

## Sec. 1—Judicial Power, Courts, Judges

**Agency Adjudication.**—In two decisions subsequent to *Marathon* involving legislative courts, *Thomas v. Union Carbide Agric. Products Co.*<sup>118</sup> and *CFTC v. Schor*,<sup>119</sup> the Court clearly suggested that the majority was now closer to the balancing approach of the *Marathon* dissenters than to the *Marathon* plurality's position that Congress may confer judicial power on legislative courts only in very limited circumstances. Subsequently, however, *Granfinanciera, S.A. v. Nordberg*,<sup>120</sup> a reversion to the fundamentality of *Marathon*, with an opinion by the same author, Justice Brennan, cast some doubt on this proposition.

In *Union Carbide*, the Court upheld a provision of a pesticide law which required binding arbitration, with limited judicial review, of compensation due one registrant by another for mandatory sharing of registration information pursuant to federal statutory law. And in *Schor*, the Court upheld conferral on the agency of authority, in a reparations adjudication under the Act, to also adjudicate "counterclaims" arising out of the same transaction, including those arising under state common law. Neither the fact that the pesticide case involved a dispute between two private parties nor the fact that the CFTC was empowered to decide claims traditionally adjudicated under state law proved decisive to the Court's analysis.

In rejecting a "formalistic" approach and analyzing the "substance" of the provision at issue in *Union Carbide*, Justice O'Connor's opinion for the Court pointed to several considerations.<sup>121</sup> The right to compensation was not a purely private right, but "bears many of the characteristics of a 'public' right," because Congress was "authoriz[ing] an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program. . . ." <sup>122</sup> Also deemed important was not "unduly constrict[ing] Congress's ability to take needed and innovative action pursuant to its Article I powers"; <sup>123</sup> arbitration seen as "a pragmatic solution to [a] difficult problem." <sup>124</sup> The limited nature of judicial review was seen as a plus in the sense that "no unwilling defendant is subjected to judicial enforcement power." On the other hand, availabil-

27 (2011) (citations omitted). The Court also noted that filing of a claim in bankruptcy court (here, a defamation claim) did not constitute consent to a counterclaim, as the claimant had nowhere else to go to obtain recovery. *Id.*

<sup>118</sup> 473 U.S. 568 (1985).

<sup>119</sup> 478 U.S. 833 (1986).

<sup>120</sup> 492 U.S. 33 (1989).

<sup>121</sup> *Contrast* the Court's approach to Article III separation of powers issues with the more rigid approach enunciated in *INS v. Chadha* and *Bowsher v. Synar*, involving congressional incursions on executive power.

<sup>122</sup> 473 U.S. at 589.

<sup>123</sup> *CFTC v. Schor*, 478 U.S. at 851 (summarizing the *Thomas* rule).

<sup>124</sup> *Thomas*, 473 U.S. at 590.