919, seventh amendment case quoted at the beginning of this Section. There, Justice Brandeis cited Scott to justify the Court's flexible reading of that amendment.

In 1921, the Supreme Court decided *Block v. Hirsch*,³¹⁵ upholding a District of Columbia war emergency rent control scheme, despite numerous challenges, including a *Lochner*-style due process argument, and a seventh amendment due process complaint. The dissent was one of the most eloquent statements of the view embracing substantive due process.³¹⁶ For the majority, no doubt held together by the need for such power in an emergency,³¹⁷ the war caused private property temporarily to be affected with a public interest, thereby justifying rate regulation under the *Munn* doctrine.³¹⁸ As for the jury trial issue, Holmes, writing for the majority, allows the District of Columbia rent commission to find finally facts determinative of the rent a private

312. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669 (1918).

313. *Id.* at 688-89; see also *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913).

314. Scott, *supra* note 312, at 691.

315. 256 U.S. 135 (1921).

316. *Id.* at 158-70.

317. See *Nebbia v. New York*, 291 U.S. 502, 551-52 (1934) (McReynolds & Van Devanter, JJ., dissenting) (explaining *Block*).

318. *Block*, 256 U.S. at 155-58.

landlord could charge.³¹⁹

The next year, 1922, we find an indication of how the judiciary, at the highest level, viewed the constraints of article III, particularly in connection with agency adjudication. Eulogizing former Chief Justice Edward D. White, William Howard Taft, his conservative³²⁰ successor, said:

The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention [to these matters] forced the modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legislative, executive, and *judicial* machinery of the Federal Government, and these in due course came under the examination of this court.³²¹

In 1924, two years after Taft's eulogy for White, Felix Frankfurter and James Landis published an article supporting Congress' authority to restrict the power of federal judges to punish certain contempts.³²² The article was subtitled, "A Study in Separation of Powers."³²³ The first portion of the article seems designed to establish the ancient pedigree and correctness of a flexible approach to the doctrine of separated powers:

As a principle of statesmanship the practical demands of government preclude [the] doctrinaire application [of principles of separation of powers]. The latitude with which the doctrine must be observed in a workaday world was steadily insisted upon by those shrewd men of the world who framed the Constitution and by the statesman who became the great Chief Justice. . . . "[A] political doctrine" . . . not a technical rule of law.³²⁴

This view is brought to bear particularly on the judicial power:

The term "judicial power" is not self-defining; it is not, like jury [It]

319. *Id.* at 158. As to the rent charged during the emergency, the Commission's judgment on the facts was final. *See* Brief for the Defendant in Error at 4, 19-21, *Block v. Hirsch*, 256 U.S. 135 (1921).

320. W. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932*, at 224-26 (1969).

321. Proceedings on the Death of Chief Justice Edward D. White, 257 U.S. xxv-xxvi (1921) (emphasis added).

322. Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 *HARV. L. REV.* 1010 (1924).

323. *Id.*

324. *Id.* at 1012-14 (footnotes omitted). The material in quotation marks is from Sir Henry Maine, in Frankfurter's and Landis' words, "following Madison."

sums up the whole history of the administration of justice in English and American courts through the centuries. Therefore, we are not applying a static concept but are dealing with a process, the activities of which must be left unhampered by particularization, in order to be able to accommodate themselves to the changing demands of the administration of justice.³²⁵

Toward the end of the decade, as Professor Scott had advocated, the Supreme Court effectively abandoned its objection to judgments notwithstanding jury verdicts in federal civil suits.³²⁶ Two years later, in *Ex parte Bakelite Corp.*, the Court sustained a congressional grant of nonjudicial power to the Court of Customs and Patent Appeals on the theory that it was a legislative, as opposed to an article III, court, and hence could act both judicially and legislatively.³²⁷ The next year, the Harvard Law Review published a study of non-article III federal courts by Professor Wilber Katz, who was then one of Professor Frankfurter's graduate students.³²⁸ Reacting to *Bakelite*, Katz identified the most serious problem caused by the Court's recognition of such legislative courts:

One must recognize . . . that to argue broadly that the "judicial power" is not vested in the constitutional courts exclusively and may be vested by Congress in legislative courts would completely nullify the tenure and salary requirements of Article III. Obviously, these provisions were intended as limitations on the power of Congress. In order to give them such an effect one must assume that the Constitution forbids the vesting in legislative courts of *some* of the jurisdiction of constitutional courts.³²⁹

Katz's problem, of course, is a particularly difficult one after *Crowell*, which allowed agency adjudication of a private law suit under an act of Congress that supplanted a common law action with a statutory one. Katz, however, writing three years before *Crowell*, did not have to consider what possibly could be within the irreducible core of article III protection if such private suits were not. Citing *Murray's Lessee*, as did Freund, Dickinson, and the Court in *Bakelite*, Katz sees the appropriate province of legislative courts as coextensive with that of executive branch decision making: "The only matters which the *Bakelite* doctrine permits to be

325. *Id.* at 1017.

326. See *Northern Ry. v. Page*, 274 U.S. 65, 67 (1927); 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 50.07[1] (2d ed. 1986).

327. 279 U.S. 438, 454, 458-59 (1929).

328. Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930).

329. *Id.* at 917 (emphasis in original).

taken from the constitutional courts and vested in legislative courts are those which Congress could, apart from that decision, commit to the final determination of executive officers."³³⁰ The distinction Katz seems to be making corresponds roughly to that between judicial-style jurisdiction over disputes involving constitutionally protected property and liberty rights, and such jurisdiction over areas of privilege: "The criterion suggested [by the language of *Bakelite*] presupposes the existence of a body of law distinguishing cases in which the Constitution permits final determination by executive officers or an administrative tribunal from those in which a litigant has a constitutional right to a hearing before a court."³³¹

2. *Phillips v. Commissioner*. The year following Professor Katz's article and one year before *Crowell*, the Supreme Court laid some important groundwork toward expanding permissible non-article III jurisdiction. Justice Brandeis's opinion for the Court in *Phillips v. Commissioner*³³² dealt with a statute that made findings by the Commissioner of Internal Revenue final in subsequent court proceedings, if supported by any evidence.³³³ In a portion of the opinion, Justice Brandeis seems to argue that tax cases are special, citing *Murray's Lessee*.³³⁴ He rejects the view that *Murray's Lessee's* rationale, permitting a summary proceeding against a tax collector, was limited to such suits brought by the government against its agents. Under such a view, *Murray's Lessee* would be seen as holding that an agent consents to summary process on becoming a tax collector. Instead, Brandeis concludes that the government can proceed in summary fashion outside the courts to collect all taxes from citizens, including income taxes.³³⁵

Brandeis may have been correct on this point, but there remains the issue of what sort of judicial review can later be had of summary executive action. On this question, he finds constitutionally adequate judicial review limited to questions of law and to assuring that some evidence supports the Commissioner's findings

330. *Id.* at 916-17.

331. *Id.* at 913.

332. 283 U.S. 589 (1931).

333. *Id.* at 599.

334. *Id.* at 596.

335. "The underlying principle in [*Murray's Lessee*] was not [the relationship of government and agent], but the need of the government promptly to secure its revenues." *Id.* at 596. In other words, Brandeis generalizes *Murray's Lessee* to all collection of revenue.

of fact: "It has long been settled that determinations of fact for ordinary administrative purposes are not subject to review."³³⁶ In support of this proposition are cited three cases involving, respectively, federal land, use of the mails, and immigration.³³⁷ These are akin to the executive action/privilege cases described earlier in this Article. Additionally, he cites United States Supreme Court cases upholding state laws providing for final fact-finding by agencies.³³⁸ In some of these, the state regulation was challenged on due process grounds.³³⁹ Finally, Justice Brandeis cites one case involving administrative finality in the regulation of private industry.³⁴⁰

The cases involving state regulation say nothing about the scope of article III. The land grant, immigration, and mails cases are classic executive-action cases, reflecting an exception to article III established early in the nineteenth century. The case involving final fact-finding by a federal agency regulating private business reflects extensions of the executive-action cases already accomplished by the time of *Phillips*. First was the extension permitting agency adjudication for the regulation of quasi-public railroads. Then, as used by the FTC in 1914, the doctrine was stretched to cover regulation of business in general, arguably on the theory that all of it was to some degree affected with a public interest.

Phillips moves one more step. It permits the federal government to use agencies to determine, at the trial level, monetary obligations, imposed under otherwise constitutional statutes, owed it by private citizens. Neither *Phillips*, nor, with the exception of *Block v. Hirsch*,³⁴¹ any of the other cases cited by Brandeis in *Crow-*

336. *Id.* at 600.

337. *Id.*, citing *Johnson v. Drew*, 171 U.S. 93, 99 (1898); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *Public Clearing House v. Coyne*, 194 U.S. 497, 508 (1904).

338. *Douglas v. Noble*, 261 U.S. 165 (1923); *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1914); *Red "C" Oil Mfg. Co v. Board of Agriculture*, 222 U.S. 380 (1912); *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552 (1905); *Reetz v. Michigan*, 188 U.S. 505 (1903).

339. See *Douglas v. Noble*, 261 U.S. 165 (1923); *Reetz v. Michigan*, 188 U.S. 505 (1903).

340. *Tagg Bros v. United States*, 280 U.S. 420 (1930). Also cited is one earlier tax case, which Justice Brandeis sees as presaging *Phillips*. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1928).

341. 256 U.S. 135 (1921). For a discussion of the factors making *Block* a limited precedent, see *supra* note 96.

ell,³⁴² involves final federal agency determination of the liability of one private party to another. In this sense the Court broke new ground in *Crowell* by crossing into the private rights realm, which was seen as centrally judicial by Ernst Freund. Still, after *Phillips*, so little seems left of the original article III that private party cases seem relatively unimportant. Are not the executive and legislative branches more likely to attempt to influence judges in cases like *Phillips* where the federal government is a party?

Seen in this light, Hughes' opinion in *Crowell* is deft symbolism. With so much no longer covered by article III, it seems to say that there is at least something covered by article III: private controversies; article III will be taken seriously. At the same time, in light of the fact that more sensitive categories of cases had been opened up to non-article III adjudication, Hughes allows it sub rosa in private-rights cases as well. He does this by allowing an agency to find facts finally. Justice Brandeis is more direct. Without acknowledging that the Court was covering somewhat new territory, his opinion is correct in its implication that major steps previously had been taken toward allowing final fact-finding by an article I body in virtually any civil controversy. Still, with the exception of the sharply distinguishable *Block v. Hirsch*,³⁴³ those major steps stopped short of agency inroads in controversies between private parties over monetary liability.

3. *Summary: The 1920s and Early 1930s.* To summarize, the 1920's, particularly the later years, were busy years in the development of judicial power and of administrative law. While the way was being paved for greater governmental powers in dissents, both on and off the Court, the scope of substantive due process limits on regulation was expanded as the Court read the judicial power and jury trial protections of the Constitution in a flexible way. Indeed, it was established that findings of facts determinative of citizens' obligations to the government made by an administrative agency could be made conclusive on the courts. Freund, Dickinson and other scholars were particularly preoccupied with what was to occur where individual rights were subjected to administrative adjudication. The questions pressed by Professor Katz were to take a most difficult form in *Crowell*, which dealt with "private

342. *Crowell v. Benson*, 285 U.S. 22, 70 n.5 (1932) (Brandeis, J., dissenting).

343. See *supra* note 96 and accompanying text.

rights." When that case was decided all of the Justices refused, perhaps wisely, to face those questions squarely, concluding that clear precedents were in place. What was in place was a series of developments of various sorts, making the result in *Crowell* seem practically desirable and relatively non-threatening.

I. *Conclusion, Section II.*

By 1932, when *Crowell* was decided, the world had changed in a number of ways that facilitated its decision. At the simplest and most linear level, the Court had accepted agency adjudication in a number of contexts, state and federal. These cases determined that final agency fact-finding violated neither the fifth nor the fourteenth amendment's due process clause. Charles Evans Hughes, the new Chief Justice and author of the opinion in *Crowell*, had been the driving force behind the New York utility regulation commission,³⁴⁴ and had gone on record, between his two terms on the Court, that final agency fact-finding was compatible at least with due process.³⁴⁵ A number of states had approved such adjudication despite separation of power challenges.

In related developments, the Supreme Court took a less than relentlessly severe view of the scope of the seventh amendment's jury trial guarantee. Additionally, the Court implicitly had found agency and executive branch adjudication compatible with article III in a series of cases which were essentially public-rights cases in the sense those words were used in *Murray's Lessee*. The Court also stretched the category to cover cases decided initially by the Interstate Commerce Commission. The Court had walked up to, but never crossed, under article III, the line drawn by Sharfman and by Congress in creating the Interstate Commerce Commission: it had never allowed final agency or executive adjudication in a controversy as purely private as imaginable. Beyond the fairly technical progression described above, there was a change in the ethos of constitutional interpretation and, in turn, in the relationship between the public and the private. This facilitated *Crowell* from the perspective of some Justices, and ensured it a good reception in scholarly circles. Beginning with glimmerings in the works of Holmes and Pound, and more fully articulated by Car-

344. 1 M. PUSEY, *supra* note 307, at 200-09.

345. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 223-24 (1928).

dozo and Frankfurter, the notion of careful remaking of fundamental law had found impressive spokesmen. Benjamin Cardozo had joined the Court, although he did not participate in *Crowell*. Acknowledging some debt to Dickinson, while still Chief Judge of the New York Court of Appeals, Cardozo, in a 1928 book, dealt with problems of constitutional interpretation.³⁴⁶ In passages concerned with the proper judicial role in reconciling legal doctrine with changing circumstances, Cardozo endorsed the view that the appropriate response is not logical synthesis, but compromise.³⁴⁷ Frankfurter, in characterizing those portions of Cardozo's book dealing with constitutional interpretation, borrows a passage from Whitehead.³⁴⁸ That passage, recognizing a need both for preserving and adjusting public symbols to new demands,³⁴⁹ captured the view of some of the Supreme Court justices at the time of *Crowell*. It states well the later prevailing view that made possible broad grants of legislative and judicial power to the executive branch and independent agencies.

At least some of Cardozo's brethren had come to appreciate the need for deft constitutional revision, or at least gymnastic interpretation, preserving, to borrow from Whitehead, constitutional "symbols" while allowing greatly needed change. As can be seen from Chief Justice Taft's eulogy to his predecessor, nowhere was such revision as acceptable as in the area of inconvenient prophylactic procedural guarantees, those going above and beyond procedural due process.

Beyond this, while the Court had generally continued to adhere to a view of substantive due process most hostile toward regulation, voices on the Court, and Dickinson off the Court, had made a convincing case that there was no natural border between the public and the private. Like many forceful insights, this one may have moved, if only slightly, even the most resistant. I believe that, although *Crowell* is couched in terms of what procedures must be accorded in a private rights case, it is partially a product of a shift in perception of the public and the private. For many of the Justices, *Crowell* was facilitated by a perspective in which for-

346. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 61-63 (1928).

347. *Id.* at 5.

348. Frankfurter, Book Review, 77 U. PA. L. REV. 436, 438 (1929) (quoting A. WHITEHEAD, *SYMBOLISM* 88 (1927)).

349. The passage is quoted in full at the beginning of this Article.

merly private rights had come to be seen as sufficiently public, whatever their official description, to permit procedures formerly used only in areas of great federal control. Certainly the *Munn* and *Lochner* line of cases deal with problems technically distinct from those involving the judicial power. Still, the new world-view of allowing greater governmental control, shared to some degree by four or more justices, created a climate for procedural reform. It was a climate that allowed forms of dispute resolution more attuned to public ends than traditional court proceedings.

Only two years after *Crowell*, and well before Roosevelt's Court-packing campaign, a majority of the Court had clearly abandoned its view that only a few businesses were affected with a public interest for purposes of regulation. It is entirely possible that this view was shared at the time of the *Crowell* decision. Finally, and closely connected with the latter, the notion of a fluid public/private distinction, which had also been reflected in the earlier work of Holmes and Pound, found clear and forceful expression in the writings of John Dickinson.

Indeed, by 1932, a British legal scholar stated: "[P]ublic law . . . is gradually eating up private law. . . . [T]he public lawyer is ousting the private lawyer, and the rights and duties of institutions are superseding the ordinary rights and duties of private citizens."³⁵⁰ While the American federal government was to remain somewhat distant from this description for a few more months, it was apt for some American state institutions, and for a new American ethos already in existence and amply represented, although to different degrees, by many distinguished members of the profession, including many of the Justices of the Supreme Court.

III. FROM *CROWELL* THROUGH *NORTHERN PIPELINE* TO *UNION CARBIDE* AND *SCHOR*.

My focus above has been on the evolution of thought, up to the time of *Crowell v. Benson*,³⁵¹ regarding federal adjudication outside of the article III courts. Particular emphasis has been placed upon the development of an exception to article III's tenure and salary provisions for cases within a "public rights" category and upon the spreading influence of that category beyond its

350. Jennings, *The Institutional Theory*, in *MODERN THEORIES OF LAW* 68, 72 (1933).

351. 285 U.S. 22 (1932).

original boundaries. The opinion of the plurality of Justices in *Northern Pipeline*³⁵² perpetuated the *Murray's Lessee-Crowell* public-rights exception. Subsequent opinions, in *Thomas v. Union Carbide Agricultural Products Co.*,³⁵³ and in *Commodities Futures Trading Commission v. Schor*,³⁵⁴ deemphasize the importance of the public-rights category without clearly discarding it.³⁵⁵ In addition, the two later cases mark a broader shift from the general approach of the plurality in *Northern Pipeline* toward non-article III adjudication.³⁵⁶

A. From *Crowell* to *Northern Pipeline*: A Brief Look at a Period of Passivity

A jump of exactly one-half century from *Crowell* to *Northern Pipeline* is, on the surface, difficult to justify. Surely, one would suppose, there must have been significant developments in the interim. A closer, but brief, look at Supreme Court cases dealing with article III reveals that 1982 was more than *Crowell's* fiftieth anniversary: it marked an important change in the tone and emphasis of article III jurisprudence.

Crowell posed a serious potential threat to the continued existence of a meaningful article III. At the most general level of analysis, it raised the question whether article III can be bent to permit all but the most blatant attempts at congressional circumvention. More specifically, it suggests that Congress has great power to use agencies and article I courts to adjudicate congressionally created rights, even when such rights are substituted for old rights of action at common law and in admiralty.³⁵⁷

From *Crowell* to *Northern Pipeline*, the Supreme Court allowed Congress increasing flexibility in circumventing article III's tenure requirements. With only a few minor exceptions, the Court decided cases and wrote its opinions in a way that did little to indicate a willingness to resist the more alarming possibilities raised by *Crowell's* broad statements.

352. 458 U.S. 50 (1982).

353. 105 S. Ct. 3325 (1985).

354. 106 S. Ct. 3245 (1986).

355. See *infra* notes 447-51, 472-78 and accompanying text.

356. See *infra* notes 449-52, 465-78 and accompanying text.

357. *Crowell v. Benson*, 285 U.S. 22 (1932). See also Hart, *supra* note 76, at 1375.

First is *Williams v. United States*,³⁵⁸ decided one year after *Crowell* and termed an "intellectual disaster" by distinguished commentators.³⁵⁹ While *Williams* is not a serious erosion of article III protections,³⁶⁰ it does demonstrate the Court's compliant attitude toward Congress' decision to avoid use of article III courts. In *Williams*, the salaries of judges of the Court of Claims were to be reduced under an act of Congress.³⁶¹ Sixty years earlier the Supreme Court had almost certainly declared the Court of Claims an article III court.³⁶² Implausibly rejecting the authority of the earlier case, the Supreme Court proceeded to assert that the Court of Claims could not be an article III court, because it heard cases outside the judicial power.³⁶³ The judicial power, however, expressly includes controversies to which the United States is a party, and suits arising under federal law.³⁶⁴ The *Williams* Court's unconvincing attempt to conclude that suits against the United States under federal law are not within the judicial power is a sad chapter in article III jurisprudence.

358. 289 U.S. 553 (1933).

359. See HART & WECHSLER, *supra* note 57, at 399.

360. *Williams* itself affected only a narrow band of cases seeking damages against the United States. Indeed, after *Murray's Lessee*, it is difficult to argue that, if the federal government consents to suit, it must consent to suit in an article III court. As a result, a finding that the Court of Claims need not be an article III court breaks no new ground and has narrow implications. The difficulties with *Williams* are twofold. First, although Congress need not have done so, the evidence indicated that an earlier Congress had made the Court of Claims an article III Court. The Court shamefully ignored this evidence and allowed a later Congress to reduce the judges salaries. Second, the Court concluded that proceedings against the United States for damages were either within the judicial power or they were not. On this view, if Congress could itself determine claims against the United States, as it had done in the past, it could not, at its option, consent to suit in an article III court. The lesson of *Murray's Lessee* is precisely the opposite; it is that there are some matters that may or may not be styled as a judicial case at Congress' option. This portion of *Williams* was so weakly reasoned that it has been the subject of ridicule. See HART & WECHSLER, *supra* note 57, at 399. It is interesting, however, that such reasoning, if sustainable, might have doomed most agency adjudication, for it was clear that most such agency litigation arose under the laws of the United States. See D. CURRIE, *supra* note 76, at 146, (asking rhetorically, "How many federal administrative agencies would be destroyed if article III were held to be exclusive? Or don't you think *Williams* should be taken to have overruled *Crowell v. Benson*?"). The main point is, of course, that the *Williams* Court intended no such thing. The difficulties with its rationale, not carefully thought through, seem to demonstrate its eagerness to find a way to accommodate Congress.

361. 289 U.S. at 559-60.

362. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 144-45 (1871).

363. 289 U.S. at 577-81.

364. For the relevant text of article III, see *supra* note 9.

Among the 1932-1982 cases, *Glidden Co. v. Zdanok*³⁶⁵ has been cited as an indication of judicial resolve to preserve a meaningful article III.³⁶⁶ The *Glidden* opinion dealt with the appeal of two cases.³⁶⁷ In each, the vote of an arguably non-article III judge was determinative of the result. In *Glidden* itself, a Court of Claims judge, sitting by designation on the United States Court of Appeals, wrote the opinion and cast a decisive vote in reversing the decision of a Federal District Court against employees in a diversity jurisdiction-contract dispute.³⁶⁸ In its companion, *Lurk v. United States*,³⁶⁹ a Court of Customs and Patent Appeals judge, sitting by designation in a District Court, presided over a criminal trial resulting in conviction.³⁷⁰ Like the Court of Claims, the Customs and Patent Court had been declared an article I court years earlier.³⁷¹ A majority of the Supreme Court concluded that both of the judges in question were article III judges.³⁷²

In reviewing *Glidden* itself, the civil appeal, the plurality of Justices left no doubt as to its view that the Constitution required an article III court.³⁷³ It is a fair reading that the concurring Justices doubted the propriety of an article I adjudication.³⁷⁴ The

365. 370 U.S. 530 (1962).

366. D. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 42-44 (2d ed. 1981).

367. 370 U.S. at 532-33.

368. *Id.* at 532; see *Zdanok v. Glidden*, 288 F.2d 99, 100, 105 (1961). The judge in question, Judge Madden, was in a majority of two and, thus, cast a deciding vote.

369. 370 U.S. at 532; see *Lurk v. United States*, 296 F.2d 360 (1961), *aff'd sub nom. Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

370. 370 U.S. at 532.

371. *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

372. A plurality of three Justices, Harlan, Brennan and Stewart, reached this result by overruling the earlier cases that declared the Claims and Patent courts non-article III courts. 370 U.S. at 541-85. Chief Justice Warren and Justice Clark concurred on the grounds that curative legislation enacted years after the earlier decisions had changed the courts into article III courts. *Id.* at 585-89. The plurality was clearly unwilling to rest its opinion upon the attempted curative legislation. *Id.* at 541-43.

373. 370 U.S. at 537-38. From a strict point of view, the statements that an article III court was required are dictum. Given the Court's conclusion that the Court of Claims is an article III court, the Supreme Court did not have to decide what an opposite conclusion would have required. If the Court's statements be dictum, they are the clearest possible. Contrast the courts avoiding the ultimate issue in *Glidden's* companion case, *Lurk*. See *supra* notes 369-72 and accompanying text.

374. They expressed disagreement on the rationale for determining article III status. See *supra* note 373. They expressed no disagreement with the plurality's conclusion that an article III court was required. Most conservatively read, their opinion may be one which avoids the issue of constitutionality of an article I adjudication by finding that such an adjudication did not occur. This is how the plurality disposed of *Lurk*, *Glidden's* companion

plurality reasoned that federal courts hear diversity cases only by virtue of article III's grant and that therefore a court and judges protected under that provision are required.³⁷⁵

Whether one agrees with the plurality that diversity cases are special, *Glidden* seems an easy case. There we have an arguably non-article III judge casting the deciding vote to reverse an article III district judge on what was seen as a question of law. Hughes' opinion in *Crowell* makes clear that, at least in cases of private right, article III review of questions of law is required.³⁷⁶ Indeed, such review was required by due process via the doctrine of supremacy of law as understood by judges and leading scholars in 1932.³⁷⁷ Had the judge in question not proven to be an article III judge, not only would the doctrine of supremacy of law have been violated, but in addition an article I judge would have been elevated above the article III district judge who heard the case originally.

Glidden, then, makes a stand for a meaningful article III, but its facts did not require the Court to take a particularly strong stand.³⁷⁸ The plurality's conclusion that article III treatment is re-

case. See *supra* notes 369-72 and accompanying text.

375. The plurality in *Northern Pipeline* likewise saw cases adjudicating state-created cases as a specially protected category. 458 U.S. at 83-84.

376. *Crowell v. Benson*, 285 U.S. 22, 54 (1932). The dissenters do not disagree.

377. "The Supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which the facts were adjudicated was conducted regularly." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). See *Dickinson*, *supra* note 161.

378. *Lurk v. United States*, *Glidden's* companion, does not reinforce a meaningful article III. 370 U.S. at 532. At best it was no occasion for comment, at worst it shows some lack of concern. All participating Justices carefully examined the article III status of the judge who conducted the criminal trial in *Lurk*. 370 U.S. at 538-42, 558-606. The Court of Appeals in *Lurk* had concluded that a trial before an article I judge was lawful, because the trial was conducted under the local law of the District of Columbia within the District. *Lurk v. United States*, 296 F.2d 360, 361-62 (1961). The plurality made clear, however, that it was not necessarily committed to the view that a conclusion of non-article III status required reversal. 370 U.S. at 537-38. Having favorably decided the Patent Court's article III status, the Court did not have to decide if *Lurk* could have been tried before an article I judge. Indeed, one wonders whether the plurality was correct that the issue was easy to dodge. The Justices concluded that, even if Mr. Lurk had been entitled to an article III judge, he had in fact been accorded one. Did Mr. Lurk really receive what article III requires? Can one have the prophylactic protection of a judge insulated from tenure and salary pressures while, during the trial, there is serious doubt, generated by the most recent Supreme Court opinion on the subject, as to whether the judge was indeed so insulated?

quired in diversity cases is a clear limit, and one echoed by a majority of Justices twenty years later in *Northern Pipeline*. Despite this, rarely has Congress attempted non-article III treatment in diversity cases, nor does it seem likely to do so on a significant scale. The most serious article III problem after *Crowell* arises from the use of agencies and article I courts to hear matters arising under quickly proliferating federal law.

During the period 1932-1982, in addition to its recognition in *Glidden* of some article III limits, courts imposed other such limits upon the kinds of parties and cases subject to non-article III courts martial. In one of them, military court jurisdiction over military wives was denied in certain cases.³⁷⁹ In another, jurisdiction over servicemen was denied military courts for crimes committed off the base and unrelated to military duty.³⁸⁰

Despite these narrow assertions of article III's protections, the force of cases expanding non-article III adjudication outstripped those cases that imposed limits. Toward the end of the period 1932-1982, the Supreme Court, for the first time, clearly allowed an article I court sitting in the District of Columbia to dispose of cases under local laws passed by Congress to regulate conduct in the District.³⁸¹

Most significantly, in 1977, in *Atlas Roofing v. Occupational Safety and Health Review Commission*,³⁸² the Court settled definitively the question of the application of the seventh amendment's jury trial provisions to administrative actions.³⁸³ The Court held that a matter that would have been a suit at common law can be preempted by an administrative scheme.³⁸⁴ By substituting an administrative action for its common law antecedent, the right to a

379. *Reid v. Covert*, 354 U.S. 1 (1957).

380. *O'Callahan v. Parker*, 395 U.S. 258 (1969). *See also* *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (denying court martial jurisdiction over former servicemen for certain offenses committed during period of service). The Supreme Court, however, has recently done away with the "service connection" requirement, thereby overruling *O'Callahan*. *Solorio v. United States*, 55 U.S.L.W. 5038 (U.S. June 25, 1987) (No. 85-1581). The *Solorio* opinion seems to cast no doubt on *Toth's* holding that former members of the armed forces are not subject to military justice for offenses committed during their previous term of duty.

381. *Palmore v. United States*, 411 U.S. 389 (1973).

382. 430 U.S. 442 (1977).

383. *See* *Young, Federal Courts & Federal Rights*, 45 *BROOKLYN L. REV.* 1145 (1979).

384. 430 U.S. at 455.

jury trial can be eliminated.³⁸⁵ Just as *Crowell* lowered any article III barriers to substitute administrative actions, *Atlas* lowered the related seventh amendment barrier and implicitly vouched for *Crowell's* continued viability as to the permissibility of agency adjudication under article III.

Finally, in *United States v. Raddatz*,³⁸⁶ the Court allowed an untenured federal magistrate to determine the facts underlying a coerced confession claim. The magistrate's decision was subject to mandatory de novo review on the record made by the magistrate, but with no requirement of a de novo hearing of evidence by the reviewing article III judge.³⁸⁷

Aside from *Williams*, the Court's record from 1932-1982 is not shameful. It may not be fair to fault the Court greatly for failing to demonstrate a sense of seriousness about article III limits. The Court has only negative control of what it decides: it cannot create test cases. Still, the two cases with the broadest reach, *Atlas* and *Raddatz*, were resolved against article III or similar seventh amendment claims. Perhaps the resolutions of these difficult cases were correct; what I find objectionable is the fact that, in so resolving the difficult cases, the Court did not indicate that it was prepared to draw a definitive line somewhere and to make serious efforts to police it.

Whether one agrees with the precise resolution of the new, post-1981 cases, the concerns driving those opinions are laudable. So is the Justices' willingness to announce publicly that there are some limits to the flexibility of article III, as exemplified by *Crowell*. What follows will trace developments from 1982 to date and will then discuss them critically.

B. *Non-Article III Adjudication 1982-1986: The Cases*

Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows³⁸⁸

Again, the passage from Whitehead quoted approvingly by

385. *Id.*

386. 447 U.S. 667 (1980).

387. *Id.* at 674.

388. A. WHITEHEAD, *SYMBOLISM* 88 (1927), quoted in Frankfurter, Book Review, 77 U. PA. L. REV. 436, 438 (1929) (reviewing B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928)); see *supra* note 1 and accompanying text.

Frankfurter in connection with constitutional change. Those words capture the Court's difficulties in applying the Constitution to changing circumstances. The story of article III we have surveyed has been the story of attempts at balancing and adjustment. In the recent cases discussed below, the Supreme Court has struggled to mediate the conflict between practical pressures, favoring new forms of adjudication, and the requirement that it preserve a meaningful role for an independent judiciary as required by the Constitution. In so doing, the post-1982 Court has attempted to make clear that there are limits to the flexibility exemplified by *Crowell*.

1. *Northern Pipeline*.

a. *The Plurality Opinion*. In *Northern Pipeline Construction Co. v. Marathon Pipe-Line Co.*,³⁸⁹ the Court held unconstitutional certain portions of the Bankruptcy Act of 1978.³⁹⁰ Those provisions permitted judges of the Bankruptcy Court, an article I court, to conduct trials of state contract and tort cases brought by the estates of bankrupt persons against third parties, regardless of diversity of citizenship.³⁹¹ At least on the surface, Justice Brennan's opinion for a plurality, including Justices Marshall, Blackmun, and Stevens,³⁹² placed very stringent limits on Congress' power to use courts other than those established under article III. The plurality recognized three,³⁹³ and most likely only three,³⁹⁴ exceptions to the rule that federal adjudication in a court must occur in an article III court. The exceptional categories of cases that, constitutionally, may be heard in an article I court are: (1) cases within the judicial power of article III but adjudicated in the territories or the District of Columbia,³⁹⁵ (2) cases of courts martial,³⁹⁶ and (3) public-rights cases.³⁹⁷ In recognizing these three categories, the plurality's justification seems partly principled, in the narrow legal sense of the word, and partly an attempt to accept article III's

389. 458 U.S. 50 (1982).

390. *Id.* at 53-56.

391. *Id.* at 52-56. (Brennan, J., plurality opinion); *id.* at 90 (Rehnquist, J., concurring in the judgment).

392. 458 U.S. at 52.

393. *Id.* at 63-70 (Brennan, J., plurality opinion).

394. *Id.* at 75-76.

395. *Id.* at 64-65.

396. *Id.* at 66.

397. *Id.* at 67-70.

case law legacy of exceptions while limiting further serious erosion: "Although the dissent is correct that these three grants are not explicit in the language of the Constitution, they are nonetheless firmly established in our historical understanding of the constitutional structure. *When these grants are properly constrained, they do not threaten the Framers' vision of an independent Federal Judiciary.*"³⁹⁸

The contents of the first two categories are clear enough. That of the third, the public-rights exception, somewhat mystifies even the plurality which invokes it:

The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." In contrast, the "liability of one individual to another under the law as defined" . . . "is a matter of private rights."³⁹⁹

Whatever the content of the public-rights category, its significance is clear according to the plurality: if an article I court adjudicates matters outside the public-rights category and not involving District of Columbia courts, territorial courts, or courts martial, its doing so is unconstitutional unless, as seems unlikely, the Court establishes further exceptions.

Having identified the categories in which adjudication may proceed in an article I court, the plurality nevertheless recognized that in other sorts of cases a substantial amount of non-article III adjudication will be permitted. It did so by drawing a distinction between article I courts and adjudicatory bodies which are "adjuncts" to article III courts.⁴⁰⁰ On this view, the agency that decided *Crowell*, a private-rights case, could do so because it was merely an adjunct to an article III court.⁴⁰¹ Under the reasoning of the plurality, the Constitution does not permit private-rights cases, such as *Crowell*, to be decided by a legislative court.

Remember that the agency in *Crowell*, characterized as an adjunct fifty years later in *Northern Pipeline*,⁴⁰² was not formally de-

398. *Id.* at 70 n.25 (emphasis added).

399. *Id.* at 69-70 (footnotes omitted) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929) and *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

400. *Id.* at 76-86.

401. *Id.* at 78.

402. *Id.* at 80-81.

nominated an adjunct to the article III courts. What, then, was the contemplated difference between adjuncts and article III courts? Apparently the difference was one of degree in terms of the scope of powers⁴⁰³ and perhaps, symbolically,⁴⁰⁴ in terms of the trappings of court-like power.

The plurality's description of article III's limits is as follows: as the scope of an agency's subject-matter jurisdiction, its powers within its jurisdiction, and its freedom from review by article III courts increase, the closer the agency moves to court status.⁴⁰⁵ With too potent a combination of these factors, an article I body reaches court status and can be assigned only District of Columbia, territorial, courts martial, or public-rights cases.⁴⁰⁶

Short of court status, an article I judicial body is an adjunct to the article III courts. This, however, does not insure constitutionality. If Congress created the right in issue, its power to provide for adjudication by an adjunct was said to be "at a maximum."⁴⁰⁷ This is true even if the right created by Congress, like the one involved in *Crowell*, was a private right assertable by one private party against another. This means that such a tribunal can have a very potent combination of powers, but not quite enough to make it a court. If, on the other hand, constitutional or state-created rights are at issue, Congress' powers to use an adjunct can be employed only if it is made relatively impotent as compared with the supervising article III court.

The *Northern Pipeline* plurality voted to strike down the Bankruptcy Act because the Bankruptcy Court could determine state-created contract rights. Thus, while its power should have been narrowly circumscribed,⁴⁰⁸ the adjunct possessed too much power for a body determining such highly protected rights.⁴⁰⁹ In what ways was the Bankruptcy Court too powerful?

First, unlike some adjuncts whose decisions were enforceable only by a subsequent action in an article III court, the Bankruptcy Court issued orders enforceable by United States marshalls unless

403. *Id.* at 84-86.

404. *See infra* notes 479-81 and accompanying text.

405. 458 U.S. at 83-86.

406. *Id.*

407. *See id.* at 83-84 & n.35.

408. *Id.* at 84-87.

409. *Id.*

successfully appealed.⁴¹⁰ Second, although tethered to bankruptcy, the Bankruptcy Court's jurisdiction covered a wide variety of substantive subjects that may be involved in any bankruptcy, such as state contract and tort claims.⁴¹¹ Third, the Bankruptcy Court possessed a wide range of remedial powers.⁴¹² Finally, the article III courts could reverse the Bankruptcy Court, on review, only for errors of law and for clearly erroneous fact-findings.⁴¹³ In all of these respects, the Court seemed to believe that the Bankruptcy Court's powers were greater even than those approved in *Crowell* for an adjunct operating subject to the substantially more relaxed standards applicable to adjudication of rights created by Congress.

b. *A Critique of the Plurality Opinion.* The plurality's opinion in *Northern Pipeline* leaves us wondering about precisely what subset of litigation involving rights created by Congress constitutes the public-rights subset. It also leaves us wondering whether the line between the set and its subset is worth drawing in light of the fact that an adjunct hearing any case involving a congressionally created right can have relatively potent powers, approaching those of a court. What is the difference between an article I court and a potent adjunct? The Court itself seems to reject the view that the difference is one of pure labeling or symbolism.⁴¹⁴ If the difference is one of fine degree based on a host of factors, why distinguish court from adjunct instead of noting that a weighing of such factors bears on the validity of any particular assignment of jurisdiction to an article I tribunal?

Justices Rehnquist and O'Connor concurred in the judgment in *Northern Pipeline* on the ground that the state-created rights did indeed define a sensitive area of jurisdiction and that the Bankruptcy Court was too independent of the article III courts.⁴¹⁵ Their opinion expressed some skepticism, however, of the elaborate system of categories drawn by the plurality.⁴¹⁶ I believe con-

410. *Id.* at 85-86.

411. *Id.* at 85.

412. *Id.*

413. *Id.*

414. I draw this conclusion because, despite the Bankruptcy Court's having been named a "court," the Supreme Court was willing to consider the possibility that its powers are sufficiently modest to allow it to be an adjunct. If the concern were with symbolism and public confusion, I would think the label extremely important. *Id.* at 76-87.

415. *Id.* at 91 (Rehnquist, J., concurring in the judgment).

416. *Id.*

cerns similar to those expressed in the criticism of the plurality just presented influenced the concurring Justices. Similar concerns caused a later defection from the plurality opinion, leading to a new majority with a less artificial view of non-article III jurisdiction. The later cases are discussed below.

Beyond the problems with the specificity and shape of the plurality's map of article III, there are difficulties with some of the factors it viewed as worth weighing. If symbolism is not important, should it really matter that a tribunal's decision is enforceable even without a court order? Whether (1) the victor before the adjunct must bring its decision to an article III court for enforcement or (2) the loser must either appeal the decision or obey it, seems to have limited practical, as opposed to symbolic, effect.⁴¹⁷ In either case, the loser can have an article III court apply the appropriate standard of review. What that standard of review is seems by far the more important issue. On that issue, as we shall see in later discussion, the plurality in *Northern Pipeline* and the majorities in later decisions seem to have misread *Crowell* as a reference point.

Oddly, perhaps the portion of the plurality opinion with the most lasting significance was not the rococo map of article III exceptions, but an acknowledgement in a footnote:

Contrary to [the dissent's] suggestion, we do not concede that "Congress may provide for initial adjudications by Art. I courts or administrative judges of all rights and duties arising under otherwise valid federal laws." Rather we simply reaffirm the holding of *Crowell*—that Congress may assign to non-Article III bodies some adjudicatory functions. *Crowell* itself spoke of "specialized functions." These cases do not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights.⁴¹⁸

This, along with the statements of the dissent discussed immediately below, constitutes the first clear signal from the Court that it was willing to police Congress' use of adjuncts, as approved in *Crowell*, in civil cases arising under acts of Congress.

c. *The Northern Pipeline Dissents*. Justices White, Burger, and Powell, dissenting in *Northern Pipeline*, came closest to meeting the Frankfurter-Whitehead challenge of preserving symbols

417. As to this factor, I agree with Professor Redish. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 217.

418. *Id.* at 80 n.32.

meaningfully while accommodating change. For them, it was too late to reverse the creation of exceptions to article III's requirements.⁴¹⁹ What was needed was to determine the circumstances that created a need for non-article III adjudication and those that created a countervailing need for the protection of an independent judiciary.⁴²⁰ Where the two were at odds, the courts would balance the needs, although not according them equal weight, in deciding which would prevail.⁴²¹ By this means, article III would be compromised with decades of recognition of federal administrative adjudication.

2. *Thomas v. Union Carbide Agricultural Products Co.*⁴²² In *Thomas*, decided in 1985, the Court confronted a constitutional challenge to provisions of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").⁴²³ That Act requires registration of pesticides by the Environmental Protection Agency ("EPA") before they can be sold.⁴²⁴ The EPA will not register a pesticide unless the manufacturer discloses research data concerning the product's health, safety, and environmental effects.⁴²⁵ Such data are of use to competitors and have trade secret status under state law until made public.⁴²⁶

FIFRA, however, prohibits a second manufacturer from registering a pesticide if it has used data submitted by another manufacturer and if no offer is made to compensate the original registrant.⁴²⁷ If the offer of compensation is not agreeable to the original provider of data, the second user must pay a sum determined by binding arbitration if he is to register his product.⁴²⁸ If the parties cannot agree on an arbitrator, either may request the Federal Mediation and Conciliation Service to appoint one.⁴²⁹ The decision of an arbitrator selected in this manner is final "except for fraud, misrepresentation or other misconduct by one of

419. *Id.* at 93 (White, J. dissenting).

420. *Id.* at 113-16.

421. *Id.*

422. 105 S. Ct. 3325 (1985).

423. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982 & Supp. III 1985).

424. *Id.* at § 136a(a).

425. 105 S. Ct. at 3329; *see also* 7 U.S.C. § 136a(c)(2) (1982).

426. *See* 105 S. Ct. at 3329.

427. 7 U.S.C. § 136a(c)(1)(D)(ii) (1982).

428. *Id.*

429. *Id.*

the parties to the arbitration or the arbitrator : . . .”⁴³⁰

In *Thomas*, an original submitter of data, disappointed both with the follow-up user’s offer and with the outcome of arbitration, challenged the arbitration scheme under article III.⁴³¹ Despite the challenger’s arguments that FIFRA’s scheme (1) substituted a new federal right for his state-created property rights⁴³² and (2) then compelled adjudication of the new right by an untenured arbitrator whose decision was virtually unreviewable,⁴³³ the Supreme Court upheld the Act.⁴³⁴

The majority opinion in *Thomas* was written by Justice O’Connor, and was joined by Chief Justice Burger, and Justices Rehnquist, White, and Powell.⁴³⁵ Thus, as contrasted with the voting in *Northern Pipeline*, the *Thomas* majority⁴³⁶ is composed of the three *Northern Pipeline* dissenters, who had rejected any formulaic application of rules for exceptions to article III,⁴³⁷ and the two concurring Justices, who were skeptical of the particular lines drawn by the plurality opinion.⁴³⁸ *Thomas* is important for its suggestion of a new majority view regarding article III that in two respects is quite different from the view expressed in the plurality opinion in *Northern Pipeline*. Specifically, and most clearly, it suggests that a reappraisal of the importance of a private-rights category is at hand and, generally, it suggests that a majority of the Court now takes a less structured, and more flexible, view of article III than presented in Justice Brennan’s 1982 opinion in *Northern Pipeline*. As we shall see in the next Section, the hints in *Thomas* matured, in 1986, into a clear break in the majority opinion in *Commodity Futures Trading Commission v Schor*.⁴³⁹

430. *Id.*

431. 105 S. Ct. at 3330-31.

432. *Id.* at 3325.

433. *See id.* at 3334.

434. *Id.* at 3335-39.

435. *See id.* at 3328.

436. Note that the *Thomas* decision was unanimous. Four Justices, however, concurred in the judgment alone. Justice Brennan filed a separate opinion in which Justices Marshall and Blackmun joined. *Id.* at 3340 (Brennan, J., concurring in the judgment). Justice Stevens concurred on the unique ground that the plaintiffs lacked standing to challenge FIFRA. *Id.* at 3344 (Stevens, J., concurring in the judgment).

437. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 92 (1982) (White, J., dissenting, joined by Burger, C.J., & Powell, J.).

438. *Id.* at 89 (Rehnquist, J., joined by O’Connor, J., concurring in the judgment).

439. 106 S. Ct. 3245 (1986).

Here is the new direction suggested by *Thomas*: "The enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform the application of Article III."⁴⁴⁰ More specifically, beyond the general rejection of formal categories, the Court was forced to address the public rights/private rights distinction, because FIFRA was challenged on the ground that it gave a non-article III tribunal, the arbitrator, too much unreviewable power in the sensitive area of private rights.⁴⁴¹ The challenger asserted *Crowell's* definition of private-rights cases: those involving the "liability of one individual to another."⁴⁴² The *Northern Pipeline* plurality had endorsed such a definition⁴⁴³ and given it new, or at least clearer, significance: in private-rights cases an article I court could not be used,⁴⁴⁴ but use of an appropriately limited adjunct would be permitted.⁴⁴⁵ The agency arbitrator in *Thomas* was, however, not clearly appropriately circumscribed. The article III courts could reverse its decision only for fraud or similar misconduct.

As a result, the constitutionality of the scheme in *Thomas* was seriously in doubt. First, the fact that the proceeding was, in substance, brought by one private party seeking the monetary liability of another suggested that it might well be a private-rights case in the sense intended by the *Northern Pipeline* plurality. But the extremely limited judicial review of the arbitrator's decision suggested that he might be so potent as to constitute an article I court.⁴⁴⁶ Under the *Northern Pipeline* plurality's reasoning this was a fatal combination: an article I court cannot hear a private-rights case. Even if the arbitrator was not an article I court, the standard of review might make him too potent an adjunct even for a case involving private rights that owed their existence to an act of Congress.

440. 105 S. Ct. at 3336.

441. *Id.* at 3335.

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

443. 458 U.S. at 67-68 (Brennan, J., plurality opinion).

444. *Id.* at 64-65.

445. *Id.* at 67-70.

446. Noting that the parties had waived whatever due process objections they might have had to a more stringent standard of review, the Court reserved judgment as to whether due process required more than review of fact-findings for fraud, misconduct or misrepresentation. 105 S. Ct. at 3339. The Court nowhere specifically discussed whether the parties personal rights under article III, also waived, might require more. It certainly held that that portion of article III designed to protect the courts as institutions did not.

It was for these reasons, among others, I believe, that the *Thomas* majority was quick to distance itself from the *Northern Pipeline* plurality's view of the nature and significance of the public-rights category.

[T]he theory that the public rights/private rights dichotomy of *Crowell* and *Murray's Lessee* . . . provides a bright line test for determining the requirements of Article III did not command a majority of the Court in *Northern Pipeline*. Insofar as appellees interpret that case and *Crowell* as establishing that the right to an Article III forum is absolute unless the federal government is a party of record, we cannot agree.⁴⁴⁷

Despite its deemphasizing of the importance of the private-rights category, the *Thomas* majority sought to justify FIFRA by clinging to a somewhat reformulated public-rights concept, one that encompassed some cases involving only private parties: "[T]he right created by FIFRA is not a purely 'private' right, but bears many of the characteristics of a 'public' right. Use of a registrant's data . . . serves a public purpose."⁴⁴⁸

"Serves a public purpose" is a broad standard indeed, by itself doing little to stand in the way of serious circumvention of article III. Despite this, the *Thomas* majority does suggest that there is at least some additional minimal content remaining in a private-rights category, aside from the state-created and constitutional rights content recognized by the majority in *Northern Pipeline*. The Court is at pains to make clear that the appellee's right was conferred by Congress and was not given in lieu of a preexisting, vested common-law right.⁴⁴⁹ Hence, according to the majority, *Crowell* was a private-rights case, not because of the nature of the parties, as the *Crowell* Court itself stressed cosmetically,⁴⁵⁰ but because the employee's statutory right to compensation was substituted for preexisting rights in admiralty.⁴⁵¹

Subject to this exception, where federal statutory rights are in issue, the Court's reformulated public-rights category seems almost coextensive with Congress' power to legislate. Or, to put it another way, it seems virtually coextensive with the public interest as Congress sees it. Roughly sixty years after John Dickinson

447. 105 S. Ct. at 3336.

448. 105 S. Ct. at 3337.

449. *Id.* at 3335.

450. *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932).

451. 105 S. Ct. at 3336-38.

wrote *Administrative Justice and the Supremacy of Law in the United States*, the Court has finally applied his analysis to the *Murray's Lessee* public-rights category.⁴⁵² The inevitable conclusion is that the public-rights category is so flexible as to envelop, virtually at Congress' option, the private-rights category.

3. *Commodity Futures Trading Commission v. Schor*.⁴⁵³ *Schor* is a rather complicated case, for it involves a complaint about non-article III adjudication raised by one found to have waived his personal rights to an article III court.⁴⁵⁴ Justice O'Connor's opinion for all Justices, save Brennan and Marshall, who dissented,⁴⁵⁵ is the only Supreme Court opinion I know of that separates the Court's institutional interest in article III's tenure and salary requirements from an individual's personal interest in having his case before an insulated judge. The Court holds that only the personal interest is waivable.⁴⁵⁶ Thus, a party who waived his personal rights to an article III court still has standing to assert article III's institutional requirements in challenging a non-article III adjudication. This analysis is complicated somewhat by the Court's conclusion that the institutional interests of the article III courts are to some degree less threatened by article I adjudication where it occurs by choice of the parties.⁴⁵⁷

In *Schor*, a commodity broker's customer brought a proceeding before the Commodity Futures Trading Commission, charging violations of requirements of the Commodities Exchange Act ("CEA").⁴⁵⁸ The relief sought was a statutory form of monetary damages.⁴⁵⁹ At the customer's option, the case could have been commenced in court in the first instance.⁴⁶⁰ The broker denied

452. See *supra* notes 285-92 and accompanying text.

453. 106 S. Ct. 3245 (1986).

454. *Id.* at 3257.

455. *Id.* at 3262 (Brennan, J., dissenting). The dissenting Justices clung steadfastly to the structured analysis of non-article III adjudication that the *Northern Pipeline* plurality had advanced.

456. *Id.* at 3256-57.

457. *Id.* at 3260.

458. *Id.* at 3250.

459. *Id.* Section 7 of the CEA, 7 U.S.C. § 18(a) (1982), permits persons injured by violations of the CEA or regulations promulgated thereunder to apply to the Commodity Futures Trading Commission "for an order awarding actual damages proximately caused by such violation." Under section 18(f) injured parties may have the order enforced in federal district court.

460. See 18 U.S.C. § 18(a) (1982) ("Any person complaining of any violation . . . may

liability, but counterclaimed for his fee as permitted by agency regulation.⁴⁶¹ By choosing to commence his action before the Commission, the customer waived his right to article III adjudication of whatever violations there may have been to his personal rights.⁴⁶²

The Court's opinion must be read in light of this waiver. It is possible, though not likely, that the basic outlines of the Court's analysis would change if the personal right to an article III tribunal had not been waived. Much more likely is the possibility that the balancing test articulated by the Court in *Schor* and discussed below would still apply, but in a way weighted more strongly against constitutionality.

In upholding the CEA as not in violation of article III's protection of the judiciary, the *Schor* majority, now including two defectors from the *Northern Pipeline* plurality, expanded and clarified the approach of the majority in *Thomas*. The detailed distinctions of the former plurality were even more clearly rejected:

In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the integrity of the Judicial Branch, this Court has declined to adopt formalistic and unbending rules. [citing *Thomas*]. . . . Although such rules might lend a greater degree of coherence to this area of law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers.⁴⁶³

Given the rather limited powers of the CEA,⁴⁶⁴ the Court would naturally have characterized that agency as an adjunct, had it subscribed to the *Northern Pipeline* distinction between an article I court and an adjunct. Doing so would have bolstered the Court's conclusion of constitutionality. Yet, as in *Thomas*, nowhere in the opinion is there mention of adjuncts. The words "non-Article III tribunals" are used throughout to deal generically with untenured federal judicial decision makers.

What the Court substitutes for the *Northern Pipeline* plurality's detailed map of article III is a list of factors to be considered in

. . . apply"): 106 S. Ct. at 3250.

461. 106 S. Ct. at 3251; see 17 C.F.R. § 12.23(b)(2) (1983) amended by 17 C.F.R. § 12.19 (1986).

462. 106 S. Ct. at 3257.

463. *Id.* at 3258.

464. *Id.* at 3258-59.

appraising the validity of any particular non-article III adjudication. Here is the list of factors, which the Court makes clear is not necessarily exhaustive:⁴⁶⁵ (1) "the extent to which the 'essential attributes of judicial power' are reserved to the Article III courts"—in other words, the breadth of the subject matter jurisdiction of a judicial body and the extent of its powers within that jurisdiction; (2) "the origins and importance of the rights to be adjudicated"; and (3) "the concerns that drove Congress to depart from the requirements of Article III."⁴⁶⁶

This list, of course, represents a combination of views present in the various *Northern Pipeline* opinions. The first two factors were stressed by the *Northern Pipeline* plurality,⁴⁶⁷ but are now cut free from the arbitrary distinctions drawn there. The balancing approach and the presence of the third factor listed above are most strongly traceable to the *Northern Pipeline* dissenting opinion.⁴⁶⁸ Indeed, most generally, *Schor* tracks the *Northern Pipeline* dissent in its concern with allowing Congress great freedom to solve practical problems, but not so much as to undermine the central role of an independent judiciary.

The third factor addresses many of the problems that would result from extending *Crowell* too far. Apparently using this factor, the Court concludes that even a sweeping, but entirely voluntary, alternate system of federal judicial tribunals might violate article III:

This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article II supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in the forum of their choice would necessarily save the scheme from constitutional attack.⁴⁶⁹

Here, in the context of a hypothetical, the Court makes clear its view that *Crowell's* permission to use non-article III tribunals is limited, however loosely, by the real need to use a specialized tribunal.⁴⁷⁰ The excerpt goes beyond making explicit what was im-

465. 106 S. Ct. at 3258.

466. *Id.*

467. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 450 U.S. 50, 77-86 (1982) (Brennan, J., plurality opinion).

468. *Id.* at 113-16 (White, J., dissenting).

469. 106 S. Ct. at 3260.

470. Indeed, the excerpt suggests that even in cases involving a congressionally cre-

plicit in *Crowell*; it declares a willingness to engage, however deferentially, in more than a perfunctory review of Congress' motives and findings of need.⁴⁷¹

As for the public rights/private rights distinction, the demotion in *Thomas* has been clarified. According to the majority, when Congress creates an interest, short of a full-fledged, vested, old-style property right, it has great power to use potent non-article III tribunals for adjudication.⁴⁷² Presumably this is true for "new property" rights,⁴⁷³ which must, of course, be accorded due process,⁴⁷⁴ but not necessarily in an article III tribunal.⁴⁷⁵

As for rights originating in the states, the majority has heightened concern, not because of state origination, but because such rights are more likely to be private, common-law rights.⁴⁷⁶ Correctly citing *Murray's Lessee*, the Court notes that cases involving private, common-law rights were historically the core of the judicial power.⁴⁷⁷ While this analysis is historically correct, it may be that there is a more pressing need for an insulated judiciary, in other categories of cases not envisioned by the framers, because of the limited view of the federal commerce power in 1789. Today's myriad federal civil proceedings, pitting the government as regulator against business and individuals, may be at greater risk of improper influence than a prototypical private contest over monetary liability.⁴⁷⁸

The *Schor* majority's elaboration and application of the balancing approach requires further analysis. As did the plurality in *Northern Pipeline*, the *Schor* Court correctly stressed the breadth or narrowness of subject matter jurisdiction, finding the CEA's province quite limited.⁴⁷⁹ This is an appropriate factor because a main

ated right not in substitution for an admiralty or common law right, non-article III adjudication must be justified by reasons like those offered in *Crowell*.

471. Beyond the Court's hypothetical, consideration of *Schor*'s third factor might prohibit, for example, Congress' assigning sensitive civil-rights cases to an agency, if done clearly in an attempt to avoid Court-declared rights.

472. 106 S. Ct. at 3259.

473. See Reich, *supra* note 163.

474. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

475. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985).

476. 106 S. Ct. at 3259.

477. *Id.*

478. See Redish, *supra* note 417, at 210.

479. 106 S. Ct. at 3258-59. Compare *id.* with 458 U.S. at 85 (Brennan, J., plurality

practical justification for a non-article III tribunal is expertise. The broader the jurisdiction the less substantial this claim. Additionally, the broader the spectrum of jurisdiction the greater the portion of the judicial power spectrum occupied by an agency, and hence the greater the threat to the tenured judiciary as an institution.⁴⁸⁰

Difficulties arise from the consideration of other factors. If a tribunal is operating within an appropriately narrow judicial spectrum, why should it not have almost all the powers of a court and why do we care if it employs juries? In other words, why can it not look substantially like a court within its province? There are several possible answers. If the power is a power to substantially encroach on liberty, perhaps there is a point to this concern. For example, contempt power and, possibly, wide powers to issue discovery orders, do seem like potentially real problems. The use of juries in some contexts might suggest that the claimed need for agency or tribunal expertise is artificial. Such powers are matters of real importance.

My concern is that the Court's formulation can easily be read as permitting consideration of the trappings of court-like status. This obscures the real question of whether a particular bundle of potent powers poses any real threat, and if so, whether it carries countervailing benefits. I recognize the Court has adopted a balancing approach, but my concern is that the Court put real interests in the balance and not just trappings. I am particularly concerned about the Court's recurring emphasis on whether the tribunal's judgment may be enforced only if an article III court orders enforcement.⁴⁸¹ As mentioned earlier, the real issue is not whether it is the winning party or the losing party who must bring the matter before an article III court, it is, rather, whether the losing party can have his day in court and, if so, what standard of review will be applied.

As for the standard of review, the *Schor* Court found the Commodities Exchange Commission's fact-findings reviewable in an article III tribunal under what it saw as the more searching

opinion).

480. See 106 S. Ct. at 3260.

481. See, e.g., *id.* at 3259; *Thomas v. Union Carbide Agric. Prods. Co.*, 105 S. Ct. 3325, 3338-39 (1985); see 458 U.S. at 85-86.

“weight of the evidence” standard applied in *Crowell*,⁴⁸² rather than what it saw as the more deferential “clearly erroneous” review that helped condemn the Bankruptcy Court in *Northern Pipeline*.⁴⁸³ Neither in *Northern Pipeline* nor in *Schor* did the Court cite any authority for its conclusion that the *Crowell* standard provides more thorough review of fact-finding.⁴⁸⁴ My research indicates that, as interpreted by the Court, the statute involved in *Crowell* required agency orders to be set aside only for errors of law or for nearly complete lack of evidence to support factual conclusions.⁴⁸⁵ Justice O’Connor, writing for the majority in *Schor*, described the *Crowell* standard as a “weight of the evidence” standard, presumably meaning that the Court would set aside the agency’s fact-finding if, after independently examining the record, it concluded that the weight of the evidence significantly supported a different conclusion.⁴⁸⁶ This interpretation sees the reviewing court in *Crowell* as possessing much greater power to set aside agency find-

482. 106 S. Ct. at 3259; see *Crowell v. Benson*, 285 U.S. 22, 64 (1932).

483. 106 S. Ct. at 3259; see *Northern Pipeline*, 458 U.S. at 85. As Professor Redish has suggested, Justice Brennan exaggerated the degree of court deference to agency findings under the “clearly erroneous” standard involved in *Northern Pipeline*. Redish, *supra* note 417, at 218 & nn.138 & 140. In fact, the clearly erroneous standard is less deferential than the substantial evidence standard, which generally governs judicial review of administrative decision making. K. DAVIS, *ADMINISTRATIVE LAW TEXT* 528 (3d ed. 1972). Review under the clearly erroneous standard is less deferential than review of the findings of fact by juries. C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* 730 (1971). Because of their special expertise at fact-finding, however, administrative agencies are often equated with juries. See, e.g., K. DAVIS, *supra*, at 528.

The substantial evidence test involves review for reasonableness. *Id.* On the other hand, under the clearly erroneous test, a trial court’s findings of fact do not bind the appellate court if the latter has the “definite and firm conviction that a mistake has been committed.” *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Agency findings, however, “may be clearly erroneous without being unreasonable so as to be upset under the substantial evidence rule.” K. DAVIS, *supra*, at 528. Similarly, though a finding unsupported by substantial evidence is clearly erroneous, the converse proposition is not true: a finding supported by substantial evidence might not withstand clearly erroneous review if, for example, the finding is “against the clear weight of the evidence.” C. WRIGHT & A. MILLER, *supra*, at 735.

I believe the standard applied in *Crowell* was not the modern substantial evidence rule, but its precursor which called for even less thorough review than its descendant. See *supra* notes 6 & 8 and accompanying text. But, even assuming the statute involved in *Crowell* called for modern-style substantial evidence review, Justice Brennan was in error in concluding that the weight of the evidence standard was a more thorough standard of judicial review than the clearly erroneous rule.

484. 106 S. Ct. at 3259; see *Northern Pipeline*, 458 U.S. at 85.

485. See *infra* notes 487-89 and accompanying text.

486. 106 S. Ct. at 3259.

ings than would a court reviewing under the clearly erroneous standard.

Justice O'Connor's interpretation of the standard of review in *Crowell* is clearly wrong. The cases involving the agency reviewed in *Crowell* applied the most deferential standard conceivable for judicial review of agency fact-finding.

By giving a large degree of finality to administrative determinations, contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged. Thus it is that the judicial review conferred by §21(b) does not give authority to the courts to set aside awards because they are deemed to be against the weight of the evidence. More is required. *The error must be one of law, such as the misconstruction of a term of the Act.*⁴⁸⁷

This passage by Justice Douglas is very close to an accurate description of the *Crowell* standard as applied in future cases. The Court did not, however, consistently see the judicial role quite so narrowly as the passage indicates: it is part of our tradition that the notion "errors of law" has come to include at least gross misreading of the factual record by the body below. The Court did acknowledge that it could reverse if "no evidence" in the record supported the agency's conclusions.⁴⁸⁸

Occasionally, under special provisions of the statute requiring "substantial evidence," the Court made clear its view that this adjective added nothing either to the usual requirement that findings must be supported by evidence or to its usual rule that inferences drawn by the agency, if supported by evidence, would not be disturbed.⁴⁸⁹ In short, it is impossible for me to imagine a more

487. *Norton v. Warner Co.*, 321 U.S. 565, 569 (1944) (emphasis added). Section 21(b) of the Longshoremen's and Harbor Worker's Compensation Act provided that the conclusions of the Deputy Commissioner would be final "if in accordance with law." 44 Stat. 1424 (1927). The *Norton* case was not aberrant. At least with regard to findings of nonjurisdictional facts, the Court, from the very beginning, interpreted this as a requirement of deferential review. Thus, for example, Chief Justice Hughes wrote:

We think that there can be no doubt of the power of the Congress to invest the deputy commissioner, as it has invested him, with authority to determine these questions after proper hearing and upon sufficient evidence. And when the deputy commissioner, following the course prescribed by the statute, makes such a determination, *his findings of fact supported by evidence must be deemed to be conclusive.*

Voehl v. Indemnity. Ins. Co. of N. Am., 288 U.S. 162, 166 (1933) (emphasis added).

488. See *supra* note 487.

489. Shortly after *Crowell*, in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), the Court confronted the Longshoremen's Act's provision that "in the absence of substantial evi-

deferential standard of review of fact-finding than that permitted in *Crowell*. Anything more lax is not a standard for, but rather a prohibition of, judicial review of fact-finding.

The current Court continues to suggest that *Crowell* was a special case, not so much because it involved two private parties, which was the reason given by the Court in *Crowell* itself,⁴⁹⁰ but because it involved rights substituted for common-law or admiralty rights.⁴⁹¹ I am concerned that the current Court is not aware of just how narrowly the Hughes' Court and its successors read the constitutional requirements for review of ordinary fact-finding in what it saw as the most sensitive of civil cases.⁴⁹² It is particularly troubling that the Court incorrectly stressed differences between the standard of review involved in *Crowell* and the standard employed in *Northern Pipeline* in reaching its decision in the latter case.

IV. CONCLUSION

As the history of the public-rights exception presented above, up to the time of *Crowell*, should make clear, the public-rights cat-

dence to the contrary," the employee should "have the benefit of the presumption of accidental death." *Id.* at 286. Citing *Crowell*, the Court stated that: "The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence." *Id.* (footnote omitted). The Court continued:

If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition . . . the issue must be resolved upon the whole body of proof pro and con; and if it permits an inference either way upon the question of suicide, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court.

Id. at 286-87 (footnotes omitted).

Similarly, in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), Chief Justice Hughes wrote that the Deputy Commissioner's finding of fact, "if there was evidence to support it, was conclusive . . ." *Id.* at 258. Thus, he continued, "it was the duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attempting a retrial." *Id.* Even if the evidence permitted conflicting inferences, the Deputy Commissioner's findings were, nonetheless, conclusive. *Id.* at 260-61; see *Norton v. Warner Co.* 321 U.S. 565, 568 (1944).

490. 285 U.S. at 51.

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

492. Presumably these were constitutional requirements because the Constitution required judicial review of questions of law, which in turn included review for gross distortions of the evidentiary record. See *Crowell v. Benson*, 285 U.S. 22, 49-50 (1932).

egory has not been a stable one. The standard nineteenth century public-rights case was a contest between a department of government and an individual concerning entitlement to a privilege. When regulation of private business became acceptable to some degree, the category of public-rights adjudication was extended, de facto, beyond cases involving privileges, to cover public law-enforcement suits brought by the government. Starting with actions against the railroads in 1887, extended to some suits against ordinary business corporations in 1914, and applied to many nominally private-rights actions in 1932, federal non-article III adjudication spread with a new view of the public interest.

In 1927, John Dickinson noted that the choice of recognition of a private right or a public action, or both, is largely a question of means for the legislature.⁴⁹³ Even early in this century, on occasion, private rights of action against private parties were conferred legislatively, largely for public purposes.⁴⁹⁴ Conversely, some suits by the government were old common-law actions in public-law garb.⁴⁹⁵ This has been even more true during recent years.⁴⁹⁶ Indeed, today it is often, though not always, fruitless to

493.

Procedurally . . . a line can be drawn, coinciding . . . with the distinction taken above between regulation by law alone and regulation by government. This seems to be the distinction Professor Freund has in mind when he says that "no community confines its care of the public welfare solely to the enforcement of the principles of the common law." (§8) But functions which are in substance the same will in the course of time pass from one side to the other of the procedural line Every matter of private law may, and generally does, involve some issue of public policy. There is merely a difference of remoteness. . . . [I]n many fields of regulation public welfare or policy first makes its appearance in common-law adjudications of differences between individuals. This policy in the course of time may come to be enforced directly by an administrative agency or criminal proceedings. But it would seem that the function of government performed in both instances the same, namely, "that of promoting the public welfare by restraining and regulating the use of liberty and property."

J. DICKINSON, *supra* note 161, at 28 n.49 (footnote omitted).

494. Sherman Act of 1890, 15 U.S.C. § 15 (1982) (treble actual damages awardable to successful private plaintiff). For a later example, see Securities Exchange Act of 1934, 15 U.S.C. § 78p (1982) (either issuer or holder of security permitted to sue to recover, for corporation, the short swing profits regardless of actual harm). These and other measures largely aimed at deterrence empower private citizens to be public enforcers.

495. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947).

496. For an indication of the modern uses of private rights, or at least private standing, to police public programs, see Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). For a discussion of another sort of action, which occasionally may have a greater public than private/ flavor—the claim of a third-party beneficiary of a

attempt to distinguish between federal rights of action created or recognized primarily for private, individual benefit, and those created as incentives for private policing of public values.⁴⁹⁷ As a result, any attempted public/private distinction, particularly a nominal one focusing on the nature of the parties to an adjudication, seems to provide no useful foundation for an exception to article III's requirements.

The Court has finally come to some recognition of these facts in *Thomas* and in *Schor*. The focus now is off arbitrary distinctions between the public and the private and between article I courts and adjuncts. The focus is now properly on balancing the need for non-article III adjudication against the threat it poses to a variety of private interests and rights, and to the tenured judiciary. The Court currently emphasizes the interplay of (1) the source, importance, and sensitivity of the rights to be adjudicated, (2) the practical need for non-article III adjudication, (3) the portion of the judicial power spectrum preempted by non-article III institutions, and (4) the degree of review available in the article III courts.

Given the long history of exceptions to article III, this look directly at the problem is for the good. Looking backwards nearly 200 years, it is, however, natural to wonder whether the changes were not so dramatic as to warrant a constitutional amendment. At some point, it becomes clear that a constitutional "symbol" has been so changed that it bears no resemblance to its former self. Perhaps even for so-called loose constructionists, this marks the limit of acceptable informal constitutional amendment by the courts. Our vantage point obscures the difficulty in recognizing when this point approaches: the dramatic change in article III, with a few exceptions, has been the product of a great many small adjustments. I understand and respect the sentiments of those who would wipe out 200 years of exceptions as illegitimate and of those who would seek the legitimating effect of a constitutional amendment. Neither approach seems realistic today.

Without abandoning 200 years of case law, the Court's current approach seems the best alternative for preserving a meaningful article III. The current Supreme Court continues to take

government contract—see *Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1176-99 (1985).

497. The doctrine of a competitor's standing to challenge agency violations of law that aid her competitor is a clear case of mixed motives.

the position that non-article III adjudication seems easiest to justify where congressionally created rights are at issue. Given the vast powers of the federal government to tax and to regulate, such cases may be of greater importance and sensitivity than actions resembling common-law damage suits. Still, the *Schor* Court's criteria may allow it to deal deftly with this constitutional-prudential problem by invalidating the more threatening forms of non-article III adjudication.

One source of doctrinal opposition to flexibility over cases involving congressionally created rights comes from those who see a flat prohibition in the modern doctrine of unconstitutional conditions. The underpinnings of such flexibility originated in *Murray's Lessee's* view that, when Congress creates a right, it is free to condition it as to procedural incidents, including the availability *vel non* of an article III forum.⁴⁹⁸ Although there is a strong surface argument that what the Court has said in recent cases is inconsistent with its procedural due process and other unconstitutional-conditions cases,⁴⁹⁹ I do not believe that is so. The unconstitutional-conditions doctrine has not been, and should not be, an absolute abandonment of the notion that an institution that creates an interest normally controls the terms on which it is granted. It is, rather, a flexible doctrine that condemns such conditioning when it poses an unacceptable threat to recognized constitutional values.⁵⁰⁰ Soundly applied, the current majority's balancing test

498. See Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197. This was the position of the *Northern Pipeline* plurality, which said that the legitimacy of non-article III adjudication in public-rights cases follows from Congress' "power to define the right that it has created." 458 U.S. at 83.

499. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, (1985).

500 In a 1983 article, Professor Redish addresses the *Northern Pipeline* decision as it bears on the legitimacy of agency adjudication. See Redish, *supra* note 498. I am in agreement with much of what he says. Indeed, I have tried to document, historically, his conclusion that the public-rights category will not bear weight. However, on an important point, I must register disagreement or concern. Professor Redish concludes that the *Murray's Lessee* justification for agency adjudication is so weakly established in the case law as to permit reexamination, and that upon reexamination that justification is clearly insufficient upon application of the modern doctrine of unconstitutional conditions:

In the present context the "greater-includes-the-lesser" argument simply does not work. First, the argument that the government may attach conditions to its consent to be sued disregards the well-established "unconstitutional conditions" doctrine. Congress indeed may have no obligation to allow suit against it or to provide a statutory benefit. According to the "unconstitutional conditions" doctrine, however, once Congress allows suit against it or provides a statutory ben-

can provide assurance that those article III values that do survive

efit, it may not condition the right . . . on the waiver of the individual's first amendment right of free expression Constitutional logic should not differ when the relevant constitutional restraint is . . . Article III

Id. at 212-13.

The quotation, of course, presents the unconstitutional conditions argument. For the threshold argument that, given the weaker force of precedent on constitutional issues and given the quantity and quality of the precedents establishing the *Murray's Lessee* justification, the precedents are not compelling, see *id.* at 204-08.

I have concern about the conclusion that the *Murray's Lessee* justification fails the "unconstitutional conditions" test, although perhaps Professor Redish is right. I disagree with his statements that the outcome is clear or that the logic of the *Murray's Lessee* justification is necessarily the same as that in his hypotheticals.

"The greater-includes-the-lesser" is a perfectly good argument for most contexts, including that of constitutional interpretation. Normally, those who grant power, whether in a charter to a corporation or in a constitution to organs of government, would intend that a power that can be exercised completely can be exercised partially or conditionally. It is only in those instances, where other values important to the grantor are seriously, or needlessly, frustrated, that the argument clearly is no longer acceptable. The examples cited by Professor Redish involved conditioning government benefits on the surrender of personal rights under circumstances wherein the clear object was the surrender of what would otherwise clearly have been an important right. *Murray's Lessee* has a different flavor over a wide range of its application.

Whether the doctrine condemns every instance of the pattern described by Professor Redish depends upon where one begins the argument. There can be little argument with one who sees in the Constitution itself a clear prohibition against the government's conditioning a power it possesses upon waiver of a constitutional right; there can be little argument, except to dispute the presence of such a prohibition. I am not attributing this position to Professor Redish. His view may rest either on such a position or on the view that the doctrine owes its existence to a policy choice by the Court. The first is hard to support. Assuming his view to be the second, the scope of the doctrine is not as clear as he seems to believe. I do not see such a prohibition as coming directly from the text. It certainly is within the bounds of reasonable argument to assert that government's prohibiting an activity, on the one hand, and its offering something conditioned on abstinence, on the other, are not only literally and analytically two different things, but may often be different in substance as well. "The basic flaw in the [unconstitutional conditions] doctrine is its assumption that the same evil results from attaching certain conditions to government-connected activity as from imposing such conditions on persons not connected with the government." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1448 (1968); see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 510 n.30 (1977). If this is recognized, then the doctrine of unconstitutional conditions is gloss or constitutional common law, a legitimate enterprise, in my estimation. But it is also a purposive, rather than a mechanical, enterprise, for it requires choice and judgment. Such a doctrine, in the form that we are discussing it, arose because the relatively new, yet extremely vast, taxing, employment, and other economic powers of the federal government offered potentially pervasive, and originally unforeseen, ways of seriously undermining the Bill of Rights.

In that context, there can be little quarrel that the unconstitutional conditions doctrine was a necessary compensatory adjustment made in the process of mapping old guarantees, not easily abandoned, onto what had become a very different Constitution. Where, how-

200 years of exceptions will not be unduly threatened.

There is one specific indication that the Court recognizes differences, even among instances of conditioning a congressionally created right upon its assertability only in a non-article III trial forum. The Court has continued to make clear its special concern when a new federal right is conferred in forced substitution for preexisting rights in admiralty and at common law. While this is legitimately an area of special caution, I am concerned that the Court has misread its precedents. The Court has stated that, in such cases, what it views as *Crowell*-like, that is, relatively thorough, article III factual review must be available. In *Crowell*, which involved a statutory substitute for an action in admiralty, the article III review was, however, not thorough at all.⁵⁰¹ In short, to a much greater degree than the current Court realizes, its own precedents, carefully read, permit unreviewable authority to agencies in statutory actions substituted for common-law and admiralty actions.

Aside from concern for preexisting rights, the rest of the *Schor* case does suffer from difficulties of vagueness and tran-

ever, the imposition of a condition is not clearly designed to frustrate rights, but does so apparently as a side effect, the proper scope of the doctrine is legitimately disputable. Considerations warranting extension include the degree to which important, protected interests are frustrated (even if as a side effect), the difficulties of drawing lines, and the need for prophylaxis to guard against a well disguised intent to frustrate rights. Considerations warranting limiting the doctrine are the facts that the doctrine is a judicial creation to protect against a certain sort of harm, and that the conditioned use of a power is a presumptively valid means of achieving the ends for which the power was created.

Where a right, particularly one not given in substitution for another previously existing right, is given, conditioned upon acceptance of narrowed procedure for its assertion, the Court has behaved contradictorily on the surface. In *Murray's Lessee* and *Northern Pipeline*, it has accepted conditioning, despite its effect on what otherwise would be a right. But in due process cases culminating recently in *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985), the Court has struck down conditioning.

These developments suggest that the unconstitutional-conditions doctrine has been one of balancing, consciously or unconsciously, and is not a simple mechanical rule. To use one test among many, the Framers might well have approved the outlawing of conditions related to speech without disputing the premise of *Murray's Lessee* that article III was not designed to limit Congress' power to consent to using virtually any sort of tribunal it wished to construct for purposes of dealing with government benefits. The question whether article III is being evaded, in the sense that evasion of the first amendment often has been sought, must begin with a sense of the intended scope of its application. That is simply not clear in the case of article III. This is not to exonerate non-article III adjudication under the doctrine of unconstitutional conditions, it is to say only that the result of the intersection of the two is not clear.

501. See *supra* notes 482-92 and accompanying text.

siency. When has too much of the article III spectrum been preempted by agencies and article I courts? What is a sufficient showing of need for expertise? What is a politically sensitive case today? Does the validity of the assignment of a particular matter change with the political climate? Is the Court then forced to declare the constitutionality of a non-article III tribunal on a "for now" basis? These are serious problems, but they are the inevitable result of 200 years of exceptions. In light of these problems, the Court's new approach has merit. It aims right at the heart of what seems, intractably, a set of intersecting problems of degree. Perhaps with more experience, some patterns, governable by more precise rules, may emerge and at least some rules may crystallize. After years of practical pressures and, perhaps, some errant precedents not easily discardable, there is currently no satisfying, bright-line solution, but only hard choices to be carefully made.

