

Sec. 1—The Congress

Legislative Powers

In *INS v. Chadha* the Court used the formalist approach to invalidate a legislative veto device by which Congress could set aside a statutorily authorized suspension by the Attorney General of the deportation of an alien. Central to the decision were two conceptual premises. First, the action Congress had taken was found to be legislative—because it had the purpose and effect of altering the legal rights, duties, and relations of persons outside the legislative branch—mandating that Congress comply with the bicameralism and presentment requirements of the Constitution.²¹ Second, the Attorney General was performing an executive function in implementing the delegation from Congress, so that the legislative veto was an impermissible interference in the execution of the laws. The Court noted that, rather than using a veto, Congress could act only by legislating, thus changing the terms of its delegation.²² Then, in *Bowsher v. Synar*, the Court held that Congress could not vest even part of the execution of the laws in an officer, the Comptroller General, who was subject to removal by Congress, because to do so would enable Congress to play a role in the execution of the laws. Again, Congress could act only by passing other laws.²³

On that same day that *Bowsher* was decided through a formalist analysis, however, the Court in *CFTC v. Schor*²⁴ used the less strict, functional approach in upholding the power of a regulatory agency to adjudicate a state common-law issue. Of even more concern was that such power previously had been denied to a non-Article III bankruptcy court in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, a formalist plurality opinion with a limiting concurrence.²⁵ Sustaining the agency's power, the Court in *Schor* emphasized "the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'" ²⁶ It further held that in evaluating such a separation-of-powers challenge, the Court had to consider the extent to which the "essential attributes of judicial power" were reserved to Article III courts. Conversely, the Court had to evaluate the extent to which the non-Article III entity exercised the jurisdic-

²¹ 462 U.S. at 952.

²² 462 U.S. at 952.

²³ 478 U.S. at 726–727.

²⁴ 478 U.S. 833 (1986)

²⁵ Although the agency in *Schor* was an independent regulatory commission and the bankruptcy court in *Northern Pipeline* was either an Article I court or an adjunct to an Article III court, the characterization of the entity is irrelevant, and, in fact, the Court made nothing of the difference. The issue in each case was whether the judicial power of the United States could be conferred on an entity that was not an Article III court.

²⁶ 478 U.S. at 848 (quoting *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 587 (1985)).