The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory

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THE TAX COURT, ARTICLE III, AND THE PROPOSAL ADVANCED BY THE FEDERAL COURTS STUDY COMMITTEE: A STUDY IN APPLIED CONSTITUTIONAL THEORY

Deborah A. Geier

"For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"

—Alexander Hamilton

I

INTRODUCTION

Is the Tax Court constitutional? The most recent article directly addressing this question appeared in 1964. Much has happened since then.

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1 THE FEDERALIST No. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961) (quoting 1 CHARLES DE SECONDAT, MONTESQUIEU, THE SPIRIT OF LAWS 181 (1750)).

2 Several lower courts, including the Tax Court itself, have ruled that the Tax Court is constitutional, notwithstanding its failure to satisfy the tenure and salary requirements of article III. Most of the cases curtly dismiss the issue of unconstitutionality by simply citing article III precedent, giving no clue as to the judges' reasoning in applying that precedent to the Tax Court. Thus, the cases seem to imply that the issue has an easy and obvious answer. See, e.g., Sparrow v. Commissioner, 748 F.2d 914 (4th Cir. 1984); Simanonok v. Commissioner, 731 F.2d 743 (11th Cir.) (per curiam), reh'g denied, 736 F.2d 1528 (1984); Redhouse v. Commissioner, 728 F.2d 1249 (9th Cir.), cert. denied, 469 U.S. 1034 (1984); Knighten v. Commissioner, 705 F.2d 777 (5th Cir.) (per curiam), cert. denied, 464 U.S. 897 (1983); Ginter v. Southern, 611 F.2d 1226 (8th Cir. 1979) (per curiam), cert. denied, 446 U.S. 967 (1980); Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636 (5th Cir.), cert. denied, 385 U.S. 918 (1966); Martin v. Commissioner, 358 F.2d 63 (7th Cir.), cert. denied, 385 U.S. 920 (1966); Willmut Gas & Oil Co. v. Fly, 322 F.2d 301 (5th Cir. 1963), cert. denied, 375 U.S. 984 (1964); Standard Hosiery Mills v. Commissioner, 249 F.2d 469 (4th Cir. 1957); Burns, Stix Friedman & Co. v. Commissioner, 57 T.C. 392 (1971). The Supreme Court has never examined the constitutional status of the Tax Court.

3 Daniel L. Ginsburg, Is the Tax Court Constitutional?, 35 Miss. L.J. 382 (1964) (arguing that the Tax Court, an independent agency in the executive branch at the time, was unconstitutional). Recent commentary dealing with the constitutionality of legislative courts seems to assume without question, much like the court rulings in cases cited supra.
First, the Tax Reform Act of 1969 upgraded the status of the adjudicative body from an independent agency in the executive branch to a court created under the authority of article I of the Constitution. That legislation also created what is known as the “small tax case” in the Tax Court, involving simplified and expedited proceedings heard by “special trial judges” from which no appeal may be taken.

Second, the Supreme Court, after avoiding the topic for nearly a decade, addressed permissible non-article III adjudication in a trio of cases decided between 1982 and 1986 and, in so doing, changed the complexion of article III analysis.

Most recent, the Federal Courts Study Committee issued a proposal on April 2, 1990, which advocates stripping the federal district courts, the Claims Court, and the federal courts of appeals of note 2, that the Tax Court is constitutional. See, e.g., Judith Resnick, The Mythic Meaning of Article III Courts, 56 U. COLO. L. REV. 581, 610 n.141 (1985).

4 Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 487, 730-36 (codified at I.R.C. § 7441 (1988)). Courts created by Congress pursuant to one of its enumerated powers in article I of the Constitution, such as the tax power, are commonly referred to as “article I courts” or “legislative courts.” See U.S. CONST. art. I, § 8, cl. 1 (power to lay and collect taxes); id. art. I, § 8, cl. 9 (power to constitute tribunals inferior to the Supreme Court).

5 Tax Reform Act of 1969, Pub. L. No. 91-172, § 957, 83 Stat. 487, 730-36 (codified as amended at I.R.C. § 7463 (1988)). Initially, the small tax case involved disputes concerning $1000 or less. Over the years, the amount has been increased to its present level of $10,000.


7 The Federal Courts Study Committee (Committee) was created pursuant to the Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988), in order to study and make recommendations concerning the problems and issues facing the federal courts. The Committee conducted a 15-month study before issuing its report on April 2, 1990. Its 15 members, appointed by Chief Justice Rehnquist, included: Joseph F. Weis, Jr. (Judge, Court of Appeals for the Third Circuit and Chair of the Committee), J. Vincent Apile II (General Counsel of the Kentucky State Department of Public Advocacy), José A. Cabranes (Judge, District of Connecticut), Keith M. Callow (Chief Justice, Supreme Court of Washington), Levin H. Campbell (Chief Judge, Court of Appeals for the First Circuit), Edward S.G. Dennis, Jr. (Assistant Attorney General for the Criminal Division of the United States Department of Justice), Charles E. Grassley (Senator and member of the Senate Judiciary Committee), Morris Harrell (partner, the law firm of Locke Purnell Rain Harrell), Howell T. Heflin (Senator and member of the Senate Judiciary Committee), Robert W. Kastenmeier (Congressman and member of the House Committee on the Judiciary), Judith N. Keep (Judge, District Court for the Southern District of California), Rex E. Lee, Jr. (President, Brigham Young University), Carlos J. Moorhead (Congressman and member of the House Committee on the Judiciary), Diana Gribbon Motz (partner, the law firm of Frank, Bernstein, Conway & Goldman), and Richard A. Posner (Judge, Court of Appeals for the Seventh Circuit). See THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, apps. A & B, at 189-96 (1990) [hereinafter FINAL REPORT].
their jurisdiction to hear most tax disputes, placing nearly exclusive jurisdiction of income, estate, and gift tax litigation in a reconstituted Tax Court comprised of a trial division and an appellate division. Under the final Committee proposal, the trial division

Taxpayers challenging a deficiency currently have their choice of three trial forums: the United States Tax Court (an article I court), the United States Claims Court (an article I court), and the various article III federal district courts. In both the Claims Court and federal district courts, the taxpayer must first pay the alleged tax liability and then sue for a refund. See I.R.C. § 7422 (1988). The taxpayer need not pay the tax in advance to file a petition in the Tax Court for a redetermination of the deficiency. See id. §§ 7451-7465. Approximately 95% of tax cases are litigated in the Tax Court. See Theodore Tannenwald, Jr., The Tax Litigation Process: Where It Is and Where It Is Going, 44 Rec. A. B. Cty. of N.Y. 825, 827 (1989). Relatively few tax cases are brought in the Claims Court, presumably because of the disadvantage of having to pay the tax first and sue for a refund without gaining the concomitant advantage of having an article III adjudicator. See generally Joan E. Baker, Is the United States Claims Court Constitutional?, 32 Clev. St. L. Rev. 55 (1983-84) (arguing that the Claims Court, an article I court, is unconstitutional); L. Paige Marvel, Forum Selection in Federal Tax Litigation, 8 Litigation 39 (1982) (analyzing the salient factors in choosing an appropriate forum).

Under the Committee's proposal, district courts would retain jurisdiction over criminal tax cases, enforcement actions concerning jeopardy assessments and actions to enforce tax liens. Appeals from these actions would continue to lie in the various federal courts of appeals, as they do now. Id. at 70.

The Committee's proposal to consolidate most tax jurisdiction in the Tax Court, however, was not unanimously recommended by its members. Mr. Dennis, Senator Grassley, Mr. Harrell, Congressman Moorhead, and Judge Weis dissented, primarily for three reasons: (1) opposition to the proposal emanating from the Internal Revenue Service, the Treasury Department, the Justice Department, the Tax Court, the Claims Court, and the American Bar Association; (2) their view that the existing tax litigation structure operates effectively; and (3) their view that lodging essentially all trial and appellate tax adjudication in a single, small tribunal would risk undermining taxpayer confidence and voluntary compliance with the tax laws. Id. at 71-72.

On December 22, 1989, the Committee issued a document containing tentative recommendations for public comment in preparation for public hearings held during January 1990 in nine U.S. cities. In its tentative recommendations, the Committee proposed that both the trial and appellate division judges of the reconstituted Tax Court be accorded article III status. See Federal Courts Study Committee, Tentative Recommendations For Public Comment 29 (Dec. 22, 1989).

At that time, the Committee recognized the possible consequences of the lack of the article III guarantees:

The Article III status of the judges should insulate them from undue influence by the Treasury Department and would thus eliminate the need to provide the taxpayers with "competitive" alternatives in the federal district courts and in the Claims Court.

Our proposal, if implemented, should ... provide greater protection to the taxpayer by assuring access to an Article III court (now available as a practical matter only to those taxpayers able to pay the assessed tax and then sue for a refund) . . . . Id. at 31. The Final Report fails to offer any reason for the change of heart regarding article III status for the trial division judges and is silent regarding the concerns expressed above. Perhaps the Committee was guided by the 1982 bifurcation of the Court of Claims into the Claims Court, an article I trial court, and the Federal Circuit Court of Appeals, an article III appellate court. See generally Baker, supra note 8 (discussing this change in detail and criticizing the article I status of the trial court). If so, the Commit-
judges would retain article I status, while the appellate division judges (approximately five in number) would be accorded article III status "in order to preserve the taxpayer's access to an Article III court (besides the Supreme Court on certiorari)."

This Article has a dual purpose. It will illuminate the dialogue surrounding the Committee's proposal. An issue distinct from the policy considerations favoring or disfavoring a single trial forum for tax disputes is the constitutionality of refusing to vest the adjudicators on that single trial forum with the independence protections of article III. A critical examination of the constitutional status of the Tax Court as currently constituted must precede as well as inform consideration of the Committee's sweeping recommendation to vest exclusive trial jurisdiction of tax disputes in the Tax Court.

Moreover, the Article critically examines the Supreme Court's current article III analytical approach in the context of a concrete example. A very wise man once told me that one way to test the validity and rationality of a theory is to apply it in other factual situa-

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11 FINAL REPORT, supra note 7, at 21. The most recent action taken by Congress was enactment of the Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5104. Section 302 of the Act directs the Federal Judicial Center to study and submit to Congress a report concerning the number and frequency of conflicts among the Circuits, as well as "the full range of structural alternatives for the Federal Courts of Appeals." Id. § 302. The bill, passed by the House as H.R. 5381 on September 21, 1990 (136 CONG. REC. H8256-01), was added to and adopted as part of S. 2648, the Judicial Improvements Act of 1990 (136 CONG. REC. S17570-04, S17583), by the Senate on the last day of the Congressional session ended in 1990.

12 It is not the purpose of this Article to explore the policy considerations favoring or disfavoring a single trial forum for tax cases, except as they impact upon article III analysis. Nor does this Article explore the portion of the Committee's proposal advocating transfer of appellate jurisdiction in tax cases from the various article III circuit courts to a single article III appellate Tax Court.

The notion of creating a single National Court of Tax Appeals is not a new one; it has surfaced repeatedly ever since Judge Roger Traynor proposed it in 1938. See Roger J. Traynor, Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes—A Criticism and a Proposal, 38 COLUM. L. REv. 1393 (1938). The person most closely identified with the idea is Erwin N. Griswold, longtime dean of the Harvard Law School. See Erwin N. Griswold, The Need for a Court of Tax Appeals, 57 HARV. L. REV. 1153 (1944). See also H. Todd Miller, A Court of Tax Appeals Revisited, 85 YALE L.J. 228 (1975) (counting 20 commentators advocating the creation of such a court between the years 1944 and 1975); Johnny D. Mixon, The Sad State of Tax Litigation: It's Time for a Change, 8 TAX NOTES 547, 552 (1979) (stating that any proposed reform of tax courts at the trial level is doomed to failure). Yet, the proposals have remained just that. For description of the arguments on both sides of this issue, see Deborah A. Geier, The Emasculated Role of Judicial Precedent in the Tax Court and Internal Revenue Service, 39 OKLA. L. REV. 427, 439-44 (1986); William D. Popkin, Why A Court of Tax Appeals is So Elusive, 47 TAX NOTES 1101 (1990); Report of Task Force on Civil Tax Litig. Process, 1989 A.B.A. SEC. TAX'N.
The Tax Court provides a unique lens through which to view not only the Court's recent article III analysis but also the proposed limiting principle articulated in the literature in reaction to the Court's decisions.

Drawing on Professor Harold Dubroff's definitive history of the Tax Court, Part II of this Article briefly describes the Tax Court's evolution, jurisdiction, and powers and even more briefly comments on the obligatory quotation of article III. Part III explores the recent trilogy of Supreme Court cases in the context of the Tax Court. Part IV examines the scholarship generated by these cases that proposes an appellate review theory as a limiting principle, focusing in particular on the conceptual problems posed by the Tax Court's small tax case jurisdiction.

A word of summary here in the introduction may give perspective to the sections that follow.

The entrenched presence of the administrative state belies any assertion that all disputes arising under federal law require initial adjudication by judges whose independence from the political branches is guaranteed by life tenure and an irreducible salary. Yet, there is a group of cases, though ill-defined, that demands adjudication by judges protected from influence by the Executive and Congress. When Congress commits adjudication of those cases to judges not so protected, heightened scrutiny under article III is warranted.

The boundaries of the group can be loosely defined as those cases in which the judgment may result in the government depriving a citizen of life, liberty or property. While disagreement can exist regarding whether the denial of a government benefit (often the subject of administrative adjudications) is tantamount to a deprivation of private property by the government, no one can deny that the exaction of taxes is a deprivation of property. Sound reasons must be forwarded by Congress, and found acceptable under article III by the Supreme Court, if article III protections are to be denied to judges adjudicating how much tax a citizen must pay under the tax laws.

The fact that citizens are given a choice of trial forums under the current system, including an article III forum, cannot be disposi-

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13 My apologies to the Honorable Monroe G. McKay, United States Court of Appeals for the Tenth Circuit (the aforementioned wise man), if I have mischaracterized his testing theory. See Erik M. Jensen, Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench, 1987 B.Y.U. L. Rev. 1103, 1130 ("[T]he limits of [a] rationale should be tested in the way Judge McKay tests a litigant's theory in his court: by questioning the theory's application to other factual situations.").

tive of the article III inquiry in view of both the conditions attached to accessing the article III court as well as the systemic effects of wholesale abrogation of tax cases to non-article III adjudicators. Moreover, the article III forum would be foreclosed under the Committee's proposal.

Neither should the possibility of appellate review by an article III judge necessarily save the system in view of the fact that nearly half of all tax litigants waive before trial their right to appellate review by electing to have their case heard under the small tax case procedures. While each waiver viewed in isolation may not be troublesome under article III, the Supreme Court has not yet concluded that the sole purpose of article III is to protect the individual's right to have his or her case heard by an independent adjudicator. The separation-of-powers component of article III is offended by the magnitude of all waivers considered as a whole.

The Article concludes that the Tax Court, both as currently constituted and as envisioned by the Committee's proposal, does not survive a principled application of article III doctrine. In fact, the doctrine itself does not survive the present analysis fully intact.

II
THE SETTING

A. The Tax Court

The Board of Tax Appeals, predecessor of the Tax Court, was created in 1924\textsuperscript{15} as an independent agency in the executive branch,\textsuperscript{16} providing a means of preassessment adjudication of tax disputes. There was no appeal procedure, but the losing party could file suit in the courts, where the findings of the Board would be taken as prima facie evidence of the facts.\textsuperscript{17}

The Revenue Act of 1926\textsuperscript{18} further refined the Board. Although certain officials advocated transforming the Board into a court,\textsuperscript{19} and although the committee reports repeatedly characterized the Board's jurisdiction as essentially judicial rather than administrative,\textsuperscript{20} Congress declined to make the Board of Tax Appeals

\textsuperscript{16} Id. § 900(k), 43 Stat. 338.
\textsuperscript{17} Id. § 900(g), 43 Stat. 337.
\textsuperscript{18} Ch. 27, 44 Stat. 9.
\textsuperscript{19} The most notable advocate of court status was A.W. Gregg, Solicitor of Internal Revenue. See H. Dubroff, supra note 14, at 111-16, 167.
\textsuperscript{20} See Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means, 69th Cong., 1st Sess. 928, 933 (1925) (testimony of former Chairman Hamel and A.W. Gregg, Solicitor of Internal Revenue); M. Carr Ferguson, Jurisdictional Problems in Federal Tax Controversies, 48 Iowa L. Rev. 312, 351-52 (1963).
a court of record. Congress did, however, make decisions of the Board of Tax Appeals directly reviewable by the circuit courts of appeals.21 This obviated the needless duplication of trials inherent under the 1924 procedures.

The Revenue Act of 194222 renamed the Board of Tax Appeals the Tax Court of the United States and changed the statutory designation of Board "members" to "judges."23 Yet, no amendment was sought to alter the status of the court as an agency in the executive branch. Professor Dubroff notes that Board Chairman John Edgar Murdock, whose thirty-seven year tenure from 1926 to 1961 is the longest in Board/Tax Court history, played a key role in the passage of the 1942 Act.24 Murdock cited three principal reasons for the name change: First, it would reduce public confusion; second, it would allow the Board to enforce its own processes; and third, it would acknowledge the fact that the Board was a court in everything but name.25

Professor Dubroff describes several unsuccessful attempts to establish article III status for the Tax Court and its judges between 1943 and 1969.26 A project instituted by the United States House of Representatives to revise and codify the laws governing the federal judiciary in Title 28 of the United States Code began in 1943.27 Judge Justin Miller, former member of the Board of Tax Appeals who had been elevated to the D.C. Circuit, suggested moving the preexisting Tax Court provisions into the revised Title 28, settling the court's status as an article I or "legislative" court.28 However,

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21 Revenue Act of 1926, ch. 27, §§ 1001(a), 1002, 44 Stat. 9, 109-10.
22 Ch. 619, 56 Stat. 798.
23 Id. § 504, 56 Stat. 957. Another change enacted at this time was the so-called Dingell Amendment, which provided for lay practice before the Board. It provided that "[n]o qualified person shall be denied admission to practice before ... [the Tax Court] because of his failure to be a member of any profession or calling." H. Dubroff, supra note 14, at 182 (quoting Revenue Act of 1942, ch. 619, § 504(b), 56 Stat. 798, 957).
24 H. Dubroff, supra note 14, at 177.
25 Id. at 178. Professor Dubroff found that the impetus for this change also came in part from the members' discomfort at being inadvertently addressed as "judge," id. at 179, 184, and from the difficulty of obtaining court space when the Board travelled. Although the Tax Court is a single court based in Washington, D.C., its rules permit the taxpayer to request the place of trial. A single Tax Court judge will travel to the requested location, and the trial is usually held in the local federal courthouse. See Marvel, supra note 8, at 41. Those in control of court space throughout the country were reluctant to permit administrative hearings in their facilities, and the prohibition extended to the Board because it was an administrative body in name. See H. Dubroff, supra note 14, at 178.
26 See H. Dubroff, supra note 14, at 184-213, from which the following synopsis in the text is drawn. See also Ginsberg, supra note 5; Daniel M. Gribbon, Should the Judicial Character of the Tax Court be Recognized?, 24 GEO. WASH. L. REV. 619 (1955-1956).
27 See H. Dubroff, supra note 14, at 185.
28 Id.
the bill died without House action in 1946.  

The plea for article III status was renewed in 1947 but defeated by opposition from three sources. First, the Departments of Justice and Treasury opposed it. Their chief disagreement at the time (and currently, for that matter) concerned representation of the United States government before the Tax Court. Since 1926, the Treasury Department has generally represented the government in all Tax Court proceedings and is "strongly opposed to relinquishing that role." Yet, since 1933, the Justice Department has represented the government in virtually all other court proceedings, including tax cases in the district courts. Justice has argued that it would be forced (apparently against its wishes) to represent the government in the Tax Court should the Court be integrated into the system of article III federal courts. Consequently, neither department has supported integration.

Second, congressional opposition emanated from the House Ways and Means Committee and the Senate Finance Committee, which feared losing legislative control over the Tax Court to the House and Senate Judiciary Committees.

Third, further opposition emanated from both accountants, who wanted to continue to represent taxpayers before the Tax Court, and lawyers, who felt that continuation of that practice after integration would constitute the unauthorized practice of law. Similar bills were introduced in 1948 and 1949 but succumbed to the same pressures that defeated the 1946 and 1947 bills.

The only attempt between 1949 and 1967 to incorporate the Tax Court into the Judiciary came in response to a 1955 report of the Hoover Commission and its Task Force on Legal Services and Procedure, which recommended that the Tax Court be removed from the executive branch and incorporated into an Administrative Court of the United States which would deal with labor, trade, and tax matters. The American Bar Association opposed the Hoover

29 Id. at 186.
30 Id.
31 See Tannenwald, supra note 8, at 840 (commenting that the issue of government representation before the Tax Court will likely continue to present an obstacle in considering article III status for the Tax Court).
32 H. Dubroff, supra note 14, at 194.
33 Id. at 195.
34 Id.
35 See supra note 23 (discussing the Dingell Amendment).
36 H. Dubroff, supra note 14, at 196. For elaboration of this issue, see id. at 196-99.
37 Id. at 201.
38 Id. at 202.
39 Id.
Commission's recommendation and, together with the Tax Court, drafted legislation which would have moved the Tax Court into Title 28 and given it article III status.\footnote{Id. at 202-03.} Although introduced in Congress in 1958 and 1959, "the bills never proceeded beyond introduction."\footnote{Id. at 203.}

The last effort to confer article III status on the Tax Court began in 1967 when the chairmen of the congressional tax committees, Congressman Wilbur D. Mills (Democrat from Arkansas) and Senator Russell B. Long (Democrat from Louisiana), introduced identical bills in the House and Senate.\footnote{Id. at 204. These bills were H.R. 10,100, 90th Cong., 1st Sess. (1967) and S. 2041, 90th Cong., 1st Sess. (1967).} Hearings were conducted by Senator Joseph D. Tydings (Democrat from Maryland) over two years, and the proposal garnered support from the American Bar Association, tax practitioners, and academicians.\footnote{H. Dubroff, supra note 14, at 207.} Yet, the historical problems persisted, particularly the issue of government representation in Tax Court proceedings.\footnote{Id. at 207-08.} The hearings turned toward broad tax litigation reforms when the Justice Department challenged the existing system of three separate trial forums, deflecting attention away from the article III status issue.\footnote{Id. at 208-12.} Finally, Chief Justice Earl Warren opposed article III status for the Tax Court, as he believed that such status should be reserved for generalist judges.\footnote{Id. at 212. Chief Justice Burger also opposed article III status for specialized courts. Apparently, Chief Justice Rehnquist has not made his views known on this issue. See Tannenwald, supra note 8, at 840.}

As chances for achieving article III status for the Tax Court became increasingly bleak, Congressman Mills submitted an alternative bill in 1969 providing for legislative court status under article I.\footnote{H. Dubroff, supra note 14, at 213 (citing H.R. 13,494, 91st Cong., 1st Sess. (1969)).} No public hearings were held on the subject, and the provisions of the bill "were quietly inserted into the Tax Reform Act of 1969 by the Senate Finance Committee in executive session," becoming law on December 30, 1969.\footnote{Id. at 214 (footnote omitted); see Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 487, 730-36. The legislation also changed the court's name from the Tax Court of the United States to the United States Tax Court in order to be consistent with the usual format used for federal courts. H. Dubroff, supra note 14, at 213.}

The scant legislative history of this provision focused on changing the designation of the Tax Court from an administrative agency to a court. The Senate Report states: "Since the Tax Court has only judicial duties, the committee believes it is anomalous to con-
tinue to classify it with quasi-judicial executive agencies that have rulemaking and investigatory functions." Because the chief goal of the legislature was simply to achieve court status, apparently no attention was given to the issue of whether the new court must be established under article III of the Constitution. The Senate Report states only:

The bill establishes the Tax Court as a court under Article I of the Constitution, dealing with the Legislative Branch. At the present time, the Court of Military Appeals is the only other Article I court. Other courts, however, have enjoyed this status in the past, including the Court of Claims. In accordance with this change, the Tax Court is given the same powers regarding contempt, and the carrying out of its writs, orders, etc., that Congress has previously given to the district courts.

No reasons were given for choosing to establish the court under article I rather than under article III. Indeed, the only mention of article III appears in a footnote to the Senate Report:

The limitations of Article III of the Constitution, relating to life tenure and maintenance of compensation, do not apply to Article I courts. The committee amendments do not place the Tax Court under the supervision of the Judicial Conference or the Director of the Administrative Office of the Article III courts or give them any power or control over the Tax Court.

The authority to establish the court under article I rather than article III simply seems to have been assumed.

Today, the Tax Court is comprised of nineteen judges who are appointed by the President, with the advice and consent of the Senate. These judges serve fifteen-year terms but may be removed by the President, after notice and opportunity for public hearing, on grounds that are quite broad: inefficiency, neglect of duty, or malfeasance in office. They have jurisdiction to redetermine deficiencies in federal income, estate, and gift taxes. The Tax Court exercises only judicial power; it makes no legislative or administra-

50 Id. at 304, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS at 2343 (footnote omitted).
51 Id. at 304 n.3, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS at 2343 n.3.
52 I.R.C. § 7443(a), (b) (1988).
53 Id. § 7443(e).
54 Id. § 7443(f). "[I]t is not at all clear that the existence of statutory removal-for-cause provisions impairs the President's removal authority. No chief executive has ever sought to dismiss for cause any official who enjoyed the protection of such a statute." Jonathan L. Entin, The Removal Power and the Federal Deficit: Form, Substance and Administrative Independence, 75 KY. L.J. 699, 778 (1987).
tive determinations. Its findings of fact are based solely upon evi-
dence submitted by the parties in accordance with prescribed rules; it makes no independent investigation. The Tax Court does not ap-
pear in court to enforce its orders. It has the power to punish con-
tempt of its authority by fine or imprisonment, at its discretion, and shares the same assistance in carrying out its powers as is en-
joyed by other Federal courts. Its opinions are judicial in every respect: They are published in an official reporter and are routinely cited as precedent not only by the Tax Court itself, but also by the district and circuit courts.

Appeals from Tax Court decisions currently lie in the various circuit courts of appeals, depending on the taxpayer’s residence, and the scope of review is the same as in appeals from district court decisions tried without a jury.

If the dispute involves $10,000 or less—a so-called “small tax case”—the taxpayer may elect to have the case conducted under simplified proceedings in the Tax Court, but the resulting decision is final and may neither be appealed to any court of appeals nor cited as precedent. Moreover, such trials are conducted not by a Tax Court judge, but rather by a “special trial judge” appointed by the Chief Judge of the Tax Court who, in small tax cases, may enter the decision for the Tax Court. The Tax Court has held that the special trial judge provisions are constitutional (although not in the context of a small tax case), and the issue is currently pending before both the Second Circuit Court of Appeals and the United

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56 Professor Resnick seems to find possession of the contempt power particularly incompatible with non-article III status. See Resnick, supra note 3, at 602, 611-12. On October 22, 1990, the Tenth Circuit held that the current Bankruptcy Courts, operating under an adjunct model, possess constitutional authority to exercise civil contempt power. Mountain Am. Credit Union v. Skinner, 917 F.2d 444 (10th Cir. 1990). Article III was not offended, the court reasoned in part, because the “district courts retain power of de novo review of the bankruptcy court’s findings of fact and conclusions of law in civil contempt proceedings,” id. at 450, and thus the essential attributes of judicial power are retained by the article III district courts. Review of Tax Court decisions is much more circumscribed. See infra note 58 and accompanying text.

57 I.R.C. § 7456(c) (1988).

58 Id. § 7482. A district court’s findings of fact may be set aside only if “clearly erroneous.” Fed. R. Civ. P. 52(a).


60 Id. § 7443A(a).

61 Id. § 7443A(c); Tax Ct. R. 182(c).

62 First W. Gov’t Sec., Inc. v. Commissioner, 94 T.C. 549 (1990).

63 The Chief Judge of the Tax Court is given statutory authority to assign small tax cases to special trial judges under I.R.C. § 7443A(b)(2), (3) (1988). Special trial judges may also hear “any other proceeding which the chief judge may designate.” Id. § 7443A(b)(4). However, they may not enter the decision of the Court in cases assigned under the authority of I.R.C. § 7443A(b)(4). See id. § 7443A(c); Tax Ct. R. 182(c).
States Supreme Court.  

First Western Government Securities, Inc. v. Commissioner, 94 T.C. 549 (1990), is the subject of an interlocutory appeal before the Second Circuit Court of Appeals. Freytag v. Commissioner, 904 F.2d 1011 (5th Cir. 1990), is now before the United States Supreme Court. See 59 U.S.L.W. 3501 (U.S. Jan. 21, 1991) (No. 90-762) (petition for certiorari granted).

The procedural posture of each case is significant to its appeal. Both cases originated in a tax shelter scheme marketed by First Western Government Securities involving tax straddles in forward contracts to buy and sell securities issued by the Government National Mortgage Association and the Federal Home Loan Mortgage Corporation. Approximately 3000 taxpayers have challenged the disallowance of the losses generated by the tax shelter. Ten test cases were selected for a consolidated trial, including Freytag, which commenced before Tax Court Judge Richard C. Wilbur.

When Judge Wilbur became ill and retired, then-Chief Judge Samuel Sterrett proposed assigning the consolidated cases to Special Trial Judge Carleton D. Powell under the authority of I.R.C. § 7443A(b)(4) (1988)—the "other proceeding" provision. See supra note 63. One party objected to the assignment and was severed from the consolidated group of cases. The remaining cases proceeded to trial under Special Trial Judge Powell, which resulted in a decision reported at 89 T.C. 849 (1987) under the name of Freytag v. Commissioner. The decision was entered by then-Chief Judge Sterrett on October 21, 1987, the same date Special Trial Judge Powell submitted his proposed opinion to the Chief Judge. Chief Judge Sterrett's opinion first states that the "Court agrees with and adopts the opinion of the Special Trial Judge that is set forth below," id. at 849, and then reproduces Judge Powell's opinion verbatim.

Although no challenge was made in the Tax Court in Freytag to the authority of the special trial judge provisions, the parties did attempt to raise the issue on appeal before the Fifth Circuit Court of Appeals, arguing that "by adopting the proposed opinion on the same day it was filed the chief judge in effect permitted the special trial judge to render the 'decision' of the Tax Court contrary to 26 U.S.C. § 7443A(c)." Freytag v. Commissioner, 904 F.2d 1011, 1015 (5th Cir. 1990). The Fifth Circuit answered abruptly: "Our analysis begins and ends with the simple fact that the opinion in this case was issued by the Tax Court in the name of the Chief Judge." Id.

The parties in Freytag petitioned the U.S. Supreme Court for certiorari on November 11, 1990, posing the following questions:

1. Are complex tax cases affecting thousands of parties and billions of dollars among 'other proceeding[s]' that 26 USC 7443A(b)(4) allows Tax Court to assign to special trial judge for trial and effective resolution?
2. Does Appointments Clause of Article III, Section 2, which allows Congress to confer power to appoint inferior officers on 'Courts of Law' and 'Heads of Departments,' permit Congress to grant chief judge of Tax Court power to appoint special trial judges?


First Western was also assigned to Special Trial Judge Powell, but the taxpayers moved at the trial level to vacate the assignment on the grounds that

1. § 7443A does not authorize the chief judge of the Tax Court to assign these cases to a special trial judge; and
2. the appointments clause of the United States Constitution article II, section 2, clause 2, does not
B. Article III of the Constitution

Article III, section 1 of the Constitution 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.\textsuperscript{65}

Section 2 of article III extends the judicial power

to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority; [and] . . . to Controversies to which the United States shall be a Party; . . . \textsuperscript{66}

As Alexander Hamilton's \textit{Federalist} papers numbers 78, 79, and 81 explain,\textsuperscript{67} the tenure and salary provisions were inserted as prophylactic measures to ensure the independence of the judiciary from the executive and legislative branches.

Although the Tax Court judges lack the independence guarantees granted to article III judges, is there any reason to impugn their independence from the executive branch? Consider the following evidence:

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\textsuperscript{65} U.S. CONST. art III, § 1.

\textsuperscript{66} \textit{Id.} art. III, § 2. The Supreme Court ruled early that the matters appealed to the circuit courts directly from the Board of Tax Appeals constituted "cases or controversies" within the meaning of article III. \textit{See} Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 722-25 (1929).

\textsuperscript{67} \textit{See} \textit{The Federalist} No. 78, 79 & 81 (A. Hamilton).
TABLE I. DISTRICT COURT CASE RECORD

<table>
<thead>
<tr>
<th>Year</th>
<th>Number Won by Government</th>
<th>Number Lost by Government</th>
<th>Number Partially Won by Government</th>
<th>Percent Won or Partially Won by Government</th>
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<td>282</td>
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<td>77</td>
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</tbody>
</table>


As Table I indicates, the government won or partially won an average of 70.5% of district court cases in the years indicated, and no particular trend is discernible. Table II shows that the percentage of cases won or partially won by the government in the Tax Court averaged 90.4% for the same period—a full twenty-point difference—evidencing a decided pro-government trend in recent years.

TABLE II. TAX COURT CASE RECORD

<table>
<thead>
<tr>
<th>Year</th>
<th>Number Won by Government</th>
<th>Number Lost by Government</th>
<th>Number Partially Won by Government</th>
<th>Percent Won or Partially Won by Government</th>
</tr>
</thead>
<tbody>
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<tr>
<td>1986**</td>
<td>1274</td>
<td>998</td>
<td>813</td>
<td>705</td>
</tr>
</tbody>
</table>


* Excludes 119 cases labelled “miscellaneous.”

** Excludes 113 cases labelled “miscellaneous.”

Should we assume that the disparity results in part from a bias on the part of Tax Court judges in favor of the government due to the absence of the prophylactic protections of article III? Tax Court Judge Theodore Tannenwald has dismissed as a “canard” the supposition that the Tax Court is a pro-government tribunal. He argues in part that the ability to file for a redetermination of a deficiency in the Tax Court without first paying the tax encourages the filing of frivolous cases designed “to postpone the evil day of payment.” The disparity may also be due in part to some unquan-

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68 Tannenwald, supra note 8, at 827.

69 Id. This argument is undercut somewhat by the addition of interest on the underpayment, I.R.C. §§ 6601, 6621 (1988), as well as the $60 filing fee. Id. § 7451 (West Supp. 1990). Moreover, if a taxpayer’s proceeding is instituted or maintained primarily
tifiable difference between the type of tax cases brought in the district courts and those brought in the Tax Court. In any event, unlike some of their administrative law counterparts, Tax Court judges are not complaining of overt pressure to rule in favor of the fisc.

The absence of overt pressure or conscious bias, on the one hand, or even evidence of statistical parity between the district courts and Tax Court case records, on the other, should not deter further inquiry into the possible constitutional infirmity of the existing Tax Court. Indeed, even if the cited statistics were identical, the unquantifiable difference that may exist between cases brought before the Tax Court and the district courts might dictate that the taxpayer should win more often in the Tax Court. Therefore, even statistical parity could nevertheless mask subtle bias.

It is precisely because the bias may not be conscious, because the bias may be so insidious as to be indiscernable to both the judges themselves as well as to the public, that tenure at an un- diminishable salary is the only sure and effective preventive. In the words of one commentator:

[The article III protection is] wholly prophylactic in nature, and therefore one whose benefits will never be immediately recognizable. Without the salary and tenure protections, it is unlikely that there would be open and heavy-handed legislative and executive pressure on and threats against the judiciary. Indeed, there is little documented evidence of such pressure or threats in the state courts, where constitutional protections of salary and tenure rarely exist. Rather salary and tenure provisions protect against subtle or unstated pressure on the judiciary. Presumably, it was because it would be virtually impossible to detect undue pressure that the framers chose to insert these prophylactic protections.

for delay and his position is frivolous or groundless, the Tax Court may award damages to the United States of up to $25,000.  Id. § 6673.  See, e.g., Worthington v. Commissioner, 58 T.C.M. (CCH) 226 (1989).

My own unscientific review of the cases reported in CCH U.S. Tax Cases 90-1, which reprints tax decisions reported during the first six months of 1990 by the Federal District Courts (including the Bankruptcy Courts), the Federal Circuit Courts of Appeals, the U.S. Claims Courts and the U.S. Supreme Court, reveals that a substantial number of cases brought in the district courts deal with procedural matters ancillary to calculation of the proper amount of taxes due. Such matters include liens and levies, jeopardy assessments, penalties, criminal actions, injunctions, fee awards, and statute of limitations matters.

See, e.g., Martin Tolchin, Judges Who Decide Social Security Claims Say Agency Goads Them to Deny Benefits, N.Y. Times, Jan. 8, 1989, at 16, col. 1 (decrying the "conflict between budget-minded agency officials and judges who are supposed to be disinterested in the fiscal effects of their rulings").

Given the potential for bias, unconscious though it may be, and the sacred status of private property ownership in our jurisprudence, existing Tax Court provisions, as well as the Committee's recommendation, should be amended to comply with the requirements of article III. A review of relevant case law further emphasizes this need.

III

The Cases

The literalist or absolutist interpretation of the language in article III with respect to those who exercise the "judicial power" seems clear: Congress may choose not to create "inferior" federal courts and permit initial adjudication of cases arising under the Constitution or federal law in the state courts, but if Congress chooses to create lower federal courts, their judges must be imbued with the article III salary and tenure protections.

On its face, this is not an unreasonable interpretation; in fact, it is an "eminently sensible reading." While state court judges typically do not enjoy tenure and salary protection, their insulation from federal executive and congressional pressures is comparable to that of article III judges. Conversely, non-article III federal adjudicators, whose jobs and salaries are dependent on executive and legislative grace, do not enjoy such independence.

Nevertheless, the Supreme Court has never taken an absolutist approach to this provision, unlike the more rigid approach adopted in such recent separation-of-powers decisions as Immigration and Naturalization Service v. Chadha (the legislative veto case) and Bowsher v. Synar (the Gramm-Rudman-Hollings case), both dealing with the distribution of powers between the legislative and executive

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73 The Supreme Court has held that article I courts exercise "judicial power": "If the power exercised by legislative courts is not judicial power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof." Williams v. United States, 289 U.S. 553, 567 (1933). While the Williams court concluded that the "judicial power" exercised by article I courts is somehow distinguishable from the "judicial power" exercised by article III courts, more recent decisions and commentary recognize that such a distinction is not tenable and have abandoned it as a basis for analysis. See Paul Bator, The Constitution as Architecture: Legislative and Administrative Courts under Article III, 65 Ind. L.J. 233, 240-43 (1989-90) (criticizing what he terms the "theological approach").


75 462 U.S. 919 (1983) (holding unconstitutional the "legislative veto").

76 478 U.S. 714 (1986) (holding unconstitutional the provision of the Gramm-Rudman-Hollings Act which placed executive power in the hands of the Comptroller General, who was subject to removal from office by Congress). See generally Entin, supra note 54 (discussing the case in depth).
Yet, while the Supreme Court has long recognized the constitutional validity of non-article III bodies exercising judicial power (beginning with Chief Justice Marshall’s blessing of territorial courts as valid article I courts some 160 years ago), the precedents uniformly lack cohesive analysis of the confines of article III jurisprudence, a failure recognized by the Court itself. Justice Rehn-

The Court’s adoption of a balancing test when the separation-of-powers issue revolves around the possible erosion of the judicial power (see infra notes 139-71 and accompanying text) is in marked contrast to the Court’s concomitant use of a formalistic constitutional construction approach when the separation-of-powers issue revolves around the possible erosion of legislative or executive power. See generally Peter Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488 (1987) (discussing the Court’s inconsistent approaches to Bowsher and Schor).

In Chadha the Court stated:

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution . . . . [P]olicy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

462 U.S. at 944-45. Might not the same be said of non-article III tribunals? In Bowsher, the Court stated: “The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.” 478 U.S. at 726. Might not the same be said about the exercise of the judicial power? The Court further noted: “[I]t is the Comptroller General’s presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems.” Id. at 727 n.5 (quoting Synar v. United States, 626 F. Supp. 1374, 1392 (D.D.C. 1986)).

In this last respect, I thought it interesting that, in justifying its 1988 budget request, the Chief Judge of the United States Tax Court notified Congress of the amount of the deficiencies that the court recovered for the United States Treasury. In his statement before the Subcommittee on Appropriations for the Treasury, Postal Service and General Government, then-Chief Judge Samuel B. Sterrett made the following remark: “During fiscal year 1986, the amount of deficiencies ultimately determined by the Court to be owed by taxpayers was $758,863,980 or about 27 times the amount of our fiscal year 1988 budget request . . . .” Quoted in Melvin Coffee, Tax Court Should Not be the Sole Forum for Tax Disputes, 41 Tax Notes 777, 777 (1988).

As Alexander Hamilton succinctly stated: “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.” The Federalist No. 79, at 472 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original). Mr. Hamilton was referring, of course, to the salary provision of article III and not to budget requests for court operations, but the quotation above nonetheless serves as an interesting twist to the concept, particularly since article III courts do not similarly submit a budget request to Congress. More important, the salary provisions for Tax Court judges are subject to Congressional revision, notwithstanding the obvious need for independence from Congress and the Executive in adjudicating matters of tax revenue in cases brought against the Federal Government.

Chief Justice Marshall first recognized the legitimacy of non-article III judicial bodies in 1828 by holding that territorial courts were valid legislative courts created under article I. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

See, e.g., Palmore v. United States, 411 U.S. 389 (1973) (holding that the Superior Court and the Court of Appeals for the District of Columbia were valid article I courts);
quist has described this area as one with "frequently arcane distinctions and confusing precedents [which] . . . do not admit of easy synthesis."\(^{80}\) Justice Harlan observed that "[t]he distinction referred to in those cases between 'constitutional' and 'legislative' courts has been productive of much confusion and controversy,"\(^{81}\) and Justice White described the precedents as a "somewhat dense history of a constitutional quandary."\(^{82}\)

After avoiding the topic for nearly a decade, however, the Supreme Court again plunged into the muddy waters in a trio of cases between 1982 and 1986: *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,\(^{83}\) *Thomas v. Union Carbide Agricultural Products Co.*,\(^{84}\) and *Commodity Futures Trading Commission v. Schor.*\(^{85}\) Some may argue that a muddied area of constitutional analysis has become even muddier.

In *Northern Pipeline*, the Court declared unconstitutional a portion of the jurisdictional grant in the Bankruptcy Act of 1978. The Act created more than 230 bankruptcy judges, purportedly as adjuncts to the district courts, and gave them "jurisdiction over all civil proceedings arising under title 11 [of the U.S. Code] or arising or related to cases under title 11."\(^{86}\) Under the Bankruptcy Act, the President, with the advice and consent of the Senate, appointed judges for fourteen-year terms.\(^{87}\) The judges were subject to removal by the "judicial council of the circuit" for "incompetency, misconduct, neglect of duty or physical or mental disability."\(^{88}\) Their salaries were set by statute and subject to adjustment.\(^{89}\)

Northern Pipeline Construction Company, after filing a petition for reorganization in the Bankruptcy Court, sued Marathon for breach of contract and warranty, as well as for misrepresentation,
coercion, and duress—all state law actions. Marathon sought dismissal of the suit, maintaining that the Bankruptcy Act unconstitutionally conferred article III judicial power on judges who lacked life tenure and salary protection.

After examining the scope of the Bankruptcy Courts' power and jurisdiction, Justice Brennan's plurality opinion concluded that the Bankruptcy Courts were not acting as mere "adjuncts" to the district courts as they were not sufficiently controlled by those courts. Consequently, they could not be analogized to magistrates, special masters or administrative agencies, whose authority the Court previously held constitutional on the grounds that the "essential attributes of judicial power" remained in article III tribunals.

More significant for our purposes, the Court also examined whether the Bankruptcy Courts, despite their "adjunct" designation, were, in fact, valid legislative courts created under article I. In this regard, Justice Brennan posited that the Constitution demands as a "fundamental principle" that the judicial power of the United States be vested in article III courts and that the past exceptions held to be constitutional "reduce to three narrow situations" which should not be expanded. In this manner, Justice Brennan was clearly trying to temper the slow evisceration of article III by piecemeal delegation of article III judicial power to non-article III tribunals.

Brennan's three historical exceptions include the territorial courts, the courts-martial, and a third, more ambiguous category containing cases involving the adjudication of "public rights." This public-rights exception first appeared in the 1856 case of Murray's

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90 *Northern Pipeline*, 458 U.S. at 56.
91 *Id.* at 56-57.
92 The lack of coherence in this area was well illustrated by the fractured court which *Northern Pipeline* produced. Justice Brennan's plurality opinion invalidating section 1471 of the Bankruptcy Act was joined by Justices Marshall, Blackmun and Stevens. Justice Rehnquist filed a concurring opinion in which Justice O'Connor joined. *Id.* at 89 (Rehnquist, J., concurring). Chief Justice Burger filed a separate brief dissenting opinion, *id.* at 92 (Burger, J., dissenting), and joined in the lengthy dissenting opinion of Justice White, in which Justice Powell also joined. *Id.* at 92 (White, J., dissenting).
93 *Id.* at 76-87 (plurality opinion).
94 See United States v. Raddatz, 447 U.S. 667, 681-84 (1980) (upholding the constitutionality of an "adjunct" model under the Magistrates Act since the ultimate decision was made by the district court after reviewing the record).
95 *Northern Pipeline*, 458 U.S. at 63-76.
96 *Id.* at 60.
97 *Id.* at 58-59.
98 *Id.* at 64.
99 See *id.* at 64-66.
Lessee v. Hoboken Land & Improvement Co., in which the Court stated:

[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.101

Justice Brennan confirmed that the public-rights exception, vaguely grounded in principles of sovereign immunity, applies principally to matters between the government and others102 which could be exclusively determined within the executive or legislative branches.103 The argument is that if the matter could be conclusively determined within the executive branch, "there can be no constitutional objection to Congress employing the less drastic expedient of committing [its] determination to a legislative court or an administrative agency."104 Where Congress creates a substantive right, it may define, within constitutional limits, the proper manner of adjudicating that right.105 Nevertheless, Justice Brennan asserted

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100 59 U.S. (18 How.) 272.
101 Id. at 284.
103 Northern Pipeline, 458 U.S. at 67-68. By focusing the inquiry on the scope of the executive branch's power to make conclusive determinations, Justice Brennan echoed a 1930 law review article by Professor Katz: "The only matters which the Bakelite doctrine permits to be 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." Wilbert Katz, Federal Legislative Courts, 43 HARv. L. REV. 894, 916-17 (citing Ex Parte Bakelite, 279 U.S. 438 (1929)).
104 Northern Pipeline, 458 U.S. at 68.
105 See Larry Kramer, The Constitution as Architecture: A Charette, 65 IND. L.J. 283, 284 (1989) ("The public rights exception is justified on the ground that the greater power not to create a right includes the lesser power to control the process by which that right is adjudicated—including the pay and tenure of the adjudicator."). This is a rather peripheral species of the "greater-power-includes-the-lesser-power" argument historically seen in unconstitutional conditions cases. The argument asserts that the greater power to confer a government benefit at all includes the lesser power to grant the benefit on condition that the recipient forgo a constitutional right normally protected from government interference. See Kathleen Sullivan, Unconstitutional Conditions, 102 HARv. L. Rev. 1415, 1458 (1989). The Supreme Court has rejected this general argument as blanket justification for conditioning the receipt of governmental benefits on the waiver of individual liberties. See, e.g., City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 762-69 (1988) (criticizing the use of this type of argument in the first amendment context).

If one accepts the premise that no constitutional right to an article III adjudicator exists in public-rights cases because such cases may be determined exclusively within the executive or legislative branches, adjudication of such rights solely in a non-article III forum does not implicate the unconstitutional conditions doctrine. There simply is no coerced surrender of any constitutional right. The unconstitutional conditions doctrine
that, even in cases arguably falling within the public-rights exception, a presumption lies in favor of article III courts. Private-rights disputes, Justice Brennan wrote, "lie at the core of the historically recognized judicial power" and, therefore, must be adjudicated by an article III court. The plurality opinion held that judges who were neither tenured nor protected against salary diminution could not adjudicate state-created private rights, such as those involved in the contract dispute between Marathon and Northern Pipeline.

The public-rights exception has little to commend it. Its historical pedigree is tenuous—Justice Curtis simply and baldly announced it in Murray's Lessee—and its relevance in today's world of "entitlements" and heightened sensitivity to due process and individual rights is questionable at best. Indeed, quiet obsolescence should have been its fate. Yet, Justice Brennan gave it new life, a life not completely extinguished by Justice O'Connor in the Thomas and Schor cases to follow. Therefore, it cannot be ignored in analyzing the constitutionality of the Tax Court.

While the need for judicial independence from Congress and the Executive in adjudicating matters of tax revenue in cases brought against the Federal Government would appear obvious, some might argue that the Tax Court fits comfortably within the ill-defined enclave of permissible article I courts adjudicating public-rights cases. In Northern Pipeline, Justice Brennan footnoted dicta from Crowell v. Benson, the landmark case which in 1932 upheld the constitutionality of factfinding by administrative agencies acting as adjuncts to article III courts and which classified tax matters as within the scope of the public-rights doctrine. Moreover, Murray's Lessee, the case that first enunciated the public-rights excep-

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106 Northern Pipeline, 458 U.S. at 69 n.23.
107 Id. at 70.
108 See id. at 71-72.
110 See infra notes 148-50, 164, 189-90 and accompanying text (noting the continuing, albeit diminished, importance of the public-rights exception in post-Northern Pipeline analysis).
111 285 U.S. 22 (1932). The statute in Crowell v. Benson required employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States and provided that initial adjudication of disputed facts be made by the United States Employees' Compensation Commission. Id. at 36-37.
112 Northern Pipeline, 458 U.S. at 69 n.22.
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was itself a tax case in which the Court validated the use of summary procedures outside of article III to recover revenues due from a customs agent. While Murray’s Lessee may be distinguished from the case of a private citizen litigating the amount of taxes he or she owes to the Government, dictum in the case implies otherwise: “It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land.”

If a public-rights analysis would alone determine whether Tax Court judges must be given tenure and salary protection—an unlikely proposition in light of the Thomas and Schor cases which followed Northern Pipeline—would this exception protect the Tax Court as currently constituted? Could Congress, as implied by dicta in Crowell v. Benson and Murray’s Lessee, actually commit the matter of whether a citizen owes taxes to the United States under the tax laws, in the words of Justice Brennan, “completely to nonjudicial executive determination, [so] that as a result there can be no constitutional objection to Congress’ employing the less drastic expedient of committing their determination to a legislative court”? As unlikely as it might be that Congress actually would commit such determina-

113 See supra notes 100-01 and accompanying text.
114 Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 282 (1856) (emphasis added). If tax cases do fall easily within the public-rights exception, the analytical oddity of the public/private dichotomy becomes even more apparent. Adjudication regarding the amount of revenue which citizens owe the federal government (of great interest to the political branches in these days of deficit budgets) could permissibly be performed by adjudicators who lack the salary and tenure protections of article III. Yet, the Bankruptcy Court jurisdiction held unconstitutional in Northern Pipeline as part of the “core” of article III adjudication requiring judicial tenure and salary protections (i.e., cases dealing with state contract law between private parties) barely falls within the scope of federal court jurisdiction at all. See Redish, supra note 72, at 208-09 (noting that the majority of such cases would fall under article III judicial power only through diversity jurisdiction). More important, such cases simply do not raise the separation-of-powers and judicial independence concerns underlying the tenure and salary protection provisions which are explicit in tax cases against the Government. After all, why would Congress or the Executive care how state law contract disputes between private parties are resolved?

This irony did not totally escape Justice Brennan. In a footnote, he stated: Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress’ and this Court’s understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

Northern Pipeline, 458 U.S. at 68 n.20.

115 See infra notes 134-206 and accompanying text.
116 Northern Pipeline, 458 U.S. at 68 (emphasis added).
tions exclusively to the Executive, we must inquire whether it would have the power to do so.

The argument indeed can be made that the public-rights exception is inapplicable if the concept of "public right" is more cleanly defined so as to be confined to those situations in which it is most defensible: 117 those dealing with a government-created benefit or largesse, 118 the administration of a government-regulated activity among private persons, 119 or true sovereign immunity. 120

When Congress creates a new right or a new benefit to be bestowed and regulated, the statutory scheme creates something in favor of citizens where nothing before existed. Administration of the scheme, while perhaps nominally dealing with these new rights or benefits as against the government, in many instances actually identifies who among the group of intended beneficiaries will receive the newly created right or benefit and to what extent.

Litigation between a citizen and the government regarding the amount of tax owed under the Internal Revenue Code is distinct from the prototypical public-rights case described above. The matter of taxation does not involve a congressionally created substantive right in favor of citizens, when adjudication pertaining to the rights or benefits created is one aspect of the scheme. Rather, through taxation the government has created a duty on the part of citizens to pay and, thus, is taking property from citizens under the statute. In this respect, the adjudication of liability to the government under the Internal Revenue Code is distinct from all other cases arguably falling within the public-rights exception.

Differentiation between adjudication of a congressionally cre-

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117 Otherwise, the definition may become dysfunctionally inclusive. As Professor Young noted:

- 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.


118 Id.

119 See Henry Monaghan, Marbury and the Administrative State, 83 COLUM. L. REV. 1, 18 (1983) (administrative agencies can adjudicate, sometimes conclusively, claims created by the administrative state, even though between private persons). But see George Brown, Article III as a Fundamental Value—the Demise of Northern Pipeline and its Implications for Congressional Power, 49 OHIO ST. L.J. 55, 71 (1988) ("The danger of tautology is obvious. Public rights cases are those which arise 'in the administration of federal regulatory programs,' and what administrative agencies may adjudicate is determined by the presence of public rights.").

120 For example, sovereign immunity claims include tort claims against the government.
ated "benefit" and the enforcement of a congressionally created "duty" is not an original notion. In his seminal 1953 article, Professor Hart argued that such a distinction controlled inquiry into the extent to which Congress may limit the jurisdiction of federal courts.\(^1\) Citing Murray's Lessee, Professor Hart concluded:

> It's perfectly obvious that final authority to determine even questions of law can be given to executive or administrative officials in many situations not having the direct impact on private persons of a governmentally created and judicially enforceable duty, or of an immediate deprivation of liberty or property by extra-judicial action.\(^2\)

The limitations of Professor Hart's benefit/enforcement dichotomy in our modern world of "entitlements" lie chiefly on the rights or benefits side.\(^3\) Indeed, construing the benefits side of the distinction liberally to the extreme may leave little room for adjudication in article III courts, save criminal cases and, I would argue, civil tax cases.

While such criticisms undermine an argument that benefit cases automatically fall within the public-rights exception,\(^4\) they do not


\(^2\) Id. at 1386 (emphasis added). Even the Supreme Court has implicitly recognized the distinction between the adjudication of rights and benefits created by Congress and the adjudication of a duty imposed by Congress. For example, in Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943), the Court considered the constitutionality of certain provisions of the Railway Labor Act. 44 Stat. 577, 48 Stat. 1185. Congress created a "right" in the majority of a class to select a bargaining representative and vested exclusive jurisdiction for resolving disputes regarding representation in the National Mediation Board. In upholding the constitutionality of the provisions, the Court concluded:

> The Act... writes into law the "right" of the "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class for purposes of this Act." That "right" is protected by [a provision] which gives the Mediation Board the power to resolve controversies concerning it... A review by the federal district courts of the Board's determination is not necessary to preserve or protect that "right." Congress for reasons of its own decided upon the method for the protection of the "right" which it created.

\(^3\) See, e.g., Daniel Meltzer, Legislative Courts, Legislative Power, and the Constitution, 65 Ind. L.J. 291, 305, n.68. But see Monaghan, supra note 119, at 22-24 (arguing that the dichotomy is fundamentally unsound).

\(^4\) For example, the Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970), rejected the broad proposition that the government may create any procedures it wishes for the denial of welfare claims since the government need not have created welfare programs at all. Id. at 262-64. Where and how the precise line should be drawn to delineate the benefit side is beyond the scope of this Article.

Two historical examples of non-article III tribunals that adjudicated matters within the public-rights exception under either the "benefits" prong or the "sovereign immunity" prong are the War Claims Commission and the Indian Claims Commission. The War Claims Commission was created in 1948 to adjudicate compensation claims of per-
similarly undermine the notion that enforcement cases, in contrast, fall outside that exception. In this regard, Professor Bator asked rhetorically:

[H]as it not been crystal clear at least in the last fifty years, that the constitutional right to judicial review is clearest and strongest in precisely the Murray's Lessee kind of case, where the government seeks to collect a debt or tax, and is thus imposing a coercive requirement on the citizen enforceable by levy of execution on his body or property? 125

Phillips v. Commissioner 126 provides support for Professor Bator's implicit conclusion. The taxpayer in Phillips received certain assets of a dissolved corporation which had been delinquent in its income tax payments. 127 The Internal Revenue Code provided for collection of delinquent amounts from transferees of dissolved corporations through a summary collection procedure, which the taxpayer challenged on both separation-of-powers and due process grounds "because it [did] not provide for a judicial determination of the transferee's liability at the outset." 128 Citing Murray's Lessee, the Court upheld the constitutionality of the summary procedures specifically because the taxpayer was not deprived of access to article III courts for the determination of issues of law and for review ensuring that some evidence supported the Commissioner's findings of fact. 129

Thus, contrary to what may be popular belief, Murray's Lessee

sons and religious organizations injured by the enemy in World War II, while the Indian Claims Commission was created in 1945 to adjudicate land claims brought by Indian Tribes against the federal government. See Navajo Tribe v. New Mexico, 809 F.2d 1455, 1460-61 (10th Cir. 1987) (describing Indian Claims Commission); Entin, supra note 54, at 749-52 (describing War Claims Commission).

125 Bator, supra note 73, at 247-48.
126 283 U.S. 589 (1931).
127 Id. at 591-92.
128 Id. at 593.
129 See id. at 595-99. The Court discussed both adjudicatory alternatives available to the taxpayer: a refund action in federal district court or a prepayment adjudication by the Board of Tax Appeals (predecessor of the Tax Court). In connection with the latter, the Court specifically noted: "A review by the Circuit Court of Appeals of an adverse determination may be had . . . . There may be a further review by this Court on certiorari." Id. at 598-99. No small tax case jurisdiction existed at the time of that decision. See infra notes 218-37 and accompanying text (discussing the constitutionality of the no-review rule for small tax cases).

The Phillips case is consistent with the earlier case of Cary v. Curtis, 44 U.S. (3 How.) 236 (1845), in which the Court affirmed Congress's power to impose summary proceedings in the collection of revenues but specifically declined to decide whether deprivation of all right of judicial action would be constitutional. "The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry." Id. at 250. See Bator, supra note 73, at 247.
simply does not stand for the proposition that the amount of income tax a citizen owes the federal government can be determined exclusively within the executive branch. And that result makes good sense. If the public-rights exception must continue to be a factor in article III analysis, the fundamental distinction between enforcement cases and benefit cases is at least a place to start in giving the concept some defensible meaning, even though the scope of the benefit side remains murky. Abuse of executive power is much more dangerous to the polity in the enforcement context than in the benefits context. Absent any judicial involvement, free reign to interpret federal tax laws and to seize funds thereunder would give the executive branch unfettered access to resources, growth, and power. In short, the adjudication of what amount of tax is due to the government under federal law could not be determined entirely within the executive branch, and thus is not a matter of public right, the adjudication of which can be committed to an article I court.130

Under current law, however, jurisdiction is not committed solely to the Tax Court; the article III district courts potentially131 remain available as alternative forums.132 Can an article I court adjudicate matters not within the public-rights exception so long as an article III forum is also available? If the answer is yes,133 the implica-

130 Professor Hart's article, supra note 121, did not address the validity of article I courts or explore in depth the public-rights exception; I am uncertain that he would have agreed with this conclusion. Regarding the existence of a citizen's constitutional right to litigate the legality of a tax," id. at 1369, Hart responded, "Personally, I think he has [such a right]... [f]or reasons of principle, which I'll develop later." Id. at 1369-70. He then proceeded to develop the dichotomy between benefit and enforcement cases. On the other hand, he did not read article III as requiring a hearing in an article III court if Congress provides an alternative procedure. "The alternative procedure may be unconstitutional. But, if so, it seems to me it must be because of some other constitutional provision, such as the Due Process Clause." Id. at 1373. But see infra notes 152, 159, and accompanying text (discussing the possibility of a due-process-like component in article III).

Professor Young, in his exhaustive development of the public-rights exception, reads the "benefit" involved in Murray's Lessee (and implicitly in all tax cases) as being the waiver of sovereign immunity on the part of the federal government. See Young, supra note 117, at 799. Read in this light, tax cases would fall within the public-rights exception under the true sovereign immunity prong, as do tort claims against the government. That leads to the untenable assertion that summary seizures by the government would be permissible and no access to article III courts would be required at all. The Court itself after Murray's Lessee held that summary seizures by the government are permissible only because access to article III courts is available. See supra notes 126-29 and accompanying text (discussing the Phillips case).

131 See infra notes 172-80 and accompanying text (discussing the possibility that the article III forum may as a practical matter be unavailable because of the prepayment requirement).

132 See supra note 8 (discussing the three alternative trial forums currently available for the adjudication of tax disputes).

133 The availability of an article III forum and forum choice by the litigant, by them-
tions of the Committee’s proposal to divest the article III district courts of jurisdiction to adjudicate most tax cases become apparent. The proposal could transform an arguably constitutional conferral of jurisdiction (because concurrent with an article III court) into an unconstitutional conferral due to the failure to satisfy the public-rights exception.

The next question, however, is: Would a public-rights analysis control today? The analytical approach adopted in Justice Brennan’s plurality opinion has been severely eroded, if not overruled sub silentio, by two more recent O’Connor opinions upholding adjudication by non-article III bodies: Thomas v. Union Carbide Agricultural Products Co. in 1985 and Commodity Futures Trading Commission v. Schor in 1986. In Thomas, Justice Brennan concurred in a separate opinion in which, invoking his Northern Pipeline plurality opinion, he found the matter to be within the public-rights exception. In Schor, Brennan was relegated to a dissenting opinion, lamenting the Court’s effective abandonment of his three-exception analysis in favor of a balancing test first enunciated by Justice White in his Northern Pipeline dissent.

After reviewing the contradictory history of the issue, Justice White concluded in this dissent that “[t]here is no difference in principle between the work that Congress may assign to an Article I court and that which the Constitution assigns to Article III courts.” Having so opined, Justice White proposed a balancing test:

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Article I court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Article I, rather than Article III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on

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selves, may not be enough to save an otherwise unconstitutional forum. See infra notes 158-61, 166-67, 173-81 and accompanying text (discussing effect of forum choice).

134 473 U.S. 568.
135 478 U.S. 833.
136 Thomas, 473 U.S. at 594 (Brennan, J., concurring). Justices Marshall and Blackmun joined Brennan’s concurrence. Justice Stevens filed a separate concurring opinion in which he argued that Union Carbide Agricultural Products Co. lacked standing. Id. at 602 (Stevens, J., concurring).
139 Id. at 113.
how that balance is to be struck.\textsuperscript{140}

The competing considerations to be weighed here are the burden on article III values, on the one hand, and "the values Congress hopes to serve through the use of Art[icle] I courts,"\textsuperscript{141} on the other.

Because the Bankruptcy Act provided for judicial review by article III courts and because a state law contract dispute is of little interest to the political branches, Justice White viewed the burden placed on article III values by the Bankruptcy Act as minimal. Moreover, because of the sheer number of bankruptcy judges—more than 200—Justice White found the values Congress sought to serve by use of a non-article III court compelling. In his words:

The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench. Moreover, Congress may have desired to maintain some flexibility in its possible future responses to the general problem of bankruptcy. There is no question that the existence of several hundred bankruptcy judges with life tenure would have severely limited Congress' future options.\textsuperscript{142}

The \textit{Thomas} decision moved the Court closer to explicit adoption of a balancing test. There, the Court upheld a binding arbitration provision in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).\textsuperscript{143} Under FIFRA, a registrant wishing to register a new pesticide using EPA data compiled by a previous registrant of a similar product must compensate the previous registrant for the use of its data.\textsuperscript{144} If the registrants fail to agree on the amount of compensation, FIFRA provides for binding arbitration by an arbitrator appointed by the Federal Mediation and Conciliation Service, with judicial review of the arbitrator's decision available only for "fraud, misrepresentation, or other misconduct."\textsuperscript{145} The arbitrator's fee and expenses are shared equally by the registrants.\textsuperscript{146}

The appellees in \textit{Thomas}, thirteen firms whose data were used by subsequent registrants, argued that the statutory mechanism of binding arbitration for determining the amount of compensation due them violated article III.\textsuperscript{147} Justice O'Connor concluded that

\textsuperscript{140} Id.
\textsuperscript{141} Id. at 115.
\textsuperscript{142} Id. at 118.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} \textit{Thomas}, 473 U.S. at 575-76.
adjudication of the compensation due prior registrants could have been decided exclusively by the legislative branch and thus fell within the spirit of the public-rights exception.\footnote{148} However, she did not rely on that categorization. Instead, Justice O'Connor observed that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"\footnote{149} and, in language smacking of a balancing test, concluded: "Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme."\footnote{150}

Moreover, the extremely limited possibility for article III judicial review was held to be sufficient under the circumstances, preserving the "‘appropriate exercise of the judicial function.’"\footnote{151} The opinion does not make clear, however, whether the complete absence of any possibility for article III judicial review would raise article III concerns or merely due process concerns. In Justice O'Connor's words: "For purposes of our analysis, it is sufficient to note that FIFRA does provide for limited Article III review, including whatever review is independently required by due process considerations."\footnote{152}

In Schor,\footnote{153} the Court held that the assumption by the Commodities Futures Trading Commission (CFTC) of jurisdiction over state law counterclaims in a reparations proceeding brought against

\footnote{148} Justice O'Connor wrote:
In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that "could be conclusively determined by the Executive and Legislative Branches," the danger of encroaching on the judicial powers is reduced.

... Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants fees to cover the cost of data and could have directly subsidized FIFRA data submitters for their contributions of needed data.

\textit{Id.} at 589-90 (citations omitted). In fact, prior to 1978, the EPA itself was charged with the duty to value data and thus the compensation due to prior registrants. The arbitration provision was enacted in 1978 because of the huge backlog of valuation cases which effectively prevented registration of new pesticides. \textit{See id.} at 572.

\footnote{149} \textit{Id.} at 568.
\footnote{150} \textit{Id.} at 590.
\footnote{151} \textit{Id.} at 592 (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).
\footnote{152} \textit{Id.} at 593 (emphasis added). \textit{Cf.} Martin H. Redish & Lawrence C. Marshall, \textit{Adjudicatory Independence and the Values of Procedural Due Process}, 95 YALE L.J. 455, 457, 491-505 (1986) (positing that procedural due process requires at a minimum that nearly all adjudicators be accorded the tenure and salary protections of article III, since an independent adjudicator is a "core element" of due process).

\textit{Thomas} is discussed further in connection with appellate review theory. \textit{See infra} notes 214-16 and accompanying text.

a broker did not violate article III. ContiCommodity Services, Inc., a commodity futures broker, filed a diversity action in federal district court to recover a debit balance in the account of Schor and Mortgage Services of America.\textsuperscript{154} Schor urged dismissal in the district court, maintaining that the matter could be settled in a reparations proceeding it had instituted against the broker before the CFTC. In that action, Schor argued that its debit balance was the result of numerous violations of the Commodity Exchange Act (CEA) by the broker.\textsuperscript{155} Although the district court declined to dismiss the action, the broker voluntarily withdrew and presented its claim as a counterclaim in the reparations proceeding.\textsuperscript{156} Schor lost its case before the CFTC and appealed the result, asserting that the power of the CFTC to entertain state law counterclaims in a reparations proceeding violated article III.\textsuperscript{157}

The first noteworthy point in Schor is that the Court explicitly separated the structural, separation-of-powers purpose of the judicial independence provisions—in this context, the assurance that the legislative and executive power would not be aggrandized at the expense of the judicial power\textsuperscript{158}—from the individual’s "personal right [to an] impartial and independent federal adjudication,"\textsuperscript{159} an individual right which can be waived. The Court concluded that Schor’s waiver was evident in its effort to have the district court suit dismissed on the ground that the matter could be settled before the CFTC.\textsuperscript{160} The Court further asserted that, even without an express waiver, the simple election to seek relief before the commission rather than proceeding in state or federal court constituted an effective waiver.\textsuperscript{161}

The Court proceeded to reason, however, that waiver could not cure a fatal defect under the structural component of article III, because article III serves institutional interests which an individual cannot be expected to protect.\textsuperscript{162} Without referring to Justice Brennan’s three exceptions, the Court then fully adopted a balancing test, which is worth quoting in full, for determining when the article III structural limitations have been transgressed:

\begin{quote}

\textsuperscript{154} See id. at 837.

\textsuperscript{155} See id. at 837-38.

\textsuperscript{156} See id.

\textsuperscript{157} See id. at 838-39.

\textsuperscript{158} See id. at 838-39.

\textsuperscript{159} See, e.g., Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam) (tripartite form of government intended to operate as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

\textsuperscript{159} Schor, 478 U.S. at 848.

\textsuperscript{160} See id. at 849.

\textsuperscript{161} See id.

\textsuperscript{162} See id. at 850-51.
\end{quote}
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 institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.\textsuperscript{163}

The Court conceded that the adjudication of the state law counterclaim was a private-rights case, assumed to be at the core of the judicial power that must be exercised by article III courts under Northern Pipeline, but refused to give that label "talismanic power in Article III inquiries."\textsuperscript{164} The Court reasoned that the congressional scheme did not "impermissibly intrude on the province of the judiciary [because the] CFTC's adjudicatory powers depart from the traditional agency model in just one respect: the CFTC's jurisdiction over common law counterclaims."\textsuperscript{165}

The Court also found it important at the structural level that the subject matter of the counterclaim was not withdrawn from the jurisdiction of the article III district courts, that the broker was given a choice to pursue his debt claim in either an article III court or as a counterclaim before the CFTC.\textsuperscript{166} However, merely providing a choice of forums, one of which is an article III court, does not dispose of the structural issue, as it might the individual one. Notwithstanding the availability of an article III forum for resolution of the dispute, the Court intimated that it might require at least some article III supervision or control of the article I forum, as well as both "valid and specific legislative necessities"\textsuperscript{167} for creation of

\textsuperscript{163} Id. at 851 (citations omitted) (emphasis added).
\textsuperscript{164} Id. at 853.
\textsuperscript{165} Id. at 851-52.
\textsuperscript{166} See id. at 854-55.
\textsuperscript{167} The full passage reads:

[T]he decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are dimin-
the non-article III tribunal, if it is to survive scrutiny at the institutional level.

The CFTC's primary purpose, the Court reasoned, was to effectuate a "specific and limited federal regulatory scheme, not [to allocate] jurisdiction among federal tribunals." The concern that drove Congress to depart from the requirements of article III was twofold. First, Congress desired to create an "an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional brokers." Second, the reparations scheme, itself constitutional, would have been undermined if Congress had not vested jurisdiction of state law counterclaims in the CFTC. Thus, the Court concluded that "the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.

What are the implications of Schor for the validity of the Tax Court? After Schor, there is a two-part inquiry. The first concerns the individual's right to an independent adjudicator under article III. Currently, tax disputes may be adjudicated in one of three forums, one of which—the federal district court—is an article III court, while the other two—the Tax Court and Claims Court—are article I courts. After Schor, could one simply argue that a Tax Court petitioner has waived his right to an independent adjudicator by choosing to litigate the deficiency in the Tax Court?

It is not that simple. In order to gain access to the article III court—and an independent adjudicator—the disputed deficiency must be paid and the taxpayer must sue for a refund. The Tax Court, on the other hand, requires no payment prior to adjudication, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences. 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 III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack.

Id. at 855 (citation omitted) (emphasis added).

168 Id.
169 Id.
170 See id. at 856.
171 Id. at 857.
172 See supra note 8 (discussing alternative trial forums currently available for the litigation of tax disputes).
173 See id.
In other words, those without the means to pay the disputed tax in advance have no access to an article III court for adjudication of the deficiency while those who can afford to pay the tax do enjoy such access. Can "consent" or "waiver" be in fact the inability to pay the deficiency beforehand?

While only anecdotal, the following observations of two practitioners, one made in 1989 and the other in the 1920s, are instructive.

I assume that the Tax Court does know that there are many practitioners in the provinces who at many times do much more than welcome the availability of forums alternative to the United States Tax Court. From time to time some practitioners in selected cases do urgently plead with their clients to encumber all of their personal and business assets, even to the point of insolvency in order to have the option of having their tax controversy tried in our United States District Court.

"In my own personal experience I have had two clients who were absolutely ruined by assessments that were unjust and that could not have stood up in a court of justice.... [A]nd it was no protection to them to say, 'Pay your taxes and then go into court,' because they did not have the money to pay the taxes and could not raise the money to pay the taxes and be out of the money two or three years." Justice Stevens, joined by Justices Brennan and Marshall, emphasized the possible illusory nature of forum choice in tax controversies in his dissent in United States v. Dalm. In Dalm, the government's position was that "[Dalm's] choice of the Tax Court forum precluded her from claiming equitable recoupment against the income tax deficiency." Justice Stevens replied that "an af-

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174 See id.
175 Coffee, supra note 77, at 778 (emphasis added).
177 110 S. Ct. 1361 (1990). Dalm was the administratrix of her former employer's estate. In 1976, the decedent's brother, who wanted Dalm to share in the estate in recognition of her years of service to the decedent, made payments to Dalm, on which she paid a gift tax. The Service asserted an income tax deficiency after determining that the amount received was income in connection with her service as administratrix and not a gift. Id. at 1363. Dalm instituted a proceeding in the Tax Court for a redetermination of the deficiency, and the case was settled for an amount less than the asserted deficiency. Id. Dalm then instituted an action in federal district court for a refund of the gift tax paid on the amounts. Although the statute of limitations had run by that time, she claimed the court had jurisdiction to hear the refund action under the doctrine of equitable recoupment. Id. at 1364. The Tax Court apparently would have lacked jurisdiction under prior precedents to consider recoupment of the prior payments against the income tax deficiency. The Supreme Court held that the district court had no jurisdiction to hear the refund claim. Id. at 1370.
178 Id. at 1372 (Stevens, J., dissenting) (quoting reply brief of the United States).
fluent taxpayer, but not a less fortunate one, can pay a deficiency assessment and file suit for a refund."

"[S]erious burdens and costs" that would make the Tax Court forum a "compelled alternative" should vitiate effectiveness of consent or waiver. This concern, however, dealing with the validity of a waiver of a personal right, requires case-by-case evaluation.

The Committee's proposal to vest nearly exclusive jurisdiction over tax controversies in the Tax Court moots the argument that the individual waives his or her right to an independent adjudicator by electing to proceed in the Tax Court instead of district court. This alone may counsel against adoption of the proposal; alternatively, it supports the argument that the trial division judges of the reconstituted Tax Court must also be given life tenure and salary protection.

179 In his Schor dissent, Justice Brennan cited another reason why forum choice may be illusory.

If the administrative reparations proceeding is so much more convenient and efficient than litigation in federal district court that abrogation of Article III's commands is warranted, it seems to me that claimants would rarely, if ever, choose to go to district court in the first instance.

Thus, any "sharing" of jurisdiction is more illusory than real.

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 865 (1986) (Brennan, J., dissenting). Approximately 95% of tax controversies are litigated in the Tax Court, see supra note 8, notwithstanding the case record statistics compiled in Tables I and II (discussed in part II(B)) and notwithstanding that the procedural differences between the forums (with the exception of the small tax case) are narrow. See Tannenwald, supra note 8, at 833. One procedural difference that may be very important in particular cases, however, is the availability of a jury trial in district court, which is not available in the Tax Court.

180 Pacemaker Diagnostic Clinic, Inc. v. Instrumented, Inc., 725 F.2d 537, 543 (9th Cir. 1984) (en banc) (upholding reference to a magistrate on consent of the parties), cert. denied, 469 U.S. 823 (1985).

181 Another question might be raised here in addition to the validity of a waiver: Are there not also equal protection implications, insofar as equal protection analysis applies under the due process clause of the fifth amendment, to the scheme requiring prepayment if one wants to exercise the "personal right" (see supra note 159 and accompanying text) to an independent adjudicator recognized by the Schor Court?

In Boddie v. Connecticut, 401 U.S. 371 (1971), the Supreme Court sustained an indigent's challenge to the state's requirement that court fees and costs (averaging $60) must be paid in order to sue for divorce. In United States v. Kras, 409 U.S. 434 (1973), the Court held that the Bankruptcy Act's conditioning of the right to discharge on the payment of a $50 fee does not violate fifth amendment due process, including "equal protection," because, unlike in Boddie, bankruptcy does not involve judicial exclusivity. A debtor can negotiate a settlement of his debt outside the judicial forum, while divorce requires judicial process. Moreover, unlike marriage, bankruptcy is not a "fundamental right" requiring strict scrutiny review, and the rational basis for the fee requirement was to make the bankruptcy system self-sustaining and paid for by those who use it.

One could persuasively argue that a taxpayer could always negotiate a settlement with the Internal Revenue Service and that access to tax dispute resolution in an article III court is not a "fundamental" right in any event, so that Kras and not Boddie controls. But is there even a rational basis for creating both an article III forum and article I
Even if the Tax Court survives scrutiny at the individual level, how does it fare at the institutional level under Schor? Recall that the continued availability of an article III forum in the alternative was important to the Schor court at the structural level as well as at the individual level. But the Court was careful to note that merely providing a choice of forums, one of which is an article III court, is not sufficient in itself. The Court implied that there must be both adequate article III supervision and control, as well as sufficiently “valid and specific legislative necessities” prompting the creation of the non-article III tribunal. Because the former implicates judicial review theory and, in particular, the small tax case jurisdiction, it will be discussed below in connection with the Schor balancing test.

The first factor to be weighed under Justice O'Connor's test is the extent to which the “essential attributes of judicial power” remain in article III courts and, conversely, the extent to which the forums for resolution of tax disputes and then conditioning access to the article III court on the financial ability to prepay the challenged deficiency?

Unlike the bankruptcy court in Kras, the payment required for access to the district court is not exacted to support court operations. The tax payments do, of course, support government operations in general, but no more than the tax payments eventually made after trial in the Tax Court. The need for prompt revenue in order to support the government—the cited reason for the prepayment requirement in the district court—is not persuasive. See Flora v. United States, 362 U.S. 145, 175 (1960): “[T]he Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full.” That logic would equally pertain to the Tax Court, where prepayment is not required, and approximately 95% of all tax litigation now occurs in the Tax Court. See supra note 8.

There is clearly a rational basis for creating a prepayment forum: the hardship involved for taxpayers who cannot prepay the tax. But what is the rational basis for requiring prepayment in order to gain access to the independent adjudicator, the article III judge, while imposing a non-article III adjudicator on litigants who cannot afford to prepay the deficiency? That is the salient question. I suppose there is one, but frankly, I cannot think of it.

I concede that I am perhaps making too much of this. After all, the Supreme Court could have examined such questions in Flora if it had wished. The Court there held that, as a matter of statutory interpretation, 28 U.S.C. § 1346(a)(1) (1988) required payment of the disputed tax in full, as opposed to partial payment, before a district court had jurisdiction to entertain a refund suit. The Court responded to the argument that requiring full payment before suit creates great hardship by stating that it “seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent.” Flora, 362 U.S. at 175. No equal protection argument was mentioned, notwithstanding that at the time (1960) the Tax Court was not even a court of record but was still designated an independent agency in the executive branch.

If the Committee's proposal is adopted, the possible equal protection problem disappears but, as noted in the text, at the expense of killing any waiver argument.

See supra notes 166-67 and accompanying text.
See Schor, 478 U.S. at 855 (quoted at supra note 167).
See infra notes 207-37 and accompanying text.
Schor, 478 U.S. at 851.
non-article III body is vested with attributes normally associated only with article III courts. It seems that this factor favors administrative agencies, which usually have nonjudicial as well as judicial functions and which ordinarily must appeal to article III courts for enforcement. The Schor Court relied heavily upon several factors, including: The CFTC scheme deviated from the agency model in only one respect (i.e., jurisdiction over common law counterclaims); CFTC orders (like those of the agency in Crowell v. Benson but unlike those of the Bankruptcy Courts found unconstitutional in Northern Pipeline) are enforceable only by order of the district court; and factual findings of the CFTC are reviewed under the more stringent "weight of the evidence" standard approved in Crowell and not the "clearly erroneous" standard applicable to the Bankruptcy Courts.\textsuperscript{186} Notwithstanding one commentator's opinion that legislative courts are nothing more than administrative agencies "in drag,"\textsuperscript{187} in view of the above description regarding its jurisdiction,

\textsuperscript{186} See id. at 851-53.
\textsuperscript{187} Kenneth Karst, Federal Jurisdiction Haiku, 32 STAN. L. REV. 229, 230 (1979). Professor Redish agrees that there is no logical distinction between the work of legislative courts and administrative agencies. See Redish, supra note 72, at 201, 214-19. Professor Fallon also agrees but notes that the lines of doctrinal development are relatively distinct. See Richard H. Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915, 928 (1988). Administrative agency doctrine relies chiefly on the adjunct paradigm, under which the important question is whether the essential attributes of judicial power reside in article III courts, while legislative court doctrine depends chiefly on the public-rights exception. See id. at 923-26. But might there be a difference of constitutional dimensions between the two?

Bowsher v. Synar, 478 U.S. 714 (1986) (see supra notes 76-77 and accompanying text) was issued the same day as Schor, and both opinions were penned by Justice O'Connor. Although Bowsher adopts a formalistic approach to the separation-of-powers question and Schor adopts a functional approach, see supra note 77, Justice O'Connor did not view them as inconsistent. "Unlike Bowsher, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch." Schor, 478 U.S. at 856-57 (emphasis added).

As recounted by George Brown, Professor Strauss has viewed this language as meaning that the "subtraction of the judicial branch's power in favor of an administrative agency poses little threat to equilibrium among the three branches because each branch has ceded some power to the agency." Brown, supra note 119, at 79 (emphasis added) (discussing Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984)). Professor Strauss argues that the checks-and-balances view of the separation-of-powers principle is superior to the compartmental view at levels below the three constitutionally named bodies: the President, the Congress and the Supreme Court. "Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance—functionally similar to that provided by the separation-of-powers notion for the constitutionally named bodies—that they will not pass out of control." Strauss, supra, at 579. The CFTC is an example, "enjoy[ing] a strong relationship with
powers (including the contempt power), and standard of review, the Tax Court does seem to have a much more difficult time than do administrative agencies under this factor. In this regard, the Tax Court is much closer to the Bankruptcy Courts found unconstitutional in *Northern Pipeline* than to the CFTC.

The second factor to be considered is the origin and importance of the right to be adjudicated. In this roundabout way, the public-rights exception survives, but as merely one factor to consider rather than as the entire test. The distinction made earlier regarding enforcement-of-duty cases can be made in arguing that the public-rights exception ought not to extend to tax cases.

Third, what are the "concerns that drove Congress to depart from the requirements of Article III"? In *Schor*, Justice O'Connor focused on Congress's intent to create an "inexpensive and expeditious alternative forum" for bringing suits against brokers and the need to include counterclaim jurisdiction to fully effectuate that purpose. Also noted is the fact that the CFTC deals only with a "particularized area of law."

The inquiry into why Congress deviated from article III requirements is a sound one. But are the factors evaluated in *Schor* pertinent to this inquiry? Congress may well have reason to decide that tax matters, for example, have "particularized needs . . . warranting distinctive treatment," but why should the need for a specialized court dictate that its members be denied tenure and salary

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188 See supra notes 52-64 and accompanying text.

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

190 See supra notes 115-30 and accompanying text.

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

192 *Id.* at 855.

193 See *id.* at 855-56.

194 *Id.* at 852 (quoting *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982)).

protection? And why should the need for informal and expeditious procedures dictate that the adjudicators need not be independent from the other branches of government?

They should not.¹⁹⁶ The reasonableness of procedures different from those found in district courts or the reasonableness of a specialized court to hear certain matters does not lead inexorably to the conclusion that the decision not to bestow tenure and salary protection on the adjudicators is reasonable. Such an approach compares apples and oranges.¹⁹⁷ The inquiry under article III is not whether a matter must be adjudicated in the established federal district courts under their established procedures or whether a matter must be adjudicated by a generalist judge who hears cases in a multiplicity of areas. Failing to keep these inquiries separate inappropriately deflects the analysis away from the principal value underlying article III—indeed, the independence of the adjudicator—and focuses

¹⁹⁶ Professor Redish has capsulized the distinction in connection with the article I military courts.

Courts and commentators have often suggested that practical considerations inherent in the operation of the military justify the Article I status of military courts. They believe that the exercise of control by federal judges is incompatible with the proper functioning of the military system. But the choice is not between judges who sit at the whim of the government, on the one hand, and direct control by federal judges, on the other. The issue is, simply, whether those personnel who do hear military cases (at least those involving a potential loss of personal liberty) will have their salary and tenure protected by Article III. Therefore, it is difficult to understand how the exigencies of military discipline in any way require non-independent adjudicators. Certainly, the military system requires firm discipline, and on the battlefield the interest in having all the trappings of a due process hearing may be forced to give way. These facts, however, need not affect whether or not individuals who hear these cases are independent of the prosecution.

MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 39-40 (1980) (footnotes omitted). Professor Young implicitly disagrees that the justification should focus on the problem with granting the tenure and salary guarantees rather than on factors supporting creation of a court different from the present federal district courts: “[T]he Schor Court correctly stressed the breadth or narrowness of subject matter jurisdiction . . . . This is an appropriate factor because a main practical justification for a non-article III tribunal is expertise.” Young, supra note 117, at 859-60 (emphasis added). See infra note 198 (regarding specialized courts).

¹⁹⁷ And even the best are guilty. In arguing against adopting a literalist application of article III, Professor Bator mischaracterizes the issue as being whether all federal adjudication must be returned to the currently constituted generalist courts rather than whether the tenure and salary guarantees—the only items article III mentions—must be extended to adjudicators not on those courts so as to ensure their independence.

Article III litigation is a rather grand and very expensive affair. It is a game played almost entirely by an elite class. It is controlled by an expensive (and, some would add, rapacious) cadre of lawyers. It seems to me a step in the wrong direction to decree that this cumbersome and expensive upper-class mechanism be given a monopoly over the resolution of disputes under the national law.

Bator, supra note 73, at 262.
it, instead, on non-issues under article III: the suitability of adjudicatory procedures and adjudicators different in form from those found in the existing district courts. 198

So what should guide the inquiry into whether Congress demonstrated "valid and specific legislative necessities" 199 for creating a non-article III tribunal? The inquiry should center on the reasons why bestowing tenure and salary protection on the adjudicators of issues not within the public-rights exception would be problematic under a given set of circumstances. In this regard, the factors considered by Justice White's *Northern Pipeline* dissent are noteworthy.

There, Justice White found the burden placed on article III values to be minimal because the outcome of state law counterclaims are of little interest to the political branches of government and because review by an article III court was provided. 200 He balanced this minimal burden against what he deemed to be Congress's compelling reasons for declining to create several hundred additional tenured judgeships, including the desire to retain a flexible ap-

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198 "The real question is not whether Congress was justified in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Art. III bankruptcy court." *Northern Pipeline*, 458 U.S. at 117-18 (White, J., dissenting). Justice White's own view, however, is that extreme specialization may be enough to deny tenure and salary protection because of the effect that "several hundred specialized judges" may have on the generalist article III courts. *Id.* at 118. Professor Bator echoed this concern in alluding to "thousands upon thousands of life-tenured article III workmen's compensation and social security and ICC and Security and Exchange Commission and NLRB and Equal Employment Opportunity Commission and OSHA 'judges' sitting in article III administrative courts." *Bator, supra* note 73, at 239. The statement is a bit hyperbolic in that the types of adjudication cited should fall easily within the adjunct paradigm or within the public-rights exception to article III adjudication.

Chief Justices Warren and Burger were of the view that life tenure and salary protection should be conferred only on generalist judges. *See* Tannenwald, *supra* note 8, at 840. Justice Brennan disagrees, noting that such a position "threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of 'specialized' legislative courts." *Northern Pipeline*, 458 U.S. at 73. There have been and continue to be specialized article III courts. *See* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); RICHARD A. POSNER, *The Federal Courts* 25 (1985); Resnick, *supra* note 3, at 600-01; Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990). Indeed, it may be argued that specialized courts are most susceptible to a "systemic bias," Revesz, *supra*, at 1166, because of a close identification with the statutory scheme and the agency initially charged with making determinations under it, and thus most in need of the independence protections.

I have never understood the argument that conferring tenure and salary protection on specialized judges may dilute the prestige of and respect for generalist judges. *See, e.g.,* Bator, *supra* note 73, at 261. It seems to me that the respect and prestige come not so much from the fact that the generalist is tenured, but rather from the fact that he or she is a generalist on our generalist courts—"entrusted with enormous powers of constitutional governance over the other branches and the sovereign states." *Id.*


200 *See supra* text accompanying notes 139-42.
proach to bankruptcy.\textsuperscript{201}

Schor was decided correctly, but not because the efficiency of using a forum other than the district courts outweighed article III values. Rather, Congress was justified, in view of the minimal burden on article III values,\textsuperscript{202} in declining to provide tenure and salary protection to adjudicators who decide almost exclusively matters within the public-rights exception. The miniscule portion of their jurisdiction that includes other matters—for sound reasons of efficiency—is simply not significant enough to warrant extension of such protection.

As to the burden on article III values with respect to the Tax Court, the political branches of the government are presumably much more interested in the outcome of tax cases than in the outcome of state law contract or debt disputes, particularly in these days of deficit budgets. And tax disputes comprise the Tax Court’s entire jurisdiction; they are not merely ancillary to public-rights adjudication. Moreover, the lack of article III judicial review in small tax cases, discussed in greater detail in Part IV, adds to the burden on article III values considered by Justice White.

On the other side of the fulcrum, the presumed congressional concern with creating more than 200 additional article III judgeships loses force in the context of the nineteen Tax Court judges. As discussed above,\textsuperscript{203} the legislative history underlying the 1969 Act is silent regarding Congress’s reason (or reasons) for declining to grant tenure and salary protection to Tax Court judges. What reasons might we impute to Congress in this regard?

Recall the bureaucratic “turf wars” that frustrated earlier efforts to establish article III status for the court.\textsuperscript{204} Are those turf wars—who gets to represent the government before the court, who gets to control the court, who gets to practice before it—“valid and specific legislative necessities”\textsuperscript{205} justifying the denial of tenure and salary protection under article III in view of the need for Tax Court independence from the political branches? Clearly, they are not, as they have nothing to do with the specific question of why conferral of

\textsuperscript{201} See id. There are other instances in which the justification for declining to bestow tenure might outweigh the burden on article III values. One is the case of temporary tribunals, such as the territorial courts blessed in American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828), which would disappear on statehood (leaving unemployed but tenured judges to place elsewhere). \textit{Cf. supra} note 124 (regarding War Claims Commission and Indian Claims Commission).

\textsuperscript{202} The political branches presumably have little interest in the outcome of state law debt claims, and article III judicial review was available.

\textsuperscript{203} \textit{See supra} text accompanying notes 49-51.

\textsuperscript{204} \textit{See supra} text accompanying notes 31-36.

\textsuperscript{205} Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 855 (1986).
tenure and salary protection on Tax Court judges would be problematic.

Given the lack of any cogent reason for denying tenure and salary protection to the nineteen Tax Court judges when measured against the undeniable need for those judges' independence from the political branches in adjudicating matters of tax revenue owed the federal government, the Tax Court should not survive scrutiny under the balancing test at the structural level. Given the imprecision of balancing tests,\textsuperscript{206} however, it is conceivable that the Supreme Court, if faced with the issue, would somehow hold otherwise with respect to the Tax Court's general jurisdiction. This brings us to the question of whether there is any limiting principle restraining application of the balancing test and, more specifically, to a consideration of the small tax case jurisdiction of the Tax Court.

IV

Appellate Review Theory

As argued above, the balancing test, properly applied, should evaluate why tenure and salary protection for the particular adjudicators are considered problematic, even though they adjudicate matters beyond the scope of the public-rights exception. Nevertheless, the Court's opinions appear to inquire only into the reasons why the matter at issue was considered unsuitable for adjudication by existing article III courts or under procedures used in those courts. If the latter interpretation controls, the deck is stacked against the article III independence guarantees. As Justice Brennan observed:

\begin{quote}
The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. 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.\textsuperscript{207}
\end{quote}

The potential erosion of judicial power under such an interpretation of the balancing test has generated scholarly commentary attempting to define a limiting principle. Professors Fallon of

\textsuperscript{206} See infra text accompanying note 207.

\textsuperscript{207} Schor, 478 U.S. at 863 (Brennan, J., dissenting) (citing Redish, supra note 72, at 221-22).
Harvard, Redish of Northwestern, Schwartz of George Washington, and the late Professor Bator of Chicago, among others, have advocated appellate review theory as the most effective limiting principle that remains available in view of the balancing test and prior precedents. Under this theory, "sufficiently searching review of a legislative court's . . . decisions by a constitutional court will always satisfy the requirements of article III." Some commentators imply that adequate article III judicial review should alone be sufficient to dispel article III concerns. I believe the better view is that article III appellate review does not supplant the balancing test. Although it may be too late in the day to adopt a literalist approach to article III's explicit commands, Congress should not be completely excused from justifying the use of nontenured adjudicators in contravention of those commands. Rather, article III appellate review should be viewed as a minimum requirement that must be satisfied in those cases in which the balancing test is otherwise met—a "solid, value-oriented floor serving as the necessary 'ground'" for article III analysis, which would


209 Fallon, supra note 187, at 933. The Justices have repeatedly noted the importance of article III judicial review. Justice Brennan intimated in Northern Pipeline that article III judicial review may be a necessary, see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 n.23 (1982), but not sufficient, see id. at 86 n.39, condition for the constitutionality of adjudication by non-article III adjudicators of matters not within the public-rights exception. Without elaboration, Justice Rehnquist agreed that "traditional appellate review" by article III courts was alone not enough to save the Bankruptcy Courts. See id. at 91 (Rehnquist, J., concurring). Justice White believes that "the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers." Id. at 115 (White, J., dissenting). In Schor, Justice O'Connor noted that the legal determinations of the CFTC were subject to de novo review. See Schor, 478 U.S. at 855.

On the other hand, Judge Posner, a member of the Committee, see supra note 7, has suggested, without alluding to article III, that Federal appellate review of administrative decisions could be reduced in scope or completely eliminated if the appellate process within the agencies themselves was strengthened. See R. Posner, supra note 198, at 160-62.

210 See, e.g., Fallon, supra note 187, at 918; Redish, supra note 72, at 227.

211 See, e.g., Meltzer, supra note 123, at 295; Saphire & Solimine, supra note 208, at 149.

212 Redish & Marshall, supra note 152, at 456. Although the authors were referring to a limiting principle in the analysis of procedural due process, the quotation is equally fitting in the article III context. The authors continued: "Absent such a floor, the flexibility of [the Court's article III balancing test] threatens to make the guarantee dependent on legislative choice . . . ." Id.
ensure at least some oversight by article III courts of the adjudication by nontenured adjudicators employed by the political branches.

Judicial review theory should not be applied mechanically, however. Professor Fallon bases his conclusion that Thomas was wrongly decided on the extremely limited availability of judicial review: "In the absence of broader judicial review, investiture of authority to decide questions of law in a non-article III federal decisionmaker encroaches too deeply on the fairness and separation-of-powers values that article III embodies." This reasoning, however, ignores the fact that the arbitrators are employees of neither Congress nor the Executive. Indeed, as their salaries are paid by the parties to the dispute, the arbitrators are presumably as independent of the federal political branches as would be the state courts—adjudicators of federal law clearly contemplated under article III. Adjudication by civilian arbitrators not paid by the government, with judicial review available to restrain egregious misconduct, is consistent with article III's demands that the adjudicators of federal cases be independent of the federal political branches.

Professor Fallon's criticism would have considerable force if the Court were to permit such limited judicial review in the case of a non-article III adjudicator employed by the political branches.

In analyzing Schor, Professor Fallon concludes that it was rightly decided because the statute provided for de novo review of questions of law by an article III court. He further observes:

The Supreme Court in Schor also relied heavily on a waiver analysis, because the parties had consented to the jurisdiction of the

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213 Whether appellate review is sufficient in itself to satisfy article III or whether it is no more than a limiting principle to the balancing test, most commentators argue that the proper scope of judicial review of law and facts should be broadened if article III values are to be given more than lip service. See, e.g., Fallon, supra note 187, at 974-91; Redish, supra note 72, at 227-28; Saphire & Solimine, supra note 208, at 139-44. But see Monaghan, supra note 119, at 26-27 (viewing the matter as one of proper delegation of legislative authority to administrative agencies and concluding that "article III, standing alone, is not violated by judicial deference to administrative construction of law").

214 Fallon, supra note 187, at 991; see Saphire & Solimine, supra note 208, at 148 (concluding that, because of the extremely limited scope of review, "Thomas was wrongly decided").

215 One could contend that this argument may be undercut by the arbitrator's desire to please the government in an effort to stay on the roster of arbitrators maintained by the Federal Mediation and Conciliation Service. However, it is difficult to see how a decision one way or the other could "please" or "displease" the government at all. The government simply has no stake or interest in the matter of how much remuneration the arbitrator determines is fairly due one party from the other for use of its data.

216 Cf. Henry J. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1279 (1975) ("there is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards").
CFTC. The case thus suggests a question—which would have been presented directly had full appellate review not been provided—about the legitimacy and effectiveness of waivers of article III rights in the absence of appellate review. As long as the waiver is not procured by any form of illegitimate pressure, waiver ought to be held permissible within an appellate review theory.\(^{217}\)

Professor Fallon adds that determining whether a waiver of the article III tribunal is procured by illegitimate means requires analysis under the unconstitutional conditions doctrine.

May a litigant waive his personal article III rights in the absence of any possibility for article III appellate review? If so, how does waiver relate to the institutional concerns underlying article III? Small tax case jurisdiction, under which a taxpayer with a dispute involving $10,000 or less may elect to have the case conducted under simplified proceedings in the Tax Court in exchange for foregoing the right to appeal to the appropriate article III court,\(^{218}\) squarely presents these questions.\(^{219}\)

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\(^{217}\) Fallon, supra note 187, at 991 (footnote omitted) (emphasis added).

\(^{218}\) See supra notes 5, 59-64 and accompanying text.

\(^{219}\) It is difficult to say with complete certainty that the Court would view the issue as one requiring analysis under the unconstitutional conditions doctrine rather than as a simple “consent” case, as it did in Schor. By definition, unconstitutional conditions cases involve “the apparent paradox of consent.” Sullivan, supra note 105, at 1491. In the course of arguing that it did not consent to the Commission’s jurisdiction over the broker’s counterclaim, Schor made a short stab at an unconstitutional conditions argument in a footnote in its brief.

The court of appeals exhibited a serious doubt about the power of Congress to condition access to the Commission for federal claims on waiver of Article III protections for state claims. In other settings, the Court has struck down the enforced linkage of a government benefit and the surrender of a constitutional right.


The doctrine of unconstitutional conditions . . . is irrelevant to this case. Respondents have not been denied a government benefit because they exercised a constitutional right. Rather, they had the option of seeking resolution of their controversy with Conti in an Article III forum or in the reparations forum. [N]othing in the Constitution in general or Article III in particular requires that this choice be totally costless. Such a requirement would effectively render all constitutional rights nonwaivable.

Reply Brief for Petitioner at 5 n.4, Schor, 478 U.S. 883 (No. 85-621).

Neither the majority nor the dissent in Schor mentioned the unconstitutional conditions argument, which leads me to believe that the current choice presented the taxpayer—to litigate his claim in the article I Tax Court or article III district courts in the first instance—would not raise unconstitutional conditions concerns in the view of any Justice. But see supra note 181 (discussing possible equal protection problems with the prepayment requirement for access to the article III judge).

However, the pre-trial waiver of all possibility of appeal to an article III court as the direct trade-off for simplified proceedings in an article I forum seems to require consideration of the unconstitutional conditions doctrine, as the possibility of appeal to an article III court has been a backdrop in other “consent” cases. “[I]n the cases uphold-
And they are important questions. In each of 1985 and 1986, forty-three percent of all Tax Court cases were decided under the small tax case provisions.\textsuperscript{220} Since approximately ninety-five percent of all tax cases are brought in the Tax Court,\textsuperscript{221} roughly forty percent of all tax disputes in this country are not only decided by non-article III adjudicators at the trial level, but are also not subject to judicial review by article III courts.\textsuperscript{222}

The unconstitutional conditions doctrine provides that the government may not condition receipt of a benefit on the surrender of a preferred constitutional right, even if the government need not grant the benefit at all. Thus, the two components of an unconstitutional conditions problem are (1) a benefit that the government is permitted, but not compelled, to provide and (2) a constitutionally protected liberty, which "must rise to the level of a recognized right—indeed, a \textit{preferred} right normally protected by strict judicial review."\textsuperscript{223} Absent a constitutional right, the government "could directly compel the result that the condition on a benefit seeks to induce."\textsuperscript{224} If the right is not a "preferred" right, the matter would be analyzed under the minimal scrutiny applied in pure "benefit" or "gratuity" cases.\textsuperscript{225}

The benefit provided by small tax case litigation is expedited and simplified procedures in the Tax Court (\textit{i.e.}, a cost savings); the constitutional right involved is the personal right to an independent adjudicator identified by the \textit{Schor} Court. This personal right (the discussion assumes) is otherwise protected by the possibility of review of the non-article III Tax Court's decision by an article III court.\textsuperscript{226}

\textsuperscript{221} See supra note 8.
\textsuperscript{222} The $10,000 jurisdictional ceiling on the use of the small tax case procedure is quite generous. It applies only to the amount in dispute, not to total tax liability for the year. The following illustrations might help put the scope of the jurisdiction into perspective. The total tax liability for 1989 of a married couple filing jointly with $50,000 of taxable income would have been $9,976.50. A taxpayer in the 28\% marginal tax bracket who deducted a hefty $35,000 in interest payments that the Service claims were non-deductible could choose to litigate the matter as a small tax case since the deficiency amount at issue would be approximately $9,800.
\textsuperscript{223} Sullivan, supra note 105, at 1427.
\textsuperscript{224} Id.
\textsuperscript{225} See id. at 1415, 1424.
\textsuperscript{226} Implicit in the discussion is the assumption that adjudication of tax disputes falls outside the public-rights exception. See supra notes 115-30 and accompanying text. If the assumption is false, then no constitutional right is implicated, since by definition the matter could be determined exclusively within the executive branch.
Is the right to an independent adjudicator a "preferred liberty" subject to strict scrutiny when burdened directly, such as the fundamental rights to freedom of speech, free exercise of religion, or interstate travel, which are typically the subject of unconstitutional conditions cases? Although Professor Redish intimates otherwise, it is doubtful, given both the Court's extremely recent recognition of this "personal" right and its facile treatment of this right in Schor (and, indeed, given the Court's blessing of the proliferation of the administrative state in general). Perhaps the personal right to an article III adjudicator may not be taken as seriously as, for example, first amendment rights because of a perception that abrogation of the former results only in the possibility that the adjudicator will not act independently of the political branches. To some, the burden on the right to an independent adjudicator may not be as tangible as in the religion and privacy cases. Under rational basis review, the conditioning of the expedited proceedings on surrender of article III appeal would undoubtedly survive scrutiny, perhaps on the ground that the record of the simplified proceedings might not be adequate to support appellate review.

227 See, e.g., FCC v. League of Women Voters, 468 U.S. 364 (1984) (invalidating a condition denying federal broadcasting funds to stations that engage in editorializing); Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating a statute that denied welfare benefits to residents living within the state for less than one year); Sherbert v. Verner, 374 U.S. 398 (1963) (overturning a denial of state unemployment benefits to a claimant who would not work on Saturday, her sabbath); Speiser v. Randall, 357 U.S. 513, reh'g denied, 358 U.S. 860 (1958) (invalidating a state requirement that World War II veterans take a loyalty oath as a condition of receiving a property tax exemption for veterans).

228 "Constitutional logic should not differ when the relevant constitutional restraint is the article III protection of judicial independence, rather than the first amendment right of free expression." Redish, supra note 72, at 213.

229 Trials of small tax cases are conducted "as informally as possible consistent with orderly procedure, and any evidence deemed by the Court to have probative value [is] admissible." Tax Ct. R. 177(b). While neither briefs nor oral arguments are required, they may be submitted on request of either party. See Tax Ct. R. 177(c). The trial is stenographically reported, but a transcript need not be made unless the Court directs. See Tax Ct. R. 178.

230 If, on the other hand, the right is considered a preferred liberty, how would the case be analyzed? While a single theory is not evident in the Court's jurisprudence, the cases talk most frequently of coercion. In the context of this case, the issue would be whether or not the provision of expedited proceedings induces or coerces claimants to refrain from exercising their article III rights of appellate review or whether there is nothing more than a voluntary exchange. See Sullivan, supra note 105, at 1428-56. Alternatively, the Court has considered whether the government's action is a corruption of the legislative process, as measured by the "germaneness" of the condition to the benefit, see id. at 1456-76, or whether the action results in the commodification of inalienable rights. See id. at 1476-89.

Professor Sullivan persuasively reveals the shortcomings of each of these approaches and suggests an alternative approach "grounded in the systemic effects that conditions on benefits have on the exercise of constitutional rights." Id. at 1490. Strict review should be applied in all cases in which conditions on government benefits either
Without invoking the unconstitutional conditions doctrine, Professor Meltzer implies that waiver of article III appellate review rights should generally be permissible; he sees no substantive difference between an effective waiver of judicial review by an article III court after decision by a non-article III tribunal (made by choosing not to appeal) and a waiver before adjudication by consent.231

If the sole consideration at stake were the waiver of a personal right of the litigant, that argument might be persuasive. However, Professor Meltzer agrees with Justice Brennan’s observation that “the structural and individual interests served by article III are inseparable.”232 As a result, allowing the litigant to waive article III judicial review may be incompatible with the institutional component of article III. As Professor Sullivan notes in her discussion of unconstitutional conditions:

Individuals who waive constitutional rights in exchange for government benefits, even if uncoerced, might undervalue the structural values those rights serve. Individuals lack both the information and the stake necessary to assess the value of their own exercise of rights to third parties and to the polity as a whole. A systemic approach can bar government from redistributing rights even if affected individuals consent.233

This position is echoed in Schor, in which the Court implied that forum choice and consent will not cure institutional separation-of-powers problems in the absence of adequate article III supervision or control of the non-article III tribunal.234

(1) skew the balance of power between the government and rightholders through state encroachment into the sphere of private autonomy or private ordering (e.g., allocating welfare benefits only to those who join the incumbent party’s ranks), (2) skew the horizontal relationships among classes of rightholders (e.g., offering cash bounties to Republican converts), or (3) skew vertical relationships among rightholders, creating an unconstitutional caste system (e.g., conditioning welfare benefits on contribution of body organs to a public organ bank). See id. at 1489-1505.

Applying a systemic approach may result in strict scrutiny review in this case (assuming, again, that we are dealing with a “preferred liberty”) under the third systemic concern of preventing a constitutional caste system. “This strand recognizes that background inequalities of wealth and resources necessarily determine one’s bargaining position in relation to government, and that the poor may have nothing to trade but their liberties.” Id. at 1497-98. Those litigants with the most meager resources may be the ones who forgo their article III appeal rights in order to take advantage of the less expensive proceedings. “Strict review, however, is not always fatal—a point illustrated, for example, by the Court’s limited toleration of affirmative action plans in the face of strict equal protection scrutiny, or approval of restrictive abortion regulations after the point of viability.” Id. at 1503 (footnotes omitted).

231 See Meltzer, supra note 123, at 303.
233 Sullivan, supra note 105, at 1491.
234 See supra note 167 and accompanying text.
In view of the independence concerns underlying article III, I believe there is a substantive difference between the pre- and post-trial waiver of article III appeal rights. The very possibility of review colors the initial decision-making process and inevitably affects the behavior of the non-article III decision maker during that process. Indeed, it is a rare trial judge who does not give some thought to the prospect of appellate review when making rulings and when writing a final opinion. With the possibility of appeal ruled out before trial, the decision maker is unrestrained from ruling in accordance with the desires of the executive branch (i.e., the IRS) or, at the very least, is less able to withstand pressure to do so. Any possible check on executive power is lost, resulting in the very aggrandizement that the institutional component of article III is designed to prevent.\textsuperscript{235}

The power to interpret federal statutory law could be seen as acting as a check on the exercise of the executive power—or the power of administrative agencies whether or not they are considered as under the head of executive authority—given that what courts do when they review agency action, both rulemaking and adjudication, is ensure that the reviewed action has not departed from congressional intent.\textsuperscript{236}

The article III concerns at the institutional level, resulting from the lack of any possibility of article III appellate review, are magnified when one remembers that approximately forty percent of all tax cases in the nation are litigated under the small tax case procedures. Twice removed from an article III court, the small tax case raises the most troubling aspect of the Tax Court's current jurisdiction in article III terms, particularly at the structural level.\textsuperscript{237} Indeed, it may be the most compelling reason to grant article III tenure to the Tax Court judges if the alternative is to abolish this helpful portion of Tax Court jurisdiction.

V

Conclusion

It is by now clear that, under the Court's current doctrine, there is no readily ascertainable answer to the question with which this Article began. A denial of independence guarantees to those adjudicating the amount of tax a citizen is legally obligated to pay the federal government is not constitutionally defensible in the face of a

\textsuperscript{235} See supra note 158 and accompanying text.


\textsuperscript{237} It is made more troubling by the fact that decisions in small tax cases can be entered by the "special trial judge" without the involvement of a Tax Court judge at all. See supra notes 59-64 and accompanying text.
thoughtful application of current doctrine. Judicial analysis in this area, however, is veiled by layer upon layer of dubiety, including the scope of the public-rights exception, the appropriateness of the factors considered under the balancing test, and the proper role of judicial review theory.

Yet, despite all the uncertainty which besets this issue, I think it virtually certain that the Supreme Court will never address the constitutionality of the Tax Court. The Justices were essentially forced to hear both Schor and Thomas; the lower courts had ruled the non-article III tribunals unconstitutional, and the Supreme Court had to restore the tribunals to life. The circuit courts have had no difficulty in concluding (largely without analysis) that the Tax Court is a valid legislative court under article I. In the absence of a circuit court opinion splitting ranks, it is unlikely that the current Court would disturb those holdings by accepting a taxpayer's petition of certiorari, particularly in view of the recent departure of the Court's article III champion, Justice Brennan.

I do not view this work as an exercise in futility, however. It has provided a framework with which to more thoughtfully evaluate the Committee's proposal to vest essentially all authority to hear tax cases in the Tax Court, which would remain an article I court at the trial level. Several of the arguments that might be proffered in support of the constitutionality of the current Tax Court depend on the availability of an alternative article III forum—an alternative forum which would be lost under the Committee's proposal. While there may be defensible policy reasons for supporting the Committee's single-forum idea (such as eliminating forum shopping and promoting certainty), Congress should provide the judges of that single forum with article III tenure and salary guarantees. Indeed, the Committee's initial draft contemplated just that.

Even absent adoption of the Committee's proposal, there are sound reasons why Congress should vest the judges on the currently constituted Tax Court with the article III guarantees. Not the least of these is the questionable constitutional status of the Tax Court's small tax case jurisdiction. The pre-trial waiver by forty percent of all tax litigants of appellate review by an article III court is troubling if the trial court itself is not an article III court; Congress need not

238 See supra note 2. Just why the circuit courts have been so easily persuaded without searching analysis is somewhat of an enigma. Because appeals from tax cases come to the circuit courts whether they are tried in the district courts or in the Tax Court, the holdings can't be understood as simply an attempt to avoid hearing tax cases, a position sympathetic to Justice Brennan. See Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 429 (1979) ("This is a tax case. Deny." That was Brennan's normal reaction to a cert request in a tax case.").

239 See supra note 10.
wait for the Supreme Court to say so before correcting the problem. The concerns about the constitutionality of the existing Tax Court are grave enough to resolve any doubt in favor of conferring the independence guarantees on its judges.

Indeed, constitutional concerns aside, there is a prudent reason why Congress should act: to encourage confidence in the system by its users—a system dependent in large part upon voluntary compliance (in the sense that enforcement capabilities would be overwhelmed by a massive taxpayer revolt). Congress began to address such concerns by enacting the so-called “Taxpayer Bill of Rights” in 1988. Justice Brennan noted the “institutional value” of the promotion of public confidence in judicial determinations due to the independence conferred by the article III protections. The message sent to the large number of taxpayers litigating their cases pro se under the Tax Court’s small tax case jurisdiction would be that they can be heard by an independent adjudicator, rendering the loss of appeal rights more palatable. It might even encourage greater use of the small tax case provisions.

Finally, the Article has highlighted the weaknesses of the Court’s current approach in establishing normative principles in the article III area. Perhaps it is a studied weakness, born of the more pervasive view held by some Justices outside of article III analysis that many issues before the Court should more appropriately be addressed by the political branches of the federal government or by the states. In light of the explosive growth in executive and congressional power in this century, that view can be dangerous. Judicial power has been anathema to certain Presidents as well as to many in Congress who would welcome a constitutional amendment repealing the life tenure provision. Viewed in this light, the Court’s nebulous and malleable approach to article III will only embolden

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242 Of course, the “special trial judges,” operating under the adjunct model of Raddatz, see supra note 94, should be prohibited from entering the final decision in small tax cases. Review of the stenographer’s records and the rendering of an independent decision by Tax Court judges—the only requirements under Raddatz—do not seem to be too burdensome a task to ask of them.
243 See, e.g., Cruzan v. Director, Mo. Dep’t of Health, 110 S. Ct. 2841 (1990) (Scalia, J., concurring) (“the federal courts have no business in this field,” concerning the right to die); David Margolick, Souter Hearings Won’t be Useful for Predictions, One Justice Says, N.Y. Times, Aug. 8, 1990, at A-12, col. 1 (reporting that Justice Stevens criticized the Court for hearing the flag burning cases in a speech made to the annual ABA meeting, stating that “they should have been left to the state courts to decide”).
the political branches to vest more and more adjudicatory authority in tribunals under their control.

The Court should strengthen both article III and the intellectual weight of its article III analysis, and may do so by addressing three points in particular. First, the Court should emphasize that, under the still-extant public-rights exception, there is a substantive difference between benefit cases (whatever their scope) and cases in which the government is attempting to enforce a duty imposed on citizens that could result in the loss of their property or liberty, with the latter group clearly falling outside of the exception.

Second, the Court should clarify that article III appellate review is a necessary, but not sufficient, floor which ensures at least minimal judicial oversight of executive enforcement of Congress's statutory scheme.

Third, and most important in my view, the Court must recognize that the factors to be weighed against the burden on article III values under the balancing test should consist of the reasons, if any, why tenure and salary protection for the particular adjudicators are considered problematic. Bluntly put, the appropriateness of specialist judges or procedures different from those currently employed in the district courts are simply not relevant to the justifiability of declining to vest particular adjudicators with the independence protections of article III. When the fallacy of the "efficiency" line of reasoning is exposed, in many cases (including the case of the Tax Court, I believe), we find the emperor has no clothes.