CHAPTER I

THE DELEGATION OF AUTHORITY TO AGENCIES

The study of administrative law can be viewed as an analysis of the limits placed on the powers and actions of administrative agencies. These limits are imposed in many ways, and it is important to remember that legal controls may be supplemented or replaced by political checks on agency decisions. One set of legal controls that we will examine at length is the procedures that reviewing courts have required the agencies to use. Another is the rules specified by Congress in the Administrative Procedure Act (APA) and other statutes. Conceptually, however, the first question that should be examined is the amount of legislative or judicial power that can be entrusted initially to the agency by the legislature—the governmental body creating it.

1. A. THE DELEGATION ISSUE

Throughout the modern era of administrative regulation, agencies have been vested with sweeping powers. Some of these powers are assigned on an industry-wide basis, as with the Federal Aviation Administration Federal Communications Commission, and the Nuclear Regulatory Commission. Other agencies are charged with enforcing certain norms of conduct throughout the economy. These range from the Federal Trade Commission, which since 1914 has enforced a ban on "unfair methods of competition," to newer health and safety regulators, such as the

Environmental Protection Agency and the Occupational Safety and Health Administration. These grants of authority are commonly described as *delegations* from the legislative branch.

What makes the delegations particularly dramatic is that these agencies typically wield powers that are characteristic of each of the three principal branches of government. The statutes under which many agencies operate can be described as giving them *legislative power* to issue rules that control private behavior, and that often carry heavy civil or criminal penalties for violations; *executive power* to investigate potential violations of rules or statutes and to prosecute offenders; and *judicial power* to adjudicate particular disputes over whether an individual or a company has failed to comply with the governing standards.

For example, the Securities and Exchange Commission (SEC) formulates law by writing rules that spell out what disclosures must be made in a stock prospectus; these rules may have the same effect as a law passed by Congress. The SEC then enforces these rules by prosecuting those who violate its regulations through disciplinary actions against broker-dealers or through stop order proceedings against corporate issuers. Finally, the SEC also acts as judge and jury in deciding whether its rules have been violated; it conducts adjudicatory hearings to determine guilt and mete out punishment (subject to judicial review). (In addition, so-called independent agencies like the SEC are subject to little management or control by the President. See p. 65 infra.)

11

Such delegations raise fundamental questions concerning the constitutional distribution of authority in our system of government. The federal Constitution, and most state constitutions as well, are based on the principle of separation of powers. Generally, law-making power is assigned to the legislature, law-enforcing power to the executive, and law-deciding power to the judiciary. With responsibility divided in this fashion, each branch theoretically provides checks and balances on the exercise of power by the other two branches. The combined powers of administrative agencies seem, at least formally, at odds with the three-part paradigm of government.

Practical justifications for these broad delegations of combined powers can be found in the institutional advantages of the administrative agency. Particularly in novel or rapidly changing fields of activity, the legislature may be unable to specify detailed rules of conduct. An agency, armed with flexible decisionmaking procedures and charged with continuing responsibility for a limited subject matter, may be better equipped to develop sound and coherent policies. Moreover, effective development and implementation of regulatory policy may require the exercise of all three kinds of power. A rule or a policy decision can be quickly nullified in practice if investigations and prosecutions are not vigorously pursued, or if adjudications are decided by tribunals that do not understand or support the regulatory goals. When the subject matter of a regulatory program is technical or complex, or when detailed knowledge of the regulated industry is essential to 12

the formulation of sound policy, administrative agencies can bring to bear their superior experience and expertise. Uniformity and predictability are also important in many areas of economic regulation. Businesses need to plan their operations and make their investment decisions with some assurance that the ground rules will not be changed abruptly or applied inconsistently—problems that might well arise if decisionmaking power were dispersed among the three branches of government.

It should also be noted, however, that a substantial number of legislators, judges, and commentators are unpersuaded by these arguments. They have continued to explore ways in which the delegations of broad authority to the agencies might be limited.

1. B. DEVELOPMENT OF DOCTRINE

The so-called *nondelegation doctrine* asserts that the Constitution limits Congress's ability to confer power on administrative agencies. Proponents of the doctrine typically rely either on general separation of powers notions or on the language of Article I, § 1 of the Constitution, which provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." To be sure, that constitutional language does not necessarily support their position. One can think of an agency's role in implementing a regulatory statute as nothing more than an exercise of *executive* power, even if the agency plays something of a lawmaking role along the way. Nevertheless, ever since the earliest days of administrative law, courts have encountered—and 13

occasionally endorsed—suggestions that at least some delegations constitute attempts to transfer "legislative powers" that Congress alone may wield.

The earliest judicial decisions discussing the nondelegation doctrine contained broad, uncompromising statements. A classic example is the Supreme Court's statement in Field v. Clark, 143 U.S. 649, 692 (1892): "That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Nevertheless, the Court in its early decisions consistently upheld delegations by minimizing their significance. Typically the Court would claim that, in the cases presented to it, the executive branch had been granted nothing more than a power to "ascertain and declare the event upon which . . . [the legislative] will was to take effect" *(Field)*, or a power to "fill up the details," United States v. Grimaud, 220 U.S. 506 (1911). In truth, the executive branch was not merely finding facts or supplying details in these cases; it was exercising a substantial measure of policy judgment. The *Field* case involved a congressional authorization for the President to impose retaliatory tariffs when foreign nations raised their duties on agricultural products; *Grimaud* upheld the power of the Secretary of Agriculture to issue regulations, backed by criminal penalties, governing the use and preservation of the national forests. The holdings of the cases, therefore, belied the Court's absolutist language.

However, as the modern industrial economy developed and demands for regulation grew, it became apparent that these narrow formulas were too restrictive, even when moderated by a liberal interpretation. Gradually the focus of judicial inquiry shifted to whether the legislature had provided *sufficient standards* to limit the scope of agency discretion. In J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928), the Supreme Court refined this modern version of the nondelegation doctrine in the often-quoted statement that, to be permissible, a delegation must contain an "intelligible principle to which the [agency must] . . . conform."

Throughout this early evolution of the doctrine, the Supreme Court had never invalidated a congressional grant of authority to an administrative agency on delegation grounds. However, the Great Depression of the 1930s brought a wave of new regulatory agencies, armed with broad statutory delegations of authority, to control the economy. In the rush to find solutions for this overwhelming economic crisis, some regulatory statutes were poorly designed, poorly drafted, and poorly implemented as well. One of the most visible and controversial of these New Deal regulatory agencies, the National Recovery Administration, provided the Supreme Court with an opportunity to demonstrate that the nondelegation doctrine could become a very real constraint on the powers of administrative agencies.

The first major test came in the "Hot Oil" case, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). 15

The National Industrial Recovery Act (NIRA) had authorized the President to prohibit interstate shipments of "contraband" oil. The purpose of this provision was to reduce economic disruptions in the oil industry, which was faced with falling demand and an increasing supply from newly discovered oil fields. The Court found that the statute gave the President absolutely no guidance as to the circumstances under which he should impose the prohibition. Accordingly, for the first time in its history, the Supreme Court struck down an Act of Congress as an overly broad delegation of legislative power.

The regulation that was challenged in *Panama Refining* also had a serious procedural defect. The "code" in question had never been officially published. Just before the case was argued in the Supreme Court, it was discovered that the code had accidentally been amended out of existence. One beneficial side effect of the *Panama Refining* decision was the passage of legislation requiring federal agencies to publish official texts of their regulations in the Federal Register. See 5 U.S.C. § 552(a)(1).

Further questions about the constitutionality of the NIRA arose a few months later in the decision that is usually referred to as the "Sick Chicken" case. It involved a criminal prosecution for violations of the Live Poultry Code issued under another section of the NIRA. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). As in the Hot Oil case, the Court was concerned by the lack of both substantive and procedural standards. The statute 16

had empowered the agency (acting on behalf of the President) to issue "codes of fair competition" for particular industries if the code "tend[ed] to effectuate the policy of this title." However, the Court could not find a clear policy directive in the legislation; indeed, the congressional statements of policy seemed to pull in several different directions. The Act adopted the policies of preventing monopolies while promoting cooperative actions among trade groups, and of encouraging increased production while improving the wages and conditions of labor; it gave no indication of how these potentially conflicting values should be weighed or reconciled. The Court also gave considerable emphasis to the procedural deficiencies in the Act. In contrast to prior delegations of authority to the Interstate Commerce Commission or the Federal Trade Commission, the NIRA did not require the agency to hold trial-type hearings, or even to provide interested persons with notice and a right to participate in the challenged decision. Nor did it provide an opportunity for judicial review to those who might be adversely affected. Thus, the Court concluded that the delegation was unconstitutionally broad.

A third Supreme Court decision invalidating a delegation on constitutional grounds was also decided in the 1930s. Carter v. Carter Coal Co., 298 U.S. 238 (1936), involved a system of industry "codes" for the coal industry, roughly similar to the "codes of fair competition" that were at issue in the *Schechter* case. In *Carter Coal*, however, the Court noted an additional factor that made the delegation suspect: decisionmaking power effectively had been granted 17

to committees of industry representatives rather than to government officials. Because these private parties had "interests [which] may be and often are adverse to the interests of others in the same business," the statute was "legislative delegation in its most obnoxious form."

In retrospect, these three decisions were the high-water mark for the nondelegation doctrine. Although Congress has continued to grant sweeping, vaguely defined powers to administrative agencies in the ensuing decades, the Supreme Court has not invalidated any other statutes on nondelegation grounds. Repeatedly, the Court has held that even the vaguest of regulatory provisions satisfied the "intelligible principle" test of *J.W. Hampton*. This leniency is exemplified by Yakus v. United States, 321 U.S. 414 (1944). There the system of wartime price controls was challenged on delegation grounds. The statute empowered an Administrator to promulgate standards that would be "generally fair and equitable and . . . effectuate the [enumerated] purposes of this Act." The Court upheld the statute, noting that constitutional problems would arise only if the legislation were so lacking in standards that "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." This leniency has continued right up until the present day. See, e.g., Mistretta v. United States, 488 U.S. 361 (1989) (upholding statute authorizing commission to write criminal sentencing guidelines). The Court's unwillingness for over seventy years to require precise standards in legislative delegations has led some commentators to conclude that this 18

branch of the nondelegation doctrine is simply unworkable, and ought to be abandoned altogether. Yet, as discussed in the next section, proposals for a reinvigoration of the doctrine have continued to surface.

1. C. MODERN NONDELEGATION CONTROVERSIES

A decision involving the Occupational Safety and Health Act of 1970 spurred broad discussion of whether the Court should begin anew to hold broad delegations unconstitutional. Section 6(b)(5) of that Act directed the Secretary of Labor to issue rules requiring employers to protect their workers, "to the extent feasible," from harm due to toxic substances in the workplace. The Secretary subsequently promulgated a regulation that called for expensive measures to minimize workers' exposure to benzene, a cancer-causing chemical. The Supreme Court struck down the rule in Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980), commonly known as the *Benzene* case. Four Justices, led by Justice Stevens, believed that the Secretary had not made all of the findings required by the statute. The fifth vote against the Secretary was that of Justice (later Chief Justice) Rehnquist, who would have held that the statute contained an unconstitutional delegation to the Secretary. He regarded the statutory phrase "to the extent feasible" as a "legislative mirage" by which Congress had simply avoided resolving the hard questions about the circumstances in which employers could be allowed to take some risks of injury to workers 19

because of the high costs of protective measures. Resolving fundamental, politically divisive policy issues, he insisted, is the very essence of legislative authority and could not "unnecessarily" be left to a politically unresponsive administrator. See also American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), in which Justice Rehnquist repeated his position and was joined by Chief Justice Burger. In ensuing years, however, Rehnquist never tried to extend this argument to other situations.

The Clean Air Act provided the backdrop for a more recent effort to revitalize the nondelegation doctrine. The Environmental Protection Agency promulgated a rule that set limits on emissions of particulates (such as soot particles) and ozone. The relevant section of the Act directed the agency to set air quality standards at a level that is "requisite to protect the public health with an adequate margin of safety." A lower court set aside the rule, asserting that the agency had articulated no "intelligible principle" to channel its exercise of discretion. Any exposure limit above zero would entail some health risk, and EPA had "failed to state intelligibly how much is too much." American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999). Here the court applied the nondelegation doctrine in an unusual fashion, by claiming that the agency itself, rather than Congress, must supply the needed clear principle. This reinterpretation of the nondelegation doctrine, the court believed, would harmonize with the modern trend under which courts look to agencies to play a leading role in fleshing out gaps in a statutory mandate. See pp. 78–88 infra. The 20

Supreme Court, however, curtly dismissed the idea that an agency's own standards can cure an unconstitutional delegation. That idea was "internally contradictory," according to the Court, because "the prescription of the standard that Congress had omitted . . . would *itself* be an exercise of the forbidden legislative authority." The Court then upheld the Act, emphasizing the requirement that air quality standards must be set at a level that is "requisite"—that is, neither higher nor lower than necessary—to protect public health. Although this criterion did leave room for administrative lawmaking, the Court said, it "fits well within the scope of discretion permitted by our precedent." Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

Although *American Trucking* helps to clarify the factors that are relevant to the constitutionality of a delegation, large questions about the future of the doctrine remain open for debate. Some commentators, believing that the legislative abdication that Justice Rehnquist perceived in *Benzene* is a common phenomenon, have urged the Court to make more frequent use of the nondelegation doctrine to invalidate regulatory legislation. In the present climate, they say, Congress has too great a temptation to make use of open-ended delegations, so that it will be able to divert public blame from itself to the bureaucracy when regulatory decisions prove controversial. Indeed, Justice Thomas has gone further, suggesting that the federal government should be allowed to "create generally applicable rules of private conduct 21 only through the constitutionally prescribed legislative process"—not through administrative rulemaking. Dep't of Transportation v. Ass'n of American Railroads, 135 S. Ct. 1225 (2015) (opinion concurring in the judgment).

While the courts have seldom articulated why they have failed to accept the challenge of Justice Rehnquist and others, three possible explanations can be suggested. First, some courts probably continue to believe that broad delegations are on the whole desirable, because they make maximum use of the flexibility that the administrative process affords. See pp. 9–12 supra. Indeed, it has been argued that broad delegations are not even necessarily undemocratic, as Rehnquist claimed. Many of them can be seen as simply shifting policymaking discretion to appointees of the President, who has his or her own electoral base. In other words, vague delegations can at times be defended as a means of giving an incumbent Administration the latitude it needs if it is to implement the President's electoral mandate.

Second, the courts may believe that they cannot devise a workable test with which to implement the nondelegation doctrine. It might be very difficult for judges to identify those delegations that involve "fundamental" issues or that are motivated by a congressional desire to avoid political accountability. If the standards for applying the nondelegation doctrine were too subjective, every new regulatory statute would be under serious threat of being held unconstitutional. It would be all too easy for private

22

parties to make a credible argument, especially with hindsight, that Congress should have spoken in more detail than it did.

Finally, and perhaps most important, courts may have refrained from using the nondelegation doctrine to strike down statutes because they have found alternative methods of preventing broad grants of power from becoming instruments of administrative oppression. The next section discusses some of these methods.

1. D. CONSTRUCTION TO SAVE A DELEGATION

Although the requirement that delegations of lawmaking authority must contain substantive standards has been relaxed, if not abandoned, since the 1930s, courts are highly attentive to questions about the legitimate scope of agencies' powers. The tendency in modern cases is to address these questions by examining not only whether an administrative statute contains an "intelligible principle" on its face, but also the total system of controls, both substantive and procedural, that limit agency power. The issue becomes whether the statutory scheme, taken as a whole, fulfills the fundamental objective of the nondelegation doctrine—assuring adequate control and accountability in the exercise of official power. Integral to this mode of analysis is the principle that a court should construe a statute to avoid constitutional difficulties. In line with that principle, courts sometimes adopt relatively restrictive 23

interpretations of regulatory legislation, while stating or suggesting that a more permissive reading could raise problems under the nondelegation doctrine.

A famous case that illustrates these tendencies is Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971). Like the *Yakus* case, *Meat Cutters* involved a broad grant of discretion to the President to set limits on wages and prices throughout the national economy. The court upheld this statute in litigation that challenged President Nixon's adoption of a wage-price freeze. Although the text of the legislation gave little if any direction as to how the President's authority should be administered, the court reviewed the legislative history and the nation's experience under previous price control programs to give content to the vague statutory language. The court concluded that the statutory standard of an earlier program—that any price controls imposed must be fair and equitable—could be read into the legislation under which the President had adopted the current controls. The court also emphasized that Congress would closely monitor the program, and that judicial review was available pursuant to the APA. Finally, the court declared that the executive branch could be expected to develop its own administrative standards over time, thus supplying the requisite specificity and precision.

To the extent that the holding in *Meat Cutters* rested on standards that the executive branch itself would need to devise, its reasoning is probably no 24

longer tenable in light of the *American Trucking* case discussed in the preceding section. However, the broader message of *Meat Cutters*—that the validity of a delegation can rest on the overall system of controls that a court can find in the regulatory framework—remains viable and finds parallels elsewhere in the case law.

1.*Implying Substantive Limitations.* Even when a statute has not been directly challenged as violating the nondelegation doctrine, courts sometimes adopt a relatively narrow view of an agency's powers, intimating that a broad view might constitute an unlawful delegation of legislative power. This device was employed to save a questionable delegation in Kent v. Dulles, 357 U.S. 116 (1958), where the Court construed the relevant statutes to prohibit the Secretary of State from denying a passport because of the applicant's political beliefs. Since the administrator's decision curtailed the constitutionally protected freedom to travel, and prior administrative practice had not included similar restraints, the Court would not presume that the agency had been granted the power in question without a clear statement of congressional intention. See also Zemel v. Rusk, 381 U.S. 1 (1965).

The narrow construction device also played a role in the two Supreme Court cases discussed in the preceding section. In *Benzene*, Justice Stevens, writing for a plurality, declined to accept Justice Rehnquist's conclusion that the Occupational Safety and Health Act was unconstitutionally vague. Instead, he maintained that the benzene rule was 25

flawed because the agency had not found that the requirements would cure a "significant risk" in the workplace, as he claimed the Act required. Most commentators agree that this construction of the Act was rather forced. But Stevens declared that he was adopting it partly because of the possibility that, without this limitation, the Act would have violated the nondelegation doctrine. Similarly, in *American Trucking*, the Court not only upheld the Clean Air Act but also used statutory interpretation to define its limitations. In addition to reading the statute as requiring that EPA's air quality standards must go no further than "necessary," the Court endorsed the government's concession that any such standards must "reflect the latest scientific knowledge." That construction, which went beyond the statutory language, imposes a significant constraint on EPA's rulemaking power.

2.*Procedural Safeguards*. Procedural safeguards to assure fair, informed decisionmaking can be crucial to the validity of a possibly overbroad delegation. In the *Panama Refining* and *Schechter* decisions, the Court placed considerable emphasis on the fact that the statutes did not require the President to use fair and open administrative procedures and explain his decisions clearly. This theme was also reflected in the *Carter Coal* case. Where governmental power has been delegated to a private group, some members of the industry may attempt to use this grant of authority to harm or exclude their competitors. Such regulation by a biased decisionmaker may be fatal to a delegation 26

under the due process clause. See pp. 239–242 infra.[1] Conversely, in *Meat Cutters* the presumed availability of judicial review under the APA supported the validity of the delegation, because it ensured that administrative standards could be tested for rationality and compliance with the congressional intent, and that the agency's consistency in interpreting and applying those standards in particular cases could be checked.

The notion that the availability of judicial review can help sustain a delegation also played a role, at least implicitly, in the Court's decision in Touby v. United States, 500 U.S. 160 (1991).

Under a 1984 amendment to the Controlled Substances Act, the Attorney General could summarily issue a "temporary scheduling order" imposing strict regulatory controls on newly invented "designer drugs." In a prosecution of a drug manufacturer for violating such an order, the defendant argued that the statute was an invalid delegation, in part because the Act provided that a temporary scheduling order "is not subject to judicial review." The Court parried this argument by holding that the Act's seemingly absolute bar to judicial review referred only to *preenforcement* challenges to scheduling orders; an individual facing criminal charges could still attack the validity of such an order as a defense to prosecution. By adopting this somewhat strained 27

statutory interpretation, the Court seemed to acknowledge that a more literal reading of the act might indeed have raised serious doubts about the constitutionality of the Attorney General's powers.

3.*Conclusion.* The courts' technique of implying limitations to circumscribe a broad delegation obviously must be used with restraint. Substitution of judicial for executive lawmaking does little if anything to promote one of the major objectives of the nondelegation doctrine—to encourage Congress to take responsibility for major policy choices. Instead, this technique replaces one unelected decisionmaker with another. Indeed, a judicially imposed construction may impair the efficacy of the regulatory scheme or make it less workable.

If, however, the choice is between construction to avoid a nondelegation problem and actual invalidation of a regulatory statute, the former has evident advantages. A judicial holding that a delegation is unconstitutional invites a major confrontation between the branches of government, for it may require radical restructuring or even abandonment of an entire program. Statutory interpretations that specify limits to regulation or require procedural fairness are less disruptive and more easily correctable if the court has misread the will of Congress.

The practice of construing regulatory authority to save a delegation also represents an effort to accommodate the needs of a complex modern economy. Rigid insistence on the legislative specification of detailed standards often may be 28

unsound and unworkable. For many regulatory problems, the legislature can neither foresee what actions the agency should take, nor constantly revise the statutory mandate as conditions change. Even when the policy alternatives are reasonably clear, an attempt to write highly detailed standards in the legislature may delay the passage of desired legislation, or jeopardize its chances for enactment. The nondelegation doctrine remains available as an *in terrorem* threat—and could be used in truly extreme cases. For most situations, however, the more immediate—and more pragmatic—task for Administrative Law is to evaluate and further refine the doctrines and techniques for making bureaucratic power accountable, without destroying the effectiveness of those administrative agencies considered necessary.

1. E. DELEGATION OF JUDICIAL POWER

The discussion thus far has concerned delegation of *legislative* power. A distinct question is the extent to which Congress may grant an agency *judicial* power, i.e., the power to adjudicate controversies between individual litigants. A strict reading of Article III of the Constitution, which provides that the "judicial Power of the United States" shall be exercised by judges with lifetime tenure and salary protection, would foreclose this option.

The propriety of using administrative agencies to adjudicate was long considered settled by Crowell v. Benson, 285 U.S. 22 (1932), which allowed an agency to resolve workers' compensation claims brought by 29

maritime workers. The Court recognized that the case involved "private rights," i.e., rights between private parties, and thus closely resembled cases traditionally heard in Article III courts. Nevertheless, the Court saw no objection to administrative adjudication as long as Congress permitted full judicial review of the agency's legal conclusions and deferential judicial review of its fact findings.[2] The Court indicated that Article III was even less of a constraint in controversies involving "public rights," i.e., rights between a private party and the government.

In 1982, however, the Court raised doubts about the survival of *Crowell's* permissiveness when it held unconstitutional the system of bankruptcy courts that Congress had established in 1978. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Although there was no opinion for the Court, the prevailing Justices expressed concern that Congress had authorized the bankruptcy judges to adjudicate a wide range of private rights questions, including rights that derived from state law rather than from Congress itself. *Northern Pipeline* was widely regarded as potentially applicable to administrative agencies as well as specialized courts.

30

But subsequent cases have removed many of these apprehensions. First, the Court upheld the EPA's use of an arbitrator to decide how much one pesticide manufacturer should pay another for using the latter's research data in a registration proceeding under the Federal Insecticide, Fungicide and Rodenticide Act. Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985). Although this was in one sense a private rights case, the Court considered the distinction between public and private rights unhelpful. Instead, it stressed that Congress must have the flexibility to adopt innovative procedures to implement a complex regulatory scheme. Furthermore, the manufacturer that would be making the payment had in effect consented to the use of arbitration; and the Act provided for judicial review of the arbitrator's decision for fraud, misconduct, misrepresentation, or constitutional error. Later, the Court sustained the jurisdiction of the Commodity Futures Trading Commission to resolve a dispute between a commodities broker and his customer, including a counterclaim based on state law. CFTC v. Schor, 478 U.S. 833 (1986). Again the Court emphasized that the private nature of the claims should not prevent the Court from weighing a number of factors in deciding whether Congress had fatally compromised the independence of the judiciary. Given that the parties had voluntarily chosen to litigate their claims before the CFTC rather than in court, that traditional judicial review was available, and that the CFTC's jurisdiction over private rights was strictly limited to what Congress believed necessary to make the regulatory scheme 31

effective, there was no reason to invalidate this minor transfer of Article III business. *Northern Pipeline* does, however, continue to have some saliency in the bankruptcy context, see Stern v. Marshall, 564 U.S. 462 (2011) (bankruptcy judge could not decide defamation counterclaim, because it concerned a matter of private rights, in contrast to agency cases such as *Schor*).

Thus, Congress's power to delegate judicial power to agencies seems fairly secure. Nearly all administrative cases involve "public rights," which are universally considered appropriate for agency adjudication. Similarly, the Seventh Amendment right to jury trial is no bar to administrative adjudication, at least in "public rights" cases. Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977). Indeed, when the Court upheld a creditor's right to jury trial in a bankruptcy trustee's suit to recover a fraudulent conveyance, it was careful to reaffirm that an administrative agency may adjudicate a dispute between private citizens if the claim is "closely intertwined with a federal regulatory program Congress has power to enact." Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989). But cf. Tull v. United States, 481 U.S. 412 (1987) (when government brings penalty action *in court*, jury trial right still obtains).

[1]Cf. Ass'n of American Railroads v. U.S. Dep't of Transportation, 821 F.3d 19 (D.C. Cir. 2016) (Amtrak, a quasi-governmental entity, was unconstitutionally biased because it helped to set regulatory standards but also had a statutory mission to maximize its own profits).

[2]The Court insisted, however, that there must be de novo judicial review of certain "jurisdictional facts." Later cases have never extended this perplexing holding, and seven Justices pronounced it dead in the *Northern Pipeline* case discussed just below. A related notion, that courts must be allowed to review de novo the fact findings on which a constitutional right depends, may have more vitality today. See p. 113 infra.