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Craig Sloan
University of Kentucky

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NOTES

Constitutional Challenges to Section 812 of the Fair Housing Act

INTRODUCTION

In 1988 Congress passed a number of dramatic amendments to the Fair Housing Act. One of the more controversial new provisions found in section 812 allows the use of administrative law judges to adjudicate disputes between persons claiming to have experienced discrimination and those accused of discriminatory housing practices. Congress's attempt to commit such determinations to an administrative tribunal raises serious issues under both the seventh amendment and article III of the United States Constitution.

Since the Supreme Court's decision in Curtis v Loether, damages actions under the Fair Housing Act have been interpreted as actions to enforce legal rights within the meaning of the Seventh Amendment. In such a cause of action, either party may demand a jury trial, something not permitted in the adjudication scheme of the newly amended section 812.

Similarly, Congress has been limited in the causes of action it may assign to a non-article III forum by the Court's decision in Atlas Roofing Co. v Occupational Safety Comm'n. "[Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury" simply by assigning these matters to an administrative tribunal.

Despite these potential constitutional challenges to the administrative adjudication scheme of section 812, the Court has upheld similar legislation where the parties freely waived their protections.

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under the seventh amendment and article III. This exception may prove to be the constitutional salvation for the amended section 812.

This note focuses on the perceived constitutional infirmities of section 812 by first examining its statutory structure, and then determining whether the statute would survive scrutiny under seventh amendment and article III challenges. Finally, consideration is given to whether or not the administrative adjudication scheme of section 812 is permissible under a theory of waiver.

I. OPERATION OF THE ENFORCEMENT PROVISIONS OF THE FAIR HOUSING ACT

The Fair Housing Amendments Act of 1988 creates three related enforcement provisions. The first provision permits the federal government to take direct action in implementing the goals of the Fair Housing Act. Under section 814, the United States Attorney General may sue in federal district court when there is reasonable cause to believe that "any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted" by the amended act. Additionally, the Attorney General has the discretion to start a civil action if the Secretary for Housing and Urban Development (HUD), acting under section 810(g), makes a "reasonable cause determination" of a discriminatory practice based on a complaint from an aggrieved private person. Under section 810(c), the Attorney General also may act when there is a breach of a conciliation agreement between private parties. Generally, the Attorney General may ask for injunctive relief and civil damages. However, any person may "upon timely application" intervene in the action commenced by the Attorney General and receive monetary damages. Thus this provision, which appears

10 42 U.S.C. § 3610(g).
11 42 U.S.C. § 3614(b).
12 42 U.S.C. § 3610(c).
13 42 U.S.C. § 3614(d)(1)(A)-(C). Civil damages are not to exceed $50,000 for a first offense or $100,000 for any further violations.
14 42 U.S.C. § 3614(e).
simply to provide for civil actions between the federal government and individuals who violate the Fair Housing Act, also lends support to aggrieved individuals. Section 810(c) can be triggered by complaints from private persons seeking to press their rights under the Act; even if the Attorney General begins an action *sua sponte*, private persons can join in the action and receive remedial damages. This administrative scheme creates the possibility that private liability between individuals will be adjudged as much as vindicating the federal government’s interest in enforcing the Act.

The second enforcement provision was also found in the original Fair Housing Act. Under section 813, private persons who believe they have been subjected to a discriminatory housing practice may, within two years of the occurrence of the discrimination or the termination of the practice, start a civil action in federal district court. A civil action also may be started upon the breach of a conciliation agreement. This section provides for the appointment of an attorney and the waiver of court costs and fees if the aggrieved party cannot “bear the costs of such [civil] action.” A mirror provision to section 814 allows the United States Attorney General to intervene in any civil action upon “certification that the case is of general public importance.” Private plaintiffs who prevail in these actions may receive injunctive relief, actual and punitive damages, plus reasonable attorney’s fees and costs at the discretion of the trial judge. Notably, no other enforcement provision allows for punitive damages. Additionally, under the 1968 Act there was a $1000 limit for punitive damages. The 1988 amendments removed that limit. Consequently, defendants in civil actions under section 813 are now subject to a much higher degree of liability should their actions be found sufficiently egregious by a judge or jury.

Interestingly, aggrieved persons cannot commence a civil action under section 813 if they have advanced their claims under the third and final enforcement provision, to the extent that an administrative

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17 42 U.S.C. § 3613(a).
18 *Id.*
19 42 U.S.C. § 3613(b).
20 42 U.S.C. § 3613(c). Upon intervention the Attorney General is accorded the same sort of relief available under section 814(e); *see supra* note 13 and accompanying text.
21 42 U.S.C. § 3613(c)(1).
22 42 U.S.C. § 3613(c)(2).
24 *See* 42 U.S.C. § 3613(c)(1).
law judge "has commenced a hearing on the record" concerning a charge of an alleged discriminatory practice. This suggests that rights provided under the civil remedy of section 813 are closely analogous to the disputed rights before an administrative law judge under section 812. It is this identity of rights between the civil action provided in section 813 and the administrative adjudication provided under section 812 that is at the heart of the constitutional controversy over section 812.

Under the third enforcement provision, disputes may be tried by an administrative law judge. This procedure is complex. First, an aggrieved person files a complaint with HUD under section 810. A complaint may be referred to a "substantially equivalent" state agency, but when no referral is made, HUD must complete investigation of the complaint within 100 days. During this period HUD may attempt to mediate a conciliation agreement between the complainant and respondent. Such conciliation agreements are subject to the HUD Secretary's approval and may involve the use of binding arbitration. If no conciliation agreement is reached, the HUD Secretary must, within the 100 day period after the filing of the complaint, determine "based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur." If reasonable cause exists, the Secretary must "issue a charge on behalf of the aggrieved person, for further proceedings under section 812." After the HUD Secretary files a charge, under section 810 "a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided.

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26 42 U.S.C. § 3612(b).
27 42 U.S.C. § 3610(a)(1)(A)(i). Aggrieved parties have one year to file after the occurrence or termination of the alleged discrimination.
28 42 U.S.C. § 3610(f). The Secretary of HUD must certify that such state or local agencies are "substantially equivalent" by looking to the substantive rights protected by such agencies as well as their procedures, remedies available, and even the existence of judicial review.
31 42 U.S.C. § 3610(b)(2).
32 42 U.S.C. § 3610(b)(3).
33 42 U.S.C. § 3610(g)(1).
34 42 U.S.C. § 3610(g)(2)(A). There is an exception provided under 42 U.S.C. § 3610(g)(2)(C) that requires the HUD Secretary to refer matters involving the legality of state and local zoning or land use law to the Attorney General under § 814, instead of issuing a charge triggering § 812.
in a civil action." The party making this election has twenty days after receipt of process to request a trial. Although either party involved in this proceeding still may exercise the right to a jury trial in an article III court, section 812 gives the aggrieved party several important advantages over the respondent. Should a respondent elect a civil action, the Attorney General must enter the civil action on "behalf of the aggrieved person." If the administrative law judge has not begun a hearing on the record, the aggrieved party can halt the administrative proceeding unilaterally by filing a civil action under state civil rights statutes, section 813, or any other Act of Congress pertaining to "discriminatory housing practice," such as section 1982 of the Civil Rights Act.

If the parties to the dispute decide to use the administrative tribunal, they are accorded the right to "appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas." There are provisions for expedited discovery and procedure. In short, the action closely resembles a court trial, despite the absence of a jury or an article III judge. The administrative law judge can assess civil penalties against a respondent who "has engaged or is about to engage in discriminatory housing practice," and the judge may issue injunctive or other equitable relief for the aggrieved party, including the award of actual damages.

Review of the administrative law judge’s action is two-fold. Final orders are reviewed by the Secretary for Housing and Urban Development, and also may be subject to review by a federal circuit court.

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37 42 U.S.C. § 3612(f) provides as follows:
An administrative law judge may not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under any Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.
38 42 U.S.C. § 1982 provides as follows:
All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
39 42 U.S.C. § 3612(c).
40 42 U.S.C. § 3612(d).
41 42 U.S.C. § 3612(g).
42 42 U.S.C. § 3612(h).
43 42 U.S.C. § 3612(i). Any party aggrieved by a final order for relief may seek review
Having set out the mechanics of the enforcement procedures, this note now focuses on the constitutionality of section 812.

II. POSSIBLE CONSTITUTIONAL CHALLENGES TO SECTION 812

The administrative adjudication provision of section 812 would most likely be attacked on seventh amendment and article III grounds. Defendants, denied a jury trial in the administrative hearing, would claim they had been stripped of their seventh amendment right to a trial by jury. If the defendants were indeed entitled to a jury trial, they would contend that it would have to be before an article III court, as the "judicial power" of the United States clearly rests with article III courts. However, in some instances Congress may assign resolution of a claim that appears to be subject to seventh amendment protections to non-article III adjudicative bodies, which do not use juries as fact finders.

The jurisprudence of seventh amendment and article III constitutional challenges remains a complex and confusing assembly of decisions. The relatively recent proliferation of administrative law judges and other non-article III tribunals has forced the United States Supreme Court to refine its reasoning. This paper utilizes the analysis adopted by the Supreme Court in Granfinanciera, S.A. v. Nordberg to determine whether section 812 is constitutional:

42 U.S.C. § 3612(i). Any party aggrieved by a final order for relief may seek review under 28 U.S.C. ch. 158, notably 28 U.S.C. § 2342, which provides in part, The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has the exclusive jurisdiction to enjoin, set aside, and suspend (in whole or in part), or to determine the validity of—

(6) all final orders under section 812 of the Fair Housing Act.

43 An article III court is one in which an article III judge presides. See, e.g., Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982). The attributes of article III judges are clearly set forth in the United States Constitution article III, § 1: The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and Shall, at stated Times, receive for their Services, a Compensation, which shall not be dimmished during their Continuance in Office.

Essentially, article III judges enjoy life tenure, subject to impeachment, and they are paid a fixed and irreducible compensation for their judicial services. In Northern Pipeline the Court felt that these attributes assured that article III judges would remain neutral and independent—unaffected by political passions present in the other branches of the federal system.

44 U.S. CONST. art. III, § 1 provides in part, 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 form of our analysis is familiar. "First, we compare the statutory action to the 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull v. United States*, 481 U.S. 412, 417-418 (1987). The second stage of this analysis is more important than the first. *Id.* at 421. If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a factfinder.48

III. SEVENTH AMENDMENT CHALLENGES TO SECTION 812

A. Rights Historically Analogous to Section 812

The seventh amendment provides as follows:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any

paradigm for resolving the seventh amendment and article III constitutional challenges presented by § 812. In *Granfinanciera*, a chapter 11 bankruptcy trustee brought an action against Colombian defendants to void allegedly fraudulent transfers. The bankruptcy court denied motions by the defendants for a jury trial. Congress had assigned the bankruptcy court jurisdiction to hear fraudulent transfer claims as part of a bankruptcy's "core proceedings." Despite this, the Supreme Court found that the bankruptcy court did not have jurisdiction over fraudulent transfers unless the defendants consented to jurisdiction. However, no such direct consent was ever given by the defendants. They were forced to appear before the bankruptcy court solely because of the trustee's actions. Even without explicit consent, the defendants would have come within the bankruptcy court's authority had they submitted a claim against the bankruptcy estate. Since no such claim was submitted by the defendants, they preserved their seventh amendment right to a jury trial. Absent any consent to jurisdiction by the defendants, Justice Brennan succeeded in analogizing actions to recover fraudulent transfers by a bankruptcy trustee to a cause at common-law in the late 18th century English courts. Furthermore, the Court could find no "public rights" cause of action created by Congress that might permit assignment of the action to a non-article III court.

The Supreme Court recently reaffirmed the *Granfinanciera* seventh amendment analysis in *Chauffeurs Local No. 391 v. Terry*, ___U.S.____, 110 S. Ct. 1339, 58 U.S.L.W 4345, 4346 (1990). Writing for the majority, Justice Marshall found an action for a breach of a union's duty of fair representation to involve both equitable and legal claims. Since the historical prong of the analysis gave no clear indication of whether the claim implicated the seventh amendment jury trial right, Marshall relied solely on the second prong of the analysis, finding the monetary damages sought to be a strong indication that the type of relief sought was that normally accorded in courts of law. Thus the seventh amendment entitled the respondent union members to a jury trial.

The Supreme Court consistently has interpreted the phrase "Suits at common law" to mean, "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." While it should be readily apparent that "the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, the right extends beyond the common-law forms of actions recognized at that time." Indeed, the Court has held that the seventh amendment applies to a host of causes based on statutes that did not exist in 1791. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

Fortunately, there is no need to engage in the sometimes arcane analysis of whether the rights created under section 812 are protected by the seventh amendment. The Supreme Court resolved this issue in Curtis v. Loether. The plaintiff in Curtis claimed that the white defendants refused to rent her an apartment because she was black. She sued the defendants under the old section 812 of the 1968 Civil Rights Act, which is comparable to section 813 of the 1988 Fair Housing Amendments Act. Both of those sections provide for civil actions to redress violations of fair housing laws. The Supreme Court had little difficulty in determining the nature of the right involved in such a civil action. "We think it is clear that a damages action under § 812 is an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions."

In reaching this conclusion, the Court appears to have used the same analysis it would later make explicit in Tull v United States. Tull involved a demand for jury trial, asserted by a defendant who

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49 U.S. CONST. amend. VII.
53 Curtis, 415 U.S. at 194.
54 Id. at 189.
55 Id. at 195.
violated the Clean Water Act by dumping fill material into navigable waters, without a permit. The United States sued for civil damages. Both the district court and court of appeals denied a jury trial for the civil penalty. The Supreme Court reversed the lower courts after determining that a jury trial was required.

The test in *Tull* operates by first finding a cause of action in a suit at common law comparable to the congressionally created statute, then second, examining the actual remedy provided by the statute to determine whether it is of a legal or equitable nature. The majority in *Curtis* found the cause of action created by statute in a housing discrimination suit similar to a tort:

A damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. This cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law.

Thus, the statutory right to be adjudicated in the amended section 812 is directly analogous to an eighteenth century “suit at common law.” The substantive cause of action brought under section 812 has not changed since the opinion in *Curtis*. The only change has been the new availability of an administrative forum under section 812 for a right that otherwise could be enforced through the civil action available under section 813. Now parties have an additional choice. They can agree to submit to an administrative law judge's determination or go to district court. The legal remedies sought in the current civil action remain the same as those under the 1968 Act—“actual and punitive” damages. The remedies

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59 *Id.* at 417-18. Justice Brennan, writing for the majority, describes the process this way:

To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to the 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 378 (1974); Dairy Queen v. Wood, 369 U.S. 469, 477 (1962). Second, we examine the remedy sought and determine whether it is legal or equitable in nature. *See, e.g.*, *Curtis* v. Loether, 415 U.S. 189, 196 (1970).
60 *Curtis*, 415 U.S. at 195-196.
in the administrative forum are also essentially legal in nature; they mirror the rights of the civil action with the exception that only punitive damages are unavailable to aggrieved parties. In characterizing the nature of the relief under the administrative provision of section 812, one might echo the language of Curtis: "if a plaintiff proves unlawful discrimination and actual damages, he is entitled to a judgment in that amount." The character of the award under section 812 is compensatory, as is the nature of the award under section 813. The right under section 812 is similar to a tort action, which strongly indicates that it should come within the protections of the seventh amendment.

B. The Nature of the Remedy Sought Under Section 812

It is impossible to impose a clear distinction between the rights an aggrieved individual may pursue under a section 813 civil action and the section 812 administrative remedy. The same rights are being adjudicated. The fact that Congress does not permit an aggrieved party to pursue these rights separately is a strong indication that they are identical. An administrative action cannot commence if the aggrieved party has already pursued a legal remedy in the district or state court.

Even in the posture of the administrative adjudication, it is hard to see how the aggrieved party’s rights have lost their "legal" character. The relief fashioned by the administrative law judge is designed to compensate the complainant for actual damages as well as any other injunctive or equitable relief deemed appropriate by the judge. Civil damages also may be imposed. However, the essential remedy, which must be granted when an aggrieved party proves discrimination, consists of money damages. This remedy supports the presumption that the cause of action is legal in nature and protected by the seventh amendment. Recently, in Chauffeurs Local No. 391 v. Terry, Justice Marshall noted "an action for money damages was 'the traditional form of relief offered in the courts of law.'" Yet, it would be a mistake to believe that "any

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61 Id. at 197.
63 42 U.S.C. § 3612(g)(3).
64 Id.
66 Chauffeurs Local No. 391 v. Terry, -U.S.-, 110 S. Ct. 1334, 1348 (1990)
award or monetary relief must necessarily be 'legal' relief." Damage may have an equitable character where they are restitutioary such as in an "action for disgorgement of improper profits." Similarly "a monetary award "incidental to or intertwined with injunctive relief" may be equitable." Clearly, a claim under section 812 does not involve restitution. The respondent has not wrongfully held money owed the aggrieved parties, nor are the damages sought under section 812 merely incidental to injunctive relief. In some cases where actual damages are awarded, injunctive relief may not be sought or granted. In any event, "[t]he right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." This follows logically from the Supreme Court holdings in Beacon Theaters, Inc. v. Westover, and Dairy Queen, Inc. v. Wood. Both cases stand for the proposition that "if . . . [a] legal claim is joined with an equitable claim, the right to jury trial on the legal claim . . . remains intact." Additionally, after the Tull decision, it appears that all civil penalties are open to seventh amendment constitutional challenges. The Tull Court held that a violator of the Clean Water Act was entitled to a jury trial on the issue of civil penalties:

A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity. [The Clean Water Act] does not direct that the "civil penalty" imposed be calculated solely on the basis of equitable determinations, such as the profits gained from violations of the statute, but simply imposes a maximum penalty of $10,000 per day of violation.

Nor does the Fair Housing Act under section 812 direct that civil penalties be imposed on the basis of equitable determinations. The language of the act merely limits the maximum amount that

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67 Id. (quoting Curtis, 430 U.S. at 196).
68 Id. (quoting Tull, 481 U.S. at 424).
69 Id.
70 Curtis, 415 U.S. at 196 n.11:
73 Curtis, 415 U.S. at 196 n.11.
74 33 U.S.C. §§ 1251 et seq.
75 Tull, 481 U.S. at 422.
an administrative law judge may levy based on the existence of prior violations by the respondent.\textsuperscript{76} Basing the civil penalty on prior bad behavior strongly suggests that the remedy is designed to punish culpable individuals and should come under the rule of \textit{Tull}, which requires a jury trial. For the most part Congress chose to ignore objections concerning constitutional challenges to the section 812 civil penalties. Congress believed it had the power to assign this newly created cause of action to a non-article III tribunal.\textsuperscript{77}

Considering the history and the nature of the right provided in section 812, it appears a party is entitled to a jury trial under the seventh amendment. The remaining step in the \textit{Granfinanciera, S.A. v. Nordberg}\textsuperscript{78} analysis is to determine "whether Congress may [assign] resolution of the relevant claim to a non-Article III adjudicative body. . .\textsuperscript{79}

IV ARTICLE III CHALLENGES TO SECTION 812

In \textit{Northern Pipeline Constr Co. v Marathon Pipe Line Co.},\textsuperscript{80} the Supreme Court attempted to clarify the jurisprudence surrounding article III constitutional challenges. The result was a complex plurality opinion that allows Congress to assign a cause of action to a non-article III court only if the cause falls under one of three exceptions. Noting the "frequently arcane distinctions and confusing precedents"\textsuperscript{81} surrounding the constitutional law of article III courts, Justice Rehnquist warned in his concurring opinion,

\textsuperscript{76} 42 U.S.C. § 3612(g)(3)(A)-(C) provides civil penalties for first offenders of up to $10,000. Repeat offenders who have committed a violation within the last five years may be fined up to $25,000. Offenders with two or more violations within seven years can receive a civil penalty of up to $50,000.

\textsuperscript{77} H.R. Rep. No. 711, 100th Cong., 2d Sess., at 74-75 (1988). Dissenters to the civil penalties clearly pointed out the faulty analysis of the congressional majority. The right being compensated under section 812 "is personal to the person injured" due to the very nature of the definition of "aggrieved person" under section 802(1), 42 U.S.C. § 3602(1):

"Aggrieved person" includes any person who—
(1) claims to have been injured by a discriminatory housing practice; or
(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

Consequently, as will be developed in the following section, a private right of action cannot be assigned to a non-article III court.


\textsuperscript{80} 458 U.S. 50 (1982).

The cases dealing with the authority of Congress to create courts other than by the use of its power under Art. III do not admit of easy synthesis. I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night.\(^8\)

Accepting these limitations, *Northern Pipeline* presents an excellent analytical framework for probing article III challenges. *Northern Pipeline* found the Bankruptcy Reform Act of 1978\(^8\) to be unconstitutional. Congress had assigned all matters related to a bankruptcy petition to non-article III bankruptcy courts. The Northern Pipeline Company attempted to bring a contract claim before the court, but Marathon Pipe Line Company successfully contended that the Bankruptcy Reform Act unconstitutionally conferred article III judicial power upon judges who lack life tenure and protection against salary diminution.\(^4\) The Supreme Court in its plurality opinion held that Congress remained limited in what matters it could assign to non-article III or so-called "legislative courts." Past precedents when properly understood indicated, 

"Territorial courts" are the first of three narrow exceptions in which Congress may assign causes of action to a non-article III court. "[T]he Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government."\(^8\)

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\(^8\) Id. at 91.  
\(^4\) *Northern Pipeline*, 458 U.S. at 60. Life tenure and protection against salary diminution are the two aspects defining an article III judge, and therefore an article III court. *See supra* note 45 for further discussion of this point.  
\(^8\) *Northern Pipeline*, 458 U.S. at 63-64.  
\(^8\) Id. at 65.  

The second exception "involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue."\(^{87}\) For example, military courts fit this definition, as article I, section 8, cl. 13, 14 gives Congress the power "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces."

The final exception involves courts created by Congress to adjudicate cases involving "public rights." This notion was first advanced in *Murray's Lessee v. Hoboken Land & Improvement Co.*\(^{88}\)

[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public 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.\(^{89}\)

Clearly, the administrative tribunal under section 812 is not a "territorial court" or a legislative court derived from specific authority in article I of the Constitution. Consequently, only the final exception may apply. If section 812 is to survive an article III challenge, one must show that Congress created a new "public right" of action.

A. "Public Right" Versus Private Right Nature of Section 812

Article III, section 2 provides in part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made. . . ."\(^{90}\) Although originally suggested by the language of *Murray's Lessee,*\(^{91}\) in *Atlas Roofing Co. v. Occupa-
the Supreme Court explicitly stated the standard by which the Court would assess article III challenges. *Atlas* involved a challenge to the new statutory duties imposed upon employers by the Occupational Safety and Health Act (OSHA) of 1970. The petitioner argued that it had been deprived of its seventh amendment right to trial by jury. Petitioner contended that the penalties assessed by the Secretary of Labor under OSHA were strongly analogous to tort claims. The Court rejected petitioner's argument by saying a new “public right” had been created by Congress. Congress had concluded that traditional remedies in courts of law could not cope with the rising number of work-related deaths. Since traditional tort claims were inadequate to protect workers, a new “public right” to safe working conditions was created. "[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that a jury trial is to be 'preserved' in 'suits at common law.'"

The *Atlas* standard focuses on characterizing rights as either "public rights" or "private rights".

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

The Court reaffirmed this principle in *Granfinanciera, S.A. v. Nordberg*, quoting the *Atlas Roofing* decision:

In *Atlas Roofing*, we noted that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an

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95 Id. at 455.
96 This new “public rights”/“private rights” doctrine seems to have been created to decide the *Atlas Roofing* case. Although suggested in the dicta of *Murray's Lessee*, 59 U.S. 272, it is not the explicit holding of any earlier opinions, and scholars have been critical of its creation by Justice White. At least one finds no historical basis for this new construct. See, e.g., Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV 1281, 1293-1338 (1978).
97 *Atlas*, 430 U.S. at 450.
administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law’.” We emphasized, however, that Congress’ power to block application of the Seventh Amendment to a cause of action has limits.  

One of those “limits” is reached when the creation of new “public rights” supplants previously established “private right” actions.

Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. To hold otherwise would be to permit Congress to eviscerate the Seventh Amendment’s guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears.

Indeed, some of the earliest case law regarding article III jurisdiction appears to support the proposition that Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”

What then is the nature of the right under section 812? Is it a “public right” or a “private right”? And how can one decide? The Court attempted more accurately to define this difference in Crowell v Benson. “Private rights” cases involve the “liability of one individual to another under the law as defined,” as opposed to “public rights” cases that “arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” Such “public rights” could be assigned to non-article III legislative courts for adjudication.

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99 Id.
100 Murray’s Lessee, 59 U.S. at 284.
101 285 U.S. 22 (1932).
103 Id. at 50.
Congress, in exercising the powers confided to it, may establish "legislative" courts (as distinguished from "constitutional courts in which the judicial power conferred by the Constitution can be deposited") which are to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible to it." But, "the mode of determining matters of this class is completely within the congressional control. Congress may reserve itself the power to decide, may delegate the power to the executive officer, or may commit it to judicial tribunals." Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercises of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pension and payments to veterans.  

Critics of the administrative adjudication provisions argue that the right of action provided under section 812 is "private in nature, in that it is intended to determine the liability of one individual to another." The Justice Department's Office of Legal Counsel noted in a memo opposing the enactment of section 812, "only private litigants may initiate the administrative proceeding," and in fact, "virtually the only role played by the Government is to provide a federal rule of decision which defines the liability between private actors." Thus, under section 812 HUD's role is largely geared "to vindicating the rights of the private litigant."  

More generally, the right created here is essentially a civil right and civil rights statutes are "intended to create personal rights, guaranteed to the individual."  

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104 Id. at 50-51 (quoting Ex parte Bakelite Corp., 279 U.S. 438, 451 (1929)).


106 Id.

107 Id.

The statutorily created right here derives from a dignitary tort and is enforceable primarily by private individuals for their own benefit pursuant to common law remedies, the Court's precedents strongly indicate that these administrative hearings will be viewed as "wholly private tort cases [that] are not at all implicated" by the public right exception described in *Atlas Roofing*.109

The Supreme Court used similar language in *Curtis v. Loether*.

An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort."110

In section 812, Congress has attempted to place the trial of a wholly "private right" beyond the view of an article III court. Yet, it is possible for Congress to supersede "private rights" of action by creating new categories of "public rights."

B. New "Public Rights" Superseding Previously "Private Rights"

Clearly, Congress can create novel "public rights" that closely parallel traditional "private rights." "Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable."111 Possibly, in amending section 812, Congress created a new "public right," and the individual damages to be awarded aggrieved parties in the administrative forum are merely incidental to the enforcement of this new "public right" to fair housing. The Office of Legal Counsel recognized this and stated,

[T]here are clearly precedents for administrative bodies both enforcing public policy and providing incidental relief, including monetary relief, to private citizens. As courts have recently noted in the context of administratively determined reparations awards under the Commodity Exchange Act, the fact that new statutory

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111 *Granfinanciera*, 109 S. Ct. at 2796 (citations omitted) (emphasis in original); *Block v. Hirsh*, 256 U.S. 135, 158 (1921); *Murray's Lessee*, 59 U.S. 272, 284 (1856).
rights are enforceable in favor of a private party does not preclude administrative adjudication of such rights.\textsuperscript{112}

The mere fact that damages are awarded to private parties does not \textit{ipso facto} mean that it is a private right. Such a conclusion would effectively eviscerate the administrative proceedings for many of the nation's administrative agencies. In an attempt to bolster arguments for the constitutionality of section 812, Professor Arthur Wolf noted the great number of federal agencies that routinely assess damages in favor of injured individuals:

Many agencies have authority to award remedial damages. For example, the Interstate Commerce Commission, the Federal Maritime Commission, and the Commodity Futures Trading Commission have the power to hear claims of persons whose rights have been violated under the applicable statutes and to award damages or reparations for such violations. Furthermore, the Secretary of Agriculture, under the Packers and Stockyard Act and the Perishable Agricultural Commodities Act, has the authority to entertain and resolve individual claims and to award damages to injured complainants. Finally, the Office of Workers' Compensation Programs in the Department of Labor processes claims of coal miners and maritime workers for employment related injuries or deaths. In each of these instances, the initial hearing is before an administrative law judge who may enter an order awarding damages to the complaining party. In each case, the person found to have violated the law is required to satisfy the damage award.\textsuperscript{113}

In this situation, Congress has not created a new or novel right of action. Instead, it has merely tacked-on an administrative forum, allowing HUD to enter the fray, not at the outset, but nearly [23] years after the creation of a private cause of action in the district court which provides for identical remedies, and nearly [17] years after the Supreme Court expressly ruled that under such circumstances trial by jury must be available on demand.\textsuperscript{114}


\textsuperscript{113} \textit{Id.} at 73 (statement of Arthur D. Wolf, Western New England College School of Law).

However, even when it appears that a "private right" of action is involved, the Supreme Court has been willing to concede that Congress can assert a superior "public right," particularly where the government is a party.

In *Atlas Roofing,* we noted that Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in or lies against the Federal Government in its sovereign capacity. Our case law makes plain, however, that the class of "public rights" whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive than *Atlas Roofing*'s discussion suggests. Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action is not a "public right" for Article III purposes, the Congress may not assign its adjudication to a specialized non-Article III court.

Has Congress supplanted the "private right" found in *Curtis,* and maintained under section 813, by establishing under section 812 a new "public right" protecting against discrimination in housing? Is this new right similar to the safe workplace "public right" created under OSHA? It would seem not.

The "private right" of action survives under the new section 812. Aggrieved parties need only enter district court to press that "private right." The existence of another forum should not affect the nature or character of that right absent something more. There is no reason to assume that because HUD intervenes in a case through the mechanism of an administrative hearing a "public right" has magically been created. In the administrative hearing, the government is in substance deciding one individual's private rights versus those of another. The dispute has only the formal

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115 *Granfinanciera,* 109 S. Ct. at 2796.
116 *See supra* notes 16-25 and accompanying text.
appearance of a dispute between an individual and the Government.117

The nature of the proceeding under section 812 is an action for damages and injunctive relief between someone who claims his or her "private rights" (rights that could have been litigated under section 813) have been violated by someone else who allegedly intends to commit or has committed housing discrimination.118 Creation of a new "public right" that assures a nation is free from housing discrimination may well be within Congress's power, but no such "public right" appears to have been created. Since Curtis, the rights at issue have been viewed as "private rights."119 An individual's right to recover damages under section 812 is based on the violation of what is essentially a personal civil right and a dignitary tort. The cause of action brought before the administrative law judge is not the vindication of newly created statutory duties owed the federal government by the violator, as was the case in Atlas.120 Rather, the right adjudicated under section 812 is basically the same as the private civil action permitted under section 813. This right is "one of private right, that is, of liability of one individual to another under the law as defined."121

C. Creation of an Extensive Regulatory Scheme Supplanting "Private Rights"

A more convincing case that a "public right" is at work in section 812 could be made if Congress had created an extensive regulatory scheme and inclusion of ancillary "private rights" was essential to the proper functioning of the scheme. In Thomas v Union Carbide Agric. Products Co.,122 the Court held that the binding arbitration scheme under the Federal Insecticide, Fungi-

117 Professor Laurence Tribe has criticized the "form over substance" analysis, which assumes that, because the government is in some way superficially involved, the action necessarily implicates "public rights." He notes that "Congress could avoid conferring jurisdiction upon an Article III court simply by altering the party structure in its new action, by replacing the private plaintiff with a government prosecutor." L. Tribe, AMERICAN CONSTITUTIONAL LAW 53 (2d ed. 1988).

118 See 42 U.S.C.A. § 3612(g)(3) (West Supp. 1990) (Administrative law judges' order for relief "may include actual damages suffered by the aggrieved person and injunctive or other equitable relief.").

119 See supra notes 62-79 and accompanying text.

120 See supra notes 92-98 and accompanying text.

121 Crowell, 285 U.S. at 51.

icide, and Rodenticide Act (FIFRA)\textsuperscript{123} did not violate article III. Rejecting an analytical approach that would favor form over substance, the Court instead looked to the substance of the arbitration provision and concluded it was a "pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product."\textsuperscript{124} Justice O'Connor 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. "To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."

Using the analytical framework of Thomas, in \textit{Commodity Futures Trading Comm'n v Schor}\textsuperscript{126} the Court found the regulatory scheme under the Commodities Exchange Act (CEA),\textsuperscript{127} which allowed the Commodity Futures Trading Commission (CFTC) to adjudicate state counterclaims, passed article III scrutiny:

"[L]ooking beyond form to the substance of what" Congress has done, we are persuaded that the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers.\textsuperscript{128}

Addressing article III concerns more directly, the Court found,

When Congress authorized the CFTC to adjudicate counterclaims, its primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals. Congress intended to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional

\textsuperscript{123} 7 U.S.C. 136 §§ et seq. (West 1988).
\textsuperscript{125} \textit{Id.} (quoting Crowell, 285 U.S. at 46).
\textsuperscript{126} 478 U.S. 833 (1986).
\textsuperscript{127} 7 U.S.C. §§ 1 et seq. (West 1988).
brokers. Its decision to endow the CFTC with jurisdiction over such reparations claims is readily understandable given the perception that the CFTC was relatively immune from political pressures and the obvious expertise that the Commission possesses in applying the CEA and its own regulations. This reparations scheme itself is of unquestioned constitutional validity.

Additionally, earlier case law indicates Congress could assign an action to a non-article III forum if a jury trial would “go far to dismantle the statutory scheme.”

Looking to the substance of the administrative tribunal provided under section 812, it is apparent that the administrative tribunal is not a part of a regulatory framework in which “private rights” are merely incidental. The purposes of the Fair Housing Act are diverse. It exists to vindicate individual rights as well as promote a general national policy against housing discrimination. Under section 814, the Attorney General is given authority to enforce the act whenever there is reasonable cause to suspect a violation. Yet, the focus of sections 812 and 813 is to encourage individuals to seek individual damages as compensation for the discriminatory conduct. For instance, under the amended section 812, aggrieved parties are to bring those “private rights” actions before an administrative tribunal.

Unlike OSHA, FIFRA, or the CFTC, the Fair Housing Act sets forth no complex set of administrative rules to be administered and interpreted as part of a general regulatory scheme. There is no extensive federal regulation of the housing industry, as there is with work sites, hazardous chemicals, and commodity futures trading. With respect to housing discrimination, the personal right of action against a violator remains the major vehicle for enforcement of the Fair Housing Act, as it has since that personal right was created by the 1968 enactment of old section 812. It is highly unlikely that, in passing the 1988 amendments, Congress believed a jury would be incompatible with the determination of the rights accorded under new section 812, primarily because Congress has retained the right to a jury trial for any party who wishes it.

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129 Id. at 855-856 (citations omitted).
130 Atlas Roofing, 430 U.S. at 454 n.11.
131 See supra notes 8-15 and accompanying text.
132 See supra notes 16-44 and accompanying text.
133 See supra notes 26-44 and accompanying text.
134 See supra notes 35-37 and accompanying text.
Any attempt to assert the rights adjudicated under the new section 812 are in fact "public rights" seems doomed to failure. These rights already have been characterized by the Court in Curtis as "private rights," similar to common law torts. An assumption that rights analogous to "public rights" are created merely by the private parties agreeing to submit to an administrative tribunal would place form over substance and strain the substantive distinction between "public" and "private rights." Congress has not created a new regulatory scheme based on its article I power. Instead it has attempted to substitute an administrative tribunal for an article III court. The justification that such tribunals are speedier and less costly hardly seems a sufficient reason for disregarding the Constitution. Administrative hearings will always be quicker and cheaper than court trials; extension of this justification would completely gut the protections of article III, effectively denying seventh amendment protection to individuals being tried on their legal liability to other individuals.

Despite these Constitutional infirmities, recent case law might permit the use of an administrative tribunal to resolve disputes when the parties enter such an adjudication voluntarily.

V. Waiver of Article III & the Seventh Amendment

In Commodity Futures Trading Comm'n v. Schor, the Court attached great significance to whether or not the party asserting a constitutional deprivation voluntarily participated in the non-article III proceeding. The complaining party in Schor opted for the CFTC's administrative forum, rather than state or federal courts, with full knowledge that the regulatory scheme allowed the CFTC to hear all counterclaims, including state law counterclaims. The Court concluded that "Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court." This notion of voluntary waiver is present in an earlier decision, Thomas v Union Carbide Agric. Products Co. In Thomas, the Court implied that chemical companies subject to an arbitration

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135 See supra notes 53-55 and accompanying text.
scheme under FIFRA were voluntary participants. However, the only voluntary element appears to have been that the companies were manufacturing chemicals in interstate commerce. In any event, *Schor* stands for the proposition that, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." Additionally, such waiver need not be express. "Even were there no evidence of an express waiver here, Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver."

While allowing the private protections of article III to be waived, the Court in *Schor* concluded that the separation of powers limitations imposed by article III could not be waived. Still, it found that the CFTC administrative mechanism presented no threat to the power of the judiciary.

It is clear that Congress has not attempted to "withdraw from judicial cognizance" the determination of Conti's right to the sum represented by the debit balance in Schor's account. Congress gave the CFTC the authority to adjudicate such matters, but the 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 diminished, 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

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139 Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 591 (1985) ("The danger of Congress or the Executive encroaching on the Article III judicial powers is at a minimum when no *unwilling* defendant is subjected to judicial enforcement power as a result of the agency 'adjudication.'") (emphasis added).
140 *Schor*, 478 U.S. at 848-49.
141 Id. at 849.
142 Id. at 850-51.
would necessarily save the scheme from constitutional attack.\textsuperscript{143}

This endorsement of article III waiver is perhaps more limited than one might conclude from the above paragraph. The Court permitted this waiver in the context of a regulatory scheme that granted limited jurisdiction over state counterclaims in a situation where not to do so would have made the scheme ineffective.\textsuperscript{144} This makes it unclear whether or not Schor could be applied to the administrative proceeding in section 812, where no regulatory scheme appears to be present, but only the naked "private right" provided by the Fair Housing Act.\textsuperscript{145}

Since Thomas and Schor, several lower courts have considered the question of consent to jurisdiction. One bankruptcy court has concluded "there is no inherent constitutional limitation on the ability of a bankruptcy court to adjudicate private claims so long as the parties consent to such adjudication."\textsuperscript{146} Another bankruptcy court found that such consent does not offend article III separation of powers concerns in a bankruptcy context because "in the case of Bankruptcy Judges, interference by a collateral branch is not a genuine threat."\textsuperscript{147} This is because each bankruptcy judge is appointed by the court of appeals for its respective circuit.\textsuperscript{148} The newly created section 812 is more of an intrusion into the judiciary. The administrative law judges are not under such direct control of the courts of appeals.

Additionally, the intrusion into the judicial branch's prerogative in Schor was extremely limited:

The Court in Schor allowed what perhaps had been thought to be exclusively Article III cases to be tried in the first instance before the administrative agency at the option of both parties. The judiciary, however, did not thereby give up any real power or prerogative; CFTC orders may only be enforced by a federal district court, where they are subject to a non-deferential standard of review (which is another way of describing supervision). That is why the Court thought the magnitude of any intrusion of the Judicial Branch "de minimis."\textsuperscript{149}

\textsuperscript{143} \textit{Id.} at 854-55.
\textsuperscript{144} See \textit{supra} notes 126-30 and accompanying text.
\textsuperscript{145} See \textit{supra} notes 8-44 and accompanying text.
\textsuperscript{146} \textit{Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.),} 95 Bankr. 782, 787 (Bankr. D. Colo. 1989).
\textsuperscript{147} \textit{Jennings v. Coblentz (In re Jennings),} 83 Bankr. 752, 761 (Bankr. D. Nev. 1988).
\textsuperscript{148} \textit{Id., see also} 28 U.S.C. § 152(a) (West 1988).
\textsuperscript{149} \textit{In re Sealed Case,} 838 F.2d 476, 508 (D.C. Cir. 1988) (quoting \textit{Schor,} 478 U.S. at 856).
The standard of review is only marginally greater for the decisions of the administrative law judges under section 812. "The appellate court would review the legal issues de novo and the usual standard of 'substantial evidence' would govern review of the factual determinations." Section 812 represents just one more step limiting article III courts' control and supervision over administrative tribunals. Factual issues in cases under section 812 will receive less scrutiny by an article III court that is one step removed from the trial than they would if the same court conducted the trial. This may constitute more than a mere de minimis intrusion into the judicial branch.

Generally, the Supreme Court has concluded that if the essential constitutional role of the judiciary is to be maintained, article III judges must exercise control over the interpretation, declaration, and application of federal law. Under the Fair Housing Act's scheme, article III judges do retain that control, but it is weakened by confinement to the Circuit Court level.

Initially, it may be difficult to see how the use of what is essentially a voluntary administrative adjudication subject to review at the circuit court level threatens the separation of powers under article III. As in Schor, it appears "the power of the federal judiciary to take jurisdiction of these matters is unaffected." The parties are merely choosing between what Congress hopes will be a more expeditious forum, under the provisions of section 812, and a more traditional route of prosecuting actions under section 813 in federal district court. Assuming that section 812 is not an invasion of the judicial power, offensive to separation of powers concerns, it would seem that waiver of article III is permissible in this context. Similarly, waiver of the seventh amendment right to jury trial simply becomes a matter of invoking the appropriate Federal Rule of Civil Procedure. As in the bankruptcy or CFTC

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152 See supra note 44.

153 Schor, 478 U.S. at 855.

154 Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be
context, it may be assumed that when the parties under section 812 decide not to elect a civil action, they are waiving their article III and seventh amendment protections. In effect, the parties have consented to the jurisdiction of the administrative law judge by agreeing to bring the case before the specialized forum of section 812.

The problem with this approach is that the voluntary nature of this waiver remains questionable, especially for respondents. If a section 812 respondent elects to proceed in district court, he or she is exposed to unlimited liability for punitive damages. No punitive damages may be awarded in the administrative hearing. Additionally, if an election for civil trial is made, the respondent will face a U.S. Attorney provided for the aggrieved party, "to commence and maintain" the civil action.

By agreeing to the administrative forum, the respondent's potential liability is limited to actual damages suffered and civil penalties, subject to various caps. In the modern litigious climate of the United States, enormous jury verdicts for punitive damages are not unprecedented. One celebrated libel award involving Penthouse magazine reached $25 million in punitive damages alone. Because a Fair Housing Act violation resembles a dignitary tort, angry juries, offended by a respondent's conduct, could also levy huge sums. A prudent respondent might feel some compulsion to remain in the administrative setting where liability is limited to actual damages, costs, and civil penalties.

Additionally, the respondent who exercises his or her seventh amendment right by electing out of the section 812 proceeding will have to face an opposing U.S. Attorney. Granted, in the administrative setting of section 812, the respondent will face government
lawyers from HUD. However, one must remember that the section 812 proceeding follows an attempt to reach a conciliation agreement with HUD officials.\textsuperscript{162} HUD already will have been sensitized to the respondent's concerns and may be more willing to press for a settlement amicable to both sides of the dispute. Justice Department attorneys may not have any such concerns. They enter the process with no institutional commitment to resolve differences between the parties. The U.S. Attorney is cast in more of a prosecutorial role. Indeed, there would seem to be more social opprobrium attached to being haled into federal district court by the Justice Department than appearing before an administrative forum. Viewed in this light, the administrative option seems less onerous for the respondent.

This inequitable shifting of remedies is repugnant to article III separation of powers concerns. If a respondent insists upon a court trial, he or she is subject to unlimited liability and must face a Justice Department attorney provided by the United States Government to litigate such cases. The respondent has no real choice in the matter. Thus, it cannot realistically be said that the respondent has voluntarily waived his article III rights.

Likewise, aggrieved complainants are encouraged initially to submit to the administrative process. If a complainant does not go through the sections 810-812 process, she will not automatically acquire a U.S. Attorney to try the case on her behalf.\textsuperscript{163} Deciding to file a complaint in federal district court under section 813 does not assure that the Attorney General will intervene.\textsuperscript{164} However, once a charge has been filed under section 812, the aggrieved party is permitted to elect for civil action\textsuperscript{165} which will trigger the appointment of a U.S. Attorney on the aggrieved party's behalf.\textsuperscript{166} It is a "win/win" situation for the aggrieved party, who may remain in the administrative proceeding or acquire free representation in a civil proceeding.

Congress has constructed a system that effectively discourages one class of litigants (the section 812 respondents) from seeking to have their rights adjudicated before article III courts. Section 812 encourages virtually all potential defendants to undergo adminis-

\textsuperscript{162} See supra notes 30-36 and accompanying text.
\textsuperscript{163} See supra notes 9-25 and accompanying text.
\textsuperscript{164} See supra notes 16-42 and accompanying text.
\textsuperscript{165} 42 U.S.C.A. § 3612(a).
\textsuperscript{166} 42 U.S.C.A. § 3612(c)(1).
trative adjudication or suffer some unpleasant consequences. Such waiver is not truly voluntary. Congress should not be able to assign a "private right" to a non-article III forum simply by suborning the personal waiver of the parties involved. Voluntariness of the waiver is important. In Pacemaker Diagnostic Clinic v. Instromedix, Judge Kennedy, now a Supreme Court Associate Justice, writing for the majority in a ninth circuit opinion, upheld the use of a federal magistrate to decide a patent infringement action and counterclaim. He ruled that the parties had waived their article III rights by agreeing to submit their case to a magistrate. However, Kennedy noted such a waiver must be truly voluntary when viewed within the context of the actual remedies available to the litigants.

The purported waiver of the right to an Article III trial would not be an acceptable ground for avoiding the constitutional question if the alternative to the waiver were the imposition of serious burdens and costs on the litigant. If it were shown that the choice is between trial to a magistrate or the endurance of delay or other measurable hardships not clearly justified by the needs of judicial administration, we would be required to consider whether the right to an Article III forum had been voluntarily relinquished.

Section 812 respondents are saddled with several heavy burdens should they choose to pursue their constitutional right to a jury trial and an article III judge. They may have to pay court costs and the opposing party's attorney fees should they not prevail; additionally, they face the imposition of potentially high punitive damages. They also must face a U.S. Attorney bent on prosecuting the law on behalf of the aggrieved party. Respondents confront none of these disadvantages if they agree to the administrative forum. To claim that section 812 is a constitutional consent to jurisdiction effectively undermines the meaning of voluntary waiver. That the waiver under section 812 should be so flawed is not surprising. Congress did not consider the need for a valid consent to jurisdiction. Instead Congress believed they had created a new "public right" that could be assigned to an administrative forum.

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167 725 F.2d 537 (9th Cir. 1984), cert. denied, 469 U.S. 824 (1984).
168 42 U.S.C.A. § 3613(c)(2).
169 42 U.S.C.A. § 3613(c)(1).
170 See supra note 77 and accompanying text.
171 See supra notes 30-37 and accompanying text.
172 See supra note 77 and accompanying text.
CONCLUSION

*Curtis v. Loether* indicates that the right to be litigated under section 812 is one protected by the seventh amendment. It is essentially a statutorily created dignity tort. Congress can assign analogous actions to non-article III courts if a "public right" is to be litigated. Individual damage claims incident to those "public rights" also can be adjudicated by non-article III courts. However, attempting to find a "public right" under the administrative adjudication of section 812 strains logic and credulity. Congress has not created a new "public right." Rather, Congress has attempted to establish another tribunal to hear the merits of the same "private right" established 23 years ago by the Fair Housing Act, the same "private right" affirmed by the Supreme Court 17 years ago in *Curtis*, and the same "private right" preserved as a civil action in section 813 of the 1988 amendments to the Fair Housing Act.

It may be possible to waive the requirements of article III and the seventh amendment. Yet, permitting such waiver is an injustice to the principle of the separation of powers. Allowing this scheme to stand would be an open invitation to Congress to construct a "phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts." To assure "voluntary" waiver, Congress needs only to establish sufficiently negative consequences to deter parties from electing an article III court. Ultimately, the administrative adjudication under section 812 is an abridgment of the seventh amendment's guarantee of trial by jury, an unconstitutional affront to the protection afforded litigants of an independent article III judge, and an impermissible invasion of the judiciary's article III powers.

*Craig Sloan*