

remedy of the type that could be imposed only by courts of law.³⁷ However, a jury need not invariably determine the remedy in a trial in which it must determine liability. Because the Court viewed assessment of the amount of penalty as involving neither the “substance” nor a “fundamental element” of a common-law right to trial by jury, it held permissible the Act’s assignment of that task to the trial judge.

Later, the Court relied on a broadened concept of “public rights” to define the limits of congressional power to assign causes of action to tribunals in which jury trials are unavailable. In *Granfinanciera, S.A. v. Nordberg*,³⁸ the Court declared that Congress “lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.” The Seventh Amendment test, the Court indicated, is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal.³⁹ As a general matter, “public rights” involve “the relationship between the government and persons subject to its authority,” whereas “private rights” relate to “the liability of one individual to another.”⁴⁰ Although finding room for “some debate,” the Court determined that a bankruptcy trustee’s right to recover for a fraudulent conveyance “is more accurately character-

³⁷ The statute itself specified only a maximum amount for the penalty; the Court derived its “punitive” characterization from indications in the legislative history that Congress desired consideration of the need for retribution and deterrence as well as the need for restitution.

³⁸ 492 U.S. 33, 51–52 (1989).

³⁹ “[I]f a statutory cause of action . . . is not a ‘public right’ for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking ‘the essential attributes of the judicial power.’ And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties the right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” 492 U.S. at 53–54 (citation omitted).

⁴⁰ 492 U.S. at 51 n.8 (quoting *Crowell v. Benson*, 285 U.S. 22, 50, 51 (1932)). The Court qualified certain statements in *Atlas Roofing* and in the process refined its definition of “public rights.” There are some “public rights” cases, the Court explained, in which “the Federal Government is not a party in its sovereign capacity,” but which involve “statutory rights that are integral parts of a public regulatory scheme.” It is in cases of this nature that Congress may “dispense with juries as factfinders through its choice of an adjudicative forum.” This does not mean, however, that Congress may assign “at least the initial factfinding in *all* cases involving controversies entirely between private parties to administrative tribunals or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts.” 492 U.S. at 55 n.10 (emphasis added).