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The Right to Jury Trial in Non-Article III Courts and Administrative Agencies after Granfinanciera v Nordberg

Mark I. Greenberg†

In 1985, the trustee in bankruptcy for the Chase & Sanborn Corporation brought suit against Granfinanciera, S.A., and Medex, Ltda., two Colombian corporations, in the United States District Court for the Southern District of Florida.1 The bankruptcy trustee alleged that Chase & Sanborn's corporate predecessor had transferred money to Granfinanciera and Medex within one year of the filing of the bankruptcy petition. He claimed that these fund transfers were either constructively or actually fraudulent, and thus should be returned to the bankruptcy estate.2

The district court referred the case to a bankruptcy court, where both Granfinanciera and Medex requested a jury trial.3 The bankruptcy judge denied this request, finding the action to involve a "non-jury issue."4 After a bench trial, the bankruptcy judge dismissed the actual fraud claim, but entered a money judgment against both defendants on the constructive fraud claim. The district court and the Eleventh Circuit5 affirmed the decision. In an appeal to the United States Supreme Court, Granfinanciera and Medex argued that by holding a bench trial, the bankruptcy judge violated their right to trial by jury under the Seventh Amendment to the United States Constitution.6

2 Id at 2787. The action was brought under 11 USC §§ 548(a)(1) and (2), and 550(a)(1) (1988).
3 Granfinanciera, 109 S Ct at 2787.
4 Id.
6 The Seventh Amendment provides that:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.
US Const, Amend VII.

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On its surface, this issue seemed straightforward. For years Supreme Court cases had recognized that the Seventh Amendment guaranteed the right to jury trial only in cases involving so-called "legal" rights. But this analysis was settled law only for cases in the federal courts established by Article III of the Constitution. Several Supreme Court precedents suggested that traditional Seventh Amendment analysis might not apply directly in non-Article III forums such as bankruptcy courts. Relying on those cases, the Court held in Granfinanciera v Nordberg that in bankruptcy courts the Seventh Amendment applies only to those legal rights which are also "private" rights. The Seventh Amendment, thus, would not preserve the right to jury trial in cases involving non-private, or "public," legal rights. Since this principle appears applicable not just to bankruptcy courts, but to all administrative agencies with the authority to adjudicate disputes, Granfinanciera provides a universal test to determine the right to jury trial in non-Article III forums.

Neither Granfinanciera nor Medex argued that the bankruptcy statutes themselves provided a right to a jury trial, Granfinanciera, 109 S Ct at 2789 n 3, though this issue is unsettled. For more on the confused nature of the statutory right to jury trial under the bankruptcy law, see S. Elizabeth Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 Minn L Rev 967, 989-96 (1988).

7 See text accompanying notes 21-24.
8 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.

US Const, Art III, § 1. Tenure during "good behavior" means that a federal judge may only be removed by impeachment, and only for conduct at least as egregious as that triggering impeachment under Articles I and II. United States v Isaacs, 493 F2d 1124, 1142 (7th Cir 1974). This, plus the guarantee of undiminished salary, protects judges from "coercion or influence by the executive or legislative branches of the Government." United States ex rel Toth v Quarles, 350 US 11, 16 (1955).

9 These precedents are discussed in part I.B.

For the purposes of this Comment, "non-Article III tribunals," "non-Article III forums" and "administrative agencies" refer generically to those congressionally established bodies that perform quasi-judicial functions. Their judges have no constitutional tenure or salary protection, as enjoyed by Article III judges.

Bankruptcy courts, for example, are established by Chapter 6 of Title 28 of the United States Code. 28 USC §§ 151-60 (1988). Bankruptcy judges are appointed for 14-year terms. 28 USC § 151(a)(1). The judicial council of the circuit in which they serve may remove them, but only for incompetence, misconduct, neglect of duty, or physical or mental disability. 28 USC § 151(e).

10 Granfinanciera, 109 S Ct at 2795.
11 Id.
12 See part III.A.
Applying this test, the Court held that the action against Granfinanciera and Medex involved a private legal right, providing the defendants with a constitutional right to trial by jury.\(^{13}\) Never before had the Supreme Court upheld a Seventh Amendment challenge to non-jury administrative adjudication.\(^{14}\) In fact, the court of appeals had affirmed the bankruptcy judge's ruling partially on the ground that by placing actions to recover fraudulent conveyances within a bankruptcy court's jurisdiction, Congress had removed the right to jury trial.\(^{15}\) By affirming the right to jury trial in private legal actions in bankruptcy courts, the Supreme Court in Granfinanciera rejected such a broad statement of the congressional power to create and require non-jury adjudication.\(^{16}\) On the other hand, the Court left the door open for non-jury administrative resolution of disputes involving public legal rights.

The nature of this exception to the Seventh Amendment should be a matter of concern. The term "public rights" was coined in the mid-nineteenth century to describe a class of rights, disputes over which could be conclusively resolved by the executive or legislative branches of the federal government, without participation by the judiciary.\(^{17}\) Thus, causes of action involving public rights do not necessarily enjoy adjudication by a judge whose independence is guaranteed by Article III. But it is not clear why such causes of action should also be free of the commands of the Seventh Amendment. Moreover, the Supreme Court has never provided a workable definition of public rights.\(^{18}\) The most recent Article III cases, in fact, suggested that the Court had abandoned any explicit use of the term.\(^{19}\)

This Comment analyzes the right to jury trial in non-Article III courts after Granfinanciera. Part I sets the stage, discussing the historical evolution of the Seventh Amendment right to trial by jury, both within and without Article III courts. Part II then

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\(^{13}\) Granfinanciera, 109 S Ct at 2797-98, 2802.

\(^{14}\) For a discussion of the previous Supreme Court cases that addressed the right to a jury trial in administrative forums, see part I.B. of this Comment.

\(^{15}\) In re Chase & Sanborn Corp., 835 F2d at 1349.

\(^{16}\) See Granfinanciera, 109 S Ct at 2796.

\(^{17}\) See text accompanying notes 78-82, 88-89.

\(^{18}\) See, for example, Northern Pipeline Construction Co. v Marathon Pipe Line Co., 458 US 50, 69 (1982) ("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 . . . ."

examines the holding and arguments of Granfinanciera itself. Finally, part III considers the potential implications for the Seventh Amendment in the wake of Granfinanciera.

I. The Seventh Amendment Before Granfinanciera

We begin by looking at how the Seventh Amendment has been applied historically by the Supreme Court. While our primary concern is the right to jury trial in non-Article III tribunals, most Seventh Amendment jurisprudence has developed in the context of Article III courts.

A. The Right to Jury Trial in Article III Courts

The right to a civil jury trial was constitutionalized in 1791 by the Seventh Amendment. At that time, much as it is today, jury trial was seen as a protective shield between the government and its citizens. But courts have not looked to this prophylactic purpose to determine where and when the Seventh Amendment should apply. Instead, they have looked to the words of the Amendment itself, which says in part that “[i]n suits at common law, . . . the right of trial by jury shall be preserved . . . .” By applying only to suits at common law, the Seventh Amendment is understood to preserve the right to jury trial in those cases which would have been granted jury trial under the English law of 1791. Such suits would have come in the English common law courts, as opposed to the court of Chancery, and are now said to involve legal, rather than equitable, rights.

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21 US Const, Amend VII.

22 See Dimick v Schiedt, 293 US 474, 476 (1935) (“In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”); United States v Wonson, 28 F Cases 745, 750 (CCD Mass 1812) (No 16,750) (“[T]he common law . . . alluded to [in the Seventh Amendment] is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.”).

23 For a description of the common law civil jury in England, see Blackstone, 3 Commentaries at *349-85 (cited in note 20).

Today, however, discerning whether a particular action would, in eighteenth-century England, have come in the Chancery or the law courts can often prove difficult, as Granfinanciera illustrates. In that case, the majority looked primarily to old English case law and came to the conclusion that the Chancery court would have probably refused to hear an action for the recovery of a fraudulent conveyance. Justice White, in dissent, analyzed much of the same material and found the record inconclusive.

In addition to questions of legal history, at least two other factors complicate the modern application of such an historical test. The Supreme Court's treatment of both factors has suggested a presumption in favor of the Seventh Amendment's applicability to any given cause of action. First, after the merger of law and equity in the federal courts in 1938, both legal and equitable issues could arise in the same suit. In a series of cases from 1959 to 1970, the Court held that such legal issues still gave rise to a right to jury trial under the Seventh Amendment. Where both legal and equitable issues turned on the same factual determinations, the Court held that, except “under the most imperative circumstances, . . . [which] we cannot now anticipate,” a court could not exercise its equitable jurisdiction and find the facts without first granting the parties a right to jury trial on the legal issues. In Dairy Queen, Inc. v Wood, the Court said that this same right to jury trial extended to legal issues arguably incidental to equitable rights. Finally, in 1970 the Court held that the Seventh Amendment applied to legal questions in actions which were cognizable historically only in equity.

The second complication to the modern application of the historical test is that since the adoption of the Seventh Amendment, Congress has created innumerable causes of action unknown to

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25 Granfinanciera, 109 S Ct at 2790-93.
26 Id at 2812-13 (White dissenting). The class of cases that are on the borderline, however, is probably rather small. See Charles Alan Wright, The Law of the Federal Courts § 92 at 609 (West, 4th ed 1983).
29 369 US 469 (1962).
30 Id at 472-73.
eighteenth-century courts. Nevertheless, the Court held in *Curtis v Loether* that the Seventh Amendment applies to new statutory causes of action "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." The Court most recently restated the test for determining when a new statutory right is subject to the Seventh Amendment in *Tull v United States*:

First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. . . . Second, we examine the remedy sought and determine whether it is legal or equitable in nature.\(^4\)

The first part of this test calls for a search for the closest historical analogy in eighteenth-century English law: if the present statutory action “looks like” one the court of Chancery would have heard, it is more probably equitable; if it is more like the actions that were tried in the common law courts, it is most likely legal. As the Court has said, however, the second part of the test, the nature of the remedy sought, is more important than the first.\(^5\) Injunctions or declaratory judgments, for example, indicate an equitable action while money damages suggest a legal one.

As a result of these Seventh Amendment precedents, nearly every legal right in an Article III court confers a right to jury trial, even when it is merely incidental to a greater equitable concern and regardless of how novel it might be. In addressing non-Article III courts, however, the Court has not been nearly so solicitous to Seventh Amendment rights.

**B. The Right to Jury Trial in Non-Article III Tribunals**

The cases in the preceding section were limited to the context of Article III courts. While a few early cases addressed Seventh Amendment challenges to agency adjudication, only in the last quarter of the twentieth century has the Supreme Court directly considered the nature of the right to jury trial in non-Article III forums.

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\(^3\) Id at 194.


\(^5\) *Granfinanciera*, 109 S Ct at 2790.
1. The Early Cases.

One of the first cases to consider the Seventh Amendment in
the context of non-Article III courts was *Block v Hirsh.* World
War I caused a large influx of people into the District of Colum-
bia. Landlords, seeking to take advantage of the rising popu-
lation, forced old tenants out to make room for new tenants, from
whom they extracted exorbitant rents. In response, Congress
passed a statute prohibiting landlords from evicting tenants after
their leases expired, as long as they continued to pay rent. The
rent could be increased, but only if a commission set up to monitor
the statute determined that an increase was justified. The stat-
ute permitted the landlord to regain possession only for the use of
himself or his family, or to tear down the building to build a new
one. To do so, the landlord had to give the tenant thirty days no-
tice, and the tenant could challenge the notice's accuracy, suffi-
ciency, good faith and service. The commission settled these dis-
putes as well, without benefit of a jury.

Writing for the Court, Justice Holmes first held that this stat-
utory scheme, though a restriction of property rights, was for the
public benefit and did not require compensation. Moreover, as
emergency legislation set to expire automatically in two years, it
was a reasonable measure that did not deprive landlords of prop-
erty without due process of law.

Justice Holmes next rejected the argument that the statute vi-
olated both landlords' and tenants' Seventh Amendment rights to
have possession of the land determined by jury trial:

If the power of the Commission established by the stat-
ute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable. While the act is in force there is little to decide except whether the rent allowed is reason-
able, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies

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36 256 US 135 (1921).
37 Id at 157.
38 Id at 153-54.
39 Id at 153-54.
40 *Block,* 256 US at 154.
41 Id at 155-56.
42 Id at 154, 157-58.
was not a reasonable provision of a statute reasonable in its aim and intent.\textsuperscript{12}

This argument bears little resemblance to the reasoning applied by the Court in its traditional Seventh Amendment jurisprudence. Nowhere did Justice Holmes consider issues of law or equity. Rather, his primary concern was whether the statute, and the commission established under it, satisfied the Takings and the Due Process Clauses of the Fifth Amendment. Once he found those clauses satisfied, the power of the commission was "established." Inherent in this power, he said, must also be the power to find the relevant facts, so long as Article III courts are "given the last word" on the commission's decisions.

While Justice Holmes's prose is less than clear, it may be read to mean that the power to "regulate the relation" necessarily includes the power to find the relevant facts, so that a Seventh Amendment objection carries no force once the non-Article III adjudication is found to otherwise satisfy the Constitution. However, the last sentence of the quoted passage suggests that the suspension of ordinary remedies—that is, jury trial in an action of ejectment—must itself be reasonable, independent of the rest of the statute.\textsuperscript{13} Here, the needs of a national emergency "reasonably" motivated the suspension. But Justice Holmes did not state whether anything less would also permit a reasonable suspension of the right to jury trial. Thus, \textit{Block} left the boundaries of the Seventh Amendment uncertain. In any event, however, this case suggested that the Seventh Amendment should be tested under a different standard in non-Article III tribunals than in Article III courts.

Sixteen years later, in \textit{National Labor Relations Board v Jones & Laughlin Steel Corporation},\textsuperscript{14} the Supreme Court reviewed an NLRB decision that ordered Jones & Laughlin to reinstate, with back pay, ten employees it had allegedly discharged illegally. Jones & Laughlin argued that the award of back pay was in effect a money judgment, a legal remedy that entitled it to a jury trial under the Seventh Amendment.\textsuperscript{15} The Supreme Court rejected this argument:

\textsuperscript{12} Id at 158.

\textsuperscript{13} It appears that Justice Holmes found the suspension of the right to jury trial reasonable because of the national emergency, the need for speedy administration, and the fact that with the rest of the Act in force there was "little" left to decide.

\textsuperscript{14} 301 US 1 (1937).

\textsuperscript{15} Id at 48.
[The Seventh Amendment] does not apply where the proceeding is not in the nature of a suit at common law . . . . The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.46

Thus, the Seventh Amendment did not apply because the “proceeding” was “statutory” and “unknown to the common law.” There are at least three possible interpretations of this holding. First, the Court may have meant that the Seventh Amendment does not apply to suits brought under statutes. Second, the opinion may alternately be read to mean that, since an English common law suit had to be heard by a common law court, a proceeding before a statutorily-created forum like the NLRB cannot be “in the nature of a suit at common law.” Third, if “proceeding” is read to refer not to the forum but to the cause of action, the Court may simply have meant that a suit for reinstatement with back-pay is a statutory action unlike any recognized in the English common law, to which the Seventh Amendment should not apply.

The first interpretation is unlikely since it runs directly counter to several earlier cases in which jury trials were granted in actions brought in federal courts under federal statutes.47 The other two, however, seem equally plausible,48 though with dramati-

46 Id at 48-49. Just before this passage, the Court noted that the Seventh Amendment “has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law . . . .” Id at 48. Thus, the presence of money damages did not transform an action the Court otherwise thought equitable into a legal one. This is no longer wholly true since Dairy Queen, Inc. v Wood, 369 US 469 (1962), held that even legal rights incidental to a greater equitable right are entitled to jury trial. See discussion in text accompanying notes 28-30. The distinction between the cases is, of course, that Dairy Queen occurred after the merger of law and equity, while Jones & Laughlin occurred before.


48 The only case cited in Jones & Laughlin for the proposition that the Seventh Amendment does not apply to proceedings “not in the nature of a suit at common law,” 301 US at 48, was Guthrie National Bank v Guthrie, 173 US 528 (1899). Guthrie involved commission adjudication of claims against a city pursuant to a territorial statute. Thus, since both of these cases involved non-Article III hearings of statutory rights unlike those that
cally different implications. The second reading would mean that there is no right to jury trial outside Article III courts, whatever the nature of the action. The third, on the other hand, merely represents the application of the ordinary Seventh Amendment test in non-Article III forums.

In either case, the *Jones & Laughlin* Court applied Seventh Amendment principles to an action outside Article III courts. *Block* had permitted suspension of the right to jury trial in a non-Article III forum if it was reasonable to do so, as part of an otherwise reasonable statute. *Jones & Laughlin* instead looked to the categories of law and equity, and for somewhat unclear reasons, found that a proceeding before the NLRB for reinstatement with back-pay was not a suit at common law.

The last case until the late 1970s to deal directly with the right of jury trial in a non-Article III court was *Katchen v Landy.* That case, like *Granfinanciera,* involved an attempt by a trustee in bankruptcy to avoid a fraudulent conveyance. In *Katchen,* however, the transferee was also a creditor of the bankrupt, and had filed claims against the bankruptcy estate. Under the Bankruptcy Act, the claims could not be allowed unless the creditor first returned the fraudulent conveyance, but the Act did not state whether this issue should be tried to the bankruptcy judge or to a jury. Noting that the bankruptcy court had “actual or constructive possession” of the bankruptcy estate, and that the Act envisioned summary, non-jury proceedings for the full adjudication of claims to that estate, the Supreme Court held that the bankruptcy court had statutory authority to compel the return of the conveyance without a jury trial.

The Court acknowledged that the Seventh Amendment might have guaranteed the creditor the right to jury trial had the trustee

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were heard in the English common law courts, it is impossible to determine whether one or both grounds supplied the bases for the decisions. Unfortunately, the opinion in *Guthrie* is no more enlightening than the language in *Jones & Laughlin.*

50 Id at 325.
51 Id at 330 n 5 (citing 11 USC § 93 (1964)).
52 Katchen, 382 US at 328.
53 Id at 327.
54 Katchen, 382 US at 329.
55 Id at 335. The Court initially found only that a bankruptcy court could adjudicate a dispute over an alleged fraudulent conveyance. But since res judicata would apply to the verdict, in the interests of efficiency the Court included the power to compel the creditor to return the conveyance. Id at 333-35.
brought his suit for recovery of the conveyance in a district court.\textsuperscript{66} But in a bankruptcy court, the Court said that the Bankruptcy Act converts the creditor's legal claim for money into an equitable claim for a pro rata share of the estate.\textsuperscript{67} That claim, like any controversy over property in the bankruptcy estate, is adjudicated in the bankruptcy court using equitable methods, and the same should be true of any objection to the claim.\textsuperscript{68} The Court recognized that the objection involved a legal right, but nonetheless held that in bankruptcy courts the Seventh Amendment did not apply to legal issues incidental to the administration of the bankruptcy estate.\textsuperscript{69} Of course, \textit{Dairy Queen, Inc. v Wood} held that except "under the most imperative circumstances" legal issues incidental to equitable causes of action must be granted the right to jury trial.\textsuperscript{70} The \textit{Katchen} Court argued that the clear congressional intent to provide for prompt resolution of claims to a bankruptcy estate, without intervention by a jury, created just such an imperative circumstance.\textsuperscript{71} Thus, the creditor did not have a right to jury trial under the Seventh Amendment.

To reach this holding, \textit{Katchen} applied the basic Seventh Amendment doctrine developed in Article III courts. Except to the extent that, as a specialized court of equity, it is "imperative" that a bankruptcy court adjudicate incidental legal issues without a jury, the non-Article III nature of bankruptcy courts seemed irrelevant. Moreover, the Court nowhere referred to cases involving the right to jury trial in non-Article III forums, such as \textit{Block} or \textit{Jones & Laughlin}. Thus, at the time of \textit{Katchen} it was not clear whether its logic was limited to bankruptcy courts, or whether it might apply as well to administrative agencies. It did suggest, however, that in at least one type of non-Article III forum, the standard Seventh Amendment analysis as developed in Article III courts was applicable.

In 1974, the Supreme Court began its attempt to synthesize these cases. Recall that in \textit{Curtis v Loether} the Court held that the Seventh Amendment applies to new statutory causes of action.\textsuperscript{62} The petitioner in \textit{Curtis} had argued that \textit{Jones & Laughlin} held

\begin{flushleft}
\textsuperscript{66} Id at 336.
\textsuperscript{67} Id at 336.
\textsuperscript{68} Id at 336-37.
\textsuperscript{69} Id at 337 (quoting \textit{Barton v Barbour}, 104 US 126, 133-34 (1881)).
\textsuperscript{71} Katchen, 382 US at 339-40.
\end{flushleft}
that statutory actions were not suits at common law, and so supported the opposite conclusion. The Court disagreed:

Jones & Laughlin merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme.

Similarly, the Curtis Court said that no jury trial was required in Katchen because "a bankruptcy court has been traditionally viewed as a court of equity, and [] jury trials would 'dismember' the statutory scheme of the Bankruptcy Act." In summary, the Curtis Court said:

These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

Since Curtis involved a case before an Article III court, these statements of the right to jury trial outside Article III courts were

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63 This is equivalent to what was earlier described as the first interpretation of Jones & Laughlin. See page 487-88.
64 Curtis, 415 US at 194 (footnote omitted). This is similar to the second interpretation of Jones & Laughlin. See page 487. The Court did seem to limit the general inapplicability of jury trials, however, to those administrative proceedings with which jury trials would be incompatible. On the other hand, the Court did not suggest what administrative forums would be compatible with jury trials.

In Pernell v Southall Realty, 416 US 363, 383 (1974), the Court used almost identical words to describe Block as it had used to describe Jones & Laughlin in Curtis:

Block v Hirsh merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication. . . . We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency.

This is an unnecessarily broad reading of Block, since that case rested partly upon the existence of a national emergency to justify the assignment. See text accompanying notes 41-43.
65 Curtis, 415 US at 195.
66 Id (footnote omitted).
dicta. Nevertheless, this represents an unnecessarily broad reading of both Jones & Laughlin and Katchen. Katchen applied standard Seventh Amendment doctrine, and only allowed bankruptcy courts to try incidental legal rights without a jury. And while Jones & Laughlin might support the general inapplicability of the Seventh Amendment to administrative forums, it may also be read more narrowly, in a way fully consistent with the Seventh Amendment.67

In any case, Curtis's dicta suggested that any action before a non-Article III tribunal is "free from the strictures of the Seventh Amendment," regardless of the nature of the action.68 Only three years later, however, the Court chose to back away from this broad suggestion.


Atlas Roofing Co., Inc. v Occupational Safety and Health Review Commission69 presented a Seventh Amendment challenge to the Occupational Safety and Health Act of 1970.70 The Act authorized representatives of the Secretary of Labor to conduct inspections of private workplaces and assess civil penalties for violations of health or safety standards. An employer could contest assessed penalties in an evidentiary hearing before an administrative law judge of the Occupational Safety and Health Review Commission (the "Commission"). An employer could appeal a judge's findings to the full Commission, or seek review in the federal courts. However, the Act provided that "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."71 "Thus," the Court noted, "the penalty may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violation."72

The employers in Atlas Roofing maintained that a suit seeking a civil penalty for a statutory violation was a standard claim for a money judgment, the classic example of a suit at common law. The Seventh Amendment, they argued, therefore entitled them to trial by jury.73

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67 This would be the third interpretation of Jones & Laughlin described earlier. See page 488.
68 Curtis, 415 US at 195.
70 29 USC §§ 651-78 (1988).
71 29 USC § 660(a).
73 Id at 448.
The Court disagreed. But instead of simply noting that the Seventh Amendment was “generally inapplicable” to administrative proceedings, as in Curtis, or that this statutory proceeding was not in the nature of a suit at common law, as in Jones & Laughlin, the Court introduced the concept of “public rights”:

At least in cases in which “public rights” are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

Since the Commission’s action was in effect a suit by the government “in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact,” this clearly involved a public right, and the employers were not entitled to a jury trial.

No precedent cited by the Court, however, held explicitly that the Seventh Amendment did not apply to cases involving public rights. Rather, the Court first looked to a group of cases in which it had sustained statutory schemes that provided for administrative adjudication of money judgments and civil penalties, notwithstanding a lack of provision for juries. For example, in Murray’s Lessee v Hoboken Land & Improvement Co., the Court upheld a statute authorizing the solicitor of the Treasury to order the sale of the lands and property of a customs collector to make up for funds collected but not forwarded to the Treasury. In a footnote, the Atlas Roofing Court quoted a passage from Murray’s Lessee:

[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

74 See Curtis, 415 US at 194. See also text accompanying note 64.
75 See Jones & Laughlin, 301 US at 48-49. See also text accompanying note 46.
76 Atlas Roofing, 430 US at 450.
77 Id at 460.
78 Id at 450-51.
79 59 US 272 (1855).
bring within the cognizance of the courts of the United States, as it may deem proper.80

Then quoting Crowell v Benson,81 the Atlas Roofing Court defined "public rights" as "those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."82 The Court also looked to a second group of cases, including Block, Jones & Laughlin and Curtis, but for little more than "the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication . . . ."83

The cases in this second group, however, nowhere mentioned public rights. As for the first group, which did discuss public rights, the Court acknowledged that none of them expressly addressed the Seventh Amendment.84 But the Court argued that it was clear enough from the first group that court involvement with the factfinding process in cases involving public rights was unnecessary.85 Moreover, it found hard to believe the proposition that those decisions did not subsume the lack of a right to jury trial.86 Thus, the Court found the Seventh Amendment no bar to administrative, non-jury adjudication of public rights.87

Public rights, as appropriated by the Atlas Roofing Court, were an exception to Article III's command that the judicial power of the United States be vested in the federal courts, in that these rights could be litigated in non-Article III federal forums.88 In origin, they represented a judicial recognition that certain determinations were exclusively within the domain of the executive and leg-

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81 285 US 22 (1932).
83 Id at 454 (quoting Pernell v Southall Realty, 416 US at 383) (emphasis supplied in Atlas Roofing removed).
84 Id at 456.
86 Id.
islative branches of government. By assuming that the Article III cases had implicitly considered and accepted the same principle under the Seventh Amendment, the Court attempted to synthesize these cases with those few that did address the Seventh Amendment. The result should concern us for several reasons. First, it is not clear why an established exception to Article III should also be applied to the Seventh Amendment, especially without considering the policies behind the constitutional right to jury trial.

A second concern arises from the state of Article III jurisprudence at the time of Atlas Roofing. Public rights were an established exception to Article III. But Crowell also found that administrative adjudication of private rights comported with Article III, so long as Congress had the power to change the mode of the proceedings, and so long as the "essential attributes of the judicial power" remained in the hands of the courts. Rather than an exception to Article III, this suggests that some degree of factfinding by an agency would not be an exercise of the judicial power at all. Atlas Roofing, however, did not address this type of court "adjunct." Thus, it was not clear whether factfinding by an adjunct might violate the Seventh Amendment while satisfying Article III.

The third concern, to which we shall now turn, arose from the fact that the public rights exception to the Seventh Amendment was culled from the separate Article III jurisprudence. Over the decade following Atlas Roofing, the public rights doctrine continued to evolve in a series of Article III cases, independent of Seventh Amendment considerations. Not until Granfinanciera did the Court consider how these changes might affect Atlas Roofing. By that time, it was no longer clear what the public rights doctrine was, or how it was to be applied to the Seventh Amendment.


After Atlas Roofing, the Court next considered the public rights doctrine in Northern Pipeline Construction Co. v Marathon

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88 See, for example, Northern Pipeline Construction Co. v Marathon Pipe Line Co., 458 US 50, 67-68 (1982) (plurality opinion). See also Young, 35 Buff L Rev at 793-94.
89 Crowell, 285 US at 51.
90 Id at 53-54.
91 Id at 53-54.
92 Exactly what degree of factfinding would be acceptable is uncertain. The statute in Crowell did not provide a clear standard of review for a court reviewing the adjunct's findings. Young, 35 Buff L Rev at 776 n 61. It can be read to suggest a highly deferential "clearly erroneous" standard. Id. The Supreme Court, on the other hand, has said that the review in Crowell was under the less deferential "not supported by the evidence" standard, Northern Pipeline, 458 US at 85 (plurality opinion), or the "weight of the evidence" standard, Schor, 478 US at 853.
Pipe Line Co. ("Northern Pipeline"). That case involved a challenge to the Bankruptcy Act of 1978, which granted bankruptcy courts jurisdiction over all "civil proceedings arising under" the Bankruptcy Act "or arising in or related to cases under" the Bankruptcy Act. The Act also granted bankruptcy judges all of the "powers of a court of equity, law and admiralty," except that they could "not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." In Northern Pipeline, a debtor in a bankruptcy proceeding brought suit in the bankruptcy court against one of its creditors, seeking damages for breaches of contract and warranty. The creditor argued that the asserted jurisdiction under the Bankruptcy Act violated Article III. The Court agreed, striking down the jurisdictional grant as unconstitutional.

Writing for a plurality of the Court, Justice Brennan attempted to define the limits of non-Article III adjudication. The structure he erected largely paralleled Crowell. He first distinguished "legislative" courts from court "adjuncts." The former were non-Article III forums that could adjudicate disputes because they came under a special exception to Article III. These included agencies that heard cases involving public rights. Justice Brennan declined to define public rights, though he observed that they "must at a minimum arise 'between the government and others.' " Court adjuncts, on the other hand, were non-Article III forums that could perform certain adjudicative functions so long as "the essential attributes of the judicial power" were retained in the

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93 458 US 50 (1982).
94 28 USC § 1471(b) (1988) (quoted in Northern Pipeline, 458 US at 54).
95 28 USC § 1481 (quoted in Northern Pipeline, 458 US at 55).
96 Northern Pipeline, 458 US at 56-57.
97 Id at 87. Justice Brennan wrote the plurality opinion, which Justices Marshall, Blackmun and Stevens joined. Justices Rehnquist and O'Connor concurred in the judgment, but on the narrow ground that Article III forbids a bankruptcy court from adjudicating a purely state law contract claim. Id at 91-92. Chief Justice Burger and Justices White and Powell dissented.
98 Id at 62-63.
99 Id at 63-64.
100 Id at 67. Justice Brennan noted two other exceptions to Article III: territorial courts, American Ins. Co. v Canter, 26 US 511 (1828); and courts-martial, Dynes v Hoover, 61 US 65 (1857). Northern Pipeline, 458 US at 64-66. Along with public rights, these are the only three exceptions to Article III that the plurality recognized. Id at 64, 70-71.
101 Northern Pipeline, 458 US at 69 (quoting Ex parte Bakelite Corporation, 279 US 438, 451 (1929)).
Article III courts. Thus, an adjunct comported with Article III because it exercised no real judicial power.

Justice Brennan noted that Congress had not constituted the bankruptcy courts as legislative courts. Even if Congress had done so, he found that the bankruptcy courts fell under none of the exceptions to Article III. In particular, the claim before the Court did not involve a public right since it was a standard state law contract claim between private parties. Neither did the bankruptcy courts satisfy the requirements of a court adjunct. Justice Brennan noted that Congress's power to prescribe alternate methods of adjudication is at its lowest when the cause of action is not statutory. Moreover, it was clear to the plurality that the Bankruptcy Act did not reserve "the essential attributes of the judicial power" to Article III courts. Bankruptcy courts had subject matter jurisdiction over any civil proceeding "related to" the Bankruptcy Act, to the full extent provided to district courts. Further, bankruptcy courts had all the ordinary powers of a district court, including the authority to issue final, binding judgments. Finally, the findings of a bankruptcy judge could be overturned on appeal only if found to be "clearly erroneous," a standard giving bankruptcy courts a high degree of deference. Thus, since bankruptcy courts under the Act of 1978 were neither proper legislative courts nor court adjuncts, the plurality found them unconstitutional.

Justice Brennan's opinion in Northern Pipeline, however, did not command a majority, and the public rights doctrine itself came under scholarly criticism. Only three years later, the Supreme Court ruled on a challenge to the Federal Insecticide, Fungicide,
and Rodenticide Act ("FIFRA")\textsuperscript{114} in \textit{Thomas v Union Carbide Agricultural Products Co.}\textsuperscript{118} Under FIFRA, pesticide manufacturers were required to submit health, safety and environmental impact data to the Environmental Protection Agency ("EPA") as part of the process of registering their pesticides.\textsuperscript{118} FIFRA also authorized the EPA to use previously submitted data, in order to expedite later registrations.\textsuperscript{117} However, a later registrant had to compensate an earlier one for the use of its data. Initially, the two parties could negotiate a fair price between themselves; if they failed to agree, FIFRA provided for binding arbitration, subject to judicial review only for "fraud, misrepresentation, or other misconduct."\textsuperscript{118} A group of large pesticide manufacturers claimed this scheme violated Article III.\textsuperscript{119}

Here the alignment of the Court changed. Justice O'Connor wrote for a majority of the Court, while Justice Brennan concurred in the judgment in an opinion joined by Justices Marshall and Blackmun.\textsuperscript{120} Justice O'Connor first rejected the plurality's scheme in \textit{Northern Pipeline}, stating that that case held:

\begin{quote}
[O]nly that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject to ordinary appellate review.\textsuperscript{121}
\end{quote}

In this case, FIFRA, a federal regulatory scheme, \textit{created} the relationship between the parties, and was the rule of decision that governed the relationship.\textsuperscript{122} Since FIFRA did not displace any state or common law actions, \textit{Northern Pipeline} did not apply.\textsuperscript{123} Justice O'Connor further rejected the bright-line public rights/private rights distinction in \textit{Northern Pipeline}. Quoting \textit{Crowell}, she said that "regard must be had, as in other cases where consti-
tutional limits are invoked, not to mere matters of form but to the
substance of what is required.\textsuperscript{124} Because the true concern of Arti-
cle III is the maintenance of judicial impartiality and the judicial
aspect of separation of powers,\textsuperscript{125} the public rights doctrine only
represents "a pragmatic understanding that when Congress selects
a quasi-judicial method of resolving matters that 'could be conclus-
ively determined by the Executive and Legislative Branches,' the
danger of encroaching on the judicial power is reduced."\textsuperscript{126} Thus, a
"seemingly 'private' right" created by Congress may be "so closely
integrated into a public regulatory scheme as to be a matter appro-
priate for agency resolution with limited involvement by the Arti-
icle III judiciary."\textsuperscript{127}

Applying these principles, Justice O'Connor found that FIFRA
did not violate Article III.\textsuperscript{128} The rights involved, though between
private parties, touched upon important issues of public health.\textsuperscript{129}
Furthermore, Congress could have ordered the EPA to indepen-
dently determine the value of the data, charge follow-on regist-
trants appropriate fees and directly subsidize prior data submit-
ters,\textsuperscript{130} FIFRA merely shifted the costs of data valuation from the
EPA to the parties.\textsuperscript{131} To find the plan unconstitutional would de-
stroy a carefully wrought administrative scheme and defeat the
legislative interests in efficient adjudication.\textsuperscript{132} Moreover, since no
parties were involuntarily subjected to FIFRA's arbitration
scheme,\textsuperscript{133} and since provision was made for some judicial re-
view,\textsuperscript{134} FIFRA did not risk executive or legislative encroachment
on the judiciary.

Thus, while she mentioned the public rights doctrine,\textsuperscript{135} Just-
ice O'Connor did not apply it as a distinct exception to Article III.
Rather, by arguing that the principle of the public rights doctrine
is to assure separation of powers, she generalized it into a balanc-
ing test that weighed the danger of encroachment on the judiciary
against the administrative need for efficiency. In his concurring
opinion, however, Justice Brennan argued that the doctrine of *Northern Pipeline* was broad enough to reach this case. While retaining the basic *Northern Pipeline* structure, but without attempting a definition, he suggested that the public rights doctrine was sufficiently flexible to avoid placing "the Federal Government in an Art[icle] III straightjacket whenever a dispute technically is one between private parties."\(^{136}\)

Nonetheless, *Commodity Futures Trading Commission v Schor*\(^{137}\) seemed to strike the death blow to public rights. Justice O'Connor now wrote for a seven-justice majority, with only Justices Brennan and Marshall dissenting. Section 14 of the Commodity Exchange Act ("CEA") provided a private remedy before the Commodity Futures Trading Commission ("CFTC") for injuries caused by a commodity broker's violation of the CEA or CFTC regulations. Under the regulations, the CFTC had authority to adjudicate counterclaims "aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint."\(^{138}\) Schor had filed just such a complaint; but the CFTC both rejected his claim and awarded the broker damages in his counterclaim.\(^{139}\)

The Supreme Court held that the CFTC's jurisdiction over the counterclaim was constitutional.\(^{140}\) Justice O'Connor first noted that Article III protects both an individual's right to an independent and impartial adjudicator and the role of the judiciary in the constitutional system of checks and balances.\(^{141}\) While Article III is more concerned with the individual than the structural interest,\(^{142}\) she argued that such individual interests can be waived by a litigant.\(^{143}\) By submitting himself to the CFTC's jurisdiction, Schor did so here.\(^{144}\) Thus, the only question was whether this legislative scheme violated Article III's structural concerns, which cannot be waived.

Relying on *Thomas*, Justice O'Connor wrote that adopting "formalistic and unbending rules" might "unduly constrict Con-
gress' ability to take needed and innovative action. Factors to consider in evaluating the risk to the judiciary included:

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

As in Thomas, public rights here played no part in determining whether a congressional assignment of adjudication violated Article III. Rather, the Court reduced Article III, at least when the litigants have waived any individual rights, to a set of interests in a strong judiciary which could be outweighed by the needs of administrative efficiency. Balancing these interests in the case of the CEA, Justice O’Connor found that the latter outweighed the former, so that Article III was satisfied.

Thomas and Schor thus represented the rejection of formal categories of exceptions or limitations to Article III. But neither of those cases addressed Atlas Roofing and the public rights exception to the Seventh Amendment. In that context, then, the old public rights doctrine arguably survived. Nevertheless, the Court’s preference for pragmatism over formal categories suggested that, like Article III, the right to jury trial might also be subject to a balancing test of efficiency against constitutional interests. This issue remained unsettled, however, until the Court directly addressed it in Granfinanciera.

II. GRANFINANCIERA V NORDBERG

Recall that Granfinanciera involved an action by a bankruptcy trustee to recover an alleged fraudulent conveyance. Apparently adopting the Tull analysis’ focus on the nature of the claim, the bankruptcy judge denied the defendants’ request for a jury trial, stating that a suit to recover a fraudulent conveyance is “a core action that originally, under the English common law, as I un-

145 Schor, 478 US at 851.
146 Id.
147 Id at 856.
understand it, was a non-jury issue.\textsuperscript{146} The district court affirmed without comment on the defendants’ request for jury trial.

The Eleventh Circuit also affirmed, rejecting the defendants’ Seventh Amendment argument.\textsuperscript{149} It first held that actions to recover fraudulent conveyances, though seeking a money judgment, were equitable, not legal, in nature.\textsuperscript{150} The court further noted, however, that “bankruptcy itself is equitable in nature and thus bankruptcy proceedings are inherently equitable.”\textsuperscript{151} Any action, then, like one to avoid a fraudulent conveyance, that is “created by the Bankruptcy Code and is brought in a bankruptcy court . . . is inherently equitable in nature.”\textsuperscript{152} Thus, the Seventh Amendment simply did not apply to such proceedings in bankruptcy courts.

The Supreme Court reversed in a majority opinion delivered by Justice Brennan.\textsuperscript{153} The Court first quoted the standard two-step \textit{Tull} test that focuses on the nature of the action and the remedy sought.\textsuperscript{154} It then added a new third step: “If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.”\textsuperscript{155} Relying on \textit{Atlas Roofing}, the Court then held that

\textsuperscript{146} \textit{Granfinanciera}, 109 S Ct at 2787 (quoting Appendix to Petition for Certiorari at 34).

\textsuperscript{149} \textit{In re Chase & Sanborn Corp.}, 835 F2d at 1348.

\textsuperscript{150} Id at 1348-49.

\textsuperscript{151} Id at 1349.

\textsuperscript{152} \textit{In re Chase & Sanborn}, 835 F2d at 1349.

\textsuperscript{149} \textit{Granfinanciera}, 109 S Ct at 2787.

\textsuperscript{154} Id at 2790. The \textit{Tull} test is discussed in text accompanying notes 34-35.

\textsuperscript{155} Id. Obviously, unless Congress has assigned adjudication to a non-Article III forum, this factor doesn’t come into play. \textit{Granfinanciera} thus has no effect on the right to jury trial in federal courts.

It is interesting to note that once before the Supreme Court announced a three-part Seventh Amendment test, in what came to be an infamous footnote in \textit{Ross v Bernhard}, 396 US 531, 538 n 10 (1970):

As our cases indicate, the “legal” nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.

Some commentators have argued that the third factor was evidence of a “complexity exception” to the Seventh Amendment, a recognition that a case could be simply too complex for a jury to handle. See, for example, Joseph C. Wilkinson, Jr., et al, \textit{A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases}, 37 U Kan L Rev 61, 83-84 (1988). On the other hand, the Ninth Circuit has criticized the third \textit{Ross} factor, finding it unsupported by precedent. \textit{In re U.S. Financial Securities Litigation}, 609 F2d 411, 425 (9th Cir 1979). Others have rejected it as too significant a constitutional doctrine to be read from a mere footnote. See, for example, Martin H. Redish, \textit{Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Mak-
"when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'\footnote{168}

The concept of public rights, of course, had changed dramatically since \textit{Atlas Roofing} last used it in the Seventh Amendment context. Drawing from \textit{Thomas}, the majority now defined a public right as a right arising between the federal government and others, or one where "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."\footnote{167}

In applying the three-part test they created, the Court first held that under \textit{Tull}, an action to recover a fraudulent conveyance involved a legal right.\footnote{158} Thus, the Court concluded that unless Congress had the power to assign adjudication of this claim to a non-Article III tribunal sitting without a jury—that is, unless the claim involved a public right, as it was now defined—the Seventh Amendment guaranteed the defendants the right to jury trial.\footnote{159}

While noting that the issue was debatable, the Court held that an action by a bankruptcy trustee to recover a fraudulent convey-

\footnote{\textit{Granfinanciera}, 109 S Ct at 2795 (quoting \textit{Atlas Roofing}, 430 US at 455) (footnote omitted by the Court).}
\footnote{\textit{Id} at 2797 (quoting \textit{Thomas}, 473 US at 593-94).}
\footnote{\textit{Id} at 2792-93.}
\footnote{\textit{Granfinanciera}, 109 S Ct at 2794.}
ance more closely resembled a private right than a public right.\textsuperscript{180}
The Court explained:

There can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which . . . "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it"—are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors’ hierarchically ordered claims to a pro rata share of the bankruptcy res. . . . They therefore appear matters of private rather than public right.\textsuperscript{181}

Since the action involved a private right, the Court concluded that the Seventh Amendment conferred a right to jury trial.

In essence, the \textit{Granfinanciera} Court took the old definition of public rights and tacked onto it the type of otherwise private right—one "closely integrated into a public regulatory scheme"—for which \textit{Thomas} had permitted non-Article III adjudication. While \textit{Granfinanciera} was explicitly concerned only with bankruptcy courts, it is apparent that the test the Court created applies with equal force to administrative agencies. For instance, many of the precedents cited by the Court, such as \textit{Crowell}, \textit{Atlas Roofing} and \textit{Thomas}, did not involve the bankruptcy courts. Moreover, the Court consistently referred generically to "Article III courts" and "non-Article III tribunals" throughout its argument. \textit{Granfinanciera} thus confirmed the continued existence of the formal public rights exception, redefined, in the context of the Seventh Amendment.

The Court did not, however, go beyond its holding that the Seventh Amendment guaranteed \textit{Granfinanciera} and Medex a right to a jury trial. It explicitly declined to decide whether bankruptcy courts can statutorily or even constitutionally conduct jury trials.\textsuperscript{182} Furthermore, though \textit{Granfinanciera} applied \textit{Thomas}, it is not clear how, or whether, it can be reconciled with \textit{Schor}. In short, \textit{Granfinanciera} says much about whether jury trials may be required in non-Article III forums, but says little about what this means for the future.

\textsuperscript{180} Id at 2797.
\textsuperscript{181} Id at 2798 (quoting \textit{Schoenthal v Irving Trust Co.}, 287 US 92, 94-95 (1932)) (citations and footnote omitted).
\textsuperscript{182} \textit{Granfinanciera}, 109 S Ct at 2802.
III. The Implications of Granfinanciera v Nordberg

A. The Right to Jury Trials in Non-Article III Forums under Granfinanciera

Under Granfinanciera, Congress may freely assign the adjudication of public rights, whether legal or equitable, to legislative courts without juries. As for private rights, the Court said that:

If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.\textsuperscript{163}

The impact of this statement turns on the meaning of “adjudication by an Article III court.” A strict reading would suggest that all private rights must come solely before Article III judges. That, however, is undoubtedly too strict, because it would render the use of special masters or magistrates unconstitutional in cases involving private rights. Thus, “adjudication by an Article III court” must permit for court adjuncts. The result of Granfinanciera, then, is a restoration of the Northern Pipeline scheme, with public rights redefined.

Once it is accepted that adjuncts can hear disputes over private rights, the question becomes whether they may conduct jury trials when the rights are also legal. If not, the Seventh Amendment under Granfinanciera would require adjudication by an Article III court if any party requested a jury trial.

In order to conduct a jury trial, an adjunct must first have the statutory authority to do so.\textsuperscript{164} Even with such authority, jury trials in adjuncts may violate Article III or the Seventh Amendment, or both. While a full discussion of these constitutional issues is beyond the scope of this Comment, a few points may be made. Under the Seventh Amendment, this issue breaks down into two questions: first, whether a trial before a non-Article III adjunct constitutes a Seventh Amendment “trial by jury”; and second, whether such a trial meets the requirement that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law?”\textsuperscript{165} As for the first

\textsuperscript{163} Id at 2797 (footnote omitted) (emphasis added).

\textsuperscript{164} It is not clear under the Bankruptcy Act whether bankruptcy judges have statutory authority to conduct jury trials. For a discussion of this issue, see Gibson, 72 Minn L Rev at 1027-34 (cited in note 6).

\textsuperscript{165} US Const, Amend VII.
question, one commentator has argued that a Seventh Amendment jury trial requires a presiding judge who possesses "the legal training and ability to instruct jurors on the law, advise them concerning the facts, and set aside inappropriate verdicts."\textsuperscript{6} If so, this could probably be satisfied by statutory provisions prescribing qualifications for presiding judges.\textsuperscript{167} The second question, on the other hand, demands that a reviewing court not "redetermine facts found by [a] jury . . . ."\textsuperscript{168} This requirement can likely be met as well, since findings of fact by juries and agencies are often subject to the same degree of scrutiny.\textsuperscript{169}

Turning to Article III, the Supreme Court has traditionally required that the "essential attributes of judicial power" be retained largely in Article III courts.\textsuperscript{170} According to the plurality in \textit{Northern Pipeline}, those "essential attributes" included the breadth of the adjunct's jurisdiction, the degree of review to which the adjunct was subject, whether the adjunct could issue final judgments, and the powers which the adjunct wielded.\textsuperscript{171} This last category included the power to preside over jury trials, the power to issue declaratory judgments and writs of habeas corpus, and the power to otherwise issue orders, processes or judgments.\textsuperscript{172} The \textit{Schor} Court looked to this same spectrum of "essential attributes" to evaluate the degree of infringement on the judiciary.\textsuperscript{173}

Although the authority to conduct a jury trial is certainly one of the essential attributes of judicial power, it is only one among many. If most of the rest of the essential attributes are left to Article III courts, the power to conduct a jury trial alone probably would not be enough to make adjunct adjudication unconstitutional.\textsuperscript{174}

\textsuperscript{6} Gibson, 72 Minn L Rev at 1035, 1037-38 (footnotes omitted).
\textsuperscript{167} For example, Professor Gibson determined that bankruptcy judges, as presently constituted, satisfy these requirements. Id at 1037-38.
\textsuperscript{169} Findings of facts by administrative agencies and juries generally may be overturned only if the reviewing court finds them unsupported by "substantial evidence." See Davis, 5 Administrative Law § 29:22 at 435, 437 (cited in note 113).
\textsuperscript{170} See \textit{Schor}, 478 US at 851; \textit{Northern Pipeline}, 458 US at 77 (plurality opinion); \textit{Crowell}, 285 US at 51.
\textsuperscript{171} \textit{Northern Pipeline}, 458 US at 84-86.
\textsuperscript{172} Id.
\textsuperscript{174} In \textit{Schor}, for example, the Court upheld the CFTC's jurisdiction over state common-law counterclaims. Id at 857. The Court argued that, since the CFTC was otherwise limited, "the magnitude of any intrusion on the Judicial Branch can only be termed de minimis." Id at 856.
While this discussion was fairly cursory, it suggests that jury trials in adjuncts would satisfy the Constitution. The Second Circuit, applying *Granfinanciera*, has recently agreed, holding that bankruptcy courts may constitutionally conduct jury trials.\(^{175}\) Moreover, it is worth noting that courts have upheld, at least implicitly, provisions for jury trials presided over by District of Columbia judges and United States magistrates, neither of whom satisfy Article III.\(^{176}\)

**B. The New Public Rights Doctrine**

As we have seen, *Atlas Roofing* joined the Article III and Seventh Amendment jurisprudences by importing the public rights doctrine from the former into the latter. When the Court abandoned the application of formal exceptions to Article III in *Thomas* and *Schor*, the public rights doctrine ceased to function as an independent, substantive part of the Article III jurisprudence. While the same could have been done for the Seventh Amendment, several obstacles made such an approach difficult.

First, the *Schor* balancing test was expressly conditioned on a waiver by the litigants of any personal right to an Article III judge.\(^{177}\) But in any case in which litigants waive their personal rights under Article III by voluntarily submitting to the jurisdiction of an agency, any Seventh Amendment rights are arguably waived if the chosen forum does not make provision for jury trials. Thus, Seventh Amendment challenges to administrative adjudication are likely to have force only where at least one litigant is present involuntarily. The *Schor* Court did not, however, describe the contours of its test in the absence of waiver. Thus, in a case like

\(^{175}\) *In re Ben Cooper, Inc.*, 896 F2d 1394, 1403-04 (2d Cir), cert granted as *Insurance Co. of State of Pennsylvania v Ben Cooper, Inc.*, 110 S Ct 3269 (1990).

\(^{176}\) The District of Columbia Court of Appeals and Superior Court were established “pursuant to article I of the Constitution . . . .” DC Code § 11-101(2) (1981). The judges are appointed by the President with the advice and consent of the Senate for 15-year terms. DC Code §§ 11-1501(a), 11-1502. Nevertheless, in *Pernell v Southall Realty*, 416 US 363 (1974), the Supreme Court held that the Seventh Amendment preserves the right to jury trial in suits at common law in the DC Superior Courts. Id at 383.

Most United States magistrates have the authority to conduct jury trials if all parties consent. 28 USC § 636(c)(1) (1988). Full-time magistrates are appointed for eight-year terms, 28 USC § 631(e), and during each term may be removed by the district court judges of the district in which they serve only for “incompetency, misconduct, neglect of duty, or physical or mental disability.” 28 USC § 631(i). A magistrate’s office may also be terminated if the judicial conference determines it is no longer necessary. Id. Nonetheless, several courts of appeals have found a magistrate’s power to conduct a jury trial constitutional. See cases collected in Gibson, 72 Minn L Rev at 1039 n 340 (cited in note 6).

\(^{177}\) See *Schor*, 478 US at 848-49.
Granfinanciera, it is unclear how the principles of Schor would apply.

Moreover, Schor pragmatically aligned the limits imposed on Congress by Article III with the constitutional goals of an independent judiciary. Therefore, it makes little sense to follow Atlas Roofing and apply the same Article III considerations to the Seventh Amendment. Rather, Schor suggests that a congressional assignment of disputes over a legal issue to an agency without jury trials should be tested against the interests protected by the Seventh Amendment. Such an approach would, of course, be a significant departure from prior Seventh Amendment case law, in which the prophylactic purposes of jury trial have never been considered. While considering the concerns behind the Seventh Amendment in evaluating potential exceptions might appear sensible, balancing the right of jury trial against the interests of convenience and efficiency might risk a slow erosion of the Seventh Amendment. In his Schor dissent, Justice Brennan argued that such a balancing test in an Article III context:

[P]its an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the balance is weighted against judicial independence.

Such an argument carries even more force in the context of the Seventh Amendment. Assuring that the essential attributes of judicial power are retained by Article III courts can maintain the vitality of Article III. The Seventh Amendment, on the other hand, does not distinguish among legal rights; there can be no irreducible core of Seventh Amendment cases since no legal right has a greater right to jury trial than any other. Moreover, the interests of the Seventh Amendment must include more than just an impartial, unbiased adjudication; otherwise, the right to a jury trial would be swallowed up by Article III and the Due Process Clause. Whatever these other interests are, they would likely fare very poorly against the tangible needs of efficiency.

178 See text accompanying notes 20-24.
179 Schor, 478 US at 863 (Brennan dissenting).
In any case, *Granfinanciera* clearly rejected the application of a balancing test under the Seventh Amendment. The Court did not, however, explicitly overrule *Schor*. For the moment, then, Article III and the Seventh Amendment have distinct tests. But since *Granfinanciera* claimed to apply Article III doctrine, and since eight of the nine justices apparently agreed on the form of the test, *Schor* is arguably no longer good law. Overruling *Schor*, however, would probably not change the rulings of the prior Article III case law. In that context, the practical differences between *Granfinanciera* and *Schor* may not be great. The inquiry under *Schor* is whether the congressional interest in providing efficient agency adjudication outweighs the danger such adjudication poses to an independent judiciary; *Granfinanciera* asks whether an otherwise private right is sufficiently intertwined with a federal regulatory program for administrative adjudication to be appropriate. Since congressional interest in an efficient decisionmaker probably exists only where a comprehensive federal program is involved, the two tests overlap considerably. Both provide the Article III flexibility the Court found lacking in *Northern Pipeline*. In fact, had the Court applied the rule of *Granfinanciera* in *Thomas* and *Schor*, the justices could very well have split the same way. Only in the context of the Seventh Amendment do the practical limitations of a balancing test make *Schor* unsuitable, and so compel *Granfinanciera*.

**CONCLUSION**

The road leading to *Granfinanciera* is a crooked one. Historically, the protections of the Seventh Amendment and Article III have not been provided to those most in need of them, but rather to those who met the conditions of formalistic tests. *Atlas Roofing*,

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180 Four justices joined Justice Brennan’s opinion. Justice Scalia concurred in a separate opinion in which he agreed with the majority’s test, but argued that public rights should be limited to actions arising between the government and others. Id at 2802 (Scalia concurring in part and concurring in the judgment).

Justice Blackmun’s dissent, which Justice O’Connor joined, effectively also applied the majority’s test. He first determined that a fraudulent conveyance action was legal, as had the majority. Id at 2816-17 (Blackmun dissenting). After noting that jury trial would be incompatible with the statutory scheme of the Bankruptcy Act, he agreed that Congress could only assign the adjudication to a non-Article III forum if the claim involved a public right. Id at 2817. Although admitting it was a close question, Justice Blackmun thought deference to congressional choice the best course in bankruptcy matters and found this action to involve a public right. Id at 2818.

Only Justice White clearly applied a different test to this question. See id at 2809-10 (White dissenting).
which mechanically applied the Article III public rights exception to the Seventh Amendment, fits well within this pattern. In *Thomas* and *Schor*, the Court broke from this tradition, seeking the flexibility that the old tests lacked by weighing the goals of Article III against the congressional interests in efficiency and convenience.

*Granfinanciera* rejected *Thomas* and *Schor* in the Seventh Amendment context, marking a compromise between the need for flexibility in administrative adjudication and the dangers of eroding constitutional protections inherent in a balancing test. It did this by restoring the formal exceptions to Article III and the Seventh Amendment, while building flexibility into the definition of one of those exceptions, public rights. Although this result was applied explicitly only to the Seventh Amendment, *Granfinanciera* may implicitly overrule *Thomas* and *Schor* under Article III as well.

While *Granfinanciera* avoided the dangers of a constitutional balancing test, however, it creates new risks to Article III and the Seventh Amendment. The class of public rights has always been ill-defined, and the Court's willingness to expand its scope dramatically in *Granfinanciera* suggests that future growth is not out of the question. Even left as it is, public rights could be an exception that swallows the rule; rare is the federal right that cannot plausibly be argued to be closely intertwined with a federal regulatory scheme. The challenge for the Supreme Court, as it applies or modifies *Granfinanciera* in the future, is to establish realistic limits to the congressional creation of administrative tribunals without juries, permitting innovation without nullifying the Seventh Amendment and Article III.