No. 13-935

IN THE
Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,
Petitioners,

v.

RICHARD SHARIF,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN COLLEGE OF BANKRUPTCY AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the American College of Bankruptcy was founded in 1989 as an honorary association of bankruptcy and insolvency professionals. Membership is by invitation only. The College's eight hundred fellows include individuals associated with all facets of bankruptcy practice: commercial and consumer bankruptcy attorneys, corporate turnaround advisers, United States Trustees, bankruptcy trustees, investment bankers, insolvency accountants, law professors, judges, government officials, appraisers, and others involved in all aspects of the bankruptcy and insolvency community.

The College has typically avoided intervening in legal and political controversies. It has filed an amicus brief only once before, in *Executive Benefits Insurance Agency* v. *Arkison*, 134 S. Ct. 2165 (2014). In *Executive Benefits*, this Court was presented with, but ultimately did not resolve, one of the issues presented in this case: whether, and under what circumstances, bankruptcy courts may enter final judgment in "non-core" matters (that is, matters of private right)[2] with the litigants' consent.

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

[2] In this brief, except where otherwise indicated, amicus uses the terms "core" and "non-core" to denote matters as to which a bankruptcy court may and may not, respectively, enter final judgment consistent with the Constitution. *See Executive Benefits*, 134 S. Ct. at 2171 n.7 ("In using the term 'core'" in the Judiciary Code, Congress intended "a description of those claims that fell within the scope of the historical bankruptcy court's power.").

As the College explained in its brief in *Executive Benefits*, bankruptcy courts' ability to enter final judgment in non-core proceedings with the parties' consent is critical to the effective and efficient administration of bankruptcy cases and consistent with longstanding historical practice. A holding that Article III does not permit bankruptcy courts to adjudicate such claims with consent would throw the bankruptcy system into disarray—while also requiring the invalidation of key aspects of the magistrate system and thus undermining the effective administration of litigation more broadly.

As a non-partisan, diverse group of experienced bankruptcy professionals with expertise across all dimensions of bankruptcy and insolvency, the College has a substantial interest in the questions presented and a unique perspective on their proper resolution that differs from that of either of the parties. The College accordingly submits this brief to provide the Court with that perspective.

SUMMARY OF ARGUMENT

This Court granted certiorari in this case to resolve two questions: (1) whether petitioner Wellness International Network's claim against the respondent, debtor Richard Sharif, is a "core" bankruptcy proceeding as to which the bankruptcy court may constitutionally enter final judgment irrespective of the parties' consent; and (2) if not, whether the bankruptcy court could nonetheless constitutionally enter final judgment on that claim *with* the parties' express or implied consent. The court of appeals erred in its analysis of both questions, although not in every instance for the precise reasons Wellness articulates.

Wellness's claim against the debtor is appropriately viewed as a proceeding to determine whether certain property is owned by the debtor and thus properly included in the bankruptcy estate. *See* 11 U.S.C. §541(a). As such, Wellness's claim is at the very heart of the bankruptcy process, in which the bankruptcy court exercises *in rem* jurisdiction over all the property of the estate and adjudicates the competing claims of the debtor and its creditors to that property. *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 369-370 (2006). Put differently, Wellness's claim is part of the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). Wellness's claim is thus very different from the common-law breach-of-contract suit against a third party at issue in *Marathon*, *see id.* at 71-72, or the common-law tort counterclaim at issue in *Stern* v. *Marshall*, *see* 131 S. Ct. 2594, 2611-2615 (2011). Indeed, nothing could be more central to the bankruptcy process than the marshaling and distribution of the debtor's assets, at issue here.

The court of appeals wrongly concluded that the bankruptcy court could not constitutionally enter final judgment on Wellness's claim against the debtor. The court did so both because it misapprehended the nature of Wellness's claim and because it wrongly believed that the bankruptcy court's need to apply state law to resolve the claim rendered it non-core. Wellness's claim was asserted against the debtor and sought a declaration that the debtor had a legal or equitable interest in certain property. To be sure, in order to determine whether the debtor has such a property interest, a bankruptcy court must apply state law. But many core bankruptcy matters require the application of state

law. Most notably, the resolution of creditors' claims against the bankruptcy estate—one of the bankruptcy court's primary functions—requires the court to look to the underlying state law that typically governs the merits of those claims. *See* 11 U.S.C. §502(b)(1); *Butner* v. *United States*, 440 U.S. 48, 55 (1979). Claims-allowance proceedings may nonetheless be finally adjudicated by the bankruptcy court because they are part of the core bankruptcy function of distributing the *res* among competing claimants. So too here.

The Court accordingly need not reach the question of consent in this case. Were the Court to do so, however, it should hold that Article III poses no barrier to a bankruptcy court's entering final judgment in matters of private right with the parties' consent. This Court explained in *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), that Article III, §1 serves to protect "primarily personal, rather than structural, interests," and that such personal rights are waivable. *Id.* at 848-849. To be sure, Article III, §1 also protects against encroachment by the political branches on the judicial branch—and arguably against improper delegation by the judicial branch of its own duties—and "the parties cannot by consent cure" such structural flaws. *Id.* at 851. But no such encroachment or improper delegation is present here, given that bankruptcy courts are units of the district court and can adjudicate matters only by reference from the district court that may at any time be withdrawn. Accordingly, the parties may give their consent to entry of final judgment by the bankruptcy court—just as they may to entry of final judgment by a federal magistrate.

Under the Federal Rules of Bankruptcy Procedure, however, such consent may not be implied. Rule 7012(b) plainly states that "[i]n non-core proceedings

final orders and judgments shall not be entered on the bankruptcy judge's order except with the *express* consent of the parties." Fed. R. Bankr. P. 7012(b) (emphasis added). *Roell* v. *Withrow*, 538 U.S. 580 (2003), which interpreted a different statutory scheme and addressed very different facts, provides no basis to rewrite the rule. It is nonetheless possible that a party might forfeit an argument that Rule 7012(b) was violated by failing to raise it in a timely manner on appeal. Amicus takes no position as to how these principles apply to this case.

ARGUMENT

I. CONSTITUTIONAL AND STATUTORY BACKGROUND

Bankruptcy's central purpose is to identify and marshal the debtor's assets that become part of the bankruptcy estate and to distribute those assets among creditors. *See, e.g.*, *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363-364 (2006). By granting the bankruptcy court exclusive *in rem* jurisdiction over the debtor's property and the authority to adjudicate claims to that property, bankruptcy eliminates the race to the courthouse that would otherwise occur when an insolvent debtor lacks sufficient assets to satisfy all creditors. Bankruptcy courts have historically possessed, and may constitutionally exercise, authority to enter final judgment in matters at the core of this process of assembling the bankruptcy estate and adjudicating competing claims to that estate.

1. The Bankruptcy Act of 1898 divided bankruptcy proceedings into "summary" proceedings, which were generally conducted before non-Article III "referees," and "plenary" proceedings conducted in Article III (or state) courts. Act of July 1, 1898, ch. 541, §22(a),

30 Stat. 544, 552 (repealed 1979); *see also Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982) (plurality opinion). "[M]atters within the traditional 'summary jurisdiction' of bankruptcy courts" that "could [be] refer[red] … to specialized bankruptcy referees" "covered claims involving 'property in the actual or constructive possession of the [bankruptcy] court,' *i.e.*, claims regarding the apportionment of the existing bankruptcy estate among creditors." *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2170 (2014) (citation omitted). "Proceedings to augment the bankruptcy estate, on the other hand, implicated the district court's plenary jurisdiction and were not referred to the bankruptcy courts absent both parties' consent." *Id.*; *see also MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 266-268 (1932).

Katchen v. *Landy*, 382 U.S. 323 (1966), illustrates the point. In *Katchen*, this Court held that bankruptcy courts could enter final judgment in preference suits—suits to bring back into the estate money preferentially paid to certain creditors during the period just before the bankruptcy—against creditors who had filed claims in the bankruptcy case. *Id.* at 327-328. The Court rejected the creditor's argument that being required to proceed in bankruptcy court without his consent violated his constitutional rights, explaining that "bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession"—that is, property of the bankruptcy estate. *Id.* at 336. Because the statute required the adjudication of preference claims against creditors before their claims against the estate could be determined, the preference action became part of the claims-allowance process, and thus within the bank-

ruptcy court's authority to determine. *See also* *Langenkamp* v. *Culp*, 498 U.S. 42, 45 (1990) (per curiam) (same under Bankruptcy Code).

2. In 1978, Congress "substantially expanded" bankruptcy courts' authority. H.R. Rep. No. 95-595, at 13 (1977). The new Bankruptcy Code abolished the statutory distinction between summary and plenary proceedings and permitted newly constituted bankruptcy courts to hear and determine "all civil proceedings arising under [the Bankruptcy Code] or arising in or related to cases under [it]." 28 U.S.C. §1471(b) (repealed 1984); *Marathon*, 458 U.S. at 54 (plurality opinion). Although the 1978 Code permitted bankruptcy courts to enter final judgment in any proceeding within federal bankruptcy jurisdiction, bankruptcy judges were not given the Article III protections of lifetime tenure and undiminished compensation.

3. In *Marathon*, this Court held that broad grant of power to a non-Article III court unconstitutional. 458 U.S. at 87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). *Marathon* involved a state-law breach-of-contract action brought by a debtor against a third-party non-creditor. The plurality concluded that such an action was a matter of "private right," rather than "public right," and thus could not constitutionally be decided by a non-Article III tribunal absent the parties' consent. While the "divided Court" was unable to agree on the precise scope of Article III's limitations, a majority of the Court held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas* v. *Union Carbide*

Agric. Prods. Co., 473 U.S. 568, 584 (1985) (citing *Marathon*, 458 U.S. at 84).

At the same time, the Court made clear that its holding did not require that all bankruptcy proceedings be adjudicated by Article III courts. The plurality explained that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," "may well be a 'public right'" that Congress could remit to a non-Article III tribunal for decision. *Marathon*, 458 U.S. at 71. And it emphasized that such proceedings "must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages" at issue in *Marathon*, which served merely "to augment [the debtor's] estate" and which the debtor could assert "[e]ven in the absence of the federal scheme." *Id.* at 71, 72 n.26. The concurring Justices agreed that "[n]one of the [Court's] cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected," but similarly recognized that "different powers granted under [the Bankruptcy] Act [of 1978] might be sustained under the 'public rights' doctrine." *Id.* at 91.

4. In response to *Marathon*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. While rejecting proposals to establish an Article III bankruptcy court, Congress sought to satisfy this Court's instruction that "'the essential attributes'of the judicial power'" be retained in the Article III court. *Marathon*, 458 U.S. at 87 (plurality opinion). Accordingly, while the 1984 Act did not alter the scope of bankruptcy jurisdiction set out in the 1978 Code, it replaced the independent bankruptcy court established in the 1978 Code with an entity that would be a "unit" of the district courts and would hear bankruptcy proceedings only by refer-

ral from the district courts. 28 U.S.C. §151. Specifically, district courts "may provide that any or all cases under [the Bankruptcy Code] and any or all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Code] shall be referred to the bankruptcy judges for the district." *Id.* §157(a). Moreover, "[t]he district court may withdraw, in whole or in part, any case or proceeding referred [to the bankruptcy court], on its own motion or on timely motion of any party, for cause shown." *Id.* §157(d).[3]

In addition, the 1984 Act drew a distinction—at the heart of the statute's scheme for constitutionally allocating authority between district and bankruptcy courts—between "core" and "non-core" bankruptcy proceedings. "In using the term 'core,' Congress tracked the *Northern Pipeline* plurality's use of the same term as a description of those claims that fell within the scope of the historical bankruptcy court's power." *Executive Benefits*, 134 S. Ct. at 2171 n.7. The Act accordingly authorized bankruptcy courts to "hear and determine … all core proceedings arising under [the Bankruptcy Code], or arising in a case under [the Bankruptcy Code]" and to "enter appropriate orders and judgments" in such proceedings, subject only to ordinary appellate review. 28 U.S.C. §157(b)(1). By contrast, "[n]on-core proceedings … concern aspects of the bankruptcy case that *Marathon* barred non-Article III judges from determining on their own." *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir. 1987)

[3] Withdrawal of a proceeding from the bankruptcy court is mandatory "if the [district] court determines that resolution of the proceeding requires consideration of both [the Bankruptcy Code] and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. §157(d).

(Breyer, J.). Absent the parties' consent, *see* 28 U.S.C. §157(c)(2), in non-core proceedings bankruptcy courts may only enter proposed findings of fact and conclusions of law, subject to de novo review by the district court, *id.* §157(c)(1).

5. In *Stern*, this Court held that Congress's efforts in Section 157 to remedy the constitutional flaw identified in *Marathon* had failed "in one isolated respect." 131 S. Ct. at 2620. In the 1984 Act, Congress enumerated certain examples of core proceedings—proceedings that it believed the bankruptcy courts could constitutionally hear and determine without the parties' consent. 28 U.S.C. §157(b)(2). It included in the list of core proceedings "counterclaims by the estate against persons filing claims against the estate." *Id.* §157(b)(2)(C).

This Court held that, as applied to the counterclaim at issue in *Stern*—a state-law tort claim by the debtor against a creditor "that is not resolved in the process of ruling on a creditor's proof of claim"—§157(b)(2)(C) was unconstitutional. *Stern*, 131 S. Ct. at 2620. As in *Marathon*, the debtor's counterclaim was a cause of action derived from state common law and was related to her bankruptcy case only because, if she were to prevail, it would increase the estate's assets. *Id.* at 2614-2615.

As in *Marathon*, however, this Court made clear that its "narrow" ruling did not call into question bankruptcy courts' constitutional authority to enter final judgments in matters that are integral to the core restructuring process. *Stern*, 131 S. Ct. at 2617, 2620. To the contrary, the Court distinguished, and implicitly reaffirmed, its prior decisions in *Katchen* and *Langenkamp* holding that a bankruptcy court could determine a preference claim by the estate against a cred-

itor that had filed a proof of claim. *See id.* at 2616-2617; *see also Granfinanceria, S.A.* v. *Nordberg*, 492 U.S. 33 (1989) (holding that there is no jury-trial right, and hence no obstacle to proceeding in a non-Article III tribunal, in a fraudulent-transfer action against a creditor that has filed a claim against the estate, but that the same is not true in an action against a party that has not filed a claim).

* * *

In sum, this Court's precedent has distinguished between traditional "'common law … claims brought by a [debtor] to augment the bankruptcy estate'"—like the contract claim in *Marathon*, the fraudulent-transfer claim in *Granfinanceria*, and the tort claim in *Stern*—and "actions … that seek 'a pro rata share of the bankruptcy res,'" like those in *Langenkamp* and *Katchen*. *Stern*, 131 S. Ct. at 2614, 2618. "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case." *Id.* at 2618. Rather, the "question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* In those circumstances, there is no constitutional obstacle to the bankruptcy court's entering final judgment even absent the parties' consent.

II. A Bankruptcy Court May Constitutionally Enter Final Judgment On The Claim At Issue Here Even Without The Parties' Consent

In this case, a federal district court entered a money judgment in favor of petitioner Wellness against respondent Sharif. Pet. App. 2a. Sharif then filed for chapter 7 bankruptcy. *Id.* Wellness filed an adversary proceeding against Sharif, individually and as trustee of the "Soad Watter Trust." JA5-22. Counts I-IV of the

adversary complaint objected to the discharge of the debt arising from the judgment against Sharif. JA13-19. Count V sought a declaration that assets Sharif had represented to the bankruptcy court were held by the "Soad Watter Trust" were in fact Sharif's own assets, that is, that "the Soad Watter Living Trust is the alter ego of Debtor." JA19-21. The bankruptcy court ordered Sharif to respond to Wellness's discovery requests. Pet. App. 2a. When Sharif failed to do so, the bankruptcy court entered default judgment in favor of Wellness. *Id.* On appeal, the district court affirmed. *Id.* 3a.

The court of appeals concluded that Wellness's declaratory judgment claim against Sharif "is indistinguishable from the tortious-interference counterclaim in *Stern*" or "the contract claim in *Northern Pipeline*." Pet. App. 48a. The court reasoned that "[t]he dispute is between private parties," "[i]t stems from state law rather than a federal regulatory scheme," and "it is intended only to augment the bankruptcy estate." *Id.* The better interpretation of Wellness's claim, however, is that it sought not to augment the bankruptcy estate but to ascertain and marshal the estate's existing assets for distribution to creditors—the core function of the bankruptcy process. For the reasons set out below, such a claim "stems from the bankruptcy itself," *Stern*, 131 S. Ct. at 2618, and is within the bankruptcy court's power to adjudicate regardless of the parties' consent.

A. Proceedings To Determine Whether Property Is Part Of The Bankruptcy Estate Are Core Bankruptcy Proceedings That May Be Finally Decided By The Bankruptcy Court

Like claims-allowance proceedings, proceedings to determine whether certain property is part of the

bankruptcy estate are "'integral to the restructuring of the debtor-creditor relationship,'" *Stern*, 131 S. Ct. at 2617, and thus matters that bankruptcy courts may constitutionally hear and determine.

The Bankruptcy Code provides that the commencement of a bankruptcy case "creates an estate" that includes (with certain exceptions) "all legal or equitable interests of the debtor in property," "wherever located and by whomever held." 11 U.S.C. §541(a). A bankruptcy filing also creates an automatic stay barring creditors from pursuing claims against that property or against the debtor, so that the estate may be protected, and its value preserved, for the benefit of all creditors. *Id.* §362(a), (c). Absent relief from the automatic stay, creditors' recourse is thus limited to the bankruptcy estate. Creditors may file proofs of claim against the estate, *id.* §501, which are allowed or disallowed by the bankruptcy court, *id.* §502. Following satisfaction of any secured or priority claims, estate property is then distributed ratably among creditors having allowed claims. *Id.* §§725, 726, 1123, 1129. At the conclusion of the bankruptcy process, the debtor may (again, with certain exceptions) obtain a discharge of pre-bankruptcy debts, *id.* §§727(a)(2), 1141(d), which permanently enjoins creditors from collecting those debts from the debtor, *id.* §524(a).

Delineating and marshaling the bankruptcy estate are thus fundamental to the core bankruptcy process of restructuring debtor-creditor relations. "Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Katz*, 546 U.S. at

363-364. Indeed, "[b]ankruptcy jurisdiction, as understood today and at the time of the [Constitution's] framing, is principally *in rem* jurisdiction" "premised on the debtor and his estate.'" *Id.* at 369, 370; *see also Straton* v. *New*, 283 U.S. 318, 320-321 (1931) ("The purpose of the Bankruptcy Act … is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors.").

Determining whether property is part of the estate is thus well within the constitutional authority of bankruptcy courts to decide by final order. A proceeding to determine whether property belongs to the debtor—and hence to his or her bankruptcy estate—unquestionably "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2618. It is a proceeding "derived from … bankruptcy law"—§541 of the Bankruptcy Code—that does not "exist[] [outside of] any bankruptcy proceeding." *Id.* Moreover, determining what property is included in the estate is integral to the "claims allowance process." *Id.* The ultimate aim of the claims-allowance process, after all, is to distribute the estate to the debtor's creditors, as allocated in accordance with their respective claims.

Bankruptcy courts' constitutional authority to adjudicate the claims-allowance process, repeatedly recognized by this Court, is thus merely one aspect of the broader overall authority that bankruptcy courts have traditionally exercised over the bankruptcy estate. As *Katchen* explained, "'[t]he whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*,' and thus falls within the principle … that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession." 382 U.S. at 329-330 (citation omitted); *see also Granfinanceria*, 492

U.S. at 57 (*Katchen* "turned … on the bankruptcy court's having 'actual or constructive possession' of the bankruptcy estate, and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate" (citation omitted)).

Indeed, adjudication of interests in the bankruptcy estate has historically been handled in summary proceedings by non-Article III courts. At the time of the Constitution's framing, English bankruptcy law was a matter of statute, not the common law. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 575-576, 590 (1998). Pursuant to the English bankruptcy statutes, bankruptcy matters were generally adjudicated by non-judicial commissioners, unless a party to the bankruptcy proceeding sought review in a court of law or equity. *Id.* at 573-578 & n.57. The commissioners determined most issues arising in the bankruptcy proceeding, including those involving property of the estate, the allowance of creditors' claims, the pro rata distribution of the estate among creditors, and the discharge of the debtor's debts. *Id.* at 573, 575-599. This summary bankruptcy procedure, conducted primarily outside the more formal judicial process of the law and equity courts, facilitated the quick and inexpensive adjustment of the relationship between an insolvent debtor and his creditors. *Id.* at 574, 596.

The first U.S. bankruptcy law, the Bankruptcy Act of 1800, "was in many respects a copy of the English bankruptcy statute then in force. … Like the English statute, [it] permitted bankruptcy commissioners, on appointment by a federal district court, … to seize and collect the debtor's assets; to examine the debtor and any individuals who might have possession of the debtor's property; and to issue a 'certificate of discharge'

once the estate had been distributed." *Katz*, 546 U.S. at 373-374 (citations omitted). The Act gave non-Article III bankruptcy commissioners broad authority over the debtor's bankruptcy proceedings and the estate, including the power to "take into their possession, all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity," Act of April 4, 1800, ch. 19, § 5, 2 Stat. 19, 23; to "admit the creditors of such bankrupt to prove their debts," *id.* §6, 2 Stat. at 23; and to "order … said bankrupt's estate … to be … divided among such of the bankrupt's creditors as have duly proved their debts under such commission," *id.* §29, 2 Stat. at 29.

As discussed above, the Bankruptcy Act of 1898 likewise granted non-Article III bankruptcy referees summary jurisdiction to determine what property was part of the estate. In *Mueller* v. *Nugent*, 184 U.S. 1 (1902), for instance, this Court held that a bankruptcy referee had the power to determine whether property held by a third party was "the property of the bankrupt … and … part of [the bankruptcy] estate," and to order its turnover. *Id.* at 4, 12-15.

Of particular relevance here, bankruptcy referees could enter final orders determining that property held by the debtor's alter ego belonged to the debtor and its estate. For example, in *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215 (1941), this Court held that a bankruptcy referee had "jurisdiction … by summary proceedings" to enter "a final order" determining that "the property of the [debtor's] corporation was property of the bankrupt estate," and hence that the referee's order could not be collaterally attacked by a creditor of the corporation seeking priority against the corporate assets. *Id.* at 217-219. The referee in *Sampsell* determined that the property nominally held by the corpora-

tion was property of the estate because it found "'the corporation[] to be the alter ego of the bankrupt,'" *Imperial Paper & Color Corp.* v. *Sampsell*, 114 F.2d 49, 52 (9th Cir. 1940), and "'nothing but a sham and a cloak' devised by [the debtor] 'for the purpose of preserving and conserving his assets' for the benefit of himself and his family" and "hindering, delaying and defrauding his creditors," 313 U.S. at 217. *See also e.g.*, *In re Eufaula Enters., Inc.*, 565 F.2d 1157, 1160-1161 (10th Cir. 1977) (holding that "the referee in bankruptcy properly exercised summary jurisdiction in requiring the state-appointed receiver to turn over [a trust's] assets to the trustee of [the debtor]" where it found that "[the trust] was an instrumentality or alter ego of [the debtor]").

Courts have likewise held under the current Bankruptcy Code that bankruptcy courts may, consistent with Article III, enter final judgments determining whether property—including property purportedly owned by the debtor's alter ego—is part of the debtor's bankruptcy estate. *See, e.g.*, *In re Johnson*, 960 F.2d 396, 400-402 & n.3 (4th Cir. 1992) (bankruptcy court could enter final judgment determining what portion of debtor's property was held in constructive trust for investors as matter "intimately tied to the traditional bankruptcy functions and estate"); *In re Gladstone*, 513 B.R. 149, 156-159 (Bankr. S.D. Fla. 2014) (bankruptcy court could finally determine action to declare that property held by debtor's alter-ego corporations "are actually assets of the Debtor" and "accordingly property of the estate under 11 U.S.C. §541"; the action "'stems from the bankruptcy itself'" because "determin[ing] what is and is not property of the estate" is "a decision central to the mission of the bankruptcy court").

B. The Court of Appeals Misapprehended The Nature of Wellness's Claim

The court of appeals nonetheless held that the bankruptcy court lacked constitutional authority to enter final judgment on what it called Wellness's "alter ego" claim against the debtor, deeming that claim "indistinguishable" from the contract and tort claims in *Marathon* and *Stern*. Pet. App. 48a. The court of appeals' characterization of Wellness's claim, however, misapprehended the nature of the proceeding before the bankruptcy court. The better reading of Wellness's claim is that it merely sought a declaratory judgment that property the debtor claimed he held in trust for another was, in reality, his own property, and hence property of the debtor's bankruptcy estate under the Bankruptcy Code. As discussed above, the bankruptcy court could constitutionally decide that question.

The court of appeals may have been led astray by the term "alter ego," which has been applied to two different types of claims. *See Gladstone*, 513 B.R. at 156-159. An "alter ego" claim may refer to a claim seeking to hold a third party liable for a debt the debtor owes to a creditor. Such a claim may seek, for instance, to "pierce the corporate veil," based on the injustice to the creditor of maintaining the separateness of the third party's assets from the debtor's assets. *See, e.g.*, *International Fin. Servs. Corp.* v. *Chromas Techs. Can., Inc.*, 356 F.3d 731, 734, 736-737, 740 (7th Cir. 2004) (remanding to district court to hold sister corporation liable for debt owed to creditor of debtor corporation if court found sister corporation to be debtor's alter ego).

That kind of "alter ego" claim against a third party, seeking to hold that party liable for the debtor's debts, may well be a matter that, absent the parties' consent,

requires adjudication by an Article III court. Such a claim would resemble a fraudulent-transfer suit against a non-creditor: It would arise under the common law between private parties and would seek to augment the bankruptcy estate rather than to identify and marshal the existing assets in the estate. *See Stern*, 131 S. Ct. at 2618; *Granfinanceria*, 492 U.S. at 55-56.

The claim Wellness asserted here, however, is better understood as the second kind of "alter ego" claim—that is, a claim that a nominal third party has no substantive existence separate from the debtor, and that property purportedly held by the third party is, therefore, the debtor's own property. *See Gladstone*, 513 B.R. at 157-159. Because this kind of "alter ego" claim asserts that the nominal third parties "are not truly separate entities" and "have no purpose other than to hide assets held entirely for the Debtor's benefit," the "gravamen of the complaint is … that all assets held in the names of the various [third parties] are actually assets of the Debtor," and thus "'interests of the debtor in property' [under] §541(a)(1)." *Id.* at 159. A suit against the debtor to determine what property the debtor owns for purposes of delineating the estate under §541 of the Bankruptcy Code—quite unlike a suit against a third party seeking to bring the third party's assets into the estate on a common-law theory of liability—is integral to the restructuring of debtor-creditor relations and may be determined by the bankruptcy court.

While Wellness's complaint did not expressly invoke §541, that is the substantive relief it sought: a declaratory judgment "as to the Debtor's ownership interest in property purportedly held in the name of the [trust]." JA19. Wellness alleged that the "Debtor has continuously concealed property that he admitted … he owned by claiming that such property is currently

owned by the [trust]"; that "[t]o the extent that the [trust] exists," it was "a mere tool or business conduit of Debtor," that "Debtor … exercises complete control over the trust and its assets," and "that the separateness of Debtor and the [trust] … has ceased"; and that Wellness was therefore "entitled to a declaratory judgment that the [trust] is the alter ego of the Debtor and that all assets of the trust should be treated as part of Debtor's estate." JA35, 36, 44.

The court of appeals was thus wrong to conclude that Wellness's claim was a "state-law claim … wholly independent of federal bankruptcy law." Pet. App. 51a. An action to determine the property of the estate under §541 is an action "derived from [and] dependent upon [federal] bankruptcy law." *Stern*, 131 S. Ct. at 2618. That state law might play a role in the analysis of the claim is irrelevant. Indeed, "the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007) (internal quotation marks omitted). In the claims-allowance process, for example, the bankruptcy court will typically look to state law to determine a claim's validity. *See* 11 U.S.C. §502(b)(1) (providing for disallowance of claims that are "unenforceable … under any agreement or applicable law"); *Butner* v. *United States*, 440 U.S. 48, 55 (1979) (noting that property interests in bankruptcy are typically created and defined by state law). But the claims-allowance procedure is nonetheless one that "stems from the bankruptcy itself" for Article III purposes. The same is true here.

III. BANKRUPTCY COURTS MAY "HEAR AND DETERMINE" NON-CORE CLAIMS WITH THE CONSENT OF THE PARTIES

Because the bankruptcy court could constitutionally enter final judgment on Wellness's claim, this Court need not reach the question of consent. Were the Court to disagree and reach that question, however, it should hold that a bankruptcy court may constitutionally hear and determine non-core matters that would otherwise require an Article III tribunal with the consent of the parties. That conclusion is most consistent with this Court's Article III jurisprudence, which holds that absent meaningful encroachment on or diminution of the prerogatives of the judicial branch, the parties' consent to non-Article III resolution of a private-right dispute does not offend the separation of powers.

Under the Federal Rules of Bankruptcy Procedure, however, consent to bankruptcy court adjudication of a non-core matter must be "express." Fed. R. Bankr. P. 7012(b). There is no reason for this Court to hold that the rule means anything other than what it says.

A. Litigants May Consent To A Bankruptcy Court's Entry Of Final Judgment On Matters Of Private Right

A bankruptcy court's adjudication of private-right controversies with the litigants' consent, as Congress authorized in §157(c)(2) of the Judiciary Code, does not offend Article III.

1. In *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), this Court explained that Article III, §1 serves to protect "primarily personal, rather than structural, interests." *Id.* at 848. "[A]s 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." *Id.*

To be sure, Article III, §1 also plays a structural role, "safeguard[ing] the role of the Judicial Branch in our tripartite system by barring congressional attempts … [to] 'emasculat[e]' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'" *Schor*, 478 U.S. at 850 (citation omitted). It may also restrain the judicial branch from abdicating its own core constitutional duties. *See, e.g.*, *Peretz* v. *United States*, 501 U.S. 923, 955-956 (1991) (Scalia, J., dissenting). "To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty[.]" *Schor*, 478 U.S. at 850-851. The question, therefore, is whether a particular grant of authority to a non-Article III tribunal creates such a significant incursion on the judicial branch, or abdication of that branch's authority, that it cannot constitutionally be tolerated even if the litigants consent.

This Court has never previously identified such a case. When it has struck down a grant of power to a non-Article III tribunal, it has always been in cases in which litigants had no option to proceed before a constitutional court. In *Marathon*, for example, this Court's holding was that "Congress may not vest in a non-Article III court the power to adjudicate, render a final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Thomas*, 473 U.S. at 584 (emphasis added). *Stern*, too, struck down §157(b)(2)(C) as applied in that case, and distinguished *Schor*, in part because the objecting creditor "did not truly consent to resolution of

[the debtor's] claim in the bankruptcy court proceedings." 131 S. Ct. at 2614.

Similarly, consent has long been the lynchpin of the magistrate system, whose constitutionality has not been impugned by this Court. *Compare Gomez* v. *United States*, 490 U.S. 858, 872 (1989) (holding, on constitutional avoidance grounds, that Congress "did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties" where the defendant did not consent), *with Peretz*, 501 U.S. at 932 (holding that a magistrate may constitutionally exercise that duty where the defendant did consent). "[T]he litigant's consent makes the crucial difference." *Peretz*, 501 U.S. at 933. As a personal right, the defendant's right to have an Article III judge preside over voir dire is waivable. *Id.* at 936-937. Moreover, a magistrate's presiding over jury selection with the defendant's consent does not offend the "structural protections provided by Article III" because "[m]agistrates are appointed and subject to removal by Article III judges"; "[t]he 'ultimate decision' whether to invoke the magistrate's assistance is made by the district court, subject to veto by the parties"; and "'the entire process takes place under the district court's total control and jurisdiction.'" *Id.*[4]

[4] Indeed, this Court has long approved similar practices in an array of contexts. *See Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889) (approving practice in chancery courts in which "the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law" and concluding that decision of master had same effect as final judgment from federal court); *Newcomb* v. *Wood*, 97 U.S. 581, 583 (1878) ("The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration, where the right

The same is true here. The 1984 Act did not "'transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Schor*, 478 U.S. at 850. To the contrary, the Act carefully and deliberately ensured that Article III district courts would exercise a full measure of control over bankruptcy proceedings. *Cf. id.* at 857 (examining the "congressional plan at issue and its practical consequences" before upholding the grant of authority). Bankruptcy courts are "unit[s]" of the district courts, 28 U.S.C. §151, and bankruptcy judges are appointed—and may be removed—by Article III judges, *id.* §152(a), (e). The district courts enjoy extensive supervisory authority over the administration of bankruptcy proceedings: Bankruptcy courts hear no matter unless the district court has made an appropriate reference, *id.* §157(a); the district court may withdraw that reference for cause at any time, *id.* §157(d); and the district court *must* withdraw the reference of any proceeding that requires meaningful interpretation of a federal statute (other than the Bankruptcy Code) affecting interstate commerce, *id.* And, of course, all bankruptcy court judgments are reviewable by Article III courts. *Id.* §158. While these provisions are inadequate to render constitutional bankruptcy courts' *nonconsensual* entry of final judgment in non-core proceedings, *see*

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exists to ascertain the facts as well as to pronounce the law. *Conventio facit legem*. In such an agreement there is nothing contrary to law or public policy."); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 127, 131 (1865) (upholding referrals of civil matters for adjudication by non-Article III entities where "the parties agreed in writing to refer the cause to a referee 'to hear and determine the same and all the issues therein, with the same powers as the court'" and noting that the "[p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law").

Stern, 131 S. Ct. at 2619, they demonstrate that the 1984 Act does not strip the judicial power of the United States from constitutional courts in a way that raises concerns consent cannot address.

Like bankruptcy courts, magistrates enter final judgments with the consent of the litigants in proceedings that would otherwise be the exclusive province of Article III courts, and have long done so without constitutional controversy. *See* 28 U.S.C. §636(c)(1); *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) ("We hold that consensual reference of a civil case to a magistrate is constitutional[.]"). The constitutionality of a magistrate judge's authority under §636(c)(1) to enter final judgment with the parties' consent has been upheld by every court of appeals to address the issue. *See* American Bar Association, *Resolution 109*, at 5 & n.23 (Feb. 11, 2013) (collecting cases); *see also id.* at 10 (resolving that "bankruptcy judges may constitutionally enter final orders and judgments in *Stern*-type proceedings upon the consent of the parties"). There can thus be no argument that the magistrate system has a more robust consent requirement or differs in any way meaningful to the constitutional analysis.

Accordingly, were this Court to determine that the bankruptcy court may not constitutionally enter final judgment on matters of private right even with the parties' consent, that ruling would logically require the invalidation not only of §157(c)(2), but the magistrate system as well. Such a result would contradict this Court's assurance that its holding in *Stern* "does not change all that much," 131 S. Ct. at 2620, and would work nothing short of a revolution in the federal courts. It should be rejected.

2. Notably, the court of appeals did not hold that §157(c)(2) was unconstitutional. Pet. App. 43a-44a. Instead, the court expressly limited its holding to "*Stern* objection[s]," *id.* 42a, 44a—that is, objections to the bankruptcy court's entry of final judgment on a claim that Congress had mistakenly designated as "core" but that in fact could not constitutionally be determined by a non-Article III tribunal. The court held only that a litigant could not waive such an objection (or, presumably, consent to the bankruptcy court's adjudication of such a claim). *Id.* 44a.

The court expressly distinguished non-core claims that Congress did not mistakenly classify as core, strongly suggesting that §157(c)(2)'s provision for bankruptcy court adjudication of such claims with the parties' consent *is* constitutional:

> Section 157(c)(2) permits a bankruptcy judge to enter final judgment in a noncore proceeding, but only if the parties consent and the district court decides to refer the matter to the bankruptcy court. Thus, a strong argument can be made that with respect to noncore proceedings Congress has left the essential attributes of judicial power to Article III courts, and so the structural interests at issue with regard to [matters mistakenly designated as] core proceedings are not present under the current statutory scheme applicable to noncore proceedings, thereby allowing room for notions of waiver and consent.

Pet. App. 43a. In support, the court cited this Court's decisions in *Peretz* and *United States* v. *Raddatz*, 447 U.S. 667 (1980), finding no Article III barrier to the op-

eration of certain aspects of the magistrate system. *Id.* 43a-44a.

The court of appeals' distinction between "*Stern*" claims and other "non-core" claims permitted it to avoid the question whether §157(c)(2) and §636(c)(1) (permitting magistrates to enter final judgment with the parties' consent) are constitutional under its analysis. The distinction, however, makes no sense. As this Court made clear last Term in *Executive Benefits*, *Stern* claims are no different from any other non-core claims. The Court recognized that the "core" and "non-core" categories represented Congress's attempt to delineate the proceedings over which bankruptcy courts could constitutionally enter final judgment absent the parties' consent. *Executive Benefits*, 134 S. Ct. at 2171 & n.7. Applying severability principles, the Court held that *Stern* claims mistakenly categorized as "core" under §157(b) may "proceed as non-core within the meaning of §157(c)." *Id.* at 2173. Accordingly, the same provisions for consent and the same structural safeguards apply to *Stern* claims as to other non-core claims. For the reasons above, bankruptcy courts may enter final judgment with the parties' consent as to both kinds of claims. Regardless of the Court's answer to the question of consent, however, the two kinds of claims must rise and fall together—along with the analogous provisions in the magistrate system.

B. Under The Bankruptcy Rules, A Litigant's Consent Must Be Express

Although a litigant may consent to having a bankruptcy court adjudicate a matter of private right, the

Federal Rules of Bankruptcy Procedure require such consent to be express.[5]

Consent to having a non-Article III judge enter final judgment in a private-right dispute is no small thing. It is a relinquishment of the right to have an Article III judge preside over a critical—indeed, determinative—stage of the proceedings. As with respect to federal magistrates, consent is "[a] critical limitation" on the bankruptcy court's "expanded" authority. *Gomez*, 490 U.S. at 870.

Congress accordingly required that "the consent of all parties to the proceeding" be obtained before a bankruptcy court may enter final judgment in a non-core proceeding. 28 U.S.C. §157(c)(2). And the Bankruptcy Rules provide, in clear and unambiguous terms, that "[i]n non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order *except with the express consent of the parties*." Fed. R. Bankr. P. 7012(b) (emphasis added); *see also id.* R. 7012 advisory committee's note (1987) ("A final order of judgment may not be entered in a non-core proceeding heard by a bankruptcy judge unless all parties *expressly* consent." (emphasis added)).

The rules further require parties to state in the complaint and responsive pleading whether the action is core or non-core and, if non-core, whether the party consents to entry of final orders or judgment by the bankruptcy judge.[6] And the rules make clear that

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[5] That is not to say that the *Constitution* requires that consent be express—a question this Court need not reach and which amicus does not address.

[6] *See* Fed. R. Bankr. P. 7008(a) (complaints filed in adversary proceedings "shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not con-

"[f]ailure to include the statement of consent does not constitute consent. Only *express consent* in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding." Fed. R. Bankr. P. 7008 advisory committee's note (1987) (emphasis added).

As this Court has observed, these rules are not mere suggestions—they are commands. *See Kontrick* v. *Ryan*, 540 U.S. 443 (2004) (Federal Rules of Bankruptcy Procedure are mandatory); *see also Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) ("[I]n every pertinent respect, [a Federal Rule of Criminal Procedure is] as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."). Accordingly, only express consent is sufficient to authorize entry of final judgment by the bankruptcy court in non-core matters—as courts have held both before and after *Stern*. *See, e.g.*, *In re Sheridan*, 362 F.3d 96, 100-101 (1st Cir. 2004); *In re Yochum*, 89 F.3d 661, 667 (9th Cir. 1996); *In re Brickell Inv. Corp.*, 922 F.2d 696, 701-702 (11th Cir. 1991); *Home Ins. Co.* v. *Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989).[7]

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sent to entry of final orders or judgment by the bankruptcy judge"); *id.* R. 7012(b) (responsive pleadings filed in adversary proceedings "shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge").

[7] *See also In re Lyondell Chem. Co.*, 467 B.R. 712, 722 (S.D.N.Y. 2012) (in light of Rule 7012(b), "mere implied consent appears to be insufficient"); *In re Madison Bentley Assocs.*, 474 B.R. 430, 436 (S.D.N.Y. 2012); *In re New York Skyline, Inc.*, 512

Nor does *Roell* v. *Withrow*, 538 U.S. 580 (2003), warrant a different result. *Roell* held—as a matter of statutory construction—that implied consent may satisfy §636(c)(1), a conclusion it reached only after determining that implied consent was consistent with "the text and structure of [§636] as a whole," and that an express consent rule would "'frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts.'" *Id.* at 587, 590-591. The Court cautioned, however, that consent should be implied only in limited, exceptional circumstances. *Id.* at 591 n.7 ("[D]istrict courts remain bound by the procedural requirements of §636(c)(2) and Federal Rule of Civil Procedure 73(b)."). *Roell* did not address or interpret the bankruptcy rules, and it simply is not possible to read those rules to permit implied consent.

The facts of *Roell* are also instructive. The party raising the constitutional challenge (Withrow) *expressly* consented to adjudication by the magistrate and then waited until after he had lost at trial to argue that the magistrate lacked the authority to enter a final judgment because opposing counsel had not done the same. *Roell*, 538 U.S. at 582-583. The Court understandably determined that Article III's protections could not be wielded by a *consenting* party as a tactical maneuver. *Id.* at 590 ("Withrow … received the protection intended by the statute[.]"). The Court had no opportunity to address a situation in which the complaining party has not expressly consented to adjudication by a non-Article III court.

B.R. 159, 177 (S.D.N.Y. 2014); *Kramer* v. *Mahia*, 2013 WL 1629254, at *4 (E.D.N.Y. Apr. 15, 2013); *Pryor* v. *Tromba*, 2014 WL 1355623, at *6 (E.D.N.Y. Apr. 7, 2014).

Adhering to the plain language of the bankruptcy rules ensures that the parties and the bankruptcy court are on notice of whether the bankruptcy court may enter final judgment from the outset of the proceeding. If a party fails to comply with the rules' requirement that it indicate in its initial pleading whether it consents to have the bankruptcy court "hear and determine" the matter, the other party may seek to enforce the rule in the bankruptcy court and demand an express statement one way or the other at the outset of the litigation. The rules thus operate to permit the diligent litigant to avoid being "sandbagged."

There are also other protections against a party's lying in wait on the issue of consent until after appeals have been taken and the merits decided, such as the ordinary principle of appellate waiver. As this Court has explained, "[n]o procedural principle is more familiar … than that a constitutional right, or a right of any other sort, may be forfeited … by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Stern*, 131 S. Ct. at 2608 (internal quotation marks omitted). Thus, even though a party's failure to object to entry of judgment does not constitute consent, on review of that judgment a party must timely raise—or forfeit according to the ordinary doctrine of appellate waiver—the argument that consent was not properly obtained.

In this case, Sharif stated in his summary judgment motion that Wellness's adversary proceeding was a core matter. Mem. in Supp. of Summ. J. 1, Dkt. 65-2 (Bankr. N.D. Ill. June 22, 2010). Amicus takes no position as to whether that statement constituted express consent sufficient to satisfy the Bankruptcy Rules. Nor does it take a position as to whether Sharif forfeited his objection to

the bankruptcy court's entry of final judgment by failing to raise that objection properly on appeal.

CONCLUSION

This Court should hold that the bankruptcy court could constitutionally enter final judgment on petitioner's claim even without respondent's consent and should therefore reverse the judgment of the court of appeals. If the Court disagrees, it should hold that bankruptcy courts may constitutionally enter final judgment in non-core proceedings with the parties' consent, but that under the Federal Rules of Bankruptcy Procedure such consent must be express.

Respectfully submitted.

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No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, ET AL.,
Petitioners,

v.

RICHARD SHARIF,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether, consistent with Article III of the United States Constitution and *Stern v. Marshall*, 131 S. Ct. 2594 (2011), a bankruptcy court may enter a final judgment on a common law "alter ego" claim that seeks to extinguish the property interests of third parties in the assets of a trust for which the debtor served as trustee, and to augment the debtor's bankruptcy estate with those trust assets.

2. Whether a litigant's consent suffices to cure the unlawful assignment of the "judicial Power of the United States" to an Article I tribunal, and if so, whether the respondent here consented *expressly*, as specifically required by Federal Rule of Bankruptcy Procedure 7012(b), or otherwise consented knowingly and voluntarily.

PARTIES TO THE PROCEEDING

Petitioners are Wellness International Network, Limited, Ralph Oats, and Cathy Oats (collectively, "Wellness"), plaintiffs-appellees below.

Respondent is Richard Sharif, the debtor and appellant below.

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INTRODUCTION

The bankruptcy court in this case entered final judgment on a claim it had no authority to adjudicate. The claim sought to bring into respondent's bankruptcy estate assets owned by the Soad Wattar Living Trust—a trust established by respondent's mother, Soad Wattar, many years before respondent became indebted to petitioner. The only parties with property interests in those assets were the Trust, Wattar herself before her death, and respondent's sister, the Trust's beneficiary. Respondent was merely the trustee, and thus had no property interest in the assets of the Trust. They accordingly did not become part of his estate when he declared bankruptcy. *See*, *e.g.*, *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.10 (1983) ("Congress plainly excluded [from the bankruptcy estate] property of others held by the debtor in trust at the time of the filing of the petition."). Petitioners nevertheless sought to augment the bankruptcy estate with the assets of the Trust, on the basis of an "alter ego" claim asserting that the assets owned by the Trust should be treated as assets owned by respondent because treating them as separate would be unjust to petitioners.

That claim is wrong on its merits, but what matters for present purposes is that it is not a claim the bankruptcy court could finally resolve. Petitioners' alter ego claim is a private, common law claim seeking to extinguish property rights of third parties, i.e., the Trust and respondent's sister. There is no serious argument that such a claim falls within the bankruptcy court's authority to allocate assets owned by the estate—authority that has always been understood as *excluding* the power to adjudicate bo-

na fide claims of third parties to ownership of property in their possession. In the language of this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), common law claims seeking to "augment the bankruptcy estate" with property interests owned by third parties cannot be adjudicated by the bankruptcy court because they are not claims derived from or dependent on bankruptcy law. *Id.* at 2615-16.

As *Stern* makes clear, the Constitution reserves the adjudication of such claims in the federal system exclusively to courts duly constituted under Article III, rather than tribunals controlled by Congress or the Executive. A debtor cannot by its own consent alter that constitutionally mandated structure, especially where, as here, the private rights at issue include property rights of a third party—respondent's sister—who not only did not consent, but who affirmatively sought to prevent the bankruptcy court from adjudicating her rights. And even if the debtor's own consent could be enough in theory to justify the bankruptcy court's exercise of Article III power to adjudicate private rights, respondent here never provided such consent—and he certainly did not consent *expressly*, as Bankruptcy Rule 7012(b) specifically requires for claims like the alter ego claim petitioners assert. The judgment should be affirmed.

STATEMENT OF THE CASE

A. Legal Background

1. A debtor's decision to file a bankruptcy petition under Chapter 7 "creates a bankruptcy 'estate' generally comprising all of the debtor's property." *Law v. Siegel*, 134 S. Ct. 1188, 1192 (2014). Bankruptcy jurisdiction "is principally *in rem* jurisdiction." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356,

369 (2006). Defining the bankruptcy estate is thus a critical first step in bankruptcy proceedings, because it establishes the pool of assets within the bankruptcy court's jurisdiction, and from which the bankruptcy court can "distribut[e] ... property among the debtor's creditors" and thus facilitate the "ultimate discharge that gives the debtor a 'fresh start.'" *Id.* at 363-64.

Section 541 of the Bankruptcy Code describes the property that may be included in the bankruptcy estate. Most fundamentally, the estate contains "all legal or equitable interests *of the debtor* in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (emphasis added); *see* 28 U.S.C. § 1334(e)(1) (district court where bankruptcy case is commenced has "exclusive jurisdiction" over "all the property, wherever located, *of the debtor* as of the commencement of such case" (emphasis added)). The estate at commencement thus includes only property interests of the debtor at the time of bankruptcy—federal bankruptcy law "does not authorize a trustee to distribute *other people's* property among a bankrupt's creditors." *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135-36 (1962) (emphasis added). And because property interests "not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable … are of course not a part of the bankrupt's property," they are not part of the bankruptcy estate either. *Id.* at 135.

While § 541 specifies which of the debtor's property interests are included in the estate, § 541 does not determine in the first instance whether the debtor owns a given property interest. Instead, "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55

(1979). There is no "federal common law of property rights." *Bishop v. Wood*, 426 U.S. 341, 349 n.14 (1976).

2. Under the Bankruptcy Act of 1898, the bankruptcy estate—and hence the bankruptcy court's "summary jurisdiction"[1]—was strictly limited to the property in the debtor's "actual or constructive" possession at the time of the bankruptcy. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982) (plurality opinion); *see infra* at 29-32. Accordingly, when property was possessed by a third party with a "bona fide claim adverse to the receiver or trustee in bankruptcy," the rights to the property had to be "adjudicated in suits of the ordinary character, with the rights and remedies incident thereto." *Cline v. Kaplan*, 323 U.S. 97, 98-99 (1944) (quotation omitted).

Under the foregoing rule, bankruptcy courts could resolve "claims regarding the apportionment of the existing bankruptcy estate among creditors," but if a claim sought "to *augment* the bankruptcy estate" with property of a third party with a bona fide ownership claim, the proceeding "implicated the district court's plenary jurisdiction and [was] not referred to the bankruptcy courts absent both parties' consent." *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014) (emphasis added).

3. In 1978, "Congress enacted sweeping changes to the federal bankruptcy laws," eliminating "the

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[1] Under the 1898 Act, the federal district courts served as bankruptcy courts and could "refer matters within the traditional 'summary jurisdiction' of bankruptcy courts to specialized bankruptcy referees." *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014).

historical distinction" between summary and plenary jurisdiction. *Id.* The 1978 Act instead "mandated that bankruptcy judges 'shall exercise' jurisdiction over 'all civil proceedings arising under title 11 or arising in or related to cases under title 11.'" *Id.* at 2170-71 (quotation omitted). With "a few limited exceptions," the Act vested bankruptcy court judges "with all of the 'powers of a court of equity, law, and admiralty.'" *Id.* at 2171 (quotation omitted). But bankruptcy judges were still "not afforded the protections of Article III—namely, life tenure and a salary that may not be diminished." *Id.*

In *Northern Pipeline*, this Court held that the 1978 Act's assignment to bankruptcy courts of the authority to decide a "state-law contract claim" against a person or entity not party to the bankruptcy "violate[d] Art. III of the Constitution." 458 U.S. at 56, 87 n.40 (plurality opinion); *see id.* at 91 (Rehnquist, J., concurring). The Court distinguished "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," and hence may be subject to adjudication by Article I courts, from "the adjudication of state-created private rights," which are constitutionally restricted to Article III courts. *Id.* at 71 (plurality opinion).

4. Congress subsequently enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, which gives federal district courts "original and exclusive jurisdiction of all cases under title 11," 28 U.S.C. § 1334(a), and permits district courts to refer to bankruptcy judges "proceedings arising under title 11 or arising in or related to a case under title 11," *id.* § 157(a). Bankruptcy judges serve 14-year terms subject to removal for cause, and their

salaries are set by Congress. *Id.* §§ 152(a)(1), (e), 153(a).

The 1984 Act "divid[es] all matters that may be referred to the bankruptcy court into two categories: 'core' and 'non-core' proceedings." *Arkison*, 134 S. Ct. at 2171; *see* 28 U.S.C. § 157. The bankruptcy court must determine whether each claim before it is core or non-core. 28 U.S.C. § 157(b)(3). Section 157(b)(2) contains a non-exhaustive list of examples of core matters, such as "matters concerning the administration of the estate," "allowance or disallowance of claims against the estate," and "objections to discharges." *Id.* § 157(b)(2)(A),(B),(J). Bankruptcy judges can "hear and determine" such claims and "enter appropriate orders and judgments" on them. *Id.* § 157(b)(1). A "final judgment" entered in a core proceeding is appealable to the district court, *id.* § 158(a)(1), which reviews the judgment under traditional appellate standards, including deference to bankruptcy-court factfinding. Fed. R. Bankr. P. 8013.

As for "non-core" proceedings—those that are "not ... core" but are "otherwise related to a case under title 11"—§ 157(c)(1) authorizes bankruptcy courts to "hear [the] proceeding" and "submit proposed findings of fact and conclusions of law to the district court," which reviews them de novo and enters final judgment. Section 157(c)(2) also provides, however, that if all parties "consent," a bankruptcy judge may adjudicate and enter a final judgment on non-core matters. The parties' "consent" to a bankruptcy court's adjudication of a non-core matter must be "express." Fed. R. Bankr. P. 7012(b).

5. In two recent cases—*Stern* and *Arkison*—this Court effectively refined Congress's designation and treatment of "core" and "non-core" matters under § 157. In *Stern*, the Court held that even a claim designated as "core" in § 157 cannot *constitutionally* be adjudicated by the bankruptcy court if the claim is, in substance, merely a common law claim that seeks to "augment the bankruptcy estate" with assets owned by a third party. 131 S. Ct. at 2616. Such claims are reserved in the federal system exclusively to the jurisdiction of Article III courts. *Id.* at 2615.

In *Arkison*, the Court held that while bankruptcy courts cannot finally adjudicate such claims, they may *consider* such claims pursuant to the procedure established by § 157(c) for adjudicating "non-core" matters—i.e., by submitting proposed findings of fact and conclusions of law to the district court, subject to de novo review and entry of final judgment by that court. *See* 134 S. Ct. at 2172-74.

B. Proceedings Below

1. *The Soad Wattar Living Trust*

Respondent introduced evidence in the bankruptcy proceeding establishing the following facts. Respondent Richard Sharif was one of eight children raised by Abdul Hadi Sharifeh and his wife Soad Wattar. S.A. 2-3.[2] When Sharifeh died in Syria in 1988, he left his estate to Wattar. At the time, their children were living in the United States, primarily in the Chicago area.

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[2] "S.A." denotes Respondent's Supplemental Appendix submitted with this brief.

In early 1992, Wattar joined her family in Chicago and adopted a U.S.-style estate plan. S.A. 7, 24. Her plan took the form of the Soad Wattar Living Trust (the "Trust")—a revocable living trust designed to hold her assets for her benefit during her life and to pass them to the Trust's beneficiary upon her death.

Wattar executed the original trust documents on January 17, 1992. S.A. 5-7, 46. She was the settlor of the Trust and funded it with approximately $2 million. S.A. 5, 77. Wattar appointed Sharif as trustee. S.A. 10, 46.

Because the Trust was a revocable living trust, Wattar owned the beneficial interest in the Trust's assets during her lifetime. *See*, *e.g.*, *Amonette v. IndyMac Bank, F.S.B.*, 515 F. Supp. 2d 1176, 1184 (D. Haw. 2007) ("Because a settlor of a revocable living trust retains an unlimited right to revoke any conveyance to the revocable living trust, it has an unfettered ownership interest even though title is legally held by the trust." (citing *Engelke v. Estate of Engelke*, 921 So.2d 693, 696 (Fla. App. 2006))). The Trust filed its own federal and state tax returns at least from 2002 through 2009, which indicated that Wattar received all income generated by the Trust assets. S.A. 35.

The Trust was amended at least three times. S.A. 8-9, 22-26. The last amendment, on October 8, 2007, designated Sharif's sister Ragda Sharifeh ("Ragda") as the sole beneficiary upon Wattar's death. S.A. 36. As death beneficiary, Ragda also possessed an equitable remainder interest in the Trust assets, which qualifies as a vested property interest under Illinois law. *See In re Estate of*

Michalak, 934 N.E.2d 697, 707 (Ill. App. 2010); *In re Estate of Zukerman*, 578 N.E.2d 248, 253 (Ill. App. 1991). Wattar subsequently moved back to Syria, where she died on March 17, 2010. S.A. 19, 30. With Wattar's death, Ragda became entitled to all Trust assets under Illinois law. *See Michalak*, 934 N.E.2d at 707.

2. *The Texas Litigation*

Wellness markets health-oriented nutritional products. In 2003, Sharif and seven co-plaintiffs—all of whom had entered into distributorship contracts with Wellness—sued Wellness in federal district court in Texas, claiming that Wellness was operating a pyramid scheme. Pet. App. 4a.

The district court concluded that the plaintiffs had failed to respond to Wellness's discovery requests, and accordingly deemed material facts admitted against the plaintiffs. Pet. App. 4a-5a. The district court then granted Wellness's summary judgment motion, and the Fifth Circuit affirmed. Pet. App. 5a. In July 2008, the district court awarded Wellness $655,596.13 in attorneys' fees. Pet. App. 5a-6a.

3. *Sharif's Bankruptcy Petition*

On February 24, 2009, Sharif filed a voluntary Chapter 7 petition in the bankruptcy court for the Northern District of Illinois. Pet. App. 6a. Sharif's debts included the attorneys' fees he owed Wellness. Pet. App. 6a-7a. Wellness filed a proof of claim in Sharif's bankruptcy case. Pet. App. 7a.

The creditors' meeting required by Code § 341 commenced on March 25, 2009. *Id.* Wellness questioned Sharif about a loan application he had signed

in 2002, which included several valuable assets not listed in the schedule of assets he filed with the bankruptcy court. Pet. App. 72a.[3] Sharif explained that he did not personally own the assets listed on the loan application. Pet. App. 7a. Instead, the assets belonged to his sisters or their companies, or to the Trust. *Id.*; J.A. 32; S.A. 4-5. As Sharif later elaborated, he had signed the loan application in an effort to help his mother (the living beneficiary of the Trust) purchase a home, and the bank's loan officer had prepared the application—this being 2002, after all—and listed assets belonging to the Trust and his sisters. S.A. 4; *see also* J.A. 30, 36, 38, 41-43. Ragda later confirmed that she directed Sharif to list her assets on the application "in order to secure a loan for her mother." Pet. App. 77a. Sharif testified that he was not actually the borrower on the loan nor the owner of the home. Rather, initially the home was owned, and the loan was owed, by a company controlled by Ragda, and shortly thereafter both the home and the loan were transferred to the Trust. S.A. 10-16.

4. *Wellness's Adversary Proceeding*

a. On November 3, 2009, Wellness commenced an adversary proceeding against Sharif, individually and as trustee of the Trust. Pet. App. 8a, 72a. Counts I through IV of Wellness's complaint asserted that Sharif had concealed his assets and therefore was not entitled to a discharge of his debts under Code § 727. Pet. App. 8a, 73a; J.A. 13-19.

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[3] Those assets included three businesses valued at $2.4 million, three parcels of property valued at $1.4 million, a retirement account valued at $1.4 million, and three bank accounts with $180,000 in cash. Pet. App. 71a.

Count V, in contrast, did not invoke any Code provision. Instead, it sought a "declaratory judgment that the [Trust] is the alter ego of [Sharif] and that all assets of the Trust should be treated as part of [the] estate." J.A. 21. Count V alleged that there was such a "unity" between Sharif and the Trust that their "separateness" had ceased and that excluding Trust assets from Sharif's estate "would result in injustice." J.A. 20.

b. Bankruptcy Rule 7008(a) requires that an adversary complaint aver whether the proceeding is core or non-core under § 157 and, if non-core, indicate whether the plaintiff consents to the entry of a final judgment by the bankruptcy judge. Wellness's complaint alleged (J.A. 6) that the proceeding was core under § 157(b)(2)(J), which defines as core an objection to a bankruptcy discharge. That designation applied to the discharge objections in Counts I-IV. But it could not have encompassed the Count V alter ego claim, which asserted no discharge objections.

Sharif answered the complaint on January 12, 2010, over a year before this Court decided *Stern*. Sharif's answer admitted that the complaint alleged a "core" objection to discharge under § 157(b)(2)(J). J.A. 24. Under Seventh Circuit law at the time, bankruptcy courts had authority to finally adjudicate claims designated as "core" under § 157(b)(2). *See In re Ortiz*, 665 F.3d 906, 910 (7th Cir. 2011).

5. *The Default Judgment*

The bankruptcy court did not enter final judgment based on the merits of Wellness's claims, but solely as a sanction for discovery violations. Pet. App. 117a-18a. On February 10, 2010, Wellness

served discovery requests, with responses due March 15. Pet. App. 8a, 73a. Sharif's deposition was scheduled for March 24. Pet. App. 73a. On March 12, Sharif's counsel requested an extension of time to complete discovery, informing the court that Sharif had traveled to Syria to attend to his gravely ill mother. Pet. App. 9a, 73a-74a. Sharif was still abroad on March 24, when his counsel filed a motion to postpone his deposition and delay his discovery responses. Pet. App. 73a. The bankruptcy court denied the motion. *Id.*

On April 15, 2010, Wellness filed a motion for sanctions and, in the alternative, to compel discovery. J.A. 46-129. Sharif attached to his response documents proving that he had been out of the country since March 5, along with a copy of his mother's death certificate. J.A. 132, 135-39. On April 21, the bankruptcy court granted Wellness's motion to compel, granting Sharif just one week to comply with all outstanding discovery requests. J.A. 140.

On April 27, Sharif produced approximately 1,500 pages of discovery. Pet. App. 73a. He was deposed on May 10. *Id.* Sharif's documents and testimony set forth extensive evidence establishing the validity and longstanding independence of the Trust. *See supra* at 7-9. Sharif also elaborated the circumstances surrounding the 2002 loan application's invocation of Trust assets. *See supra* at 9-10.

By May 23, Sharif had produced thousands of pages of documents. J.A. 143. On May 24, the bankruptcy court held a hearing to determine whether Sharif was in compliance with its April 21 order. Pet. App. 74a. On June 22, Sharif moved for summary judgment. Pet. App. 10a.

On July 6, 2010, the bankruptcy court entered a default judgment against Sharif as "a sanction for [his] failure to comply with discovery requests." Pet. App. 117a-18. The judgment denied Sharif a discharge under Code § 727 and extinguished Ragda's rights in the assets of the Trust, declaring it to be "the alter ego of the Defendant Richard Sharif because he treats its assets as his own property and it would be unjust to allow Debtor to maintain that the trust is a separate entity." Pet. App. 74a-75a, 119a.

6. *Appellate Proceedings*

a. Sharif appealed the bankruptcy court's final judgment to the district court, arguing that the bankruptcy court had erred in entering a default judgment. Pet. App. 15a, 76a-77a.

On December 12, 2011, Ragda filed a motion in the district court under § 157(d) to "withdraw the reference"—i.e., to have the district court reclaim jurisdiction over the case. Pet. App. 15a. Citing *Stern*, Ragda argued that the bankruptcy court lacked jurisdiction to enter a final judgment on Wellness's complaint. *Id.*[4] A month later, Sharif filed a motion for supplemental briefing on *Stern* and the Seventh Circuit's decision in *Ortiz*, 665 F.3d 906. *Id.*

[4] This was not Ragda's first effort to protect her property interest in the Trust. After learning that the bankruptcy court had entered a default judgment declaring the Trust her brother's alter ego, Ragda filed an adversary complaint in the bankruptcy court alleging that the bankruptcy trustee had wrongfully converted the Trust's assets and seeking a declaration that she was the beneficiary of the Trust. Pet. App. 77a. The bankruptcy court dismissed her complaint. *Id.* Ragda's appeal has been stayed pending this Court's disposition of this case. S.A. 91-92.

The district court denied both motions as untimely and affirmed the bankruptcy court's judgment. Pet. App. 16a. The court held the challenge to bankruptcy court jurisdiction waived and rejected both of Sharif's claims on the merits, reviewing the bankruptcy court's factual findings for clear error and its decision to enter a default judgment for abuse of discretion. *Id.*

b. On appeal, the Seventh Circuit affirmed the bankruptcy court's disposition of Counts I-IV. Pet. App. 66a.

As to the Count V alter ego claim, the court concluded that Sharif had admitted that the entire adversary complaint stated a "core" discharge objection under § 157(b)(2)(J), and thus "proceed[ed] on the assumption that the alter-ego claim was a core proceeding" as a matter of statute. Pet. App. 21a. But the court agreed with Sharif that as a *constitutional* matter, the bankruptcy could not enter final judgment on the alter ego claim. As the court explained, Wellness's claim that Sharif was the alter ego of the Trust—and thus that Trust assets could be declared Sharif's assets, depriving Ragda of her rights in them—was "indistinguishable" in "almost all material respects" from the claims addressed in *Stern* and *Northern Pipeline*. Pet. App. 48a. Like those claims, the alter ego claim "is a common law claim" and "is intended only to augment the bankruptcy estate." *Id.* The bankruptcy court accordingly had no authority to render final judgment on that claim. Pet. App. 51a.

The court further concluded that "a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceed-

ing." Pet. App. 45a. The question whether the bankruptcy court could constitutionally adjudicate Wellness's alter ego claim under *Stern* concerned "the allocation of authority between bankruptcy courts and district courts" under Article III and thus "implicate[d] structural interests," Pet. App. 42a, making it nonwaivable.

SUMMARY OF ARGUMENT

I. The bankruptcy court lacked constitutional authority to finally adjudicate Wellness's alter ego claim. Bankruptcy courts may resolve "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *Stern*, 131 S. Ct. at 2614, but not common law claims that seek to "augment the bankruptcy estate" with the property of third parties, *id.* at 2616. Wellness's alter ego claim falls in the latter category.

A. Wellness contends that the bankruptcy court could render final judgment on the alter ego claim based on its authority under § 541 to determine which property of the debtor should be included in the bankruptcy estate. That argument rests on the false premise that because Sharif was trustee of the Trust, the Trust's assets became part of the estate under § 541. Under Illinois law, however, the Trust was a distinct legal entity with full ownership rights in the Trust assets. As trustee, Sharif possessed only "bare legal title"—a valueless interest allowing him to administer the Trust. Under both this Court's precedents and § 541, the Trust assets did not automatically become part of the bankruptcy estate at its commencement. Wellness's alter ego claim thus did not seek to determine whether Sharif's property should be included in the bankruptcy

estate, but instead ought to *augment* the bankruptcy estate with third-party property.

B. That claim is precisely the type of claim that must be adjudicated by an Article III court.

The alter ego claim is identical in all material respects to the claim in *Stern*. It is a common law claim designed to augment Sharif's estate with property interests owned by a third party. And it does not implicate the core bankruptcy function of reordering Sharif's debts—it does not ask the court to distribute or otherwise administer assets already within the estate, but instead seeks to add third-party assets to the estate.

Firmly established historical practice prohibited bankruptcy courts from seizing property owned and possessed by legally distinct third-party entities. Bankruptcy courts were authorized to decide whether assets indisputably within the debtor's actual or constructive possession were part of the bankruptcy estate, but they could not adjudicate bona fide claims by third parties to ownership of property in their possession.

The Solicitor General's argument that Wellness's alter ego claim is governed by a "federal rule of decision," based on *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941), is both wrong and irrelevant. Illinois law determines the underlying property rights in the Trust assets, as Wellness concedes. *Sampsell* did not create or apply a federal common law alter ego rule. Moreover, the particular source of law for a claim is ultimately irrelevant—even if a claim is codified in the Bankruptcy Code, it must be finally adjudicated by an Article III court if, as here, the claim in substance resembles a common

law claim seeking to augment the estate with third-party assets.

The Solicitor General also errs in arguing that the bankruptcy court had authority to adjudicate the alter ego claim because it had authority to adjudicate Wellness's discharge objections, which indisputably implicate "core" bankruptcy powers. Unlike the discharge objections, the alter ego claim requires adjudication of third-party property interests, which is precisely why a bankruptcy court cannot finally resolve it.

C. Wellness's argument that it would be impractical to prohibit bankruptcy courts from entering final judgment on alter ego claims is irrelevant to the scope of their constitutional authority. It also rests on the mistaken assumption that district courts would be required to enter final judgment on *all* state-law disputes. Sharif instead argues only that Article III courts must finally decide claims seeking to augment the estate with third-party property. And even in those cases, bankruptcy courts would have authority to litigate the claim and issue proposed findings of fact and conclusions of law.

II. A bankruptcy court's final adjudication of a private rights claim (like the alter ego claim here) is a structural Article III violation that cannot be cured by consent of private parties. And even if consent mattered, there must be *express* consent, which Sharif did not provide.

A. Private parties cannot consent to a reordering of the separation of powers, which protects liberty by restricting the authority of each branch as against the others. In particular, Article III protects the rights of individuals by ensuring that their pri-

vate rights are adjudicated in the federal system by neutral and independent judges with life tenure and salary protection (and juries in appropriate cases), rather than by tribunals subject to legislative and executive manipulation. This Court's precedents—particularly *Stern* and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)—confirm that litigant consent and litigation conduct cannot eliminate the structural threat to liberty posed by allowing non-Article III courts to exercise the judicial power of the United States. Allowing litigant consent to cure the Article III violation here would be particularly inappropriate because Wellness's alter ego claim seeks to adjudicate the property rights of *third parties*, who not only never consented to bankruptcy court jurisdiction, but affirmatively sought to withdraw the case from the bankruptcy court and pursue Article III adjudication.

B. Even if litigant consent could waive an Article III violation, the waiver would have to be knowing and voluntary. And in the bankruptcy context, Rule 7012(b) goes even further, requiring *express* consent to a bankruptcy court's final adjudication of "non-core" matters. The conduct Wellness identifies as demonstrating Sharif's supposed consent here does not remotely qualify as express consent—or knowing and voluntary consent in any respect—to non-Article III adjudication.

C. The Article III violation in this case was not and could not be cured by Sharif's failure to raise it on appeal. The structural violation cannot be forfeited for the same reason it cannot be waived. And the violation deprived the district court of appellate jurisdiction, a defect that can be raised at any time.

ARGUMENT

I. THE BANKRUPTCY COURT LACKED THE CONSTITUTIONAL AUTHORITY TO ENTER A FINAL JUDGMENT ON WELLNESS'S ALTER EGO CLAIM

This Court's decision in *Stern* draws a clear, administrable distinction between matters that bankruptcy courts may finally adjudicate, and those that must be adjudicated by Article III courts. Bankruptcy courts may resolve "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," 131 S. Ct. at 2614 (quotation omitted), but they cannot resolve private, common law claims that "simply attempt[] to augment the bankruptcy estate" with property owned by third parties, *id.* at 2616.

The *Stern* rule derives from a distinction this Court has long recognized between private rights, which Congress cannot "withdraw from judicial cognizance," and "public rights," which Congress "may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). The Court first applied that distinction to the bankruptcy context in *Northern Pipeline*, in which a majority of Justices agreed that bankruptcy courts could not "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" filed in bankruptcy court by a debtor against a third party. 458 U.S. at 56, 87 n.40 (plurality opinion); *see id.* at 91 (Rehnquist, J., concurring in judgment). The debtor's contract claim against the third party did not involve a "public right" under the bankruptcy power, the plurality ex-

plained, because the claim did not seek to "restructur[e] … debtor-creditor relations, which is at the core of the federal bankruptcy power," but instead sought merely to "augment the estate" by "adjudicati[ng] … state-created private rights." *Id.* at 71.

The Court drew the same distinction in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), holding that a trustee's "fraudulent conveyance" action under 11 U.S.C. § 548(a)(2) to recover assets from a third party could not be "assign[ed]" by Congress "to a specialized non-Article III court lacking the essential attributes of the judicial power," where a jury trial would be unavailable. 492 U.S. at 53 (quotation omitted). Congress could, the Court explained, create "public rights" and "assign their adjudication to an administrative agency with which a jury trial would be incompatible." *Id.* at 51 (quotation omitted). But fraudulent conveyance claims fall outside that "public rights" category because they are "quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56.

In *Stern*, the Court applied the same distinction to a debtor's tort claim seeking to obtain assets from a party with a claim against the estate. Because the debtor's claim was asserted as a counterclaim, it fell within the sixteen matters designated by Congress in § 157(b) as "core" matters subject to final adjudication by a bankruptcy court. *See* 28 U.S.C. § 157(b)(2)(C). The Court held, however, that Article III prohibited Congress from authorizing a bankruptcy court to enter final judgment on the debtor's

claim. The claim, the Court emphasized, did not implicate "public rights" because it was "neither derive[d] from nor depend[ent] upon any agency regulatory regime." 131 S. Ct. at 2615. Rather, the tort counterclaim was "one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court." *Id.* at 2616.

In this case, Wellness contends that its "alter ego" claim against Sharif fits within the "public rights" category subject to Article I adjudication because the claim arises from the bankruptcy court's obligation under § 541 "to determine which of the debtor's assets actually fall within the estate." Petr. Br. 22; *see* U.S. Br. 14.

Wellness's argument rests on a single fundamentally incorrect premise, *viz.*, that Sharif possessed a property interest in the Trust assets. He did not. As trustee, Sharif held no legal or equitable interest in the Trust's assets. Those assets accordingly were not made part of his bankruptcy estate at its commencement—indeed they were affirmatively excluded from the estate. The only way they could be brought into the estate is through a claim *seeking to bring them into the estate*, by extinguishing the competing property interests of third parties in the same assets. Wellness's alter ego claim is just such a claim, which is exactly the kind of claim that cannot be—and historically has not been—adjudicated by an Article I tribunal.

A. Because Sharif As Trustee Did Not Possess Any Property Interest In The Trust Assets, The Assets Did Not Automatically Become Part Of The Bankruptcy Estate

Wellness's entire argument presupposes that because Sharif was the trustee of the Trust when he declared bankruptcy, Sharif himself possessed a property interest in the Trust assets. Petr. Br. 12, 13, 14, 15, 20, 22, 24, 27, 31, 32, 33, 37, 39, 40. On the basis of that premise, Wellness says this case is controlled by the unexceptional authority of the bankruptcy court under § 541 "to determine which of the debtor's assets actually fall within the estate." *Id.* at 22.

Wellness's § 541 argument fails at its "foundational" (*id.* at 23) premise: although Sharif was trustee of the Trust, that service obligation never gave him any legal or equitable interest in the Trust assets themselves. Under Illinois law, "a written trust … possesses a distinct legal existence." *Pierce v. Chester Johnson Elec. Co.*, 454 N.E.2d 55, 57 (Ill. App. 1983). That distinct legal entity—not Sharif—owned the Trust assets. *See Richard W. McCarthy Trust v. Ill. Cas. Co.*, 946 N.E.2d 895, 904 n.6 (Ill. App. 2011) ("[T]here is no question under Illinois law that the change in the name on the notes from McCarthy individually to McCarthy as trustee of the trust was a change in the ownership of the notes. The trust is a separate legal entity.").

As trustee, Sharif was a "'mere representative'" of the Trust's interests. *Fletcher v. Fletcher*, 380 S.E.2d 488, 491 (Va. 1997) (quoting George T. Bogert, The Law of Trusts & Trustees § 961, at 2 (2d

ed. 1983)). In that capacity he possessed at most "'bare' legal title," which simply permits a trustee to exercise "administrative powers" on behalf of the trust. Restatement (Third) of Trusts § 42, cmt. a (2003) ("Restatement"); *see In re Pfister*, 749 F.3d 294, 297 (4th Cir. 2014) (trustee's "bare legal title" is "a valueless asset"). It is the trust *beneficiary* who possesses the "beneficial interests (or 'equitable title') in the trust property." Restatement § 42 cmt. a. Under Illinois law, once Ragda was named death beneficiary, Wattar and Ragda were the only individuals with equitable interests in the Trust assets. *See supra* at 8-9.

Because Sharif as trustee did not possess property interests in the Trust assets when he declared bankruptcy, those property interests did not automatically become part of the estate at its commencement. Property interests "not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable … are of course not a part of the bankrupt's property." *Pearlman*, 371 U.S. at 135. It follows that, as the Court has repeatedly recognized, where a debtor is "at most a trustee of the bare legal title" of property owned by another person or entity, the property itself does not become part of the bankruptcy estate. *State Bank of Hardinsburg v. Brown*, 317 U.S. 135, 137 (1942); *see Whiting Pools*, 462 U.S. at 204 n.8 (the bankruptcy estate does not include "property of others in which the debtor had some minor interest such as a lien or bare legal title"); *see also* George T. Bogert, Trusts § 32, at 107 (6th ed. 1987) ("Since the trustee's title is not a beneficial one and his holding is as a representative only, his property interest is not one which

gives his personal creditors any right to take his property….").

Wellness's singular focus on the bankruptcy court's authority over estate assets pursuant to § 541 thus simply misses the point: the estate at commencement includes only *the debtor's* property interests, *see supra* at 3, and Sharif as trustee had no property interests in the Trust assets. Indeed, § 541 confirms that the Trust assets are *excluded* from the estate. Section 541(d), for example, provides that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest … becomes property of the estate … only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." Similarly, § 541(b)(1) excludes from the estate "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." Under that provision, where a debtor holds the "property of others … in trust at the time of the filing of the petition," that property is "plainly excluded" from the bankruptcy estate. *Whiting Pools*, 462 U.S. at 205 n.10.

Wellness accordingly errs in invoking the bankruptcy court's authority under § 541 over property interests *owned by the debtor* as the basis for the bankruptcy court's conclusive authority over property interests *owned by the Trust and Ragda*. Petr. Br. 20. Contrary to Wellness's submission, the alter ego claim does not seek merely to *define* the contours of the bankruptcy estate by determining which property interests owned by Sharif should be included in the estate. The claim instead seeks to *augment* the estate with property interests owned by third par-

ties. That kind of claim can be adjudicated only by an Article III court, as explained below.

B. Wellness's Common Law Claim To Augment The Estate With Property Interests Owned By Third Parties Must Be Adjudicated By An Article III Court

Because Wellness's alter ego claim on its face is a claim seeking to augment the bankruptcy estate with third-party property interests, it must be adjudicated by an Article III court. Notably, Congress itself did not consider alter ego claims to implicate "core" bankruptcy powers—such claims are not included among the statutory list of "core" matters specified in § 157(b). The same result is required as a constitutional matter under the principles enunciated in *Stern*, and under the historical bankruptcy practices that inform those principles.

1. *The Alter Ego Claim Is A Common Law Claim Seeking To Augment The Estate With Third-Party Assets*

The Court in *Stern* held that a debtor's tort claim against a third party could not be finally adjudicated by the bankruptcy court because it did not seek "a pro rata share of the bankruptcy res," 131 S. Ct. at 2618, but instead was a claim "at common law that simply attempt[ed] to augment the bankruptcy estate" with the defendant's assets, *id.* at 2616. For that critical distinction, *Stern* relied on *Northern Pipeline*, which held that the debtor's state-law contract claim against a third party could not be finally adjudicated by the bankruptcy court, and *Granfinanciera*, which held that a trustee's fraudulent conveyance action under § 548(a)(2) to recover assets from a third party could not be withdrawn from Arti-

cle III adjudication where jury trial rights apply. *See supra* at 19-20. As *Stern* emphasizes, all three claims shared the same features: each was essentially a common law claim that sought to augment the bankruptcy estate with property owned by third parties, and none was intertwined with the "core bankruptcy power" of "restructuring … debtor-creditor relations." *Arkison*, 134 S. Ct. at 2170-71 (quotation omitted); *see Stern*, 131 S. Ct. at 2614-16, 2418.

The same is true of the "alter ego" claim asserted by Wellness: it is a common law claim that seeks to augment the estate with third-party property, and nothing about the claim is intertwined with the restructuring of debtor-creditor relations and allocation of the bankruptcy res. As shown in Section I.A above, Sharif possessed no property interest in the Trust assets—only Wattar and Ragda did. Those distinct, third-party property interests did not automatically become part of the bankruptcy estate by operation of the Code. Just the opposite: they were specifically excluded by §§ 541(b)(1) and 541(d). *See supra* at 24. Accordingly, Wellness's alter ego claim *necessarily* sought to augment the bankruptcy estate by adding the property of third parties.

Wellness's claim also does not arise uniquely from "the bankruptcy itself," nor must it "necessarily be resolved in the claims allowance process." *Stern*, 131 S. Ct. at 2618. It is a theory of recovery familiar in common law contract and debt actions, *see*, *e.g.*, *Gallagher v. Reconco Builders, Inc.*, 415 N.E.2d 560, 563-64 (Ill. App. Ct. 1980), and whether the Trust assets are added to the estate has nothing to do with whether Wellness's claims are allowed or Sharif's debts are discharged. *See infra* at 35-37. Section

541, the provision now cited by Wellness, does not include a private right of action for veil-piercing (or anything else), and there is no "federal common law of property rights." *Bishop*, 426 U.S. at 349 n.14; *see infra* at 33-34.[5] Property interests instead "are created and defined by state law." *Stern*, 131 S. Ct. at 2616 (quotation omitted). Count V of Wellness's complaint tacitly acknowledges as much—contrary to Wellness's position here, Count V does not cite § 541, but instead tracks almost word-for-word the elements of a common law alter ego claim under Illinois law.

Under Illinois law, one legally distinct entity may be deemed the alter ego of another if the party seeking to pierce the veil proves both "that (1) there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances are such that adhering to the fiction of a separate corporate existence would promote injustice or inequity." *Int'l Fin. Servs. Corp. v. Chromas Techs. Can. Inc.*, 356 F.3d 731, 736 (7th Cir. 2004) (quotation omitted). Count V of Wellness's complaint accordingly alleges that there was such a "unity" between Sharif and the Trust that their separateness no longer existed, and that excluding the Trust's assets from the estate would "result in injustice." J.A. 20. Because that private common-law claim exists entirely inde-

[5] Even if the Code did create an express "alter ego" claim, it could not be finally adjudicated by the bankruptcy court. *See infra* at 35-36.

pendent of the bankruptcy, it must be adjudicated by an Article III court.[6]

2. *Bankruptcy Courts Historically Were Prohibited From Seizing Third-Party Assets*

The "firmly established historical practice" under English and American bankruptcy laws, *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring), prohibited bankruptcy courts from seizing property owned and possessed by legally distinct third-party entities, contrary to Wellness's suggestion. Petr. Br. 32; *see also* ACB Br. 15-16. Bankruptcy courts surely did have summary jurisdiction "to decide whether *a debtor's property* constitutes property of the bankruptcy estate." Petr. Br. 32 (emphasis added). But they *never* had summary jurisdiction to resolve bona fide ownership claims of *third parties* to property in their possession. Every authority and precedent cited by Wellness makes that point clear.

a. Wellness emphasizes that English bankruptcy commissioners had the right to administer property "rightfully in the possession of the estate" in summary equitable proceedings (precursors to today's bankruptcy court proceedings). *Id.* at 34 (quot-

[6] Wellness's own amicus the American College of Bankruptcy ("ACB") concedes that an alter ego claim "based on the injustice to the creditor of maintaining the separateness of the third party's assets from the debtor's assets"—which is exactly what Wellness asserts—is a claim that "may well … require[] adjudication by an Article III court." ACB Br. 18-19. There is no reason to equivocate, as the College's own explanation shows: "Such a claim would resemble a fraudulent-transfer suit against a non-creditor: It would arise under the common law between private parties and would seek to augment the bankruptcy estate rather than to identify and marshal the existing assets in the estate." *Id.* at 19. Quite so.

ing Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 Am. Bankr. L. J. 121, 124 (2012)). But as explained in the same article cited by Wellness, bankruptcy commissioners could exercise authority *only* over "property that actually found its way into the hands of the commissioners and the estate's representative, the assignee in bankruptcy." Brubaker, 86 Am. Bankr. L. J. at 123. Critically, "if a determination were required to ascertain *whether property belonged in the bankrupt's estate or not*"—the type of claim at issue here—"there was no 'bankruptcy' jurisdiction, as such, over the matter." *Id.* (emphasis added). The only way a trustee could obtain "money or property from a third party" on the ground that the property should be part of the estate was to file "an ordinary formal suit in the appropriate superior court." *Id.* at 123-24. In the words of Lancelot Shadwell, the Vice-Chancellor of England, "[t]he jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate; but has no power to determine what *is* the bankrupt's estate." *Id.* at 123 (quoting *Halford v. Gillow*, 60 Eng. Rep. 18, 20 (Ch. 1842)).

English bankruptcy commissioners, in other words, may have been able to "break open the homes, warehouses, trunks, or chests *of the bankrupt* to seize property belonging to the bankruptcy estate." Pet. Br. 33-34 (emphasis added). But they could *not* accost *a third party* and demand surrender of property to the estate. Plenary proceedings were required to resolve third-party disputes over property ownership.

b. Practice in the United States followed a similar model. Under the 1898 Act, the bankruptcy es-

tate was confined to property in the debtor's "actual or constructive" possession at the time of the bankruptcy. *N. Pipeline*, 458 U.S. at 53; *see Katchen v. Landy*, 382 U.S. 323, 327 (1966); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940). Possession was "essential to jurisdiction," *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 432 (1924), and thus "where possession [was] assertedly held not for the bankrupt, but for others prior to bankruptcy," the party in possession was "not subject to summary jurisdiction"—it could be divested of its property interest only through "a plenary suit under § 23 of the Bankruptcy Act." *Phelps v. United States*, 421 U.S. 330, 335-36 (1975) (quotation omitted); *see May v. Henderson*, 268 U.S. 111, 115 (1925) ("It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a bankruptcy court.").[7]

To determine its own jurisdiction, the bankruptcy court did have narrow authority to "ascertain[]" whether the third party's ownership claim was "ingenuous and substantial"—if so, the bankruptcy court could not proceed unless the third party consented to the adjudication of its rights. *Cline*, 323 U.S. at 98. But so long as the property was possessed by a third party with a "bona fide claim adverse to the receiver or trustee in bankruptcy," the rights to the property had to be "adjudicated 'in suits

[7] The possession required for summary jurisdiction included "[c]onstructive possession," which referred to property owned by the debtor but "in the hands of the bankrupt's agent or bailee," or of "some other person" who either makes "no claim to it" or a claim that is "colorable only." *Taubel-Scott-Kitzmiller*, 264 U.S. at 432-33.

of the ordinary character, with the rights and remedies incident thereto.'" *Id.* at 98-99 (quotation omitted); *see* Kenneth N. Klee, Bankruptcy & the Supreme Court 211-12 (2008) (bankruptcy court "lack[ed] jurisdiction to decide controversies" regarding property in possession of "third person [with] a bona fide claim adverse to the bankruptcy estate"). In short, "in no case where it lacked possession, could the bankruptcy court … adjudicate in a summary proceeding the validity of a substantial adverse claim," absent the consent of the third-party claimant. *Taubel-Scott-Kitzmiller*, 264 U.S. at 433-34.[8]

That rule was also applied in *Mueller v. Nugent*, 184 U.S. 1 (1902), on which Wellness heavily but mistakenly relies. Petr. Br. 23-24; *see* ACB Br. 16. The Court in *Mueller* held that summary jurisdiction encompassed "the *property of a bankrupt*" that had "come into the hands of a third party before the filing of the petition in bankruptcy, *as the agent of the*

[8] The practice under the 1898 Act of allowing bankruptcy referees to determine whether a third-party ownership claim is "bona fide" is an irrelevant anachronism. It resulted in "an excessive amount of preliminary litigation over jurisdictional issues" in which a bankruptcy court conducted a "minitrial" on the merits, attempting to apply the "murky contours" of whether the adverse ownership claim was bona fide. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 792-93 (2000). The practice was arguably consistent with courts' former practice of deciding easy jurisdictional questions to avoid difficult merits inquiries—a practice this Court no longer allows. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). In any event, the third parties here plainly have bona fide ownership claims, which the bankruptcy court did not even consider when it extinguished their property interests through a default judgment against Sharif. *See supra* at 7-9.

bankrupt, and to which [the agent] asserts no adverse claim." 184 U.S. at 14 (emphasis added); *see id.* at 17 (third party "held this money as the agent of … the bankrupt, and without any claim of adverse interest in himself"). The property, in other words, indisputably belonged to the debtor, and because it was possessed by the debtor's agent for the debtor's benefit, the Court deemed it to be in the "constructive possession" of the debtor himself. *Id.*; *see supra* note 7. Under those circumstances, the bankruptcy court had authority "to compel the bankrupt or his agent to deliver up money or assets of the bankrupt," *id.*—a precursor to the "turnover" action now codified in § 542. But the *Mueller* Court also emphasized that the bankruptcy court could *not* itself have compelled a turnover if the third party had "asserted … the right to possession by reason of a claim adverse to the bankrupt" that was "real" and not "merely colorable." *Id.* at 15.[9] In that situation, the Court held, the bankruptcy court "must decline to finally adjudicate on the merits." *Id.*

Mueller thus reflects the broader historical record, which squarely refutes, rather than supports, any suggestion that the bankruptcy courts' former "summary jurisdiction" encompassed bona fide property interests possessed by third parties.

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[9] The term "colorable" here was used not its generally positive modern sense, but to mean a claim that was at most only facially plausible but would not withstand even preliminary scrutiny. Brubaker, 41 Wm. & Mary L. Rev at 792-93; *see* Webster's New International Dictionary of the English Language 529 (2d ed. 1955) ("colorable" definition includes "counterfeit or feigned").

3. *The Solicitor General's "Federal Rule Of Decision" Argument Is Incorrect And Irrelevant*

The Solicitor General argues that *Stern* is inapplicable because Wellness's alter ego claim was governed by a "federal rule of decision." U.S. Br. 21 (quotation omitted). That argument is wrong in two respects.

First, there is no such thing as a federal common law alter ego rule. Even Wellness concedes that state law determines the underlying property rights in Trust assets. Petr. Br. 27. The Solicitor General's contrary argument relies entirely on *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941)—which Wellness never cites—but *Sampsell* does not apply any such federal common law rule. *Sampsell* instead applies the irrelevant and anachronistic "bona fide/merely colorable adverse claim" rule just discussed, holding that a corporation created by the debtor to conceal his assets had no bona fide ownership claim *under state law* because it was a blatant sham, established for no purpose other than to facilitate a fraudulent transfer of the debtor's property to escape his creditors. 313 U.S. at 218-19.

The debtor in *Sampsell* formed the corporation *after* he incurred the debt at issue, installed his wife and son as owners and officers, transferred his business assets to the corporation, and then promptly declared bankruptcy. *Id.* at 215-16. On those facts, the bankruptcy referee determined that "the transfer to the corporation was not in good faith" and that "the corporation was 'nothing but a sham and a cloak'" designed to allow the debtor to shield his assets. *Id.* at 216-17. The referee therefore concluded that "the property of the corporation was property of

the bankrupt estate." *Id.* at 217. This Court upheld the ruling as within the bankruptcy court's summary jurisdiction, but only because on the undisputed facts as they came before the Court, the debtor's corporation did not have "the status of a substantial adverse claimant within the rule of *Taubel-Scott-Kitzmiller*." *Id.* at 218. Rather, the corporation's distinct ownership claim was "merely colorable," because the corporation was "formed in order to continue the bankrupt's business, … the bankrupt remain[ed] in control, and … the effect of the transfer [wa]s to hinder, delay, or defraud his creditors." *Id.*

Nothing in that analysis refers to a federal common law alter ego rule. To the contrary, the court of appeals' decision held that "in determining the relationship of the corporation and the bankrupt to each other and the effect thereof, the applicable law is that of California." *Imperial Paper Corp. v. Sampsell*, 114 F.2d 49, 52 (9th Cir. 1940). This Court did not disagree, but instead simply held that the corporation's adverse ownership claim was plainly insubstantial *as a matter of fact*. And under the *Taubel-Scott-Kitzmiller* rule the *Sampsell* Court actually did apply, the bankruptcy court would have *lacked* jurisdiction had there been a bona fide claim of separateness, as there is here. *See supra* at 8-10.[10] *Sampsell*, in short, is as unhelpful to Wellness

[10] *Sampsell*'s lack of force as precedent on the constitutional limits of bankruptcy court jurisdiction is further confirmed by the fact that the referee's final judgment ruled that the debtor had effectuated a fraudulent transfer to his sham corporation—a ruling plainly beyond the constitutional limits of bankruptcy court jurisdiction defined in *Stern*, 131 S. Ct. at 2614-15 (discussing fraudulent transfer claim in *Granfinaciera*).

as its absence from Wellness's brief suggests.[11]

Second, it is ultimately irrelevant to the *Stern* analysis whether the alter ego claim arises from state law, federal common law, or even federal statutory law. The relevant inquiry is whether it is akin to a *common law claim seeking to augment the estate*, rather than a specialized claim implicating particular expertise concerning the "core … bankruptcy power" of "restructuring … debtor-creditor relations." *N. Pipeline*, 458 U.S. at 71; *see Stern*, 131 S. Ct. at 2614-15. This point is clear from *Stern*'s reliance on *Granfinanciera*, which addressed an action by a bankruptcy trustee to "recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2)." 492 U.S. at 53. Even though Congress explicitly created a federal statutory vehicle for trustees to bring such actions in the execution of their Code-created duties, this Court focused on the *substance* of the actions, observing that they "more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56. For that reason, Congress could not "assign [the] adjudication [of a trustee's § 548(a)(2) fraudulent conveyance action] to a specialized non-Article III court lacking the essential attributes of the judicial power." *Id.* (quotation omitted). The same analysis would apply here if—contrary to reality—federal common law governed the alter ego claim.

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[11] The government's other "federal common law" cases do not address the law governing property rights in bankruptcy cases, which clearly is controlled by state law.

4. *The Bankruptcy Court's Authority To Adjudicate Discharge Objections Does Not Create Authority To Adjudicate Alter Ego Claims*

The Solicitor General also argues that the bankruptcy court could finally adjudicate Wellness's Count V alter ego claim because it depends on the same factual allegations as Wellness's discharge objections in Counts I-IV, which indisputably implicate "core" bankruptcy powers. U.S. Br. 16-17. That argument is incorrect.

The discharge claims are within the bankruptcy court's jurisdiction because they seek to deny Sharif the discharge of his debts to Wellness—a quintessential exercise of the core bankruptcy power to restructure debtor-creditor relations. *See Stern*, 131 S. Ct. at 2605. The alter ego claim is qualitatively different: a ruling in Wellness's favor on the alter ego claim would forever extinguish the Trust's and Ragda's distinct property interests in the Trust assets. In other words, only Count V requires adjudication of third-party property interests, which is why only Count V exceeds the constitutional limits of the bankruptcy court's final adjudication authority.

The same was not true in *Katchen* and *Langenkamp v. Culp*, 498 U.S. 42 (1990), both cited by the Solicitor General. U.S. Br. 16-17. As elaborated at length in *Stern*, both *Katchen* and *Langenkamp* addressed the adjudication of preference claims asserted against creditors *who filed proofs of claim* in the bankruptcy proceeding. *Stern*, 131 S. Ct. at 2616-17. Adjudication of the preference claims was *required* in the process of allowing or disallowing the creditors' claims in those cases, and in that respect was "integral to the restructuring of the

debtor-creditor relationship." *Id.* at 2617 (quotation omitted). "[I]n contrast," where "the creditor has *not* filed a proof of claim, the trustee's preference action does *not* become[] part of the claims-allowance process subject to resolution by the bankruptcy court." *Id.* (first emphasis added; quotation omitted). The third-party interests at stake here track the latter description: neither the Trust nor Ragda filed proofs of claim, and adjudication of their property interests is not in any way required for the allowance and disallowance of those claims that were filed. It is required only because Wellness wants to swell the bankruptcy estate with property in which the Trust and Ragda possess equitable interests. That claim, and the private third-party rights it implicates, must be finally adjudicated by an Article III court.

C. Requiring District Courts To Enter Final Judgment On Alter Ego Claims Would Not Threaten The Efficient Administration Of Bankruptcy Cases

Finally, Wellness warns that the rule Sharif proposes would "threaten[] the efficient administration of bankruptcy cases." Petr. Br. 40. Of course, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Stern*, 131 S. Ct. at 2619 (quotation omitted). But Wellness's concern is misplaced in any event.

Wellness's argument rests entirely on the erroneous premise that under Sharif's position, bankruptcy courts would be categorically prohibited from deciding all state-law issues, even when they are "incidental." Petr. Br. 40-41. Sharif urges no such rule.

He seeks only what *Stern* already requires: Article III adjudication of *common law claims that seek to augment the estate with third-party property*. Accordingly, a ruling in Sharif's favor would not "meaningfully change[] the division of labor in the current statute," *Stern*, 131 S. Ct. at 2620—especially given that bankruptcy courts historically could not even *consider* claims like Wellness's. *See supra* at 28-32.[12]

What is more, after *Arkison*, bankruptcy courts can hear even constitutionally "non-core" matters like alter ego claims and issue "proposed findings of fact and conclusions of law to the District Court to be reviewed de novo." 134 S. Ct. at 2174. In light of that ruling, a bankruptcy court should be able to address all matters before it in a single final opinion to be reviewed by the district court, with the standard of review dependent on the issue being reviewed. There is thus nothing impractical about adhering to *Stern*—and if there were, it would not matter.

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[12] It is worth noting that the Bankruptcy Code already "contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts." *Stern*, 131 S. Ct. at 2619. Bankruptcy courts are statutorily prohibited from hearing certain categories of cases, such as personal injury tort and wrongful death claims. 28 U.S.C. § 157(b)(5). The courts have devised methods to expeditiously decide cases involving such claims. *See*, *e.g.*, *In re ASARCO LLC*, 2009 WL 8176865, at *1 (Bankr. S.D. Tex. July 21, 2009) (partial withdrawal of reference "efficiently resolve[d]" outstanding issues); *In re Ephedra Prods. Liability Litig.*, 2005 WL 1593046, at *1 (S.D.N.Y. June 3, 2005) (district court ordered that it and bankruptcy court would "jointly hear" further issues).

II. SHARIF COULD NOT AND DID NOT CONSENT TO FINAL ADJUDICATION OF WELLNESS'S ALTER EGO CLAIM BY THE BANKRUPTCY COURT

Wellness contends that even if the bankruptcy court's entry of final judgment on Sharif's alter ego claim violated Article III, the violation does not matter because Sharif consented to final adjudication by the bankruptcy court. But Sharif could not and did not provide such consent. The limitation on bankruptcy courts' jurisdiction implicates structural separation-of-powers interests, not just the waivable personal rights of bankruptcy litigants. An Article I court's exercise of power constitutionally reserved to Article III courts is thus an error "the parties cannot by consent cure." *Schor*, 478 U.S. at 851. That principle applies with particular force where, as here, a third party whose property interests the bankruptcy court purports to adjudicate specifically *objected* to the bankruptcy court's authority. And even if Sharif could consent, he did not in fact, because he never *expressly* agreed to the exercise of final adjudicatory power by the bankruptcy court over the "non-core" alter ego claim, as required by Bankruptcy Rule of Procedure 7012. Nor did he otherwise knowingly and voluntarily consent to non-Article III adjudication.

A. Sharif Could Not Consent To The Exercise Of Article III Power By An Article I Bankruptcy Court

1. *Private Parties May Not Alter The Separation Of Powers Mandated By The Constitution*

a. "Basic to the constitutional structure established by the Framers was their recognition that

'[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'" *N. Pipeline*, 458 U.S. at 57 (plurality opinion) (quoting The Federalist No. 47, at 300 (J. Madison) (H. Lodge ed. 1888)). The Constitution's Framers defended against such tyranny by assuring "that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct." *Id.* "The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature." *Id.* at 58.

Judicial independence was assured not only by the vesting of the judicial power exclusively in the federal courts, but also through the structural provisions provided for in Article III, § 1—federal judges are guaranteed life tenure (subject only to removal by impeachment) and "a fixed and irreducible compensation for their services." *Id.* at 59. Article III is thus "an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch." *Stern*, 131 S. Ct. at 2608 (citation and internal quotation marks omitted). And this Court has repeatedly held that one of the ways Article III protects that "system of checks and balances" is by assuring that the Judiciary's authority to decide private claims cannot be transferred to non-Article III tribunals subject to congressional and executive control (and hence possible manipulation). *See Stern*, 131 S. Ct. at 2609.

b. It is fundamental that a private litigant may not, through his litigation conduct, adjust the constitutional relationship between the three governmental branches. Article III "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances.'" *Schor*, 478 U.S. at 851 (quoting *N. Pipeline*, 458 U.S. at 58). And when "this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850-51. "When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851.

2. Stern *And* Schor *Make Clear That The Debtor's Consent Alone Does Not Justify A Bankruptcy Court's Exercise Of Power Reserved To Article III Courts*

The constitutional violation in this case is the same violation at issue in *Stern*—a final bankruptcy court adjudication of a private-rights claim. That violation cannot be cured by party consent because it poses a direct "threat to the separation of powers." *Stern*, 131 S. Ct. at 2620.

a. *Stern*'s analysis of *why* bankruptcy courts may not finally adjudicate "private rights" rests entirely on separation-of-powers concerns. "Under the basic concept of separation of powers ... that flow[s]

from the scheme of a tripartite government adopted in the Constitution," *Stern* explains, "the judicial Power of the United States" cannot be shared with the other branches. *Id.* at 2608 (quotation omitted). "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking," the Court emphasized, "if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Id.* at 2609. For these *structural* reasons, "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.'" *Id.* (quoting *Murray's Lessee*, 59 U.S. at 284).

Indeed, *Stern* asked and answered the very question at issue here. The question: "Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy?" *Id.* at 2620. The "short but emphatic" answer: "yes." *Id.* And because Wellness's alter-ego claim is in all material respects identical to the tort claim at issue in *Stern*, *see supra* at 25-27, allowing a bankruptcy court to enter a final judgment—even with litigant consent—would "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." 131 S. Ct. at 2620.

b. This Court's decision in *Schor*, as analyzed in *Stern*, further confirms that the Article III violation at issue here cannot be cured by litigant consent. *Schor* "concerned a statutory scheme that created a procedure for customers injured by a broker's violation of the federal commodities law to seek reparations from the broker before the Commodity Futures

Trading Commission (CFTC)." *Stern*, 131 S. Ct. at 2613; *see Schor*, 478 U.S. at 836. A customer filed a claim with the CFTC "to recover a debit balance in his account"; the broker initially sued for the same amount in federal court but then submitted its claim to the CFTC. *Stern*, 131 S. Ct. at 2613 (citing *Schor*, 478 U.S. at 837-38). After the agency ruled against the customer, "the customer argued that agency jurisdiction over the broker's counterclaim violated Article III." *Id.*

This Court rejected that argument, holding that any right the customer had to an Article III tribunal was waivable (and waived), because his claim at most implicated only his personal right to an Article III adjudication, and not the structural interests protected by Article III. 478 U.S. at 857-58. But the factors underlying the Court's decision in *Schor* compel the opposite conclusion here, as *Stern* itself explains:

- In *Schor*, "CFTC orders were 'enforceable only by order of the district court.'" *Stern*, 131 S. Ct. at 2613 (quoting *Schor*, 478 U.S. at 853). Here, Congress authorized bankruptcy courts to enter final judgments of the United States, with only appellate review by district courts. 28 U.S.C. §§ 157(b)(1), 158(a)(1).
- In *Schor*, "the claim and the counterclaim concerned a 'single dispute'—the same account balance." *Stern*, 131 S. Ct. at 2613 (quoting *Schor*, 478 U.S. at 844). The alter ego claim here, by contrast, is materially distinct from the discharge claims and im-

plicates rights and interests far beyond those claims. *See supra* at 35-37.

- The claim at issue in *Schor* was "'completely dependent upon'" and "created by federal law." *Stern*, 131 S. Ct. at 2614 (quoting *Schor*, 478 U.S. at 856). The alter ego claim here turns on state law. *See supra* at 27, 33.
- "[T]he CFTC's assertion of authority involved only 'a narrow class of common law claims' in a 'particularized area of law.'" *Stern*, 131 S. Ct. at 2613 (quoting *Schor*, 478 U.S. at 852, 854). This case "deal[s] … not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*." *Id.* at 2615.
- In *Schor*, "the area of law in question was governed by 'a specific and limited federal regulatory scheme' as to which the agency had 'obvious expertise.'" *Id.* at 2613 (quoting *Schor*, 478 U.S. at 855). By contrast, "[t]he 'experts' in the federal system at resolving common law counterclaims"—as with common law alter ego claims—"are the Article III courts." *Id.* at 2615.
- In *Schor*, "the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount," and thus "the Court repeatedly emphasized that it was 'necessary' to allow the agency to exercise jurisdiction over the broker's claim, or else 'the reparations procedure would have been confounded.'" *Id.* at 2613-14 (quoting *Schor*, 478 U.S. at 856). But here, as in *Stern*, the federal bankrupt-

cy-law discharge objections could be resolved without resolving the state-law alter ego claim, and vice versa. *Supra* at 35-37.

- Finally, the parties in *Schor* "had freely elected to resolve their differences before the CFTC." *Stern*, 131 S. Ct. at 2613; *see Schor*, 478 U.S. at 855.

Wellness understandably emphasizes only the final factor—party consent. But the fact that consent was only *one* of many factors relevant to whether Article III adjudication was required demonstrates beyond any doubt that consent is "not dispositive," as Wellness ultimately concedes. Petr. Br. 58. And in any event, Sharif did not "freely elect" bankruptcy court adjudication. *See infra* at 53-55.

Schor accordingly reflects the principle *Stern* later underscored—allowing bankruptcy courts to adjudicate private rights implicates structural separation-of-powers concerns that "the parties cannot by consent cure." *Schor*, 478 U.S. at 851.

3. *Wellness's Contrary Arguments Lack Merit*

a. Wellness principally contends that the structural interests discussed in *Stern* are irrelevant here because the parties in *Stern* had not consented to final adjudication by the bankruptcy court. Petr. Br. 44-45. But the lack of consent in *Stern* simply means that the issue presented here was absent there. Nothing in *Stern* suggests that litigant consent *could* cure the structural separation-of-powers violation it recognized.

To the contrary, *Stern* holds that if "the bankruptcy court itself exercises 'the essential attributes of judicial power [that] are reserved to Article III

courts,' … *it does not matter who … authorized the judge to render final judgments* in such proceedings." 131 S. Ct. at 2619 (quoting *Schor*, 478 U.S. at 851) (emphasis added). That passage explains why it is irrelevant that Article III judges appoint bankruptcy judges; it follows that if Article III courts cannot authorize bankruptcy courts to exercise Article III powers, then surely private parties cannot do so either.

b. Wellness next contends that "the right to an Article III court is eminently waivable" because Article III "'primarily' protects the individual." Petr. Br. 48 (quoting *Schor*, 478 U.S. at 848). But *Stern* rejects this dichotomy between individual and structural Article III interests, at least for the types of Article III violations at issue here: "'The structural principles secured by the separation of powers'" protect "'each branch of government from incursion by the others'" *and* "'protect the individual as well.'" 131 S. Ct. at 2609 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011)). Put differently, Article III protects individual liberty by enforcing the constitutional restrictions on each Branch's power—including the prohibition on the exercise of the Article III judicial power by entities subject to congressional and executive control.

c. Wellness also argues that Article III errors implicate the separation of powers only when Congress attempts to "'*transfer jurisdiction*'" from Article III courts to non-Article III tribunals. Petr. Br. 49 (quoting *Schor*, 478 U.S. at 850). But that is exactly what happened here—on Wellness's theory of the statute, Congress authorized bankruptcy courts to render final, binding judgments of the United States

on a private-rights claim, granting district courts only appellate jurisdiction over such claims.

Wellness says there was no transfer of jurisdiction here because "bankruptcy judges operate entirely within the confines of the Judicial Branch and under the direct control of the district courts." Petr. Br. 49; *see* U.S. Br. 27-28. *Stern* holds otherwise: "[I]t is … the bankruptcy court itself that exercises the essential attributes of judicial power." 131 S. Ct. at 2618. Because the bankruptcy court "has the power to enter appropriate orders and judgments—including final judgments—subject to review only if a party chooses to appeal," the "authority—and the responsibility—to make an informed, final determination … remains with the bankruptcy judge, not the district court." *Id.* at 2619 (quotation omitted). The supervisory powers of the federal district courts thus do not eliminate the "threat to the separation of powers" created by conferring on bankruptcy courts authority to decide cases reserved by the Constitution to Article III courts. *Id.* at 2620.

d. Wellness next asserts that this Court has consistently allowed non-Article III tribunals "operating under the control of Article III courts to enter judgments with litigant consent." Petr. Br. 52. But this Court has never held that litigant consent can remedy a non-Article III tribunal's *final adjudication* of a claim that the Constitution reserves for an Article III court. In every case Wellness cites, the "essential attributes of judicial power" remained with an Article III court. *Schor*, 478 U.S. at 852. Most do not even involve the entry of a final judgment by a non-Article III tribunal. *See Peretz v. United States*, 501 U.S. 923, 937 (1991) (magistrate judge may preside over *voir dire* with the defendant's consent be-

cause district court controls the process and enters judgment); *Schor*, 478 U.S. at 853 (CFTC orders were "enforceable only by order of the district court"); *Kimberly v. Arms*, 129 U.S. 512, 524-25, 530 (1889) (trial court entered final judgment giving effect to parties' agreement, akin to an arbitration agreement, to allow special master to make factual findings); *Newcomb v. Wood*, 97 U.S. 581, 583 (1878) (court confirmed referees' report and entered judgment); *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 126-27, 133 (1864) ("judgment was rendered" by the trial court "upon the report of the referee," to which "the losing party made no objections").

Wellness cites only two cases in which the Court considered the effect of litigant consent on the entry of final judgment by non-Article III tribunals, but both were decided on *statutory* grounds. In *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932), the Court held that bankruptcy referees were "courts" within the meaning of § 23b of the Bankruptcy Act, and did not mention the Constitution. *Id.* at 268; *see* Pet. App. 44a n.2 (discussing *McDonald*). Similarly, in *Roell v. Withrow*, 538 U.S. 580 (2003), "[t]he *only* question" was the *statutory* question "whether [implied consent] can count as conferring 'civil jurisdiction' under [28 U.S.C.] § 636(c)(1)"—a provision of the Federal Magistrates Act—"or whether adherence to the letter of § 636(c)(2) is an absolute demand." *Id.* at 586-87 (emphasis added); *see id.* at 587 n.5. In holding that implied consent can satisfy § 636(c)(1), the Court did not address the "serious constitutional concerns" raised by the dissent concerning entry of judgment by a magistrate. *Id.* at 592 (Thomas, J., dissenting).

e. Finally, the Solicitor General contends that arbitration, in which parties do consent to an arbitral determination of their rights, "provides [a] useful analogue" for the entry of final judgment by a bankruptcy court. U.S. Br. 25-26. Not so. "[A]rbitration is not a judicial proceeding," *McDonald v. City of W. Branch*, 466 U.S. 284, 288 (1984) (quotation omitted), and arbitrators do not exercise the core authority of Article III courts—entering final *judicial* determinations on matters of private right. A judgment confirming an arbitral order must be entered by a court. *See* 9 U.S.C. § 9.

Indeed, the difference between private arbitration and the alter ego claim at issue here demonstrates why litigant consent is particularly irrelevant in ameliorating the constitutional error identified in Part I. Arbitration does not involve the final adjudication of legal and equitable rights of third parties not subject to the arbitration. An alter ego claim does, which is why it cannot be finally adjudicated by a bankruptcy court. Even if the *litigant* consented to bankruptcy court adjudication of third-party property rights, that does not mean the *third parties* did. In this case, Ragda never consented to the bankruptcy court's adjudication of her rights in the Trust assets; to the contrary, she moved to withdraw the bankruptcy court's mandate for lack of authority to adjudicate her rights. *See supra* at 13 & n.4. No separation-of-powers principle would allow a litigant to consent to the Article III adjudication of a non-party's private rights.

B. Even If Litigant Consent Could Cure The Unlawful Exercise Of Article III Power By The Bankruptcy Court, Only *Express* Consent Would Suffice, And Sharif Did Not Provide It

Even if it were true that litigant consent could suffice to justify the exercise of Article III power by an Article I entity, such consent must be *express* in the bankruptcy context. Sharif neither provided express consent nor knowingly and voluntarily consented to bankruptcy court adjudication in any other manner.

1. *Bankruptcy Rule 7012(b) Requires Express Litigant Consent To The Bankruptcy Court's Final Adjudication Of "Non-Core" Claims*

Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Accordingly, a litigant's waiver of the right to adjudication by an Article III court, no less than waiver of any other right, must be knowing and voluntary.

This Court's cases deeming consent relevant to non-Article III court adjudication confirm that point. The Court in *Schor*, for example, made clear that "Schor effectively agreed to an adjudication by the CFTC" based on "full knowledge" that the CFTC would exercise jurisdiction over a counterclaim against him. 478 U.S. at 850. Likewise, in *Roell* the Court repeatedly emphasized that litigation before a magistrate judge imbued with judicial power is permissible under the controlling statute only if, *inter alia*, the litigant is *explicitly advised* of both the "need to consent and the right to refuse it." 538 U.S. at 590; *see id.* at 588 n.5. If a knowing and voluntary

waiver is required even in the *statutory* context, it is certainly required to waive a *constitutional* right to an Article III court. And in the bankruptcy context in particular, only *express* consent suffices.

"*Stern* claims" of the sort at issue here are claims that Congress *statutorily* designated as "core" in § 157(b)(2)—and thus subjected to bankruptcy court adjudication absent consent under § 157(b)(1)—but that *constitutionally* must be decided by an Article III court. Such claims are analogous to "non-core" claims covered by § 157(c)—claims that cannot be finally adjudicated by a bankruptcy court absent consent of the parties. *See Arkison*, 134 S. Ct. at 2173. In Wellness's words, "a '*Stern* claim' and a non-core claim [under § 157(c)] are the same." Petr. Br. 46.

But if so, then the debtor's consent to final bankruptcy adjudication must be *express*, as Bankruptcy Rule 7012(b) specifically requires for the adjudication of non-core matters: "In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties." Fed. R. Bankr. P. 7012(b). That rule—which, like all Bankruptcy Rules, is mandatory and carries the force of statute, *see Kontrick* v. *Ryan*, 540 U.S. 443 (2004); ACB Br. 29—reflects this Court's and Congress's judgment that only express consent will assure that waiver of a right to an Article III court is knowing and voluntary. As the College puts it, "[t]here is no reason for this Court to hold that the rule means anything other than what it says." ACB Br. 21.

Wellness nevertheless contends that express consent is unnecessary—and that implied consent

suffices—relying principally on *Roell*. Petr. Br. 64. But *Roell* emphasizes that "implied consent will be the exception, not the rule." 538 U.S. at 591 n.7. And the facts of *Roell* confirm just how exceptional the circumstances must be before consent will be implied.[13]

The party raising the challenge in *Roell* himself expressly consented to adjudication by the magistrate; it was only after he lost at trial that he argued that the magistrate lacked the authority to enter a final judgment because the *opposing parties* had not expressly consented. 538 U.S. at 582-84. "On at least three different occasions," however, counsel for those parties "was present and stood silent when the Magistrate Judge stated that they had consented to her authority." *Id.* at 584 n.1. The parties thus were explicitly "made aware of the need for consent and the right to refuse it," *id.* at 590, which was a "prerequisite" to adjudication by the magistrate, *id.* at 588 n.5. Moreover, when the issue of those parties' consent was raised *sua sponte* on appeal, they stated their consent expressly in a "formal letter" filed with the court. *Id.* at 583-84. In short, there was no

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[13] Wellness also cites two other cases (Petr. Br. 64), both of which are inapposite. In *Thomas v. Arn*, 474 U.S. 140 (1985), the Court held that waiver of objections to proposed findings of fact and conclusions of law does not "remove[] the essential attributes of the judicial power" from Article III courts because the district judge "retains full authority … to enter judgment." *Id.* at 154 (quotation omitted). And *Cline* "reject[ed] the suggestion that respondents conferred consent" on a bankruptcy referee "by participating in the hearing on the merits." 323 U.S. at 100. *Cline* also was a statutory case, not an Article III case. *See id.* at 99 (relying for the proposition that a litigant could consent to bankruptcy jurisdiction on *MacDonald*, itself a statutory precedent, *see supra* at 48).

question that all parties in *Roell* actually did consent, knowingly and voluntarily, to entry of judgment by the magistrate. And even then, only a bare majority of Justices found the requirements of express consent satisfied. *See id.* at 592 (Thomas, J., dissenting, joined by Stevens, Scalia, and Kennedy, JJ.) (rejecting conclusion that "consent need not be explicit, but rather may be inferred from the parties' conduct").

2. *Sharif Did Not Provide The Express Consent Required By Rule 7012(b), Or Otherwise Knowingly And Voluntarily Consent To Bankruptcy Court Adjudication*

The circumstances that (barely) justified a finding of consent in *Roell* bear no resemblance to the circumstances of this case. The bankruptcy court here did not repeatedly assert in Sharif's presence that Sharif had consented to its authority to finally decide the alter ego claim, without protest by Sharif, and Sharif did not eventually express his consent in writing after the fact. The facts of consent in *Roell* confirm the absence of consent here.

a. Wellness nevertheless contends that Sharif expressly consented by filing the bankruptcy case itself. Petr. Br. 61. That argument borders on frivolous. The fact that Sharif consented to the bankruptcy court's administration of his estate (plainly within the bankruptcy court's constitutional authority) does not remotely suggest his consent to the bankruptcy court's *adjudication of Wellness's alter ego claim*. On Wellness's theory, every debtor who voluntarily files for bankruptcy *necessarily* satisfies Rule 7012(b)'s express consent requirement as to any non-core proceeding that may arise during the bank-

ruptcy. Wellness's argument would make the Rule meaningless, which is why the argument cannot be correct.

b. Wellness also contends that Sharif consented to bankruptcy court jurisdiction by (i) admitting in his answer that Wellness's adversary complaint (including its alter-ego claim) was a "core" claim within the meaning of § 157(b), and (ii) filing a summary judgment motion on all Wellness's claims (including its alter ego claim) in bankruptcy court. Wellness recognizes that this conduct can only count as *implied* consent, Petr. Br. 65, effectively conceding that it cannot qualify as the express consent required by Rule 7012(b). And in any event, neither of these acts comes anywhere close to expressing Sharif's knowing and voluntary consent to the bankruptcy court's finally adjudicating Wellness's alter ego claim.

Wellness's complaint alleged that its claims were "core" solely under § 157(b)(2)(J), which solely governs discharge objections. That allegation thus necessarily applied only to Counts I-IV, which are the only counts asserting discharge objections. *See supra* at 10-11. Wellness alleged no statutory basis on which the alter ego claim could be deemed core. Sharif's acquiescence to Wellness's statutory assertion of core status under § 157(b)(2)(J) thus likewise could not have applied to Count V, which plainly does not assert any discharge-based claim. Sharif did mistakenly agree in his answer with Wellness's allegation that its entire complaint was core under §157(b)(2)(J), but that mistake is, if anything, the opposite of *knowing and voluntary* consent to bankruptcy court adjudication of the one claim that was *not* core either under § 157(b)(2)(J) or the Constitution. Unlike in *Roell*, Sharif was never given clear

notice that he was free to decline consent to adjudication of the alter ego claim by the bankruptcy court.

Sharif's filing of a summary judgment motion in the bankruptcy court also was not knowing and voluntary consent to entry of final judgment by the bankruptcy court. A summary judgment motion does not itself concede the decisionmaker's authority to enter a *final* judgment on the subject of the motion—it means only that the issue can be resolved as a matter of law. A summary judgment motion easily could be filed in a "non-core" bankruptcy court proceeding—the court would simply make a ruling, which then would be reviewed de novo. Further, Sharif again was never given notice that he could prevent a final adjudication of the alter ego claim simply by withholding his consent. His knowing and voluntary consent to the exercise of Article III power by the bankruptcy court thus cannot be inferred from the mere fact that he litigated Wellness's adversary proceeding in the normal course. That is especially so because neither *Stern* nor *Arkison* had been decided when Wellness's adversary complaint was being litigated, and Sharif could not have anticipated this Court's decisions at the time. Where this Court "decides a relevant case while litigation is pending … omission of an argument based on [this] Court's reasoning does not amount to a waiver." *Ind. Bell Tel. Co., v. McCarty*, 362 F.3d 378, 390 (7th Cir. 2004) (quotation omitted); *see Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143-45 (1967) (party does not waive a "known right" simply by failing to assert the right before it was recognized in subsequent decision).

C. Sharif Did Not Forfeit His Article III Argument By Failing To Raise It On Appeal

Finally, Sharif did not forfeit his constitutional objection to the bankruptcy court's unlawful exercise of Article III power by failing to assert the objection on appeal. Petr. Br. 65; U.S. Br. 32.

First, entry of final judgment on private rights by a bankruptcy court judge, as in this case, presents a structural Article III problem that "the parties cannot by consent cure." *Schor*, 478 U.S. at 851. And a "right that cannot be waived cannot be forfeited by other means." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 895 n.2 (1991) (Scalia, J., concurring).

Second, and in any event, the Article III violation here cannot be cured by forfeiture because the violation deprived the district court of appellate jurisdiction. The district court only has jurisdiction (as relevant) to hear appeals of bankruptcy court "final judgments." 28 U.S.C. § 158(a). The consequence of the constitutional error in this case is that the bankruptcy court lacked authority to enter a final judgment on Wellness's alter ego claim. And because there was no valid final judgment, the district court lacked appellate jurisdiction to review the judgment—a jurisdictional defect that "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see Roell*, 538 U.S. at 597-99 (Thomas, J., dissenting) (lack of consent to magistrate adjudication must be corrected *sua sponte* on appeal because magistrate can only enter final judgment with consent, and appellate jurisdiction depends on existence of a final judgment); *Ortiz*, 665 F.3d at 915

(*Stern* error results in invalid bankruptcy court final judgment and thus defeats appellate jurisdiction).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After *Stern v. Marshall*

by

*Ralph Brubaker**

Perhaps fittingly, perhaps ironically, we are commemorating the 30th anniversary of the Supreme Court's epochally disruptive decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[1] while still reeling from another serious dislocation, delivered in the form of the Court's recent opinion in *Stern v. Marshall*.[2] In that decision, the Supreme Court relied heavily upon *Marathon* to hold that the provision of title 28 (the "Judicial Code") granting our non-Article III bankruptcy judges core jurisdiction to enter final orders and judgments on "counterclaims by the estate against persons filing claims against the estate"[3] is unconstitutionally over-broad, at least as applied to the counterclaim at issue in the case, even though that counterclaim was compulsory and not permissive.

Few have been willing to accept at face value Justice Roberts' assurance that the "decision does not change all that much."[4] Only time will tell, of course, but the majority's reasoning has planted many potential landmines throughout the current statutory provisions governing bankruptcy judges' adjudicatory authority, and in this article, I will attempt to discern where those perils (do or do not) lie.

Before reaching the constitutional issue, the Court grappled with a difficult interpretive issue regarding the statutory provision at issue, which itself

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[1]458 U.S. 50 (1982).

[2]131 S. Ct. 2594 (2011).

[3]28 U.S.C. § 157(b)(2)(C) (2006).

[4]*Stern*, 131 S. Ct. at 2620.

was drafted in an attempt to toe the constitutional line limiting the extent of the non-Article III bankruptcy judges' adjudicatory authority. The essential background, though, for understanding the interrelated statutory and constitutional dimensions of *Stern v. Marshall* is a rich accumulated history of bankruptcy adjudications. Therefore, Part I of this article will summarize the jurisdictional history relevant to both the statutory and constitutional issues presented in *Stern v. Marshall*. Part II analyzes the Court's construction of the statute governing bankruptcy judges' adjudicatory authority, and Part III is devoted to *Stern v. Marshall*'s constitutional holding and its implications (both modest and potentially far-reaching) regarding the permissible adjudicatory powers of non-Article III bankruptcy judges.

Although certainly not definitively established, the best reading of the Court's cumulative jurisprudence regarding non-Article III bankruptcy adjudications is that the Court's jurisprudence under the Bankruptcy Act of 1898 (the "1898 Act") demarcating the boundaries between so-called "summary" referee jurisdiction and "plenary" suits at law and in equity has essentially been constitutionalized. Consequently, the current statute is constitutionally suspect to the extent it authorizes non-Article III bankruptcy judges to enter final orders and judgments in any bankruptcy proceeding that would not indisputably have been a summary matter appropriate for final adjudication by a non-Article III referee under the 1898 Act.

I. THE HISTORICAL EVOLUTION OF BANKRUPTCY ADJUDICATIONS

The only way to fully comprehend federal bankruptcy jurisdiction—including the current assignment of adjudicatory authority to non-Article III bankruptcy judges—is to understand the history of federal bankruptcy jurisdiction. To provide a context for analyzing *Stern v. Marshall*, therefore, this article briefly reviews the history of which that decision is a product.

What that history reveals is that a longstanding historical distinction between "summary" bankruptcy proceedings and "plenary" trustee suits, originating in England, also became the cleavage the Supreme Court adopted for delineating the adjudicatory authority of non-Article III and Article III bankruptcy adjudicators under the 1898 Act. When Congress gave non-Article III bankruptcy judges broader adjudicatory powers under the Bankruptcy Reform Act of 1978 (the "1978 Reform Act"), the Court declared its jurisdictional provisions unconstitutional in *Marathon*, necessitating the current jurisdictional provisions that permit non-Article III bankruptcy judges to enter final orders and judgments only in "core" bankruptcy proceedings. *Stern v. Marshall*, though, holds that even that statutory limitation is unconstitutionally overbroad, on grounds that inevitably invite an examination of

the summary-plenary distinction that the Court itself employed in restricting the adjudicatory authority of non-Article III bankruptcy arbiters.

A. "Bankruptcy" Proceedings in England

American bankruptcy jurisdiction developed, of course, from an English system, which itself had quite a history, and the English model of jurisdiction in bankruptcy was, very explicitly, an *in rem*, property-based jurisdiction—centered around the construct of a bankrupt's "estate." The English bankruptcy commissioners, who exercised bankruptcy jurisdiction under the supervision of the Lord Chancellor in Equity, had jurisdiction over administration of the bankrupt's estate for ultimate distribution to the bankrupt's creditors. As part of their administration of the estate, the commissioners could, inter alia, pass on the validity of creditors' claims.[5]

This English version of bankruptcy jurisdiction, however, was limited to jurisdiction over a debtor's property that actually found its way into the hands of the commissioners and the estate's representative, the assignee in bankruptcy (who would now be known as the bankruptcy trustee). Thus, if a determination were required to ascertain whether property belonged in the bankrupt's estate or not, there was no "bankruptcy" jurisdiction, as such, over the matter. For example, if an assignee sought to recover money or property from a third party, contending that the money or property was owing to or owned by the bankrupt and therefore should be included in the bankrupt's estate for the benefit of the bankrupt's creditors, bankruptcy jurisdiction did not extend to the assignee's action. The assignee could pursue such an action only through a formal complaint in a court of law or by a formal bill in equity, depending on the character of the action itself as either legal or equitable in nature.[6]

In 1842, Vice-Chancellor Shadwell concisely summarized the historical reach of English bankruptcy jurisdiction this way:

> [T]he jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate; but has no power to determine what *is* the bankrupt's estate. If the question be a legal one it must be tried at law; and if it be an equitable one, it must be decided in this Court. But when you have determined what is the property of the bankrupt, the whole

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[5]This jurisdiction of bankruptcy commissioners was subsequently vested in "The Court of Bankruptcy" in 1831. *See* John C. McCoid, II, *Right to Jury Trial in Bankruptcy:* Granfinanciera, S.A. v. Nordberg, 65 Am. Bankr. L.J. 15, 29-33 (1991); Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 575-78, 587-89 (1998).

[6]*See* McCoid, *supra* note 5, at 29-31; Plank, *supra* note 5, at 577, 583, 585 & n.10, 586-87, 591, 595, 611, 613.

> administration of it falls under the jurisdiction of the Court in bankruptcy.[7]

Thus, the English model bifurcated jurisdiction. There was *in rem* jurisdiction over property rightfully in the possession of the estate, and this bankruptcy jurisdiction extended to administration of that property for the benefit of the bankrupt's creditors, and all such matters were resolved by summary equitable proceedings.[8] Moreover, the first-instance adjudicators in these summary bankruptcy proceedings were bankruptcy commissioners, whose decisions were subject to revision through a petition for review of the commissioners' determinations filed with the Lord Chancellor.[9] If an assignee were required to sue someone to recover money or property *for* the estate, however, there was no "bankruptcy" jurisdiction at all; such an action required an ordinary formal suit in the appropriate superior court.

B. Early American Bankruptcy Statutes

Bankruptcy would not become a permanent institution in this country until 1898. Earlier legislation proved sporadic and short-lived but nonetheless contained jurisdictional provisions that elucidate the nature of "bankruptcy proceedings" in federal court. Operative language in both the Bankruptcy Act of 1841 (the "1841 Act")[10] and the Bankruptcy Act of 1867 (the "1867 Act")[11] contained nearly identical grants of federal jurisdiction over "all matters and proceedings in bankruptcy."[12] Of course, if that statutory reference to "bankruptcy proceedings" were limited to the then-prevailing English notion of "bankruptcy proceedings," it would exclude an assignee's suit to recover money or property for the estate. Determining the scope of federal bankruptcy jurisdiction (vis-à-vis the jurisdiction of state courts), however, implicates an issue of judicial federalism that was unknown to the English system,[13] and Justice Story placed a uniquely American spin on the idea of jurisdiction over "bankruptcy proceedings" in two early opinions construing the 1841 Act.[14]

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[7]Halford v. Gillow, 60 Eng. Rep. 18, 20 (Ch. 1842).

[8]*See Ex parte* Matthews, 26 Eng. Rep. 1266, 1267 (Ch. 1754); Thomas Cooper, The Bankrupt Law of America Compared with the Bankrupt Law of England 117 (Fred. B. Rothman & Co. 1992) (1801).

[9]*See* McCoid, supra note 5, at 29–31; Plank, *supra* note 5, at 576–77, 582–83, 587–88, 589–90.

[10]Ch. 9, 5 Stat. 440 (repealed 1843), *reprinted in* 10 Collier on Bankruptcy 1738–45 (James Wm. Moore et al. eds., 14th ed. 1978).

[11]Ch. 176, 14 Stat. 517 (amended 1868, 1870, 1872, 1873, 1874 & 1876 and repealed 1878), *reprinted in* 10 Collier on Bankruptcy, *supra* note 10, at 1746–82.

[12]1867 Act § 1; 1841 Act § 6.

[13]*See* Milwaukee & M.R. Co. v. Milwaukee & St. P.R. Co., 69 U.S. (2 Wall.) 609, 633 (1864) (noting that practice in the English courts is not determinative "in the sense which this Court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts").

[14]*See Ex parte* Christy, 44 U.S. (3 How.) 292 (1845) (Story, J.); Mitchell v. Great Works Mill. & Mfg.

For Justice Story, the construct of the bankrupt's "estate" remained central to bankruptcy jurisdiction, just as it had in England. However, Justice Story's concept of *federal* bankruptcy jurisdiction was not the equivalent of English bankruptcy jurisdiction. Justice Story held that federal jurisdiction over "proceedings in bankruptcy" encompassed "all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned, since they are matters arising under the act, and are necessarily involved in the due administration and settlement of the bankrupt's estate."[15] According to Justice Story, then, federal jurisdiction over "bankruptcy proceedings" extended to "the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate."[16] Similarly, the 1867 Act's general federal jurisdiction over "all matters and proceedings in bankruptcy" was construed to include any action to which the estate was a party, including an assignee's suits to recover money or property for the estate.[17]

Thus, in our federal system of dual sovereigns with both state and federal courts, the American model of "bankruptcy" jurisdiction, as established in the early American bankruptcy statutes, was that of a general federal bankruptcy jurisdiction over any claim to which a bankruptcy estate is a party, whether that claim is made by or against the estate.[18] The manner of proceeding, though, reflected the English division between summary bankruptcy proceedings and plenary assignee suits.

While both the 1841 and 1867 Acts granted the federal district courts general jurisdiction over "all matters and proceedings in bankruptcy," each Act also contained a separate statutory provision specifically granting original jurisdiction to the old federal circuit courts over assignee "suits at law and in equity" to recover money or property from a so-called "adverse claimant."[19] This required an independent plenary suit in the circuit court, commenced by

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Co., 17 F. Cas. 496 (C.C.D. Me. 1843) (No. 9662) (Story, Circuit Justice). In the *Mitchell* case, while riding circuit in his capacity as a Circuit Justice, Justice Story held that the 1841 Act's jurisdiction over "all matters and proceedings in bankruptcy" extended to an assignee suit to collect a debt owing to the bankrupt. *Mitchell*, 17 F. Cas. at 499. *Christy* held that the 1841 Act's general federal bankruptcy jurisdiction encompassed an assignee's suit to recover real estate seized from the bankrupt in mortgage foreclosure proceedings in state court prior to commencement of the bankruptcy proceedings, where the assignee was challenging the validity of the underlying mortgages. *Christy*, 44 U.S. (3 How.) at 321–22; *see also* Nugent v. Boyd, 44 U.S. (3 How.) 426, 426–28, 434–37 (1845) (finding bankruptcy jurisdiction under 1841 Act where "controversy was between the bankrupt's assignee, on one side, and a mortgage creditor and purchasers at the sale under state process of the mortgaged premises, on the other").

[15]*Christy*, 44 U.S. (3 How.) at 313.

[16]*Id.* at 314.

[17]*See* Lathrop v. Drake, 91 U.S. 516, 518–20 (1875); Smith v. Mason, 81 U.S. (14 Wall.) 419, 431–32 (1871); Morgan v. Thornhill, 78 U.S. (11 Wall.) 65, 75 (1870).

[18]*See* Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an* In Rem *Model of Bankruptcy Jurisdiction*, 15 EMORY BANKR. DEV. J. 261, 263–66 (1999) [hereinafter Brubaker, *Clinging to* In Rem *Bankruptcy Jurisdiction*].

[19]*See* 1867 Act § 2; 1841 Act § 8; *see also* Ralph Brubaker, *On the Nature of Federal Bankruptcy*

a formal bill or complaint.[20] In contrast, the district court's general federal jurisdiction over "all matters and proceedings in bankruptcy" under the 1841 Act, by its terms, was "to be exercised summarily, in the nature of summary proceedings in equity."[21] The 1867 Act did not specify the process (summary or plenary) for district courts to use in exercising their general federal bankruptcy jurisdiction, but the Supreme Court held that actions against adverse claimants required a plenary suit, whether in district court or circuit court.[22] All other bankruptcy proceedings in the district court, though, were resolved summarily.[23]

The procedural divide established under the early American bankruptcy statutes, therefore, simply adopted the English practice requiring a formal plenary suit in assignee actions to recover money or property from an adverse claimant.[24] As in England, American assignees had to pursue adverse claimants through formal plenary suits commenced in either a federal district or circuit court. All other "bankruptcy proceedings," however, were conducted by summary processes in the federal district court, and as in England, early Congresses also authorized (non-Article III) bankruptcy commissioners to act as first-instance adjudicators in summary bankruptcy proceedings. For example, in the very first federal bankruptcy statute, the Bankruptcy Act of 1800, bankruptcy commissioners were given powers very similar to those of English bankruptcy commissioners, and similar to the relationship between English commissioners and the Lord Chancellor, decisions by the 1800 Act commissioners were subject to revision only through a petition for review of the commissioners' determinations filed with the federal district court.[25]

Jurisdiction: A General Statutory and Constitutional Theory, 41 WM. & MARY L. REV. 743, 759–64 (2000) [hereinafter Brubaker, *Bankruptcy Jurisdiction Theory*].

[20]*See* Marshall v. Knox, 83 U.S. (16 Wall.) 551, 554–55, 556 (1872) (decided under the 1867 Act); *Smith*, 81 U.S. (14 Wall.) at 430–33 (same); *Christy*, 44 U.S. (3 How.) at 314–15, 316–17 (decided under the 1841 Act).

[21]1841 Act § 6. In England, assignee suits against adverse claimants, because they were not encompassed within English "bankruptcy" jurisdiction, thus required plenary suit in a court of law or equity. Justice Story nonetheless concluded that the 1841 Act's general summary jurisdiction of "proceedings in bankruptcy" in the district courts encompassed assignee disputes with adverse claimants, notwithstanding the fact that this permitted the assignee to proceed summarily (rather than through a plenary suit) against an adverse claimant in the district court. *See Christy*, 44 U.S. (3 How.) at 314, 317. Although subsequent bankruptcy statutes were generally construed to require plenary proceedings in actions to recover money or property from adverse claimants in either federal district or circuit court, Justice Story's original notion, that such actions are subsumed within the scope of general federal bankruptcy jurisdiction, endured. *See* Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 765–77.

[22]*See Marshall*, 83 U.S. (16 Wall.) at 554–57; *Smith*, 81 U.S. (14 Wall.) at 429–33 & 432 n.10† (citing *Ex parte* Bacon, 2 Molloy 441 (1810)).

[23]*See* Sherman v. Bingham, 21 F. Cas. 1270, 1272 (C.C.D. Mass. 1872) (No. 12,762) (Clifford, Circuit Justice); Goodall v. Tuttle, 10 F. Cas. 579, 582–83 (W.D. Wis. 1872) (No. 5533).

[24]*See* GEORGE TAYLOR, THE BANKRUPT LAW, ACT OF MARCH 2, 1867, WITH NOTES AND REFERENCES TO ENGLISH DECISIONS 61–62 (1867) (citing *Ex parte* Bacon, 2 Molloy 441 (1810)).

[25]*See* McCoid, *supra* note 5, at 33; Plank, *supra* note 5, at 606–10. The 1841 Act contemplated a less

C. The Bankruptcy Act of 1898

The more expansive model of general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate, under the 1841 and 1867 Acts, was seen as necessary to effectual and efficient administration of bankruptcy estates. This jurisdictional scheme, however, produced a persistent tension between the federal interest in estate administration and the localized interests of particular litigants, witnesses, and attorneys, who often found the federal forum inconvenient as compared with state courts.[26] In the making of the first bankruptcy statute in the era of "permanent" bankruptcy law, the 1898 Act,[27] there were widely-held misgivings about conferring too much power on the federal courts.[28] The 1898 Act responded to this animosity toward a general federal jurisdiction over "all matters and proceedings in bankruptcy" by narrowing the compass of federal bankruptcy jurisdiction.

1. *Summary Versus Plenary Jurisdiction*

The 1898 Act reduced the sweep of federal bankruptcy jurisdiction essentially through a return to the English *in rem* model of bankruptcy jurisdiction, in the now-infamous summary/plenary jurisdictional dichotomy erected by the 1898 Act.[29] The 1898 Act also introduced an inferior judicial officer,

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prominent adjudicatory role for bankruptcy commissioners, although it did authorize the district court judges to "appoint[ ] commissioners to receive proof of debts, and perform other duties, under the provisions of this act." 1841 Act § 5. Any party, however, had a right to have any contested issue finally determined in the district court, with a broad statutory right to a jury trial. *See id.* § 7. The commissioners' role under the 1841 Act, therefore, was likely much more administrative and less adjudicatory than under the 1800 Act or in England, and the 1867 Act expressly codified this design. Sections 3 and 4 of the 1867 Act expressly delineated the powers and duties of "registers," which were primarily administrative in character, as "nothing . . . shall empower a register . . . to hear a disputed adjudication." The registers' adjudicatory role under the 1867 Act in any contested litigation, therefore, was quite limited: "[I]n all matters where an issue of fact or of law is raised and contested by any party to the proceeding before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge." 1867 Act § 4.

[26]In fact, each of the three early "temporary" bankruptcy statutes was repealed, in large part, because of the relative inconvenience of the federal courts. *See* H.R. Rep. No. 55-65, at 126-27 (1897); 1 Collier on Bankruptcy, *supra* note 10, ¶ 0.04, at 8; 1 Frank O. Loveland, A Treatise on the Law and Proceedings in Bankruptcy § 5, at 10, § 6, at 12 (4th ed. 1912); 1 Harold Remington, A Treatise on the Bankruptcy Law of the United States § 7, at 17, § 8, at 18, § 9, at 19 (James H. Henderson ed., 5th ed. 1950).

[27]Pub. L. No. 55-171, ch. 541, 30 Stat. 544 (amended variously 1903-1976 & repealed 1978), *reprinted in* Collier on Bankruptcy app. A, pt. 3(a) (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

[28]*See* David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 Emory Bankr. Dev. J. 321, 323, 331-32, 334-35 (1999); Charles J. Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 Emory Bankr. Dev. J. 343, 355, 359-60, 362-64, 380 (1999).

[29]Thus, while section 2a(7) of the 1898 Act gave federal courts jurisdiction to "[c]ause the estates of bankrupts to be collected . . . and determine controversies in relation thereto," the scope of this jurisdiction was restricted by the proviso "except as herein otherwise provided." 1898 Act § 2a(7). Section 23 of the Act provided otherwise with respect to plenary suits—"controversies at law and in equity . . . between trustees as such and adverse claimants"—giving the federal courts jurisdiction only "in the same manner

analogous to English and 1800 Act bankruptcy commissioners, to exercise *in rem* bankruptcy jurisdiction in summary proceedings.[30]

Under the 1898 Act, there was summary *in rem* jurisdiction in the federal courts to adjudicate all disputes incident to administration of property in the actual or constructive possession of the court (through its officer, the bankruptcy trustee), and this summary *in rem* jurisdiction included adjudication of all creditors' claims against the estate.[31] There was no summary *in rem* jurisdiction, however, over trustees' suits to recover money or property for the estate—so-called plenary suits against "adverse claimants"—and that is the means by which the 1898 Act curtailed federal bankruptcy jurisdiction. The 1898 Act restricted federal jurisdiction over a trustee's plenary *in personam* suits.[32] That was not universally true, though, because there were limited instances in the 1898 Act in which Congress expressly granted the federal courts bankruptcy jurisdiction over a trustee's plenary *in personam* suits.[33] For example, a trustee's avoidance actions could be brought in federal court.[34] Moreover, in corporate reorganization proceedings, *any* plenary suit—even on a debtor's state-law cause of action to which the trustee merely succeeded as property of the estate—could be pursued in federal court as part of the "bankruptcy proceedings."[35]

2. *Summary Versus Plenary Process*

Of course, the summary/plenary dichotomy also implicated differing procedural modes, as it had in England and under earlier American bankruptcy

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and to the same extent as though such [bankruptcy] proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." *Id.* § 23a.

[30]*See* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten* Callaway v. Benton *Case*, 72 AM. BANKR. L.J. 1, 23–25 (1998) [hereinafter Brubaker, *Nondebtor Releases and Jurisdiction*].

[31]*See* Katchen v. Landy, 382 U.S. 323, 329–30 (1966) ("'The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*,' and thus falls within the principle . . . that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession." (citation omitted) (quoting Gardner v. New Jersey, 329 U.S. 565, 574 (1947)).

[32]*See* Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 430–34 (1924); 2 COLLIER ON BANKRUPTCY, *supra* note 10, ¶¶ 23.05[1], 23.05[3]–[4], 23.06[1].

[33]The primary exceptions were federal jurisdiction by consent and federal plenary jurisdiction over suits to avoid liens and recover preferences and fraudulent conveyances. *See generally* 2 COLLIER ON BANKRUPTCY, *supra* note 10, ¶¶ 23.08, 23.14, 23.15. In addition, section 23 did not apply to restrict plenary jurisdiction in corporate reorganization proceedings under Chapter X. *See generally* 6 COLLIER ON BANKRUPTCY, *supra* note 10, ¶ 3.18.

[34]In *Bardes v. First National Bank*, 178 U.S. 524 (1900), the Court held that section 23 limited the jurisdiction of federal courts to entertain a trustee's plenary suit to recover a prebankruptcy fraudulent conveyance by the bankrupt. After the *Bardes* case, Congress amended section 23 to except from its limitations trustee suits to avoid liens and recover preferential and fraudulent transfers. *See* 2 COLLIER ON BANKRUPTCY, *supra* note 10, ¶¶ 23.08, 23.14, 23.15.

[35]*See* Williams v. Austrian, 331 U.S. 642 (1947). *See generally* Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 774–77.

statutes. "Summary" jurisdiction accurately connoted the more informal and expeditious nature of the proceedings, initiated by a motion, petition, or application, with a relatively short notice period before a hearing, where the evidence would often be presented through affidavits. Exercises of "plenary" jurisdiction, by contrast and as the name indicates, required a full plenary suit: an ordinary civil action in federal court conducted according to normal rules of civil procedure, including summons and complaint, formal pleadings, discovery, and trial, all according to the timetables for and in precisely the same manner as a normal civil action.[36] Most significantly, Seventh Amendment jury trial rights attached to any plenary legal action by the trustee against an adverse claimant,[37] but the litigants had no Seventh Amendment jury trial rights in summary proceedings.[38]

3. *Referees' Jurisdiction in Summary Proceedings*

The 1898 Act vested bankruptcy jurisdiction over both summary and plenary proceedings, as an initial matter, in the U.S. district courts, sitting as "courts of bankruptcy."[39] However, adjuncts to the district courts, entitled bankruptcy referees,[40] were authorized to exercise most of the district court's summary jurisdiction through a referral system.[41] Nonetheless, a referee's jurisdiction over proceedings in referred cases was limited not only by specific exceptions in the 1898 Act itself, but also by a Supreme Court interpretation of the Act that limited a referee to the exercise of summary jurisdiction.[42]

This limitation of referees' adjudicatory powers to summary matters only was certainly *not* compelled by the terms of the statute itself, which contained a very broad, open-ended authorization for referees to exercise the same "jurisdiction to . . . perform such duties as are by this Act conferred on courts of bankruptcy."[43] In addition, the Act contained a definition of "court" that included both the district court and the referee, making clear that in referred cases, the referee acted as the court.[44] Thus, when the Su-

[36]*See* 2 COLLIER ON BANKRUPTCY, *supra* note 10, ¶ 23.02.

[37]*See* Schoenthal v. Irving Trust Co., 287 U.S. 92, 94–95 (1932).

[38]*See* Katchen v. Landy, 382 U.S. 323, 326–29 (1966).

[39]*See* 1898 Act § 1(10) (district courts are "courts of bankruptcy"); *id.* § 2a ("courts of bankruptcy . . . are hereby invested . . . with . . . original jurisdiction in proceedings under this Act").

[40]Referees were officers of the district court, appointed by the district court judges for terms of six years. *Id.* §§ 33, 34a.

[41]*See* White v. Schloerb, 178 U.S. 542, 546 (1900) (When a "case in bankruptcy is referred by the court of bankruptcy to a referee . . . he exercises much of the judicial authority of that court."). In many cases, rules provided for automatic reference to the referee. *See* 2 COLLIER ON BANKRUPTCY, *supra* note 10, ¶ 22.03.

[42]*See* Weidhorn v. Levy, 253 U.S. 268, 274 (1920).

[43]1898 Act § 38(6).

[44]*See id.* § 1(10) (definition of "court"); *id.*§ 1(20) (definition of "judge"); *id.* § 1(26) (definition of "referee"). Moreover, referees were required to "take the same oath of office as that prescribed for judges of United States courts." *Id.* § 36.

preme Court decided in *Weidhorn v. Levy* that "the referee is to exercise powers *not* equal to or co-ordinate with those of the court or judge,"[45] the Court was devising a prudential limitation on the adjudicatory powers of the non-Article III referees, without any congressional guidance as to what those limits (if any) must or should be. Indeed, as the Court expressly acknowledged in *Katchen v. Landy*, the Court itself was the principal architect of the full extent of the non-Article III referees' adjudicatory powers, which "in the absence of congressional definition . . . is a matter to be determined by decisions of this Court."[46] Pursuant to the Court's decisions, a referee had no jurisdiction over plenary matters;[47] the referee's summary jurisdiction, though, was indistinguishable from that of the district court, including the power to enter final orders reviewable only by appeal[48] and carrying the full collateral preclusiveness of res judicata.[49]

D. The Bankruptcy Reform Act of 1978 and the *Marathon* Decision

The 1978 Reform Act brought sweeping changes to bankruptcy law, repealing the 1898 Act and enacting the Bankruptcy Code. Undoubtedly, one of the most significant changes came through an expansive grant of federal bankruptcy jurisdiction.

The 1978 Reform Act created federal bankruptcy jurisdiction over all matters "related to" a bankruptcy case. The statutory grant was of "original and exclusive jurisdiction of all [bankruptcy] cases" and "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code] or arising in or related to [bankruptcy] cases."[50] The 1978 Reform Act also created a new court to exercise this broad bankruptcy jurisdiction: an adjunct to each federal district court, denominated the "United States Bankruptcy Court for the district."[51] Although bankruptcy jurisdiction was initially vested in the federal district courts, the 1978 Reform Act provided that "the bankruptcy court for the district in which a [bankruptcy] case is commenced shall exercise all of the jurisdiction conferred by this section on the district courts,"[52] with review only through ordinary appellate proce-

[45]*Weidhorn*, 253 U.S. at 273 (emphasis added).

[46]Katchen v. Landy, 382 U.S. 323, 328 (1966).

[47]The only exception was that the parties to an otherwise-plenary matter could consent to summary proceedings before the referee. *See* MacDonald v. Plymouth Cnty. Trust Co., 286 U.S. 263, 266–68 (1932).

[48]*See Weidhorn*, 253 U.S. at 271; 2A Collier on Bankruptcy, *supra* note 10, ¶¶ 39.16, 39.28.

[49]*See Katchen*, 382 U.S. at 334; Page v. Ark. Natural Gas Corp., 286 U.S. 269, 270–72 (1932); 2A Collier on Bankruptcy, *supra* note 10, ¶ 39.29.

[50]Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668 (1978) (repealed 1984) (enacting 28 U.S.C. § 1471(a)–(b)).

[51]*Id.* § 201(a), 92 Stat. at 2657 (repealed 1984) (enacting 28 U.S.C. § 151(a)).

[52]*Id.* § 241(a), 92 Stat. at 2668 (repealed 1984) (enacting 28 U.S.C. § 1471(c)).

dures in the district court. Thus, the new jurisdictional scheme removed the summary *in rem* strictures that confined the power of the former referees and gave the newly created bankruptcy courts both *in rem* and full *in personam* jurisdiction over any controversy related to a bankruptcy case.

The adjunct bankruptcy courts created by the 1978 Reform Act exercised all of the expanded federal bankruptcy jurisdiction, yet the bankruptcy judges were not given Article III status, with its protections of lifetime tenure and undiminished compensation.[53] Specifically, the bankruptcy judges were to be appointed by the President for only fourteen-year terms, and they were subject to removal during their terms by their circuit judicial councils.[54] In addition, the 1978 Reform Act set bankruptcy judges' salaries (at 92% of district court judges' salaries) and made them subject to adjustment under the Federal Salary Act.[55] The congressional decision to deny bankruptcy judges Article III status proved catastrophic for the bankruptcy system.[56]

In the momentous case of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[57] the Supreme Court held that the 1978 Reform Act's jurisdictional design violated Article III as applied to the case before it, a suit by a chapter 11 debtor-in-possession to recover damages from a third party for a prepetition breach of contract. Of course, under the 1898 Act, such a suit would have been a plenary action against an adverse claimant, outside the summary jurisdiction of a bankruptcy referee, requiring plenary suit in state court or a federal district court. Under the 1978 Reform Act, however, this suit fell within the pervasive jurisdiction of the new bankruptcy courts. A plurality of the Supreme Court, in an opinion authored by Justice Brennan, concluded that this grant of jurisdiction to bankruptcy judges had "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and ha[d] vested those attributes in a non-Art. III adjunct."[58] The concurring justices agreed that jurisdiction to adjudicate the debtor's action, which would exist in essentially the same form if the debtor had not filed bankruptcy, could only be vested in an Article III judge.[59]

Perhaps the broadest proposition on which both the *Marathon* plurality and concurrence agreed was this: "It is clear that, at the least, the new bank-

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[53]*See* U.S. CONST. art. III, § 1.

[54]*See* Pub. L. No. 95-598, § 201(a), 92 Stat. at 2657–58 (enacting 28 U.S.C. §§ 152–153) (repealed 1984).

[55]*See id.* § 201(a), 92 Stat. at 2658 (enacting 28 U.S.C. §§ 154) (repealed 1984).

[56]Susan Block-Lieb provides an excellent account of the political machinations leading to that decision in her contribution to this symposium. *See* Susan Block-Lieb, *What Congress Had to Say: Legislative History as a Rehearsal of Congressional Response to* Stern v. Marshall, 86 AM. BANKR. L.J. 55 (2012).

[57]458 U.S. 50 (1982).

[58]*Id.* at 87 (Brennan, J., plurality opinion).

[59]*Id.* at 89–92 (Rehnquist, J., concurring).

ruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against [defendant] Marathon."[60] The Court has subsequently characterized the *Marathon* holding as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review."[61]

E. The Bankruptcy Amendments and Federal Judgeship Act of 1984

Congress's response to the *Marathon* holding was the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), which put in place the current bankruptcy court and jurisdictional structure.[62] BAFJA enacted what is essentially a return to a system of jurisdiction by referral, similar to that of the 1898 Act. BAFJA retained the adjunct bankruptcy courts for each district. A bankruptcy court is a non-Article III "unit of the district court," with the bankruptcy judge serving "as a judicial officer of the district court."[63] Bankruptcy judges are appointed by the circuit courts of appeals for fourteen-year terms.[64]

BAFJA also retained the 1978 Reform Act's broad grant of bankruptcy jurisdiction over any matter "related to" a bankruptcy case. As under both the 1898 Act and the 1978 Reform Act, federal district courts continue to be the initial repositories of original bankruptcy jurisdiction, with the BAFJA jurisdictional grant being exactly the same as that of the 1978 Reform Act: "original and exclusive jurisdiction of all [bankruptcy] cases" and "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to [bankruptcy] cases."[65] Unlike the 1978 Reform Act, however, BAFJA did not commit all of this jurisdiction to the non-Article III bankruptcy judges. Rather, BAFJA permitted the district courts to refer to bankruptcy judges all bankruptcy cases and proceedings within the district court's broad bankruptcy jurisdiction.[66]

Every judicial district, by local rule, has provided that all bankruptcy cases and proceedings will be referred automatically to the bankruptcy court. Yet, the power of a bankruptcy judge with respect to a referred proceeding

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[60]*Id.* at 87 n.40 (Brennan, J., plurality opinion); *see also id.* at 92 (Burger, J., dissenting) (describing narrow basis of concurrence as holding of the Court).

[61]Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985).

[62]For a detailed political history of the congressional response to *Marathon*, see Block-Lieb, *supra* note 56.

[63]28 U.S.C. § 151 (2006).

[64]*See id.* § 152(a)(1).

[65]*Id.* § 1334(a)-(b).

[66]*Id.* § 157(a).

differs markedly depending upon whether the proceeding constitutes what the statute denominates a "core proceeding[ ] arising under [the Bankruptcy Code], or arising in a [bankruptcy] case"[67] or, by contrast, is "a proceeding that is not a core proceeding but that is otherwise related to a [bankruptcy] case."[68]

In a core proceeding, a bankruptcy judge has the power to "hear and determine" the controversy and "enter appropriate orders and judgments," subject only to appellate review.[69] In a noncore, "related to" proceeding, the bankruptcy court can hear the dispute, but unless the parties consent to a final determination by the bankruptcy judge,[70] the bankruptcy judge's authority is limited to submitting proposed findings of fact and conclusions of law to the district court, for entry of a final order or judgment by the district court after a de novo review.[71]

Thus, under the current jurisdictional system, determining which proceedings are within the core jurisdiction of bankruptcy courts to enter final orders and judgments is a critical inquiry and is ineluctably intertwined with the larger inquiry regarding the constitutional limits on the adjudicatory powers of non-Article III bankruptcy judges. In *Stern v. Marshall*, the Supreme Court addressed both the statutory and constitutional scope of bankruptcy judges' core jurisdiction.

II. THE STATUTORY LIMITS OF BANKRUPTCY JUDGES' CORE JURISDICTION

The precise bankruptcy proceeding at issue in *Stern v. Marshall* was one front in a much larger all-out estate war over the vast material bounty of oil and gas magnate J. Howard Marshall, II.[72] J. Howard's impending (and then actual) departure from this earthly coil precipitated a tortuous and protracted dispute that pitted his second son and principal heir, E. Pierce Marshall, against J. Howard's famous, young, late-(in-his-)life bride, Vicki Lynn Marshall, better known as model and celebrity spokesperson and personality Anna Nicole Smith. Far-flung litigation proceeded simultaneously in both a Texas probate court and two federal courts in California, spinning a tangled web of conflicting decisions, and producing, in addition to the 2011 *Stern v.*

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[67]*Id.* § 157(b)(1).

[68]*Id.* § 157(c)(1).

[69]*Id.* § 157(b)(1); *see id.* § 158.

[70]*See id.* § 157(c)(2).

[71]*See id.* § 157(c)(1).

[72]For a more elaborate summary of the litigation and the complex procedural posture producing the *Stern v. Marshall* decision, see Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, BANKR. L. LETTER No., Aug. 2011, at 1, 1–5.

Marshall opinion, an earlier 2006 Supreme Court case[73] that addressed an equally vague and perplexing procedural issue—the so-called "probate exception" to federal jurisdiction.[74]

In the midst of the Texas probate litigation, Anna Nicole filed a chapter 11 petition in the Central District of California, and Pierce filed in the California bankruptcy court both a proof of claim and a nondischargeability complaint, alleging that Anna Nicole was liable to him for defamation based on prepetition statements that some of her lawyers made to the press intimating that Pierce had used forgery, fraud, and overreaching to gain control of J. Howard's assets. In response, Anna Nicole filed counterclaims against Pierce alleging that he had tortiously interfered with Anna Nicole's expectancy of an inter vivos gift from J. Howard.

Anna Nicole was already asserting essentially the same tortious interference claim in the Texas probate litigation. Subsequent conflicting judgments from the Texas probate court and the California bankruptcy and district courts presented some extremely perplexing questions regarding issue and claim preclusion principles. As framed by the Ninth Circuit, though, which court was compelled to give issue preclusive effect to a previous court's collateral decision depended on which of the three sequential determinations—(1) the California bankruptcy court's $475 million judgment against Pierce on Anna Nicole's tortious interference counterclaim, (2) the subsequent Texas probate court's judgment against Anna Nicole, finding that she was entitled to no relief on her tortious interference claim, or (3) the subsequent California district court's $90 million judgment against Pierce on Anna Nicole's tortious interference counterclaim—was the first *final* judgment.

If the California bankruptcy court did *not* have core jurisdiction to enter final judgment on Anna Nicole's tortious interference counterclaim, then the Texas probate court's judgment (denying Anna Nicole any relief on her tortious interference claim) would be the first final judgment, entitled to full collateral preclusive effect (via issue preclusion a/k/a collateral estoppel) in the California district court's subsequent adjudication. If, however, the California bankruptcy court *had* core jurisdiction to enter a final judgment on Anna Nicole's tortious interference counterclaim, then ultimately resolving the proper application of preclusion principles would have been much more complex. The Ninth Circuit, though, took the former position, holding that the California bankruptcy court did *not* have the authority to enter a final judgment on Anna Nicole's tortious interference counterclaim, and the Su-

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[73]*In re* Marshall, 547 U.S. 293 (2006).

[74]*See* Ralph Brubaker, *The Oil Tycoon, the Playboy Playmate, and Bankruptcy's Encounter with the Probate Exception to Federal Jurisdiction*, 26 BANKR. L. LETTER, July 2006, at 1.

preme Court affirmed.[75]

From this procedural morass, then, the sole determinative issue at stake for the Supreme Court was the extent of a bankruptcy court's authority to enter final orders and judgments. That issue, of course, implicates the *Marathon* holding concerning the constitutional limits of non-Article III bankruptcy judges' adjudicatory authority, as those limits were addressed by BAFJA. Because Congress, through the jurisdictional category of core proceedings, sought to give bankruptcy courts as much (but no more) final adjudicatory powers as are constitutionally permissible, faithful adherence to that statutory design will inevitably force some attempt to articulate where the constitutional line lies.

In *Stern v. Marshall*, rather than opting for a narrow construction of the statute that would avoid confronting the constitutional question, the Court interpreted the statute in a manner that required the Court to confront the constitutional question. Its holding that a portion of the jurisdictional statute (which the Court described as presenting a very "narrow" question) is unconstitutional, has now stoked a renewed, anxious search for those constitutional limits, thirty years after *Marathon* triggered a similar, even more frenetic constitutional quest. Given that the statute codifies an extremely opaque constitutional limit that the Court has never been willing (or able) to illuminate clearly, the distressed response to *Stern v. Marshall* was inevitable, and the Court's attempt to downplay the significance of its decision brings to mind Kevin Bacon's character during the parade scene in *Animal House*.[76]

While the Court's interpretation of the statute may seem facially unremarkable, the Court's statutory analysis actually contains some very helpful clues about the majority's attitude toward important constitutional questions, such as the validity of supplemental jurisdiction principles in the context of non-Article III adjudications, and whether litigant consent will validate an otherwise unconstitutional final adjudication by a non-Article III bankruptcy judge.

A. How to Codify an Unknown Constitutional Limit?

Stern v. Marshall initially presented a statutory interpretation issue of whether Anna Nicole's counterclaim against Pierce was within the scope of the statutory specification of a "core" proceeding in which the Judicial Code authorizes a bankruptcy judge to enter final orders and judgments. Section 157(b)(2)(C) of the Judicial Code expressly provides that core proceedings include "counterclaims by the estate against persons filing claims against the

[75] *In re* Marshall, 600 F.3d 1037 (9th Cir. 2010), *aff'd sub nom.*, Stern v. Marshall, 131 S. Ct. 2594 (2011).

[76] Animal House (National Lampoon 1978). If unfamiliar with this particular scene, a clip is available at http://www.youtube.com/watch?v=zDAmPIq29ro.

estate," which plainly would include within its scope Anna Nicole's counterclaim (as chapter 11 DIP representative of the estate) to the proof of claim filed against her bankruptcy estate. As Justice Roberts noted in his majority opinion, therefore, Anna Nicole's "counterclaim against Pierce for tortious interference is a 'core proceeding' under the plain text of § 157(b)(2)(C)."[77] The problem with literal application of § 157(b)(2)'s identification of core proceedings, though, is that it literally includes proceedings in which it is clearly unconstitutional for non-Article III bankruptcy judges to enter final orders and judgments.

Restricting the adjudicatory authority of bankruptcy courts to core proceedings was obviously an attempt to cure the constitutional infirmities of the 1978 Reform Act identified by the Court in *Marathon*. The terminology of "core" bankruptcy proceedings has no statutory ancestors and is apparently taken from Justice Brennan's plurality opinion, wherein he said that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case."[78] At the same time, it is equally clear that Congress intended to give bankruptcy judges as much jurisdiction as is constitutionally permissible (without really knowing, of course, the precise contours of the very fuzzy constitutional line that the Supreme Court has never articulated with anything approaching clarity or coherence). The structure of § 157(b)(2)'s specification of core proceedings reflects this quandary.

Nowhere does the statute define a core proceeding. The closest thing to a definition comes through a long illustrative list of matters included within core proceedings in § 157(b)(2). That statute, though, also expressly states that this list is non-exclusive. Thus, even unspecified proceedings may be core (although the statute does not explain how to determine whether an unspecified proceeding is core). The illustrative list of core proceedings also includes the catch-all categories of "matters concerning the administration of the estate" and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship."[79]

Both of those catch-all categories of core proceedings, if construed broadly enough (e.g., recall Justice Story's construction of the early bank-

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[77]*Stern*, 131 S. Ct. at 2604.

[78]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (Brennan, J., plurality opinion).

[79]28 U.S.C. § 157(b)(2)(A), (O) (2006). The second catch-all core category, like the "core" terminology itself, also apparently has its origins in the language of Justice Brennan's *Marathon* opinion, quoted *supra* in the text accompanying note 78.

ruptcy jurisdiction statutes),[80] could easily include even the action at issue in *Marathon*. Pursuing a debtor's state-law cause of action against a third party is part-and-parcel of "administration of the estate," and it clearly affects "the liquidation of the assets of the estate." Pursuing that cause of action also affects "the adjustment of the debtor-creditor relationship" because it determines how much property is available for distribution amongst the creditors. Indeed, the gathering of the assets of the estate for distribution to creditors is the essence of bankruptcy. As Justice Story put it, "all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned . . . are necessarily involved in the due administration and settlement of the bankrupt's estate."[81]

Congress obviously could not have intended to include *Marathon* actions as core proceedings, though, as that would clearly be unconstitutional (under the *Marathon* holding itself), and the entire category of core proceedings was created to avoid crossing the *Marathon* constitutional line. Interpretation of the scope of core proceedings should, therefore, rely upon the interpretive canon that favors, where possible, a statutory interpretation that avoids serious doubts as to the constitutionality of the statute. At the same time, though (and in tension with that canon), Congress's obvious intent to give bankruptcy judges as much jurisdiction as is constitutionally permissible must be considered.

The *Stern v. Marshall* Court acknowledged that "designating all counterclaims as 'core' proceedings raises serious constitutional concerns."[82] When confronted with § 157(b)(2)(C)'s express language providing that adjudication of all "counterclaims by the estate against persons filing claims against the estate" are core proceedings, however, the Court stated that "we do not think the plain text of § 157(b)(2)(C) leaves any room for the canon of avoidance. We would have to 'rewrit[e]' the statute, not interpret it, to bypass the constitutional issue § 157(b)(2)(C) presents."[83]

B. Core Proceedings That Do Not "Arise Under" the Bankruptcy Code Nor "Arise in" the Bankruptcy Case?

The Ninth Circuit's decision provided a potential workaround that would have allowed the Court to limit the scope of the statutory definition of core proceedings to coincide precisely with the constitutional limits of bankruptcy judges' adjudicatory authority. According to the Ninth Circuit, § 157(b)(1) of the Judicial Code is not simply an authorization for bankruptcy judges to "hear and determine" and "enter appropriate orders and

[80] *See supra* notes 10–18 and accompanying text.
[81] *Ex parte* Christy, 44 U.S. (3 How.) 292, 313 (1845).
[82] *Stern*, 131 S. Ct. at 2605.
[83] *Id.*

judgments" in "all core proceedings"; rather, that authorization extends only to "core proceedings arising under title 11 [the Bankruptcy Code], or arising in a [bankruptcy] case under title 11." Under the Ninth Circuit's interpretation, then, the "arising under" and "arising in" prepositional phrases modify and restrict "core proceedings" such that "[a] bankruptcy judge may only determine a claim that meets Congress's definition of a core proceeding *and* arises under or arises in title 11."[84]

That interpretive move would indeed give courts all the flexibility needed in cases like *Stern v. Marshall* to align the content of statutory core proceedings (appropriate for final determination by a non-Article III bankruptcy judge) with the constitutional limit of non-Article III bankruptcy judges' adjudicatory authority (whatever that limit is determined to be in a given case). Setting aside the "arising under" category of statutory federal question claims,[85] determining the content of the category comprised of claims "arising in a [bankruptcy] case under title 11" is not apparent simply from the face of the statute itself. Therefore, that jurisdictional category could easily be expanded or contracted to achieve the objective of taking core proceedings to (and constraining them within) constitutional limits.

Indeed, when examined in the historical context of determining the full scope of federal bankruptcy jurisdiction vis-à-vis the jurisdiction of state courts (implicating an issue of judicial federalism and *not* the *Marathon* separation-of-powers issue regarding non-Article III adjudications), recall that the Supreme Court construed early statutory grants of federal jurisdiction over "all matters and proceedings in bankruptcy" (including under the 1898 Act)[86] to include jurisdiction over all claims by and against the bankruptcy estate, which would include even a *Marathon*-like claim being pursued by the estate.[87] A "historical survey of the development of American bankruptcy jurisdiction," therefore, "suggests that such a *Marathon* action by the estate is . . . suitably characterized as an 'arising in' proceeding—as part of Justice Story's original vision of a general federal bankruptcy jurisdiction over 'all matters and proceedings in bankruptcy.'"[88] It is only under the distinct *subsequent* influence of the *Marathon* decision and BAFJA that the jurisdictional category of claims "arising in a [bankruptcy] case" is now understood as *not* including a *Marathon*-like claim because that interpretation would unconstitutionally empower non-Article III bankruptcy judges to render final

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[84]*In re* Marshall, 600 F.3d 1037, 1055 (9th Cir. 2010).

[85]*See* discussion *infra* notes 265–88 and accompanying text.

[86]*See* Williams v. Austrian, 331 U.S. 642 (1947); Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 774–77; Brubaker, *Clinging to* In Rem *Bankruptcy Jurisdiction*, *supra* note 18, at 268–69.

[87]*See supra* notes 10–18, 29–35 and accompanying text; *see also* Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 759–65.

[88]Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 856.

judgments on those actions.[89]

The structure that BAFJA (under the influence of the *Marathon* separation-of-powers holding) superimposed upon the jurisdictional statute essentially forces, as a matter of statutory interpretation, the definition of claims "arising in a [bankruptcy] case" to include only those claims (and no others) on which non-Article III bankruptcy judges can constitutionally render final judgment. The Ninth Circuit's interpretation of § 157(b)(1), therefore, would enable the following chain of statutory reasoning (that fully incorporates the *Marathon* constitutional limitation on non-Article III bankruptcy judges' adjudicatory authority): (1) it would be unconstitutional for a non-Article III bankruptcy judge to render a final judgment on the estate's state-law counterclaim (which is what the Supreme Court ultimately held to be the case in *Stern v. Marshall*); (2) the plain language of § 157(b)(2)(C) clearly categorizes the estate's counterclaim as a "core" proceeding (also what the Supreme Court held in *Stern v. Marshall*); (3) the estate's state-law counterclaim, though, is not one "arising in" the bankruptcy case (because to hold otherwise would authorize an unconstitutional final judgment by a non-Article III bankruptcy judge); (4) because the estate's state-law counterclaim is a "core" proceeding that does *not* also "arise in" the bankruptcy case, § 157(b)(1) does *not* authorize the bankruptcy judge to "hear and determine" or enter final "orders and judgments" on that counterclaim. Of course, if the determination were that it *is* constitutional for a non-Article III bankruptcy judge to render a final judgment on the state-law counterclaim at issue, under the Ninth Circuit's approach to interpretation of the statute, that would also be tantamount to a determination that the state-law counterclaim at issue *is* one "arising in" the bankruptcy case within the meaning of the statute, in which case § 157(b)(1) *would* authorize the bankruptcy judge to "hear and determine" that counterclaim and render a final judgment thereon.

C. Core Proceedings Either "Arise Under" the Bankruptcy Code or "Arise in" a Bankruptcy Case

The Supreme Court, however, rejected the Ninth Circuit's interpretation of the statutory relationship in Judicial Code § 157(b)(1) between (i) "core proceedings" and (ii) proceedings that "arise under" the Bankruptcy Code or "arise in" a bankruptcy case. Instead, the Court adopted the predominant understanding of the relationship between core proceedings and the statute's jurisdictional nexuses.

As an initial matter, the current Judicial Code (in § 1334(b)) grants the

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[89] *See id.* at 853, 854–59. "Obviously, then, Congress did not select these terms in 1978 to assure that it would be able to allocate the exercise of jurisdiction the way it did *six years later* in the 1984 Amendments." *In re* Simmons, 205 B.R. 834, 844 n.22 (Bankr. W.D. Tex. 1997).

federal district courts (as had the 1978 Reform Act) original jurisdiction over three categories of bankruptcy proceedings: proceedings (1) "arising under" the Bankruptcy Code, (2) "arising in" a bankruptcy case, or (3) "related to" a bankruptcy case. BAFJA allocates adjudicatory authority for bankruptcy proceedings falling within federal bankruptcy jurisdiction, between the Article III district courts and the non-Article III bankruptcy courts, by employing (via Judicial Code § 157) the same three jurisdictional nexuses. Section 157(b)(1) addresses bankruptcy judges' adjudicatory authority in "core proceedings arising under title 11 [the Bankruptcy Code], or arising in a [bankruptcy] case under title 11," and § 157(c)(1) addresses bankruptcy judges' authority in "a proceeding that is not a core proceeding but that is otherwise related to a [bankruptcy] case under title 11."

The alternative (and predominant) interpretation of the statutory relationship between core proceedings and the jurisdictional nexuses, adopted by the Court in *Stern v. Marshall*, is that the jurisdictional nexuses are "simply describing what core proceedings are: matters arising under Title 11 or in a Title 11 case."[90] *Marathon* and BAFJA imposed an "ex post separation of powers gloss" on the statute's jurisdictional nexuses, through which "[t]he statute's jurisdictional nexuses have evolved into catachrestic compartments that mark the boundaries between the limited jurisdiction of non-Article III bankruptcy judges and the residual authority of the Article III district courts."[91]

> Although *Marathon* and BAFJA contemplated no change whatsoever in the sum total of federal bankruptcy jurisdiction, they have nonetheless converted the statute's three jurisdictional nexuses into terms of art that draw a divide in this federal bankruptcy jurisdiction between (1) "core" proceedings [which are those] "arising under" or "arising in," in which a bankruptcy judge can enter final orders, and (2) noncore "related to" proceedings, in which only a district court can enter final orders absent consent of the parties to a bankruptcy court adjudication."[92]

Indeed, § 157(b)(3) directs bankruptcy judges to "determine . . . whether a proceeding is a core proceeding . . . or is a proceeding that is otherwise related to a case," and thus seems to confirm that the core/noncore line is the only one drawn by the statute. The majority in Stern concluded that there are but "[t]wo options. The statute does not suggest that any other distinc-

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[90]Stern v. Marshall, 131 S. Ct. 2594, 2604 (2011).

[91]Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 855.

[92]*Id.* at 857 (footnotes omitted).

tions need be made."[93] In contrast, as Justice Roberts noted, the Ninth's Circuit's interpretation suggests a third category: core proceedings that are only "related to" the bankruptcy case (but not "arising under" nor "arising in"). Given the terms of § 157(b)(3), however, a core "related to" proceeding seems "a contradiction in terms. It does not make sense to describe a 'core' bankruptcy proceeding as merely 'related to' the bankruptcy case; oxymoron is not a typical feature of congressional drafting."[94]

1. *The Statutory List of Core Proceedings*

Justice Roberts acknowledged that this interpretation is not compelled by the plain meaning of the text because "[a]s written, § 157(b)(1) is ambiguous."[95] Nonetheless, structural cues led the Court to adopt the predominant understanding that core proceedings are those that "arise under" the Bankruptcy Code or "arise in" a bankruptcy case. One of those structural cues is that the alternative Ninth Circuit interpretation would undercut the entire statutory enterprise of codifying a lengthy list of specific illustrative core proceedings, particularly given that (as noted) the meaning and content of the "arising in" category of proceedings is highly uncertain and unspecific (at least on the face of the statute itself).

> It is hard to believe that Congress would go to the trouble of cataloging 16 different types of proceedings that should receive "core" treatment, but then fail to specify how to determine whether those matters arise . . . in a bankruptcy case if—as [the alternative Ninth Circuit interpretation] asserts—the latter inquiry is determinative of the bankruptcy court's authority.[96]

Of course, recognizing that Congress was obviously trying to give non-Article III bankruptcy judges as much adjudicatory authority as is constitutionally permissible, without really knowing in advance where the Court would, in subsequent cases like *Stern v. Marshall*, actually draw the constitutional line for certain matters (such as estate counterclaims) suggests a very cogent reason why Congress would do precisely that which the Court finds hard to believe. Nonetheless, the Court's interpretation has predominated because it does indeed seem to be the most plausible, natural reading of the statutory text, as indicated by the other structural cue on which the Court relied.

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[93] *Stern*, 131 S. Ct. at 2604.

[94] *Id.* at 2605.

[95] *Id.* at 2604.

[96] *Id.* at 2605.

2. *An Unprovided-For Category of Proceedings?*

The Court was even more troubled by the fact that the Ninth Circuit's alternative statutory interpretation created a category of statutorily unprovided-for proceedings: core proceedings that neither "arise under" the Bankruptcy Code nor "arise in" a bankruptcy case. "Nowhere does § 157 specify what bankruptcy courts are to do with respect to the category of matters that [the Ninth Circuit's interpretation] posits—core proceedings that do *not* arise under Title 11 or in a Title 11 case."[97] Such proceedings are not addressed by § 157(b)(1), because they neither "arise under" nor "arise in," and similarly, such proceedings are not addressed by § 157(c)(1), as that provision only addresses proceedings that are not core. There is no statutory provision for bankruptcy judges to exercise any authority (not even to "hear" and submit proposed findings and conclusions to the district court) in the posited category of unprovided-for core proceedings that neither "arise under" nor "arise in."

Note, though, that the same is potentially true under the Court's interpretation of § 157(b)(1), although perhaps with little adverse effect. While the statute, under the Court's interpretation, provides for a bankruptcy judge to "hear and determine" and enter final "orders and judgments" in all statutory core proceedings, the Court held that there are certain statutory core proceedings (such as the counterclaim at issue in *Stern v. Marshall* and perhaps others) in which a bankruptcy judge cannot enter final judgments because to do so would be unconstitutional. Nowhere does the statute expressly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law to the district court in such a core proceeding in which the bankruptcy judge cannot enter a final judgment (as the statute does for noncore "related to" proceedings—but *not* for core proceedings—in § 157(c)(1)). Moreover, the Court was very coy in addressing this point, simply noting at the end of its very long opinion that "Pierce has not argued that the bankruptcy courts 'are barred from' . . . proposing findings of fact and conclusions of law on those matters."[98] That, of course, simply begs the question of whether a bankruptcy judge *can* submit proposed findings and conclusions to the district court in such a matter if a litigant does object. Section 157(b)(1) does expressly provide for the bankruptcy judge to "hear" such a statutory core matter, although that would be a futile exercise if the bankruptcy judge is not even authorized to submit proposed findings and conclusions to the district court after hearing the matter.

Notwithstanding the Court's failure to directly confront this issue, bankruptcy judges should hear and submit proposed findings of fact and conclu-

[97] *Id.* at 2604.
[98] *Id.* at 2620.

sions of law to the district court in such statutory core proceedings[99] based on their all-encompassing authorization to "hear and determine" the matter and enter any and all "appropriate orders."[100] The greater statutory authority to enter final orders necessarily includes the lesser statutory authority to enter provisional findings and conclusions. Furthermore, the fact that the district court is the principal repository of original jurisdiction over the matter,[101] with the discretionary power to withdraw the reference from the bankruptcy judge at any time,[102] means that there are no obstacles whatsoever to the district court (1) directing the parties to timely and specifically object to any of the bankruptcy judge's provisional findings and conclusions, (2) reviewing de novo the provisional findings and conclusions entered by the bankruptcy judge, and (3) entering any final order or judgment after conducting that de novo review. That this procedure is exactly the same as the process specifically authorized and directed in noncore related-to proceedings,[103] of course, does *not* mean that this same process is *not* statutorily authorized for core proceedings. Indeed, the statute fully authorizes this process whenever it is appropriate, because to do otherwise would be unconstitutional.[104]

D. The Waivable Nature of the Statutory Allocation of Adjudicatory Authority

Pierce offered one more very clever statutory argument in an effort to foreclose entirely any inquiry into the constitutionality of § 157(b)(2)(C), to wit, that § 157(b)(5) deprived the bankruptcy court of any jurisdiction to enter a final order on Anna Nicole's tortious interference counterclaim. The latter provision, also added to the Judicial Code in BAFJA, mandates that "[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose."[105] Pierce argued that this provision deprived the bankruptcy court of jurisdiction over his defamation claim, which is a tort claim, and as a result, the bankruptcy court was similarly deprived of jurisdiction over Anna Nicole's counterclaim to that defamation claim, presumably on the notion that any

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[99]Douglas Baird's contribution to this symposium contains a particularly thoughtful consideration of a range of possible responses to this statutory puzzle. *See* Douglas G. Baird, *Blue Collar Constitutional Law*, 86 Am. Bankr. L.J. 3 (2012).

[100]28 U.S.C. § 157(b)(1) (2006).

[101]*See id.* § 1334(b).

[102]*See id.* § 157(d).

[103]*See id.* § 157(c)(1).

[104]Ill-considered, ill-advised dicta suggesting otherwise should be acknowledged as such and simply ignored. *See, e.g.*, *In re* Ortiz, 665 F.3d 906, 915 (7th Cir. 2011).

[105]28 U.S.C. § 157(b)(5).

core jurisdiction over an estate's counterclaim, as such, would be completely derivative of core jurisdiction over the creditor's claim against the estate—a kind of ancillary or supplemental core jurisdiction. The Supreme Court rejected this argument in a manner that revealed very little about the validity of the argument's intriguing premises, but that addressed a more pervasive issue regarding the fundamental nature of Judicial Code § 157.

This statutory argument raised a number of very difficult issues that the Court was not anxious to confront: The validity of any notion of supplemental core jurisdiction is highly controversial.[106] Additionally, the lower courts do not agree on the precise scope of the statutory reference to "personal injury tort" claims (particularly whether such a claim must stem from physical injury).[107] Thus, it is not at all clear that Pierce's defamation claim (though a tort claim) was a "personal injury tort" claim within the meaning of § 157(b)(5). Furthermore, because the statute only requires that personal injury tort claims be "tried" in a federal district court, it is unclear whether bankruptcy courts can finally adjudicate such a claim in a manner that does not require "trial" of the claim (e.g., by way of a motion to dismiss or summary judgment, which is how the California bankruptcy court adjudicated Pierce's defamation claim).[108] Moreover, even if § 157(b)(5) completely divests bankruptcy courts of any authority over personal injury tort *claims* against the estate, § 157(b)(2)(C) by its express terms still purports to give bankruptcy courts core jurisdiction to enter final orders on any and all *counterclaims* by the estate against persons filing claims (even personal injury tort claims) against the estate. Diluting this express statutory authorization by delving into esoteric notions of supplemental core jurisdiction (1) would face an up-hill climb given the Court's penchant for strict textualism, and (2) would be every bit as nuanced and difficult as determining the constitutional limitation on that statutory provision.

The Court, though, ultimately decided that all of these difficult issues were moot because Pierce did not object (and, indeed, affirmatively consented) to the bankruptcy court adjudicating his defamation claim against Anna Nicole: "We have recognized 'the value of waiver and forfeiture rules' in 'complex' cases, and this case is no exception. . . . If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly."[109] Moreover, and most significantly, the Court stated that *nothing* in the allocation of federal bankruptcy jurisdiction as between Article III district courts and non-Article

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[106]The Court's constitutional holding, though, does speak to this issue, at least indirectly. *See infra* notes 205–24, 251–64 and accompanying text.

[107]*See In re* Arnold, 407 B.R. 849, 851–53 (Bankr. M.D.N.C. 2009).

[108]*See In re* Dow Corning Corp., 215 B.R. 346 (Bankr. E.D. Mich. 1997).

[109]Stern v. Marshall, 131 S. Ct. 2594, 2608 (2011).

III bankruptcy courts is "jurisdictional" in the sense that would invoke subject matter jurisdiction doctrines, such as the one holding that issues of subject matter jurisdiction are nonwaivable and can be raised at any time (including for the first time on appeal or sua sponte by the court):

> Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. See §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See § 157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in non-core case). By the same token, § 157(b)(5) . . . may . . . be similarly waived.[110]

Note, then, that this provides an answer to the puzzle of another potential unprovided-for statutory lacuna produced by the Court's interpretation of the statutory relationship between core proceedings and the jurisdictional nexuses: Can the parties consent to a final adjudication by a bankruptcy judge in a statutory core proceeding in which it would otherwise be unconstitutional for the bankruptcy judge to enter a final order? The only express statutory provision for final adjudication by the bankruptcy court through consent of the litigants is under § 157(c)(1) in "a proceeding related to a [bankruptcy] case under title 11;" there is *no* express statutory provision for final adjudication by the bankruptcy court through consent of the litigants in a core "arising in" proceeding such as the counterclaim at issue in *Stern v. Marshall*.

As with the issue of proposed findings and conclusions in such statutory core proceedings (discussed above),[111] bankruptcy courts should finally adjudicate such statutory core proceedings with litigant consent, and given the Supreme Court's reasoning, will be on solid ground in doing so. If a final bankruptcy-court adjudication of such a statutory core proceeding on consent of the litigants is constitutionally sound,[112] the bankruptcy courts have all the statutory authorization they need in § 157(b)(1), which fully authorizes bankruptcy courts to "hear and determine" and enter final orders and judgments in *any* statutory core proceeding. If the constitutional right to insist upon entry of final judgment by an Article III judge is a waivable right,[113] then waiver of that right would seem to invoke the bankruptcy judge's full statutory adjudicatory authority under § 157(b)(1).

Note also, then, that the ultimate effect of the Court's interpretation of § 157 seems to be exactly the same as if the Court had said that Anna Ni-

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[110] *Id.* at 2607.

[111] *See supra* notes 97–104 and accompanying text.

[112] *See infra* notes 169–81, 289–303 and accompanying text.

[113] *See infra* notes 169–81, 289–303 and accompanying text.

cole's counterclaim (because it would be unconstitutional for the bankruptcy judge to enter a final judgment thereon over the objection of Pierce) could *not* be considered a core "arising in" proceeding; rather, that counterclaim must be considered a noncore "related to" proceeding in which the bankruptcy judge can (1) hear the matter and submit proposed findings and conclusions to the district court under § 157(c)(1), or (2) can finally adjudicate the matter with the consent of the parties under § 157(c)(2).[114] In fact, consistent with Congress's obvious objective of giving bankruptcy courts as much core jurisdiction as is constitutionally permissible (but no more than is constitutionally permissible), that is how the lower courts generally approached the interpretation of the scope of core proceedings before *Stern v. Marshall*. At the end of the day, therefore, the Court's complex, lengthy interpretive exercise may have been "much ado about nothing," and judges and lawyers can simply go on applying the statute in that straightforward, common-sense fashion.[115]

Be that as it may, the Court concluded that the statute did authorize the bankruptcy court to render final judgment on Anna Nicole's state-law counterclaim (over Pierce's objection) as a statutory core proceeding. The Court then went on to conclude that, in that regard, the statute is unconstitutional in that it divests the Article III district courts of the essential attributes of the "judicial Power"—reserved by Article III of the Constitution to judges with lifetime tenure and irreducible compensation—and improperly assigns exercise of this judicial power to a non-Article III tribunal.

III. THE CONSTITUTIONAL LIMITS OF BANKRUPTCY JUDGES' CORE JURISDICTION

Despite finding that the statute authorized the bankruptcy court to enter a final judgment on Anna Nicole's state-law compulsory counterclaim against Pierce, the Court held that in this respect the statute was unconstitutionally over-broad. In doing so, the majority opinion reveals both a distinct turn in the Court's general Article III jurisprudence regarding the permissible adjudicatory authority of non-Article III tribunals and, at the same time, continuity in the Court's presumptive constitutional guidepost for navigating the very

[114]Indeed, language from Justice Roberts' majority opinion actually characterizes the holding as a "removal of counterclaims such as [Anna Nicole]'s from core bankruptcy jurisdiction" that does not "meaningfully change the division of labor in the current statute." *Stern*, 131 S. Ct. at 2620. One could logically conclude, therefore, that removal of such proceedings from the core category means that "they are noncore, and fully within the definition of related-to jurisdiction in § 157(c)(1)" and § 157(c)(2). *In re* Emerald Casino, Inc., 459 B.R. 298, 301 n.1 (Bankr. N.D. Ill. 2011).

[115]The one way in which the Court's interpretation may change things is with respect to consent. Section 157(c)(1) requires "consent of all parties to the proceeding," which may require affirmative conduct consenting to a final bankruptcy-court adjudication beyond mere waiver by failure to object promptly to a final bankruptcy-court adjudication.

difficult constitutional boundary problems that bankruptcy adjudications present. Consequently, *Stern v. Marshall* resurrects (and virtually confirms) the long-smoldering suspicion that other portions of the statutory grant of core jurisdiction to non-Article III bankruptcy judges are likewise unconstitutional.

A. The Constitutional Context

Article III, § 1 of the Constitution provides:

> 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 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 diminished during their Continuance in Office.[116]

Moreover, it is by virtue of Article III, § 2—authorizing "[t]he judicial Power [to] extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States"—that the Article III federal district courts are vested with their original federal bankruptcy jurisdiction over "all cases under" the Bankruptcy Code and "all civil proceedings arising under [the Bankruptcy Code], or arising in or related to [bankruptcy] cases."[117] Yet, adjudicatory authority over these same federal bankruptcy cases and proceedings—which is presumably in exercise of Article III district judges' constitutional "judicial Power"—is also assigned to non-Article III bankruptcy judges who do not have the protections of life tenure and irreducible compensation that Article III, § 1 mandates for those vested with "judicial Power."

The apparent incongruity between the textual dictates of the Constitution and bankruptcy judges' adjudicatory powers is part of a larger, lingering constitutional puzzle. Indeed, "throughout virtually all of American history, Congress has created tribunals in which the judges do not have life tenure and protected salary to decide cases and controversies enumerated in Article III."[118] Such non-Article III "tribunals date from the early years of the Republic, and include such familiar bodies as courts-martial, territorial courts, and administrative agencies."[119] The Supreme Court's various decisions and articulated rationales for the constitutionality of such non-Article III tribu-

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[116]U.S. Const. art. III, § 1.

[117]28 U.S.C. § 1334(a)-(b) (2006); *see* Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 800-52.

[118]Erwin Chemerinsky, Federal Jurisdiction § 4.1, at 222 (5th ed. 2007).

[119]James E. Pfander, Principles of Federal Jurisdiction § 10.3, at 327 (2d ed. 2011).

nals, however, "do not admit of easy synthesis,"[120] to say the least. The Court's decision in *Marathon* is emblematic.

The *Marathon* decision itself signaled that a majority of the Court believed that Article III does indeed impose meaningful limits on Congress's power to create non-Article III tribunals. Yet, there was no majority opinion clearly articulating what those limits are (in general or in the bankruptcy context at issue). Justice White's dissent was characteristically trenchant in exposing the absence of any coherent explanation reconciling the *Marathon* holding with the Court's prior decisions validating various non-Article III adjudications. Consequently, Justice White advocated abandoning the search for determinate, formal limits and proposed instead a more functional, ad hoc approach to ascertaining the constitutionality of any given non-Article III adjudication—one that balances "the strength of the legislative interest" in employing a non-Article III tribunal against "the values furthered by Art. III."

> I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.[121]

In its next two decisions regarding non-Article III adjudications, *Thomas*[122] and *Schor*,[123] the Court not only upheld the particular non-Article III adjudication at issue in each case, but the Court also appeared to adopt precisely the kind of functional balancing approach proposed by Justice White in his *Marathon* dissent. Indeed, this prompted Dean Chemerinsky to opine that the *Marathon* decision itself was perhaps ripe for an outright overruling, stating that although "[t]here is . . . an unpredictability to the Court's balancing approach, since it is not clear what weight the Court will give to what factors in the balancing," nonetheless, "if *Northern Pipeline* were decided today, there is every reason to believe that it would be resolved differently. The approach endorsed in *Schor* indicates a strong likelihood that

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[120]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

[121]*Id.* at 115 (White, J., dissenting).

[122]Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985).

[123]Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

Justice White's opinion might attract a majority of the Court."[124]

1. Marathon: *"Reports of My Death Are Greatly Exaggerated"*

Stern v. Marshall has now proved that prediction wrong and has reaffirmed the continuing validity of *Marathon* as binding precedent. Indeed, Justice Breyer's dissenting opinion complains that the *Stern v. Marshall* majority "overemphasizes the precedential effect of the plurality opinion in" *Marathon*.[125] Those holding out hope that *Marathon* might be overruled, therefore, will find no solace in *Stern v. Marshall*.

The fact that *Stern v. Marshall* has not ushered in a widely-anticipated overruling of *Marathon* provides a window into a number of particularly significant methodological aspects of Chief Justice Roberts' majority opinion. Understanding these methodological moves, in turn, helps explain both the *Stern v. Marshall* holding and the full implications of that decision. Most significantly, *Stern v. Marshall* is entirely consistent with the Court's prior jurisprudence in equating the right to final judgment from an Article III judge in bankruptcy proceedings to the Seventh Amendment jury trial right in bankruptcy proceedings, and in tying both of those constitutional rights to the historical distinction between summary bankruptcy proceedings (appropriate for final adjudication by a non-Article III tribunal sitting without a jury) and plenary suits (in which litigants retain constitutional rights both to jury trial and to entry of final judgment by an Article III judge).

2. *Rejection of Functional Balancing and Resurrection of Formalism*

The complete turnover in the composition of the entire Court since *Schor* has worked a conversion of the prevailing views regarding the proper approach to determining the constitutionality of non-Article III adjudications. The four *Stern v. Marshall* dissenters (Breyer, Ginsburg, Sotomayor, and Kagan) would have upheld the constitutionality of Judicial Code § 157(b)(2)(C)—at least as applied to compulsory counterclaims—using a "more pragmatic approach to the constitutional question" that considers a number of relevant factors "to determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III,"[126] consistent with Justice White's *Marathon* dissent and the Court's opinions in *Thomas* and *Schor*. However, the five-justice majority (Roberts, Scalia, Kennedy, Thomas, and Alito) would have none of that, and have resurrected formalism

[124]Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule* Northern Pipeline, 65 AM. BANKR. L.J. 311, 320 (1991).

[125]Stern v. Marshall, 131 S. Ct. 2594, 2623–24 (2011) (Breyer, J., dissenting).

[126]*Id.* at 2624, 2625–26.

in the jurisprudence of non-Article III adjudications.[127] Indeed, Justice Scalia not only joined the majority opinion's formal constitutional limit on bankruptcy judges' core jurisdiction, but also separately concurred to, inter alia, deride the dissent's "intuitive balancing of benefits and harms"[128] as an inappropriate method of constitutional adjudication.

3. *Seventh Amendment Decisions as Article III Precedent*

After the Court's *Marathon* decision and enactment of BAFJA, the Court addressed litigants' Seventh Amendment jury trial rights in federal bankruptcy proceedings in its 1989 *Granfinanciera* decision.[129] Although the Court granted certiorari solely on the Seventh Amendment issue, and thus the *Granfinanciera* holding did *not* directly address any issue regarding the constitutionality (under Article III) of bankruptcy judges' core jurisdiction under BAFJA, Justice Brennan's majority opinion in *Granfinanciera* drew heavily upon the Article III analysis in his plurality *Marathon* opinion. Moreover, *Granfinanciera* explicitly equated the Seventh Amendment issue with the Article III issue:

> In certain situations, of course, 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. Congress' power to do so is limited, however, just as its power to place adjudicative authority in non-Article III tribunals is circumscribed. . . .
>
> [I]f [such] 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. . . . [I]f the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a 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 indepen-

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[127]*See* Erwin Chemerinsky, *Formalism Without a Foundation:* Stern v. Marshall, 2011 S. Ct. Rev. (forthcoming 2012).

[128]*Stern*, 131 S.Ct. at 2621 (Scalia, J., concurring).

[129]Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

> dent bar to the adjudication of that action by a nonjury factfinder.[130]

The lower courts, however, have tended to read *Granfinanciera* strictly as a Seventh Amendment decision and have not given it precedential effect in imposing any new Article III limitations (independent of those already imposed by virtue of *Marathon*) on bankruptcy judges' core jurisdiction. Indeed, Justice Breyer's dissent in *Stern v. Marshall* would only read *Granfinanciera* to mean that "the jury trial question and the Article III question are highly analogous."[131]

Chief Justice Roberts' majority opinion, though, relied directly (and without qualification) upon Seventh Amendment jury trial decisions (in *Granfinanciera*, *Katchen v. Landy*,[132] and *Langenkamp v. Culp*[133]) as if they were binding precedent for purposes of the Article III decision in *Stern v. Marshall*—systematically describing, paraphrasing, or recasting language, analysis, conclusions, and holdings from those decisions in Article III terms.[134] The *Stern v. Marshall* decision, therefore, seems to provide the (heretofore missing) Article III counterpart to the *Granfinanciera* Seventh Amendment decision in fully equating bankruptcy litigants' Seventh Amendment right to a jury trial in federal bankruptcy proceedings with their right to a final judgment from an Article III judge. *Granfinanciera* and *Stern v. Marshall*, together, seem to stand for the proposition that if the right to a jury trial exists in a particular proceeding, then so does the right to a final judgment from an Article III judge, and vice versa; and if the former right to a jury trial does *not* exist in a particular proceeding, then neither does the right to a final judgment from an Article III judge, and vice versa.[135]

4. *Constitutionalization of the 1898 Act Summary-Plenary Dichotomy*

In *Marathon*, the Court expressly sought to impose and enforce some "limiting principle" for determining the extent to which "Congress may create courts free of Art. III's requirements."[136] The Court, however, failed to ar-

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[130]*Id.* at 52–54 (citations omitted).

[131]*Stern*, 131 S. Ct. at 2628 (Breyer, J., dissenting).

[132]382 U.S. 323 (1966).

[133]498 U.S. 42 (1990).

[134]*See Stern*, 131 S. Ct. at 2611, 2614–15, 2615–18.

[135]Of course, as discussed below, I believe that *both* constitutional rights are waivable. *See infra* notes 169–81, 289–303, and accompanying text. The heuristic set forth in the text, therefore, glosses over the possibility that a party in a particular proceeding might waive one right but not the other. It also glosses over the fact that there may be no Seventh Amendment jury trial right, even in an action in which there is a right to final judgment from an Article III judge, if the remedy sought in the action is equitable rather than legal. *See Granfinanciera*, 492 U.S. at 58 n.13.

[136]Northern Pipeline Constr. Co. v Marathon Pipe Line Co., 458 U.S. 50, 73 (1982) (Brennan, J., plurality opinion).

ticulate clearly what that limiting principle is. That frustrating inscrutability was particularly evident as regards non-Article III bankruptcy adjudications, notwithstanding the (highly cryptic) reference to "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power" and therefore presumably appropriate for final adjudication by a non-Article III bankruptcy judge, and which "must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages"[137] that was at issue in *Marathon*.

With respect to the particular bankruptcy proceeding at issue in *Marathon*—a bankruptcy estate's prepetition state-law cause of action—the most visible marker indicating the dubious constitutionality of a non-Article III bankruptcy judge entering final judgment was that such an action, absent consent of the litigants, had *never* been entrusted to final adjudication by a non-Article III judicial officer under *any* bankruptcy statute prior to the 1978 Reform Act. Such an action was a quintessential plenary suit against an adverse claimant—outside the summary jurisdiction of 1898 Act referees—that could only be tried by an Article III judge. Indeed, Justice White in his *Marathon* dissent astutely noted that this seemed to be the implicit unstated assumption on which the Court based its constitutional ruling:

> I take it that the Court does not condemn as inconsistent with Art. III the assignment of these functions—*i.e.*, those within the summary jurisdiction of the old [referees]—to a non-Art. III judge, since, as the plurality says, they lie at the core of the federal bankruptcy power. They also happen to be functions that have been performed by referees . . . for a very long time and without constitutional objection.[138]

Hence, notwithstanding much of the language of the *Marathon* plurality and concurring opinions, it seems that the most objectionable aspect of the 1978 Reform Act, in the eyes of the Court, was that it simply went beyond the 1898 Act in the jurisdictional authority entrusted to a non-Article III arbiter.[139] Thus, it seems that *Marathon* essentially constitutionalized the 1898 Act's divide between summary and plenary proceedings, or at least was the first step in that direction because the same phenomenon repeated itself even more conspicuously in *Granfinanciera*.

In concluding that the defendant in a trustee's fraudulent conveyance action under Bankruptcy Code § 548 has a Seventh Amendment right to a jury

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[137]*Id.* at 71.

[138]*Id.* at 99 (White, J., dissenting).

[139]*See id.* at 80 n.31 (Brennan, J., plurality opinion) (noting that "the jurisdiction of the bankruptcy courts was 'substantially expanded' by the [1978 Reform] Act," such that "the new bankruptcy judges, unlike the referees, have jurisdiction far beyond" summary matters under the 1898 Act).

trial, the *Granfinanciara* Court explicitly relied on the fact that "[p]rior to passage of the Bankruptcy Reform Act of 1978, . . . fraudulent conveyance and preference actions brought by a trustee in bankruptcy were deemed separate, plenary suits to which the Seventh Amendment applied,"[140] under the Court's holding in *Schoenthal v. Irving Trust*.[141] By contrast, the Court had held in *Katchen v. Landy*[142] that litigants had no Seventh Amendment jury trial rights in 1898 Act summary proceedings.

The balance of the *Granfinanciera* Court's reasoning—employing the *Marathon* distinction between those proceedings that do and those that do not involve "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power"—clearly relied upon the 1898 Act's divide between summary and plenary proceedings to draw that distinction. The Court's conclusion that a trustee's fraudulent conveyance suit is *not* "integral to the restructuring of debtor-creditor relations"[143] ultimately turned on the fact that such a suit would have been a plenary *in personam* "controversy at law" against an "adverse claimant" under the 1898 Act[144] and, thus, not within the *in rem* jurisdiction of referees over summary bankruptcy proceedings (such as adjudication of creditors' claims against the estate):

> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which we said in *Schoenthal v. Irving Trust Co.* "constitute no part of the [summary] proceedings in bankruptcy but concern controversies arising out of it"—are quintessentially [plenary] suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.[145]

The Court acknowledged that "[t]he 1978 Act abolished the statutory distinction between plenary and summary bankruptcy proceedings, on which the Court relied in *Schoenthal* and *Katchen*" and that "in the 1984 [BAFJA] Amendments Congress drew a new distinction between 'core' and 'non-core' proceedings and classified fraudulent conveyance actions as core proceedings triable by bankruptcy judges."[146] However, the Court opined that Congress

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[140]*Granfinanciera*, 492 U.S. at 49–50.

[141]Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932).

[142]382 U.S. 323 (1966).

[143]*Granfinanciera*, 492 U.S. at 58.

[144]*See* 1898 Act § 23a (addressing the more limited federal bankruptcy jurisdiction over "controversies at law or in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants"); Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 765–77.

[145]*Granfinanciera*, 492 U.S. at 56 (citation omitted).

[146]*Id.* at 60.

could not even "purport[ ] to abolish jury trial rights in what were formerly plenary actions."[147]

> This purely taxonomic change cannot alter our Seventh Amendment analysis. Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.[148]

According to the *Granfinanciera* Court, in abolishing the 1898 Act summary-plenary dichotomy, "Congress simply reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations."[149] According to the Court, then, that fraudulent conveyance action was *not* integrally related to the restructuring of debtor-creditor relations simply because it had previously been classified as a plenary suit in the 1898 Act.

The *Granfinanciera* Court, therefore, "constitutionalized the 1898 Act's summary-plenary dichotomy even more explicitly than had *Marathon*"[150]—a point astutely noted, once again, by Justice White in his *Granfinanciera* dissent.[151] That phenomenon became even clearer in the Court's per curiam 1990 opinion in *Langenkamp v. Culp*,[152] where the question was whether creditors who had filed proofs of claim against the debtor's bankruptcy estate had Seventh Amendment jury trial rights in the trustee's preference suits against those creditors. This was, of course, the same issue presented in *Katchen v. Landy*,[153] which held that no Seventh Amendment jury trial rights attached to summary proceedings under the 1898 Act. The Court's short opinion in *Langenkamp v. Culp* simply parroted language from *Katchen v. Landy* (or, more properly, parroted Justice Brennan's *Granfinanciera* summary of *Katchen v. Landy*).

Critical to the Court's decision in *Katchen v. Landy*, however, that a creditor who has filed a claim against the estate has no jury trial rights in a

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[147]*Id.*

[148]*Id.* at 61.

[149]*Id.* at 60.

[150]CHARLES J. TABB & RALPH BRUBAKER, BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE 816 (3d ed. 2010).

[151]*See Granfinanciera*, 492 U.S. at 76–77 (White, J., dissenting) (noting and puzzling over the fact that apparently "the Court determine[d] that an action to recover fraudulently conveyed property is not 'integrally related' to the essence of bankruptcy proceedings" because "under federal bankruptcy statutes predating the 1978 Code," "actions such as this one were solely heard in plenary proceedings in Article III courts"); *see also id.* at 93 (Blackmun, J., dissenting) (agreeing with Justice White that the Court is employing "a century-old conception of what is and is not central to the bankruptcy process").

[152]498 U.S. 42 (1990).

[153]382 U.S. 323 (1966).

trustee's responsive preference suit, was the fact that Congress (in § 57g of the 1898 Act) had expressly made adjudication of the preference claim part and parcel of, and an absolute prerequisite to, the summary process of allowance or disallowance of the creditor's claim. The Bankruptcy Code contains a substantively identical successor to that statutory provision in Code § 502(d), but tellingly, the *Langenkamp* opinion made no mention whatsoever of either statutory section. Neither, for that matter, did Justice Brennan's *Granfinanciera* opinion—once again, highlighted by Justice White,[154] the author of the *Katchen* opinion.

This omission is easy to understand and forgive, though, if the 1898 Act's summary-plenary dichotomy has been constitutionalized. If that is the case, Congress's current statutory design—requiring the adjudication of a preference suit against a creditor as part and parcel of, and as an absolute prerequisite to, the allowance or disallowance of the creditor's claim against the estate—is immaterial and can simply be ignored. Because adjudication of a preference suit against a creditor was categorized as a summary proceeding under the 1898 Act, and thus was "integral to the restructuring of the debtor-creditor relationship" according to *Granfinanciera*,[155] its status as such has been fixed for all time for purposes of denying any Seventh Amendment jury trial right to a preference defendant who has filed a claim against the estate. Thus, the terse per curiam *Langenkamp* opinion without full briefing.

5. *1898 Act Summary-Plenary Decisions as Article III Precedent*

This apparent constitutionalization of the 1898 Act's summary-plenary dichotomy takes on added import when we recall that *Granfinanciera* and now *Stern v. Marshall* also fully equate (1) bankruptcy litigants' Seventh Amendment right to a jury trial in federal bankruptcy proceedings with (2) their constitutional right to a final judgment from an Article III judge. This is particularly significant because before *Marathon*, the Court had never explicitly addressed the constitutionality (under Article III) of federal bankruptcy adjudications by non-Article III judicial officers. For example, because the only constitutional issue raised in *Katchen v. Landy* was that of Seventh Amendment jury trial rights, as Justice Brennan specifically pointed out in *Marathon*, "there was no discussion of the Art. III issue."[156] *Katchen*'s deter-

[154]"The Court misses *Katchen*'s point, however: it was the fact that *Congress* had committed the determination and recovery of preferences to [summary] bankruptcy proceedings that was determinative in that case, not just the bare fact that the action 'happened' to take place in the process of adjudicating claims." *Granfinanciera*, 492 U.S. at 75 (White, J., dissenting).

[155]*Langenkamp*, 498 U.S. at 44 (citing *Granfinanciera*, 492 U.S. at 57–59).

[156]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 n.31 (1982) (Brennan, J., plurality opinion); *see also Granfinanciera*, 492 U.S. at 57 (noting that "[o]ur decision in *Katchen v. Landy* [was] under the Seventh Amendment rather than Article III").

mination, therefore, regarding whether the preference action at issue was within the summary jurisdiction of the referee was strictly a statutory construction decision "after due consideration of the structure and purposes of the Bankruptcy Act as a whole, as well as the particular provisions of the Act brought in question."[157] No longer!

Constitutionalization of the 1898 Act divide between summary and plenary proceedings, combined with the Court fully equating the Seventh Amendment and Article III inquiries, should mean that not only are Supreme Court opinions decided in the context of bankruptcy litigants' Seventh Amendment jury trial rights direct binding precedent on the Article III issue (which, as discussed above,[158] the majority opinion implicitly assumed in *Stern v. Marshall*), the Supreme Court's statutory construction decisions classifying particular proceedings as either summary or plenary under the 1898 Act are direct binding precedent on the Article III issue. The latter move was evident in the *Schor* Court's reliance upon *Katchen v. Landy*[159] and is even more prominent in Chief Justice Roberts' *Stern v. Marshall* majority opinion.

The *Katchen v. Landy* opinion was clearly divided into a discussion, first, "[w]ith respect to the statutory question"[160] of whether the preference action at issue was within a referee's summary jurisdiction (answered in the affirmative) and second, the creditor-defendant's argument "that this reading of the statute violates his Seventh Amendment right to a jury trial"[161] (which argument was rejected). Nonetheless, Chief Justice Roberts (without qualification) directly cited to and quoted from *Katchen*'s statutory construction discussion as if it were binding precedent for purposes of the Article III decision in *Stern v. Marshall*—systematically describing, paraphrasing, and recasting the statutory construction language, analysis, conclusions, and holding from that decision in Article III terms.[162]

Now reconsider, then, the Court's observation in *Katchen v. Landy* "[w]ith respect to the statutory question" that "Congress has often left the exact scope of summary proceedings in bankruptcy undefined, and this Court has . . . recognized that in the absence of congressional definition this is a

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[157]*Katchen*, 382 U.S. at 328.

[158]*See supra* notes 129–35 and accompanying text.

[159]Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 852 (1986) (citing and quoting *Katchen*, 382 U.S. at 334).

[160]*Katchen*, 382 U.S. at 328.

[161]*Id.* at 336.

[162]*See* Stern v. Marshall, 131 S. Ct. 2594, 2615–18 (2011) (citing and quoting *Katchen*, 382 U.S. at 325–36). Indeed, Roberts' extensive analysis of *Katchen* referred almost exclusively to *Katchen*'s statutory construction discussion and made only one (nonobvious) reference to *Katchen*'s discussion of the Seventh Amendment issue. *See Stern*, 131 S. Ct. at 2616 (quoting *Katchen*, 382 U.S. at 336).

matter to be determined by decisions of this Court."[163] Consistent with the Court's own usage of the *Katchen v. Landy* precedent, those statutory construction decisions may properly be regarded as binding precedent for purposes of both bankruptcy litigants' Seventh Amendment right to a jury trial in federal bankruptcy proceedings *and* their constitutional right to a final judgment from an Article III judge.

Careful analysis of *Marathon*, *Granfinanciera*, *Langenkamp v. Culp*, and now *Stern v. Marshall*, therefore, reveals:

> Through these decisions, the Court tied both (1) the permissible bounds of a non-Article III bankruptcy judge's jurisdiction (over "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power") and (2) the extent of the constitutional right to a jury trial in bankruptcy proceedings (in actions not "integral to the restructuring of debtor-creditor relations") to the 1898 Act's divide between summary and plenary proceedings.[164]

Laying bare all of these implicit methodological assumptions embedded in Chief Justice Roberts' majority opinion illuminates the *Stern v. Marshall* decision and its implications.

B. The *Stern v. Marshall* Constitutional Holding

With the foregoing methodological assumptions defining the universe of relevant Article III precedent, Chief Justice Roberts' majority opinion proceeded to decide the constitutional question at issue essentially through a systematic process of elimination, which led to the ultimate conclusion by the *Stern v. Marshall* majority that none of the Court's precedents condone final adjudication of an action such as Anna Nicole's by a non-Article III bankruptcy judge.

In summary, the Court concluded as follows: Given that bankruptcy judges are statutorily authorized to enter final judgments in core proceedings, bankruptcy judges are not properly characterized as mere "adjuncts" to federal district courts in core proceedings. Pierce did not consent to final judgment from the California bankruptcy court on Anna Nicole's compulsory counterclaim, notwithstanding the fact that he voluntarily filed a proof of

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[163] *Katchen*, 382 U.S. at 328.

[164] Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 777 n.111 (citations omitted); *see also* Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of* Gibbons *and* Marathon, 1982 S. Ct. Rev. 25, 42 (after *Marathon*, observing that the referee "jurisdictional provisions of the 1898 Act might seem to be a safe harbor"); S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judges' Uncertain Authority*, 65 Am. Bankr. L.J. 143, 170 (1991) (after *Granfinanciera*, observing that "it appears that the Court might have in mind the bankruptcy [referee]'s old summary jurisdiction when it considers what Congress could permissibly commit to bankruptcy court jurisdiction").

claim with the bankruptcy court. The enigmatic public rights doctrine, even if it is a valid basis for justifying non-Article III bankruptcy adjudications (which is highly doubtful), cannot justify the bankruptcy court's final judgment on Anna Nicoles' tortious interference claim, which is indistinguishable from the claim at issue in *Marathon*. The Court's famous holding in *Kathen v. Landy* is limited to its unique procedural context of adjudicating an avoidance-action counterclaim that must be finally adjudicated in order to dispose fully of the creditor's claim against the bankrupt's estate; that case does not support any broader validation of general supplemental jurisdiction principles in the context of non-Article III adjudications.

1. *Anna Nicole's Counterclaim Looks Like a* Marathon *Claim*

The point of departure for Chief Justice Roberts was *Marathon*. That case involved a prepetition cause of action for damages under state common law, to which the debtor's bankruptcy estate merely succeeded under Bankruptcy Code § 541(a)(1), and that the chapter 11 debtor was prosecuting in federal court as "representative of the estate."[165] In all these respects, Anna Nicole's state-law tortious interference claim against Pierce was indistinguishable from the action at issue in *Marathon*. Chief Justice Roberts' presumptive conclusion, therefore, was that the same result as in *Marathon* should befall Anna Nicole's damages action—viz, a final judgment from a non-Article III bankruptcy judge would be unconstitutional—*unless* there was relevant Article III precedent that could sustain final adjudication of that action by a non-Article III tribunal.

2. *Bankruptcy Judges Are Not "Adjuncts" in Core Proceedings*

Chief Justice Roberts quickly disposed of the argument that the bankruptcy judge's core jurisdiction over Anna Nicole's tortious interference claim could be sustained on the ground that bankruptcy courts are properly deemed mere "adjuncts" of the Article III district courts. The Court has, indeed, upheld the powers of certain non-Article III judicial officers on this basis, such as the powers of federal magistrate judges.[166] Moreover, this "adjunct" theory presumably is the constitutional justification for bankruptcy judges' more limited authority in noncore "related to" proceedings to "hear" the action and "submit proposed findings of fact and conclusions of law to the district court," with "any final order or judgment [to] be entered by the district court" only after a de novo review.[167]

The validity of the adjunct theory, however, rests on the notion that in

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[165]11 U.S.C. § 323(a) (2006).

[166]*See* U. S. v. Raddatz, 447 U.S. 667 (1980). The seminal decision regarding non-Article III adjuncts is *Crowell v. Benson*, 285 U.S. 22 (1932).

[167]28 U.S.C. § 157(c)(1). *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 769–70 (2004).

those instances in which a non-Article III officer is acting as a true "adjunct" to the Article III district court, it is still the Article III district court that is exercising the Article III "judicial Power" in such instances (and *not* the non-Article III adjunct). In the context of bankruptcy adjudications under the existing statutory scheme for allocation of adjudicatory authority, *Stern v. Marshall* indicates that the determinative aspect of the Article III "judicial Power" that must remain in the Article III district courts—in order for the bankruptcy courts to be considered mere "adjuncts" of the Article III district courts—is the power to enter final judgment:

> [A] bankruptcy court resolving a [core] counterclaim under 28 U.S.C. § 157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§ 157(b)(1), 158(a)-(b). It is thus no less the case here than it was in *Northern Pipeline* that "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with" the bankruptcy judge, not the district court. Given that authority, a bankruptcy court can no more be deemed a mere "adjunct" of the district court than a district court can be deemed such an "adjunct" of the court of appeals. We certainly cannot accept the dissent's notion that judges who have the power to enter final, binding orders are the "functional[ ]" equivalent of "law clerks[ ] and the Judiciary's administrative officials." And even were we wrong in this regard, that would only confirm that such judges should not be in the business of entering final judgments in the first place.[168]

Note, then, that none of the other structural mechanisms by which the Article III judiciary can "control" bankruptcy judges mattered in the least, given bankruptcy judges' power to enter final judgments in core proceedings. Entirely irrelevant were: the fact that bankruptcy judges are now appointed by Article III judges (rather than the President, as was the case under the 1978 Reform Act), appellate review of any bankruptcy court judgment in a core proceeding by an Article III court, district courts' discretion to not refer bankruptcy cases and proceedings to their bankruptcy courts, and district courts' broad discretionary power to withdraw the reference of any bankruptcy case or any bankruptcy proceeding at any time before final judgment.

Because non-Article III bankruptcy judges' power to enter final judgments in core proceedings evidently cannot be sustained on the theory that

[168]Stern v. Marshall, 131 S. Ct. 2594, 2619 (2011).

bankruptcy judges are simply "adjuncts" of the Article III district courts in core proceedings, Chief Justice Roberts looked elsewhere for constitutional authority for the bankruptcy judge to enter a final judgment on Anna Nicole's tortious interference counterclaim.

3. *Pierce Did Not Consent to Final Judgment from the Bankruptcy Court*

Under the 1898 Act, litigant consent could give the federal district courts subject-matter jurisdiction over a trustee's plenary suit that otherwise (without consent) was entirely outside federal bankruptcy jurisdiction and, thus, could be pursued only in state court—implicating Article III judicial federalism.[169] In addition, though, under the Supreme Court's decision in *MacDonald v. Plymouth County Trust Co.*,[170] litigant consent would also convert an otherwise-plenary suit that could only be tried in a federal district court (or in the old circuit courts) into a summary proceeding in which a referee could enter final judgment,[171] which of course implicates the *Marathon* separation-of-powers issue of non-Article III adjudications.

Justice Brennan's plurality *Marathon* opinion, in describing the limits on 1898 Act summary jurisdiction of referees that the 1978 Reform Act exceeded, *twice* noted that *with consent* referees could hear and finally determine otherwise-plenary suits, citing *MacDonald v. Plymouth County Trust Co.*[172] Justice Rehnquist's concurrence repeatedly[173] emphasized defendant Marathon's objection to the bankruptcy court deciding the action at issue as a determinative feature in the unconstitutionality of the bankruptcy court's judgment.[174] The dissents of both Chief Justice Burger (describing the holding of the Court)[175] and Justice White[176] also expressly stated their under-

[169]*See* 1898 Act § 23b; Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 767–74; Brubaker, *Clinging to* In Rem *Bankruptcy Jurisdiction*, *supra* note 18, at 266–69 & n.27.

[170]286 U.S. 263 (1932).

[171]The *MacDonald* Court held that "[t]he referee may, if the parties consent, try the issues which must otherwise be tried in a plenary suit brought by the trustee," and in such a suit, "[w]e can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit . . . may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted." *MacDonald*, 286 U.S. at 267. "[T]he referee appointed by the District Court, where the bankrupt's estate is being administered, is a court within the meaning of section 23b, . . . and hence is vested with such jurisdiction that, the defendant consenting, he may try and determine the issues in the suit," and "the privilege of trial by plenary suit being waived, the referee possesses the power which courts of bankruptcy possess to hear and determine the issues presented." *Id.* at 266–67.

[172]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53, 80 n.31 (1982) (Brennan, J., plurality opinion).

[173]*Id.* at 89, 91 (Rehnquist, J., concurring).

[174]"I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* to be violative of Art. III of the United States Constitution." *Id.* at 91 (Rehnquist, J., concurring) (emphasis added).

[175]"[T]he Court's holding is limited to the proposition stated by Justice Rehnquist in his concurrence in the judgment—that a 'traditional' state common-law action, not made subject to a federal rule of deci-

standing that consent of the litigants to final adjudication in a non-Article III bankruptcy court would cure any unconstitutionality under the Court's holding, "just as [was the case] before the 1978 Act was adopted."[177] Similarly, the *Thomas* Court's oft-quoted[178] subsequent characterization of the *Marathon* holding expressly includes the proviso "without the consent of the litigants."[179]

These explicit *Marathon* signals were undoubtedly what led Congress to conclude that BAFJA was on firm constitutional ground in enacting § 157(c)(2) of the Judicial Code—providing for final judgment by a bankruptcy judge in a noncore "related to" proceeding such as the *Marathon* action "with the consent of all the parties to the proceeding"—which was likely the Justices' intention in repeatedly flagging litigant consent. The Court, though, had never explained why litigant consent should cure constitutionally infirm non-Article III adjudications, and consent seems out of place if one focuses on the structural separation-of-powers dimension of Article III's constraints. As the Court itself subsequently noted in *Schor*:

> [O]ur precedents establish that Article III, § 1 . . . serves as "an inseparable element of the constitutional system of checks and balances." Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts, and thereby preventing "the encroachment or aggrandizement of one branch at the expense of the other." To the extent that this structural principle is implicated in any given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions

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sion, and related only peripherally to an adjudication of bankruptcy under federal law, must, *absent consent of the litigants*, be heard by an 'Art. III court' if it is to be heard by any court or agency of the United States." *Id.* at 92 (Burger, C.J., dissenting) (emphasis added).

[176]*Id.* at 95 (White, J., dissenting).

[177]*Id.*

[178]For example, both the majority and dissenting opinions in *Stern v. Marshall* quoted that passage from *Thomas*. *See* Stern v. Marshall, 131 S. Ct. 2594, 2615 (2011); *id.* at 2624 (Breyer, J., dissenting).

[179]The *Thomas* passage, in its entirety, is:

> The Court's holding in that case establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without the consent of the litigants*, and subject only to ordinary appellate review.

Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985) (emphasis added).

> of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.[180]

Nonetheless, the *Schor* Court—relying principally upon the prominent *Marathon* signals regarding litigant consent—also stated:

> [O]ur prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural interests. See, *e.g.*, [*Marathon*, 458 U.S. at], at 90 (Rehnquist, J., concurring in judgment) (noting lack of consent to non-Article III adjudication); *id.*, at 95 (White, J., dissenting) (same). . . .
>
> [A]s 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. Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication. See, *e.g.*, 458 U.S. at 80 n.31; *id.*, at 91 (Rehnquist, J., concurring in judgment); *id.*, at 95 (White, J., dissenting).[181]

The *Schor* case involved a futures contract customer who filed with the CFTC a reparations complaint against his broker, alleging numerous violations of the Commodities Exchange Act (CEA) that resulted in a negative balance in his trading account. The broker filed a counterclaim against the customer to recover the debit balance in the customer's account, under a CFTC regulation permitting (but not compelling) the filing of counterclaims arising out of the same transaction. The Supreme Court held that the customer "waived any right he may have possessed to the full trial of [the] counterclaim before an Article III court"[182] because (1) he could have filed his reparations complaint as a federal-question action in an Article III federal district court, and (2) when he filed his complaint with the CFTC, the CFTC's published regulations made it clear that the CFTC would also adju-

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[180]Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1986) (citations omitted).
[181]*Id.* at 848-49 (citations omitted).
[182]*Id.* at 849.

dicate any related counterclaims filed against him. "In such circumstances, it is clear that [the customer] effectively agreed to an adjudication by the CFTC of the entire controversy by seeking relief in this alternative forum."[183]

The *Stern v. Marshall* dissenters would have drawn the same inference of consent from Pierce's filing of a proof of claim in the bankruptcy court. This argument has some superficial appeal, particularly given the express terms of § 157(b)(2)(C), authorizing bankruptcy judges to hear, determine, and enter final judgment on any and all "counterclaims by the estate against persons filing claims against the estate."

As Chief Justice Roberts correctly noted, though, the first half of the *Schor* consent inference is entirely absent in the context of creditor claims in bankruptcy. By virtue of the automatic stay of Bankruptcy Code § 362(a) and the discharge injunction of § 524(a), Pierce's only means by which to assert his claim against the property of Anna Nicole's bankruptcy estate was (under § 501(a)) by filing a proof of claim with the bankruptcy court. Once Anna Nicole filed bankruptcy, Pierce was no longer free to pursue property of her bankruptcy estate via a lawsuit in an Article III district court (which would have assured that any responsive counterclaims would also be decided by an Article III district court). An inference of creditor consent to bankruptcy-court jurisdiction over estate counterclaims seems wholly unwarranted, then, when the only forum in which a creditor can assert its claim against the estate is the bankruptcy court. Indeed, such a fictional deemed "consent" might even run afoul of the doctrine of unconstitutional conditions, on the ground that a creditor cannot be compelled to forfeit its right to final judgment from an Article III court on the estate's counterclaims in order to preserve its right to a distribution from the estate.

What's more, in *Katchen v. Landy*,[184] the Court specifically and expressly refused to premise summary referee jurisdiction over estate counterclaims against a creditor on any notion that the creditor somehow consented to summary referee jurisdiction over counterclaims by filing a proof of claim.[185] In *Granfinanciera*, the Court followed *Katchen*'s lead and distinguished *Schor*'s implied consent rationale as entirely inapplicable to a creditor's filing of a proof of claim against a bankruptcy estate, on the same grounds articulated above:

> It warrants emphasis that th[e] rationale [of *Katchen v. Landy*] differs from the notion of waiver on which the Court relied in *Commodity Futures Trading Comm'n v. Schor* . . . .

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[183]*Id.* at 850.

[184]382 U.S. 323 (1966).

[185]*See id.* at 332 n.9; Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 787–88 n.156.

> The [*Schor*] Court reached [its consent/waiver] conclusion . . . on the ground that Congress did not require investors to avail themselves of the remedial scheme over which the Commission presided. The investors could have pursued their claims, albeit less expeditiously, in federal court. By electing to use the speedier, alternative procedures Congress had created, the Court said, the investors waived their right to have the state-law counterclaims against them adjudicated by an Article III court. Parallel reasoning is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims.[186]

The *Stern v. Marshall* dissenters tried to make hay from the fact that Pierce was simultaneously contending that his claim was nondischargeable so that he could continue to pursue Anna Nicole and her nonexempt postbankruptcy income and assets (that were not property of her bankruptcy estate) in either the bankruptcy court or, alternatively, a nonbankruptcy court. That, however, is an entirely irrelevant red herring. Pierce's claim against Anna Nicole personally (as distinguished from his claim against her bankruptcy estate) is actually a separate, distinct claim against a different party or "person" (if you will) than his proof of claim against Anna Nicole's bankruptcy estate.[187] The possibility, therefore, that he might have a secondary source of recovery from some other person does not diminish in the least the fact that if Pierce wanted any payment from Anna Nicole's bankruptcy estate, his only available option was to file a proof of claim in the bankruptcy court, which is fatal to any consent inference other than consent to receiving his due from the estate on that claim. Thus, the *Stern v. Marshall* Court concluded that "Pierce did not truly consent to resolution of [Anna Nicole's counter]claim in the bankruptcy court proceedings."[188]

4. *The Public Rights Doctrine or Established Historical Practice?*

Chief Justice Roberts considered two other potential constitutional justifications for the bankruptcy judge to enter a final judgment on Anna Nicole's tortious interference counterclaim, both of which he analyzed under the rubric of the very amorphous and apparently still-evolving "public rights" exception, which permits Congress constitutionally to assign adjudication of so-called public rights to non-Article III arbiters.

Traditionally, the public rights doctrine was limited to civil disputes be-

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[186]Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989).

[187]*See* Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 911–13 & n.594.

[188]Stern v. Marshall, 131 S. Ct. 2594, 2614 (2011).

tween private citizens and the Government.[189] In *Marathon*, though, Justice Brennan's plurality opinion had suggested that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . may well be a 'public right,'"[190] even though such a conception would clearly expand public rights matters well beyond disputes between private citizens and the United States. The Court's subsequent decisions in *Thomas* and *Schor* appear to have abandoned the limitation that public rights matters must involve the Government as a party, but in *Granfinanciera*, Justice Brennan (for the Court) expressly equivocated on his earlier suggestion that it is the public rights doctrine that sanctions bankruptcy adjudications by non-Article III arbiters in matters "at the core of the federal bankruptcy power."[191] The Court's short per curiam opinion in *Langenkamp* simply noted its conclusion (relying on *Katchen*) that adjudication of a trustee's preference claim against a creditor is "integral to the restructuring of the debtor-creditor relationship,"[192] but did not further elaborate as to why this would make the matter appropriate for adjudication by a non-Article III bankruptcy judge and did not mention the public rights doctrine.

In *Stern v. Marshall*, four of the five justices in the majority continued to equivocate on whether the public rights doctrine is an appropriate constitutional explanation for non-Article III bankruptcy adjudications. Chief Justice Roberts quoted *Granfinanciera*: "We noted that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.'"[193] The *Stern v. Marshall* majority opinion chose to "follow the same approach" as *Granfinanciera*, in that "even if one accepts this thesis" that the restructuring of debtor-creditor relations is a public right, Anna Nicole's counterclaim "does not fall within any of the varied formulations of the public rights exception in this Court's cases" "any more than" did the claim "under state common law between two private parties" in *Marathon*.[194] Thus, "Congress could not constitutionally assign resolution of" Anna Nicole's counterclaim "to a non-Article III court."[195]

However, one of the five justices in the *Stern v. Marshall* majority, Justice Scalia (not prone to equivocation), wrote separately to go even further and reiterate the position he took in *Granfinanciera*, that he does *not* accept

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[189]*See generally* Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765 (1986).

[190]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (Brennan, J., plurality opinion); *see also id.* at 91 (Rehnquist, J., concurring) (acknowledging the possibility that some "powers granted under [the 1978 Reform] Act might be sustained under the 'public rights' doctrine").

[191]*See Granfinanciera*, 492 U.S. at 56 n.11.

[192]Langenkamp v. Culp, 498 U.S. 42, 44 (1990).

[193]*Stern*, 131 S. Ct. at 2614 n.7 (quoting *Granfinanciera*, 492 U.S. at 56 n.11).

[194]*Stern*, 131 S. Ct. at 2611, 2614 & n.7.

[195]*Id.* at 2614 n.7.

the thesis that the restructuring of debtor-creditor relations is a public right: "I adhere to my view . . . that—our contrary precedents notwithstanding—'a matter of public rights . . . must at a minimum arise between the government and others.'"[196] For Justice Scalia, then, non-Article III bankruptcy adjudications simply cannot be justified using the public rights doctrine and therefore must rest upon a different constitutional rationale:

> Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, 285 U.S. 22 (1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason—and not because of some intuitive balancing of benefits and harms—I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true "public rights" cases. Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate; the subject has not been briefed so I state no position on the matter. But [Anna Nicole] points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.[197]

Historical practice would, indeed, seem to validate the Court's apparent constitutionalization of the 1898 Act summary-plenary distinction. As the historical survey in Part I reveals, adjudication of historically summary matters (such as creditors' claims against a bankrupt's estate) by non-Article III officials has a long, established historical pedigree, rooted in the commissioner adjudications of English bankruptcy practice, which were also employed by Congress in the very first federal bankruptcy statute, the 1800 Act.[198] Moreover, that seems to be precisely the instinct that initiated constitutionalization of the summary-plenary distinction in *Marathon*. As Justice Brennan put it:

> [T]he Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general presciptions of Art. III.[199]

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[196]*Id.* at 2620 (Scalia, J., concurring).

[197]*Id.* at 2621 (Scalia, J., concurring) (citations omitted).

[198]*See supra* notes 5-49 and accompanying text.

[199]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (Brennan, J., plurality opinion).

The *Marathon* Court, though, could "discern no such exceptional grant of power applicable in the [action] before us"[200]—what had consistently been recognized as requiring a plenary suit against an adverse claimant since well before, at the time of, and for nearly two centuries after the Founding.[201]

Whether characterized as a branch of the public rights doctrine or simply established historical practice permitting certain non-Article III bankruptcy adjudications, it was still incumbent upon the *Stern v. Marshall* majority to reconcile its decision with *Katchen v. Landy*[202] and the Court's opinion "to the same effect"[203] in *Langenkamp v. Culp*.[204]

5. *Supplemental Jurisdiction in Non-Article III Adjudications*

Under the 1898 Act, there generally was no federal bankruptcy jurisdiction at all over a trustee's suit to recover money or property for the estate on a debtor's prepetition state-law cause of action—implicating Article III judicial federalism.[205] There was, however, federal bankruptcy jurisdiction over a trustee's avoidance actions (such as fraudulent conveyance and preferential transfer suits), but the trustee's avoidance actions had to be pursued via a plenary suit in an Article III federal district court and could not (absent consent of the litigants) be summarily adjudicated by a non-Article III referee—implicating our *Marathon* non-Article III adjudications issue.[206]

Because the counterclaim at issue in *Katchen v. Landy* was a trustee's preference cause of action against a creditor who had filed a claim against the estate, note that *Katchen* did not implicate any issue of judicial federalism. There was clearly subject-matter jurisdiction in the federal courts to adjudicate the trustee's preference claim against the creditor. The only issue at stake in *Katchen v. Landy*, therefore, was whether a non-Article III referee (over the creditor's objection) had summary jurisdiction to adjudicate the trustee's preference action, given that it was asserted in objecting to the allowance of, and as a counterclaim to, a creditor's proof of claim filed against the estate. On that non-Article III adjudication issue, the *Katchen* Court held that, in view of the express provisions of § 57g of the 1898 Act—providing that even an otherwise valid creditor claim must be disallowed unless

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[200]*Id.* at 71 (Brennan, J., plurality opinion).

[201]*See supra* notes 5-61 and accompanying text. "[T]he lawsuit in which Marathon was named a defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional [plenary] actions at common law tried by the courts at Westminster in 1789." *Marathon*, 458 U.S. at 90 (Rehnquist, J., concurring).

[202]382 U.S. 323 (1966).

[203]Stern v. Marshall, 131 S .Ct. 2594, 2617 (2011).

[204]498 U.S. 42, 44 (1990).

[205]*See* 1898 Act § 23; Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 765-74; Brubaker, *Clinging to* In Rem *Bankruptcy Jurisdiction*, *supra* note 18, at 266-69.

[206]*See* Weidhorn v. Levy, 253 U.S. 268, 274 (1920); Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 769-71 & n.90.

and until the creditor disgorges in its entirety any voidable preference received by the creditor—the referee did have summary jurisdiction to finally adjudicate the trustee's preference counterclaim under those circumstances, as a necessary incident to its summary jurisdiction to allow or disallow the creditor's claim against the estate.[207]

There was another kind of estate counterclaim against a creditor under the 1898 Act, though, that implicated not only that same non-Article III adjudication issue, but that also implicated the judicial federalism issue of the outermost bounds of federal bankruptcy jurisdiction:

> Recall that section 23 of the 1898 Act, to a very large extent, affirmatively denied federal bankruptcy jurisdiction in suits by the bankruptcy estate on a debtor's state-law cause of action. However, the Supreme Court's sanction of ancillary jurisdiction over compulsory counterclaims in *Moore v. New York Cotton Exchange* [270 U.S. 593, 609-10 (1926)] raised the possibility of ancillary jurisdiction over a bankruptcy estate's state-law action, when asserted as a counterclaim to a creditor's claim against the estate. This prospect first took shape in the context of equitable receivership proceedings and eventually gained widespread acceptance in bankruptcy. In *Alexander v. Hillman*, [296 U.S. 222 (1935)] the Court applied *Moore*'s ancillary jurisdiction principles to counterclaims by a receiver against creditors who had filed claims in federal receivership proceedings. The lower courts, relying upon *Hillman*, concluded that a bankruptcy trustee's compulsory counterclaims against a creditor likewise were within the jurisdiction of the federal bankruptcy court, notwithstanding the circumscription of section 23.[208]

In addition to this judicial federalism move of bringing within the scope of federal bankruptcy jurisdiction such compulsory state-law counterclaims (over which there otherwise was no independent basis for federal jurisdiction as stand-alone claims), the lower courts simultaneously made the non-Article III adjudication move of holding that bankruptcy referees had summary jurisdiction to finally adjudicate such compulsory state-law counterclaims (that otherwise would be considered plenary suits that could only be tried in an Article III district court as stand-alone claims). Significantly, though (and unlike *Katchen*'s reliance upon § 57g of the 1898 Act), there was no explicit

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[207]*See Katchen*, 382 U.S. at 325-36.

[208]Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 785-86 (footnotes omitted).

statutory hook for summary referee jurisdiction over such transactionally related, compulsory state-law counterclaims. "Like general principles of supplemental jurisdiction, this jurisdiction was, rather overtly, premised largely upon considerations of fairness, procedural convenience, and judicial economy"[209]—a notion of both (1) supplemental federal bankruptcy jurisdiction and (2) supplemental summary jurisdiction, that simultaneously implicated both (1) the judicial federalism issue of subject-matter jurisdiction and (2) the non-Article III adjudication issue of referees' summary jurisdiction.

The Court in *Katchen*—again, addressing *only* the latter non-Article III adjudication issue of summary referee jurisdiction—expressly acknowledged the compulsory counterclaim case law in the lower courts,[210] but *Katchen* sent mixed signals regarding the validity of that case law on the issue of summary referee jurisdiction—what would essentially be a kind of ancillary or supplemental summary jurisdiction over transactionally related, compulsory counterclaims for which the referee had no independent basis for summary jurisdiction as stand-alone claims.

On the one hand, *Katchen*'s reasoning (in addition to § 57g of the 1898 Act) relied heavily upon *Hillman* and procedural simplification ideals, extensively quoting from *Hillman* on the equitable principle that served as the progenitor for modern principles of supplemental jurisdiction—a development "in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief."[211] Moreover, the *Katchen* Court favorably cited the compulsory counterclaim cases as fully in accord with its decision, characterizing those cases as "reach[ing] similar results."[212] All of this was enough to convince the lower courts, and even the Court itself in *Schor*, that in *Katchen*, "this Court upheld a bankruptcy referee's power to hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction."[213]

On the other hand, there is reason for extreme trepidation about any wholesale, mechanical transplantation of general supplemental jurisdiction principles, consciously developed in the context of subject-matter jurisdiction (implicating Article III judicial federalism), into the context of non-Article III adjudications (implicating Article III judicial independence and separation-of-powers). Indeed, Justice White's *Katchen* opinion expressly stated that the

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[209]*Id.* at 786.

[210]*Katchen*, 382 U.S. at 326 n.1, 336 n.12.

[211]*Id.* at 335 (quoting Alexander v. Hillman, 296 U.S. 222, 242 (1935)).

[212]*See Katchen*, 382 U.S. at 326 n.1, 335–36 & n.12.

[213]Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 852 (1986).

Court was reserving word on whether it would ultimately validate such a move, stating that:

> We obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to [allowance of] the [creditor's] claim [against the estate].[214]

In *Schor*, the Court seemed to take a step in the direction of transplantation of general supplemental jurisdiction principles into the context of non-Article III adjudications, upholding the CFTC's power to adjudicate certain state-law compulsory counterclaims through a "pragmatic" balancing approach, which will inevitably be very generous toward the eminently pragmatic principles of general supplemental jurisdiction. Indeed, Justice Breyer's dissent in *Stern v. Marshall* highlighted the virtues of the general supplemental jurisdiction principles emphasized in *Katchen* and that would obviously be served by permitting bankruptcy courts to exercise core jurisdiction over the estate's compulsory counterclaims against creditors.[215]

The *Stern v. Marshall* majority, however, very abruptly (and with no explanation) refused even to acknowledge the possibility that supplemental jurisdiction is a valid concept in the context of non-Article III adjudications.[216] The Court very conspicuously ignores *Katchen*'s prominent reliance upon more general supplemental jurisdiction reasoning and expressly limits *Katchen*'s holding to Justice White's above-quoted limitation: a referee's summary jurisdiction properly attached only to adjudication of those aspects of the estate's counterclaim against a creditor that "would necessarily be resolved in the claims allowance process."[217] Thus, a bankruptcy judge cannot constitutionally determine (by final order) any factual or legal issues "which have not been disposed of in passing on objections to [allowance of] the creditor's claim" against the estate.[218]

This, of course, is not necessarily a rejection of supplemental jurisdiction

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[214]*Katchen*, 382 U.S. at 333 n.9.

[215]*See* Stern v. Marshall, 131 S. Ct. 2594, 2626, 2629 (2011) (Breyer, J., dissenting).

[216]The closest the majority opinion came to an explicit acknowledgment of the concept was in a "cf." citation in a footnote in that portion of the opinion addressing Pierce's statutory construction argument (discussed *supra* notes 105–09 and accompanying text) that implicitly relied upon the notion that § 157(b)(2)(C) is a grant of supplemental core jurisdiction. *See Stern*, 131 S. Ct. at 2606 n.4 (analogizing to the situation "when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over pendent state-law claims").

[217]*Stern*, 131 S. Ct. at 2618.

[218]*Katchen*, 382 U.S. at 333 n.9.

in the context of non-Article III adjudications, but it does tightly circumscribe the necessary supplemental relationship. Rather than the broader transactional supplemental relationship that prevails in the context of federal subject matter jurisdiction—joining claims that originate in the same transaction or occurrence or the same series of transactions or occurrences or "a common nucleus of operative fact"[219]—it restricts supplemental jurisdiction in the context of non-Article III adjudications to something more akin to a "necessity" standard, similar to so-called necessity jurisdiction under the 1898 Act.[220] The *Stern v. Marshall* Court's restrictive reading of the CFTC counterclaim jurisdiction approved in *Schor* is also consistent with a "necessity" standard for supplemental jurisdiction in non-Article III adjudications.[221]

Note also that the *Stern v. Marshall* Court's implicit repudiation of any broader notion of supplemental jurisdiction for non-Article III adjudications imposes a more formidable, permanent obstacle than did the Court's prominent reservations about general supplemental jurisdiction in the context of subject matter jurisdiction, expressed in cases such as *Aldinger v. Howard*[222] and *Finley v. United States*.[223] In those cases, the Court's concern was that general principles of supplemental jurisdiction, while fully consistent with Article III, had taken root and flourished without any express statutory imprimatur from Congress.[224] Lack of statutory authorization, of course, is not the obstacle here, as the *Stern v. Marshal* Court expressly held that there was statutory authority for the bankruptcy court to hear, determine, and render final judgment on Anna Nicole's tortious interference counterclaim. Thus, the only basis on which the Court could repudiate any broader notion of supplemental jurisdiction for non-Article III adjudications—beyond a strict "necessity" rationale—is that any broader notion of supplemental jurisdiction for non-Article III adjudications is unconstitutional.

One by one, then, Justice Roberts repudiated each and every potential constitutional justification for the bankruptcy court's entry of final judgment on Anna Nicole's tortious interference claim against Pierce. Taken together,

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[219]United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

[220]*See* Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 780–84.

[221]"Most significantly, given that the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount, the Court repeatedly emphasized that it was 'necessary' to allow the agency to exercise jurisdiction over the broker's claim, or else 'the reparations procedure would have been confounded.'" *Stern*, 131 S. Ct. at 2613–14 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986)); *see also Stern*, 131 S. Ct. at 2613 (emphasizing that in *Schor* "the claim and the counterclaim concerned a 'single dispute'—the same account balance").

[222]Aldinger v. Howard, 427 U.S. 1 (1976).

[223]Finley v. United States, 490 U.S. 545 (1989).

[224]*See* Ralph Brubaker, *Supplemental Bankruptcy Jurisdiction*, 27 BANKR. L. LETTER, Mar. 2007, at 1, 2–3; Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 879–80. Congress then cured this infirmity with its enactment of the general supplemental jurisdiction statute. *See* 28 U.S.C. § 1367 (2006).

though, what does the opinion mean for the rest of the bankruptcy courts' core jurisdiction?

C. The Implications of *Stern v. Marshall*'s Constitutional Decision

The *Stern v. Marshall* Court's modus operandi—systematically ruling out any potential constitutional justification for the bankruptcy court's entry of final judgment on Anna Nicole's state-law tortious interference claim—much like its treatment of the public rights doctrine, means that the Court did not validate *any* of those potential constitutional justifications for *any* of the bankruptcy courts' adjudicatory authority. Indeed, Chief Justice Roberts likely adopted this approach to afford the Court maximum flexibility should it ever choose to revisit the constitutionality of bankruptcy judges' adjudicatory authority in other areas. Indeed, some of the potential constitutional justifications that the Court analyzed (such as the public rights doctrine as applied to bankruptcy adjudications) likely will not stand.

As the methodological assumptions embedded within the Court's opinion reveal, though,[225] some propositions will be much harder to disavow than others. Moreover, notwithstanding the coy opinion structure, Chief Justice Roberts did seek to reassure those who must now "live" with the Court's decision and try to discern its full implications, that "our decision today does not change all that much."[226] That is likely true with respect to bankruptcy judges' core jurisdiction in traditional "summary" proceedings, which encompasses the vast majority of bankruptcy judges' core jurisdiction. With respect to traditionally "plenary" proceedings, though, the unmistakable effect of the Court's decision (as stated by Justice Roberts himself) is to render unconstitutional the statutory authorization for bankruptcy judges to exercise core jurisdiction over such suits. What's more, that conclusion also calls into question the constitutionality of the entire category of "arising under" jurisdiction as an independent basis for core jurisdiction in a non-Article III bankruptcy court.

Any exercise of supplemental core jurisdiction, beyond the strict necessity standard of *Stern v. Marshall*, is now constitutionally suspect, requiring reexamination of matters such as bankruptcy courts' core jurisdiction to enter money judgments on nondischargeable debts. Core jurisdiction by consent, though, while obviously a curious anomaly of the Court's jurisprudence of non-Article III adjudications, may well withstand constitutional scrutiny.

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[225] *See supra* notes 120–64 and accompanying text.

[226] *Stern*, 131 S. Ct. at 2620. "We conclude today that Congress, in one isolated respect, exceeded [Article III's] limitation." *Id.* "We do not think the removal of counterclaims such as [Anna Nicole]'s from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; . . . the question presented here is a 'narrow' one." *Id.*

1. *Bankruptcy Judges' Core Jurisdiction in Traditional "Summary" Proceedings*

The *Stern v. Marshall* Court's willingness to regard and treat both *Katchen v. Landy*[227] and *Langenkamp v. Culp*[228] as if they were binding precedent for purposes of Article III means that bankruptcy judges' core jurisdiction in claims allowance proceedings appears constitutionally sound. The prerequisite to the conclusion that non-Article III referees and bankruptcy judges can render final judgment on avoidance-action counterclaims, consistent with Article III, is the constitutional validity of the notion that "'[t]he whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*,' and thus falls within the principle . . . that [non-Article III] bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession."[229]

Moreover, given that this *in rem* principle (though wholly metaphorical and apparently infinitely malleable[230]) was nonetheless the theoretical foundation of the Court's entire jurisprudence regarding the summary jurisdiction of 1898 Act referees, bankruptcy judges' core jurisdiction is presumptively constitutional with respect to all other matters that were uncontroversially within referees' summary jurisdiction under the 1898 Act. The *Stern v. Marshall* Court's willingness to regard and treat both *Katchen v. Landy* and *Langenkamp v. Culp* as if they were binding precedent for purposes of Article III is a very persuasive indication that the Court has indeed constitutionalized the 1898 Act summary-plenary distinction and will continue to uphold core jurisdiction in the non-Article III bankruptcy courts over any matter that was incontrovertibly within 1898 Act referees' summary jurisdiction.[231]

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[227]382 U.S. 323 (1966).

[228]498 U.S. 42, 44 (1990).

[229]*Katchen*, 382 U.S. at 329–30.

[230]Much of my previous writing on bankruptcy jurisdiction has been devoted to making the point (explicitly or implicitly) that the *in rem* characterization is extremely fluid, and the Supreme Court (in the true spirit of a legal fiction) often employs it in a transparently results-oriented fashion. *See, e.g.*, Ralph Brubaker, *Explaining* Katz*'s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 108–12 (2007); Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief After* Hood, 13 AM. BANKR. INST. L. REV. 59, 74–98 (2005); Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 844–52, 933–40; Brubaker, *Clinging to* In Rem *Bankruptcy Jurisdiction, supra* note 18, at 269–84. Consequently, invoking Supreme Court precedent (bankruptcy or otherwise) from outside the specific context of non-Article III bankruptcy adjudications in order to characterize a particular proceeding as *in rem* (and, therefore, as the argument goes, appropriate for final adjudication by a non-Article III bankruptcy judge) is not necessarily an accurate reflection of the Court's jurisprudence regarding the limits on non-Article III bankruptcy arbiters' adjudicatory authority.

[231]In his contribution to this symposium, Troy McKenzie questions the advisability of this historical approach by pointing out that there was (and will, of course, continue to be) substantial uncertainty as to the precise contours of the divide between summary and plenary proceedings. *See* Troy A. McKenzie, *Getting to the Core of* Stern v. Marshall*: History, Expertise, and the Separation of Powers*, 86 AM. BANKR.

Reading the "tea leaves" scattered through the Supreme Court's opinions, of course, does not rule out the possibility of some future bombshell entirely exploding the non-Article III bankruptcy courts,[232] particularly given the Court's inclination to look to history for guidance. The history of bankruptcy adjudications does not point unambiguously in the direction of continuing to permit non-Article III bankruptcy adjudications. For example, one of the most comprehensive and persuasive historical analyses of non-Article III adjudications is that of Professor Pfander.[233] Professor Pfander offers a textual foundation for federal adjudications outside Article III and its strictures in Article I's authorization for Congress "[t]o constitute Tribunals inferior to the supreme Court,"[234] as distinguished from Article III's authorization for the "judicial Power" to be exercised only by "such inferior Courts as the Congress may from time to time ordain and establish."[235] According to Professor Pfander's account, the Framers understood that certain matters "fell outside the judicial power due to the traditional limits on the scope of the powers of the English superior courts of law, equity, and admiralty."[236]

With respect to bankruptcy, the Founding generation's understanding of the "judicial Power" was obviously shaped by the English "system of adjudication that took place in part outside the superior courts of law, equity, and admiralty," through what Blackstone characterized as an "extrajudicial method of proceeding" before commissioners.[237] Moreover, the peculiarity that would likely cause the Founding generation to regard bankruptcy commissioners' work as inappropriate for Article III courts exercising the "judicial Power," was "the dual function of the commissioners in administering the estate and adjudicating certain claims."[238] Professor McCoid likewise de-

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L.J. 23 (2012). True, the 1978 Reform Act tried to do away with such inquiries entirely, but *Marathon* and the subsequent codification of a core/non-core distinction (analogous to the summary/plenary distinction) make such uncertain line-drawing exercises inevitable. One could, indeed, construct an entirely different dimension along which to draw the line, but there is no assurance that it will be more determinate than the summary/plenary line. Moreover, there is already a large existing body of case law on the summary/plenary line decided under the 1898 Act (i.e., why reinvent that wheel?), and most significantly, if the Supreme Court has indeed constitutionalized the 1898 Act summary/plenary divide (as suggested above), we are stuck with it (indeterminacy and all).

[232]For an argument that bankruptcy judges' appointments violate Article II, for example, see Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233 (2008).

[233]*See* Pfander, *supra* note 167.

[234]U.S. CONST. art. I, § 8, cl. 9.

[235]*Id.* art III, § 1.

[236]Pfander, *supra* note 167, at 715.

[237]*Id.* at 719. *Accord* Plank, *supra* note 5, at 609-10 (1998) (opining that the 1800 Act's "grant of original jurisdiction to bankruptcy commissioners and not to Article III judges suggests that the early Congresses did not consider such original jurisdiction to fall within the 'judicial Power'").

[238]Pfander, *supra* note 167, at 720.

scribed the characteristic functions of English commissioners as both executive and judicial in nature:

> Necessarily making determinations of law and fact as they carried out these duties, the commissioners clearly functioned in a judicial fashion, and colloquially, at least, they could be labeled a court. In many respects, however, their work perhaps more nearly resembled the activities of our present-day administrative agencies.[239]

Indeed, under English law, colonial statutes, and the 1800 Act, commissioners had wide-ranging powers to administer a debtor's estate, including even the power to directly seize the body and effects of the debtor and break into any premises for that purpose.[240] "Thus, the early refusal of Congress to place the administration of bankruptcy estates entirely in the hands of Article III judges may reflect a recognition . . . that the administrative work of commissioners did not fit comfortably within the definition of the judicial power of the United States."[241]

Note, though, that if this is the proper understanding of why those bankruptcy matters historically regarded as "summary" were appropriate for non-Article III adjudication, that justification for non-Article III bankruptcy arbiters seems to have disappeared entirely with the comprehensive restructuring of the bankruptcy court in the 1978 Reform Act to wholly remove bankruptcy judges from any direct involvement in administration of debtors' estates and strictly confine "the role of the federal bankruptcy court to adjudication of actual controversies that do arise."[242] Obviously, then, one can make a credible argument, grounded in constitutional text and history—as Professor Pfander does—that it is unconstitutional to permit the current non-Article III bankruptcy judges to exercise any adjudicative powers beyond those of a true "adjunct":

> [T]he functional justification for the initial reliance upon bankruptcy commissioners has now all but disappeared. As currently structured, the bankruptcy courts no longer perform any administrative function but act solely as neutral and independent tribunals for the resolution of disputes. Without any administrative role, the case for bankruptcy courts outside of Article III grows more difficult to sustain.

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[239]McCoid, *supra* note 5, at 30.

[240]*See generally* McCoid, *supra* note 5, at 28–37; Plank, *supra* note 5, at 578–80, 584–87, 599, 603–06, 608–09.

[241]Pfander, *supra* note 167, at 720.

[242]Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 836 & n.344 (summarizing the relevant legislative history); *see also* Block-Lieb, *supra* note 56.

> One can fairly ask why Article III does not require Congress either to grant the bankruptcy courts formal Article III status or to transfer the work back onto the dockets of the district courts.[243]

That conclusion obviously would require a very drastic reversal of course, given the final adjudicatory powers that bankruptcy judges have been exercising in "core" proceedings for the past nearly-30 years. Moreover, it would likely require the Court to overrule its per curiam decision in *Langenkamp v. Culp* and to reconceptualize its posited relationship between non-Article III adjudications and the Seventh Amendment. The bankruptcy system, in particular, may have already travelled too far down a different path even to attempt to retrace its steps and start over. Moreover, precipitously concluding that the entire system of bankruptcy judges' core jurisdiction is unconstitutional is entirely unjustified unless and until the Supreme Court sends very different signals than they have to date. The Supreme Court's cumulative jurisprudence to date indicates that the Court considers those bankruptcy matters historically regarded as "summary" to be appropriate for final adjudication by a non-Article III bankruptcy judge.

2. *Bankruptcy Judges' Jurisdiction Over State-Law Counterclaims*

Notwithstanding the *Stern v. Marshall* holding that a bankruptcy court "lack[s] the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim,"[244] bankruptcy courts continue to have much adjudicatory authority over (including the power to finally decide) many nonbankruptcy state-law counterclaim issues. After *Stern v. Marshall*, final adjudication of a nonbankruptcy state-law counterclaim is properly within a non-Article III bankruptcy judge's core jurisdiction only to the extent that the bankruptcy judge must address factual and legal issues involved in the counterclaim in order to fully and finally dispose of the creditor's claim against the estate. Of course, any issues relevant to the counterclaim that are actually litigated and decided by a final order of the bankruptcy judge, in disposing of the creditor's claim, will thereafter bind the parties under the issue preclusion principles of collateral estoppel[245] (and on direct appeal, will receive the same deference as any other final appealable order—most significantly, factual findings will only be reversed if clearly erroneous).

With respect to any factual and legal issues that the bankruptcy judge does *not* need to address in order to dispose fully and finally of the creditor's

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[243]Pfander, *supra* note 167, at 770.

[244]Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011).

[245]*See* Katchen v. Landy, 382 U.S. 323, 333–35 (1966).

claim against the estate, though, those must be treated as noncore "related to" matters on which the bankruptcy judge can only submit proposed findings and conclusions, for consideration and final judgment by the district court, after a de novo review (including, if the district judge wishes, after reargument or retrial, including hearing additional evidence).

In applying that framework, a lot will depend upon the precise positions of the parties and the evidence presented. For example, sometimes it may be possible for the bankruptcy judge to dispose of the creditor's claim without ever addressing the estate's counterclaim, which would render the counterclaim a noncore "related to" proceeding in its entirety. Indeed, that seems to be the situation in *Stern v. Marshall*: the bankruptcy judge entered summary judgment entirely disallowing Pierce's defamation claim against Anna Nicole's bankruptcy estate before even addressing (through a subsequent full-blown trial) Anna Nicole's tortious interference counterclaim. So in *Stern v. Marshall*, given the framework that the Court adopted for counterclaims, it was very easy to conclude that the bankruptcy judge in that case could not constitutionally exercise core jurisdiction over the counterclaim. Once the bankruptcy judge had already disallowed Pierce's claim, thereafter, *everything* the bankruptcy judge was doing with respect to Anna Nicole's counterclaim clearly was *not* necessary to dispose of Pierce's claim (which had already been fully adjudicated).

Of course, that is not necessarily how resolution of claims and counterclaims occur. Claims and counterclaims (particularly compulsory counterclaims) tend to be a little more messily intertwined in practice. Determining the extent of a bankruptcy judge's ability to enter final orders on counterclaim issues will be highly context-specific, but as illustrated elsewhere,[246] there are a multitude of circumstances in which a bankruptcy judge will have to address factual or legal issues determinative to a counterclaim in order to adjudicate fully a creditor's claim against the estate.

Moreover, notwithstanding some language in *Stern v. Marshall* that might lead to a contrary conclusion,[247] a bankruptcy judge need not resolve the extent of his/her authority regarding a counterclaim at the outset of the adversary proceeding. The Court held that Judicial Code § 157's allocation of adjudicatory authority between the bankruptcy court and the district court "does not implicate questions of subject matter jurisdiction,"[248] which means that the full extent of a bankruptcy judge's authority need not be

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[246]Ralph Brubaker, *Article III's Bleak House (Part II): The Constitutional Limits of Bankruptcy Judge's Core Jurisdiction*, 31 BANKR. L. LETTER, Sept. 2011, at 1, 14–15.

[247]"From the outset," there "was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in resolution of [Anna Nicole]'s counterclaim." *Stern*, 131 S. Ct. at 2617–18.

[248]*Id.* at 2607.

established on the face of the pleadings (as is typically the rule for subject-matter jurisdiction). The bankruptcy judge should be able to let the actual evidence presented and the ultimate decisional needs of the particular case at issue dictate the full extent of his/her adjudicatory authority over state-law counterclaims. According to the *Stern v. Marshall* Court's own statement of the holding of the case, a bankruptcy judge only "lack[s] the constitutional authority to enter a final judgment on a state law counterclaim" to the extent that a particular issue of fact or law "is *not* resolved in the process of ruling on a creditor's proof of claim."[249] This may well leave the parties with a great deal of uncertainty through the course of the litigation and may greatly complicate the litigation process—a danger of which Justice Breyer warned in his dissent.[250] In the majority's view, though, such practical concerns simply do not rise to the level of constitutional significance that can overcome the mandates of Article III.

3. *General Supplemental Core Jurisdiction*

If general supplemental jurisdiction principles were properly applicable to expand the jurisdiction of non-Article III tribunals, those principles would obviously have application in many bankruptcy contexts other than simply "counterclaims by the estate against persons filing claims against the estate,"[251] and statutory authorization for such supplemental core jurisdiction could easily be found in the catch-all core categories.[252] Indeed, some courts have relied upon general supplemental (ancillary or pendent) jurisdiction principles as a basis for bankruptcy courts to exercise core jurisdiction over claims for which they would not have core jurisdiction as stand-alone claims, on the basis that these claims nonetheless are transactionally related to and joined with core claims pending before the bankruptcy court.[253] Moreover, in the 1970 discharge amendments to the 1898 Act, Congress expressly gave referees final jurisdiction over just such an instance of supplemental summary jurisdiction in the case of referees' summary jurisdiction to enter final judgment against the debtor personally on a claim declared nondischargeable.[254]

However, the *Stern v. Marshall* Court's implicit repudiation of the

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[249]*Id.* at 2620 (emphasis added).

[250]*See id.* at 2630 (Breyer, J., dissenting) (predicting "a constitutionally required game of jurisdictional ping-pong between" the bankruptcy court and the district court that will "lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy").

[251]28 U.S.C. § 157(b)(2)(C) (2006).

[252]*See id.* § 157(b)(2)(A) & (O).

[253]*See, e.g.*, *In re* Lionel Corp., 29 F.3d 88, 90, 92 (2d Cir. 1994).

[254]*See* Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 911–21 & n.603; Ralph Brubaker, *Bankruptcy Court Jurisdiction to Enter a Money Judgment on a Nondischargeable Debt: Exposing* Pacor*'s Deficiencies and the True Supplemental Nature of Third-Party "Related To" Bankruptcy Jurisdiction*, 29 BANKR. L. LETTER, Apr. 2009, at 1, 8 [hereinafter Brubaker, *Money Judgments on Nondischargeable Debts*].

broader supplemental summary jurisdiction implications of *Katchen v. Landy* as unconstitutional under Article III[255] clearly indicates that any broad, general notion of supplemental core jurisdiction is also unconstitutional. Bankruptcy judges' general supplemental jurisdiction is at best noncore "related to" jurisdiction.[256]

The *Stern v. Marshall* decision in this regard also calls into doubt the constitutionality of the almost universal consensus to date (relying upon practice after the 1970 amendments to the 1898 Act) that bankruptcy judges have core jurisdiction to adjudicate and enter final judgment against the debtor personally on claims declared nondischargeable.[257] As Douglas Baird rightly points out, that conclusion will now have to be reconsidered in light of *Stern v. Marshall*.[258]

As discussed above, the most that *Stern v Marshall* implicitly admits is the possibility of supplemental core jurisdiction over common factual and legal issues that are "necessary" to adjudicate those matters historically considered "summary." Dischargeability determinations were within the 1898 Act summary jurisdiction of bankruptcy referees both before and after the 1970 amendments,[259] and thus, the constitutionality of core jurisdiction in the bankruptcy courts to make "determinations as to the dischargeability of particular debts"[260] seems secure. Before the 1970 amendments, though, the federal courts "refused to liquidate nondischargeable debts and enter money judgments against debtors for lack of federal jurisdiction," thus relegating the creditor to an additional plenary suit against the debtor in a nonbankruptcy state or federal court with jurisdiction over an action on the underlying debt.[261]

The current grant of subject-matter jurisdiction to federal district courts to hear and render final judgment on debts declared nondischargeable is clearly constitutional (as a matter of Article III judicial federalism), as an appropriate instance of supplemental jurisdiction incident to the federal-question claim of dischargeability.[262] Supplemental *core* jurisdiction in the non-Article III bankruptcy courts to adjudicate and enter judgment on a debt

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[255]*See supra* notes 205–24 and accompanying text.

[256]*See* Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 921–33; *see also* Townsquare Media, Inc. v. Brill, 652 F.3d 767, 771–72 (7th Cir. 2011).

[257]*See* Brubaker, *Money Judgments on Nondischargeable Debts*, *supra* note 254, at 6–9.

[258]*See* Baird, *supra* note 99.

[259]*See In re* Johnson, 211 F. Supp. 337, 343 (D.N.J. 1962), *vacated and remanded on other grounds*, 323 F.2d 574 (3d Cir. 1963) (reinstating referee's dischargeability determination); Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1, 9, 25 (1971).

[260]28 U.S.C. § 157(b)(2)(I) (2006).

[261]Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 913.

[262]*See id.* at 911–21; Brubaker, *Money Judgments on Nondischargeable Debts*, *supra* note 254, at 5–6.

declared nondischargeable, though, is much more questionable.[263] Consistent with the rationale of *Stern v. Marshall*, bankruptcy courts' core jurisdiction over debts declared nondischargeable would seem to be limited to only those factual and legal issues necessary to dispose of the core nondischargeability action,[264] and bankruptcy courts would seem to be limited to submitting proposed findings and conclusions to the district court on all other issues, including the amount of the creditor's nondischargeable claim.

4. *Core "Arising Under" Jurisdiction Over Traditional "Plenary" Suits*

One potential constitutional justification for bankruptcy judges' core jurisdiction that the Court surveyed in *Stern v. Marshall* is inconsistent with other premises embraced (and flatly contradicts direct statements) in the majority opinion and thus can no longer be safely indulged. Recognition of this reality means that bankruptcy judges' core jurisdiction under § 157(b)(2)(F) & (H) of the Judicial Code over proceedings to avoid and recover preferential transfers and fraudulent conveyances is unconstitutional, and statutory core jurisdiction over other bankruptcy causes of action may also be unconstitutional.

Both Justice Brennan's plurality *Marathon* opinion and Justice Rehnquist's concurrence emphasized the state common-law nature of the action at issue in that case.[265] Justice Brennan further stated:

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right to . . . provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have

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[263] *See* Brubaker, *Money Judgments on Nondischargeable Debts*, *supra* note 254, at 6–9.

[264] In the rarer case where the trustee is also a party to the action because the creditor's claim against the debtor's bankruptcy estate is also being adjudicated by the bankruptcy court, final adjudication of all factual and legal issues necessary to fully dispose of the core claim allowance proceeding may fully and finally dispose of all issues necessary for the bankruptcy court to also enter a money judgment against the debtor personally if the debt is declared nondischargeable.

[265] *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982) (Brennan, J., plurality opinion) (emphasizing that "Northern's claim[s] for damages for breach of contract and misrepresentation[ ] involve a right created by *state* law"); *id.* at 90 (Rehnquist, J., concurring) ("There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law.").

> traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created.[266]

This was apparently an effort to accommodate and distinguish the appropriate judicial functions of federal administrative agencies,[267] but the discussion of congressional discretion in rights of its own creation has created considerable uncertainty regarding the extent to which adjudication of federal statutory causes of action can be committed to non-Article III tribunals.[268] Moreover, in the bankruptcy context, the emphasis on preserving Article III adjudication of state common-law claims is especially curious, as adjudicating such state-law rights (e.g., creditor claims) is central to the historical summary *in rem* process of administering all property in the possession of the court—a point made, once again, by Justice White, at length, in his dissent.[269] As was true with his entire speculative invocation of the public rights doctrine, Justice Brennan's flirtation with a conception of federal law or congressionally created rights—in what correspondingly appears to have been an attempt to simultaneously accommodate and distinguish traditional non-Article III bankruptcy adjudications in summary matters—was not well formed.[270]

In drafting BAFJA, Congress emphasized its desire to preserve in the bankruptcy courts the traditional role of non-Article III bankruptcy adjudicators with respect to issues of state law. Indeed, Judicial Code § 157(b)(3) expressly provides that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law."

At the same time, though, Congress also seized upon Justice Brennan's comment about congressional discretion over federal statutory causes of action to expand bankruptcy courts' adjudicatory powers beyond the summary *in rem* jurisdiction of 1898 Act referees. In particular, recall that under the

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[266]*Id.* at 83–84 (Brennan, J., plurality opinion).

[267]*See id.* at 78–84 (Brennan, J., plurality opinion) (discussing "[t]he use of administrative agencies as adjuncts [that] was first upheld in *Crowell v. Benson*," which "involved the adjudication of congressionally created rights").

[268]*See* Young, *supra* note 189, at 850–52, 865–69.

[269]*See Marathon*, 458 U.S. at 94–100 (White, J., dissenting). "Initial adjudication of state-law issues by non-Art. III judges is . . . hardly a new aspect of the 1978 Act." *Id.* at 99 (White, J., dissenting). "The difference between the new and old Acts, therefore, is not to be found in a distinction between state-law and federal-law matters; rather, it is in a distinction between [summary] *in rem* and [plenary] *in personam* jurisdiction." *Id.* at 97 (White, J., dissenting).

[270]The attempt to force-fit traditional summary proceedings into a conception of federal law (presumably appropriate for non-Article III adjudications) is most evident in Brennan's comment (apparently alluding to the summary bankruptcy process) that "[o]f course, bankruptcy adjudications themselves, as well as the *manner* in which the rights of debtors and creditors are adjusted, are matters of federal law." *Id.* at 84 n.36 (Brennan, J., plurality opinion) (emphasis added).

1898 Act, a trustee's actions to avoid and recover preferential transfers and fraudulent conveyances were not within the summary jurisdiction of referees; rather, such avoidance actions had to be brought by plenary suit in an Article III court with Seventh Amendment jury trial rights.[271] In BAFJA, though, Congress gave non-Article III bankruptcy judges core jurisdiction to adjudicate to final judgment any and all federal-law rights and claims in the Bankruptcy Code, by defining "core proceedings" to include any "proceedings arising under title 11."[272] "This 'arising under' bankruptcy jurisdiction was designed to replicate general federal question jurisdiction where the source of federal law under which a claim is made is the federal Bankruptcy Code,"[273] and thus includes within bankruptcy judges' core jurisdiction both preference suits under Bankruptcy Code § 547 and fraudulent conveyance suits under § 548.

Here, then, is another payoff from the laborious forensics that tease out the methodological assumptions implicit in the *Stern v. Marshall* majority opinion.[274] If the Court has fully equated the right to final judgment from an Article III judge with the Seventh Amendment right to a jury trial in federal bankruptcy proceedings, and thus, the Court's decisions regarding Seventh Amendment jury trial rights in bankruptcy proceedings are binding Article III precedent on the right to final judgment from an Article III judge in bankruptcy proceedings, then the holding in *Granfinanciera* that Seventh Amendment jury trial rights attach to a fraudulent conveyance suit under Bankruptcy Code § 548 means that the litigants in such a suit also have a right to insist upon final judgment from an Article III judge. That is, non-Article III bankruptcy judges' statutory core jurisdiction to enter final judgment in fraudulent conveyance suits is unconstitutional.

Indeed, the *Stern v. Marshall* Court stated outright that *Granfianciera* held, with respect to the fraudulent conveyance suit at issue in that case, "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court."[275] Moreover, it is clear that the *Granfianciera* Court, for purposes of its decision and its rationale, regarded preference actions as "indistinguishable from [a fraudulent conveyance] suit in all relevant respects,"[276] and thus relied upon the case of *Schoenthal v.*

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[271]*See supra* notes 29–49 and accompanying text.

[272]28 U.S.C. § 157(b)(1) (2006).

[273]Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 801.

[274]*See supra* notes 120–64 and accompanying text.

[275]Stern v. Marshall, 131 S. Ct. 2594, 2614 n.7 (2011). "[Anna Nicole]'s counterclaim—like the fraudulent conveyance claim at issue in *Granfianciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases." *Id.* at 2614. "We see no reason to treat [Anna Nicole]'s counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*." *Id.* at 2618.

[276]Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 48 (1989).

Irving Trust[277] (holding that Seventh Amendment jury trial rights attended a trustee's preference suit under the 1898 Act) as controlling the outcome in *Granfinanciera*.[278] Consequently, the rationale of the *Granfinanciera* decision itself clearly called into doubt the constitutionality of bankruptcy judges' core jurisdiction over preference and fraudulent conveyance suits.[279] After *Stern v. Marshall*, the conclusion seems inescapable that such core jurisdiction to enter final judgment—expressly conferred by Judicial Code § 157(b)(2)(F) & (H)—is unconstitutional. Without consent of the litigants, a bankruptcy judge can do no more than hear the action and submit proposed findings and conclusions to the district court.

Stern v. Marshall also calls into doubt the constitutionality of the entire category of "arising under" core proceedings as an independent basis for final judgment by a non-Article III bankruptcy judge, although the Court does throw a couple of head fakes on that score. Like the plurality and concurrence in *Marathon*, the *Stern v. Marshall* majority opinion emphasized the state-law nature of Anna Nicole's counterclaim and specifically emphasized that, unlike "both *Katchen* and *Langenkamp*," where "the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law," Anna Nicole's "claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding."[280] "Congress has nothing to do with it."[281]

Like the speculative "public rights" rationale as a potential justification for final judgment from a non-Article III bankruptcy judge, this potential federal-law justification also seems specious and unsustainable. If the state-law/federal-law rationale had any independent significance, then it would flatly contradict the majority's simultaneous assertion, regarding the § 548 fraudulent conveyance action at issue in *Granfinanciera*, that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court."[282]

In *Granfinanciera*, Brennan's opinion suggested that the reason the § 548 federal cause of action cannot be finally adjudicated by a non-Article III court may be because that statutory right did not "creat[e] a new cause of action,

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[277]287 U.S. 92 (1932).

[278]*See Granfianciera*, 492 U.S. at 48–50, 55–56.

[279]*See* Gibson, *supra* note 164, at 168–71.

[280]*Stern*, 131 S. Ct. at 2618. *See* N. Pipeline Constr. Co. v Marathon Pipe Line Co., 458 U.S. 50, 84 & n.36 (1982) (Brennan, J., plurality opinion) (emphasizing that "the cases before us . . . involve a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court" and for which "Congress has not purported to prescribe a rule of decision").

[281]*Stern*, 131 S. Ct. at 2614.

[282]*Id.* at 2614 n.7.

and remedies therefor, unknown to the common law."[283] That rationale, however, would not distinguish fraudulent conveyance actions from preference actions, at least under the reasoning of *Granfinanciera* itself,[284] and thus, provides no support for the *Stern v. Marshall* Court's speculation that the federal-law nature of the preference actions in *Katchen* and *Langenkamp* can somehow distinguish those preference actions from the fraudulent conveyance action at issue in *Granfinanciera*. It appears that the only durable justification for non-Article III adjudication of the preference actions in *Katchen* and *Langenkamp* (that can at least prevent *Stern v. Marshall* from being hopelessly incoherent and internally inconsistent) is the Court's "necessity" rationale: as objections and counterclaims to creditors' claims against the estate, adjudication of the preferences was necessarily part and parcel of the summary process of adjudicating allowance of the creditors' claims against the estate.

The notion that bankruptcy courts can, consistent with Article III, render final judgment on any claim whose source of law is the Bankruptcy Code is as dubious as the notion that the "public rights" doctrine can ever sustain non-Article III bankruptcy adjudications. Indeed, one of the five Justices joining the *Stern v. Marshall* majority opinion, Justice Scalia, wrote separately to express his disagreement with both of those suggestions: "Article III gives no indication that state-law claims have preferential entitlement to an Article III judge . . . ."[285] "Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v Benson*, in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary."[286]

For any Bankruptcy Code cause of action, therefore, that could not have

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[283]*Granfinanciera*, 492 U.S. at 60; *see also* Young, *supra* note 189, at 868 ("The Court has continued to make clear its special concern when a new federal right is conferred in forced substitution for preexisting rights in admiralty and at common law.").

[284]"There is no dispute that actions to recover preferential or fraudulent transfers were often brought at law in late 18th century England." *Granfinanciera*, 492 U.S. at 42–43. "As we noted in *Schoenthal v. Irving Trust Co.*: 'In England, long prior to the enactment of our first Judiciary Act, common law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts.'" *Id.* at 43 (citation omitted). *See* Gibson, *supra* note 164, at 169 ("Throughout its opinion, the Court equated fraudulent conveyances and preference actions, and thus seemingly indicated that the article III, as well as the seventh amendment, analysis would be the same for these types of proceedings.").

Whether the Court was correct in treating preference and fraudulent transfer actions as indistinguishable, though, is another matter. *See* Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 714–18 (1985); Bruce A. Markell, *Toward True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital*, 21 IND. L. REV. 469, 473–75 (1988); McCoid, *supra* note 5, at 19–28.

[285]*Stern*, 131 S. Ct. at 2621 (Scalia, J., dissenting).

[286]*Id.* (citation omitted).

been within the summary *in rem* jurisdiction of referees under the 1898 Act, the statutory designation of such a Code claim as "core" is constitutionally suspect. The cause of action that immediately comes to mind here (other than a preference or fraudulent conveyance suit) is a damages action under the Code's bankruptcy discrimination statute, first codified in 1978, although that statute's conceptual relationship to the Bankruptcy Code's automatic stay and discharge injunction injects considerable ambiguity into the issue.[287] Moreover, in the bankruptcy discrimination statute, Congress did "'creat[e] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem."[288] Perhaps that rationale can be used to sustain bankruptcy judges' core jurisdiction over damages suits under the bankruptcy discrimination statute. *Stern v. Marshall*, though, forces us to bracket the entire category of core "arising under" proceedings and question whether the federal-law nature of any particular bankruptcy right or claim, in and of itself, will justify a non-Article III bankruptcy judge finally adjudicating that right.

5. Judicial Code § 157(c)(2) Consent

As explored above,[289] there is also reason for some concern about the constitutionality of § 157(c)(2), which gives bankruptcy judges authority to enter final judgment in noncore "related to" proceedings with the parties' consent. Justice Roberts' opinion, however, contains considerable comfort that, at least with respect to bankruptcy adjudications, final adjudication by a non-Article III arbiter with litigant consent is constitutionally sound.

The *Schor* decision did not definitively resolve the role of litigant consent in validating otherwise unconstitutional non-Article III adjudications. That decision, by its terms, held that waiver of the right to final judgment from an Article III judge was effective only to the extent that litigants' personal rights to independent, impartial adjudications are at stake. Moreover, while acknowledging that Article III's judicial independence safeguard[s] "serve[ ] to protect primarily personal, rather than structural interests,"[290] the Court also stated that to the extent structural separation-of-powers concerns are at stake, "notions of consent and waiver cannot be dispositive because [Article III's independence] limitations serve institutional interests that the parties cannot be expected to protect."[291] Indeed, the Court did not consider

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[287]*See generally* Ralph Brubaker, *The Bankruptcy Discrimination Statute and Discriminatory Hiring Decisions: Turning Textualism's Hierarchy Upside Down*, 31 BANKR. L. LETTER, June 2011, at 1, 1–4. Bankruptcy referees had summary jurisdiction to issue injunctions necessary to preserve the integrity of bankruptcy relief. *See* Brubaker, *Nondebtor Releases and Jurisdiction*, *supra* note 30, at 22–25.

[288]*Granfinanciera*, 492 U.S. at 60.

[289]*See supra* notes 169–81 and accompanying text.

[290]Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

[291]*Id.* at 851.

Schor's consent dispositive and, therefore, conducted a further balancing inquiry to assess the impact upon structural separation-of-powers interests from the non-Article III adjudication in that case.

Where, then, does that leave the validity of litigant consent to bankruptcy court adjudications in which it is otherwise unconstitutional for the bankruptcy judge to render final judgment? Given the many cumulative signals from the Court regarding the propriety of litigant consent to otherwise unconstitutional non-Article III bankruptcy adjudications (discussed above),[292] it would be precipitous and unwarranted, absent some contrary indication from the Court itself, to conclude that § 157(c)(2) is unconstitutional. Moreover, the same is true with respect to litigant consent to final judgment from a bankruptcy judge in those statutory core proceedings in which (in light of *Stern v. Marshall*) it is otherwise (absent litigant consent) unconstitutional for the bankruptcy judge to enter final judgment. As discussed above,[293] there is undoubtedly statutory authority for final judgment by bankruptcy judges in such core proceedings,[294] and given the Court's favorable indications to date regarding the validity of litigant consent in bankruptcy adjudications, a presumption of constitutionality for litigant consent is fully warranted, unless and until the Court indicates otherwise.

From *Stern v. Marshall* itself, one of the most encouraging signs for the validity of litigant consent is the Court's willingness to regard *Katchen v. Landy*'s statutory construction decision about the scope of referees' summary jurisdiction as Article III precedent. This is significant given that the Supreme Court itself, in *MacDonald v. Plymouth County Trust Co.*,[295] also construed highly ambiguous language in the 1898 Act as nonetheless authorizing summary referee jurisdiction over an otherwise-plenary suit with the consent of the litigants.

It might seem extremely curious (and even perhaps illegitimate) that the Court would transmogrify these statutory construction decisions into Article III decisions, when that constitutional issue was never raised nor explicitly considered.[296] As the jurisprudence of non-Article III adjudications illustrates, though, if a given non-Article III adjudication is unconstitutional and is a nonwaivable defect, appellate courts can, often have, and indeed have an obligation to raise that defect sua sponte. That the Supreme Court itself, therefore, never did so while, over an extended period of time, actively shaping the contours of bankruptcy referees' summary jurisdiction (including in a

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[292]*See supra* notes 169–81 and accompanying text.

[293]*See supra* notes 109–15 and accompanying text.

[294]*See* 28 U.S.C. § 157(b)(1) (2006).

[295]286 U.S. 263 (1932).

[296]*See, e.g.*, *Marathon*, 458 U.S. at 80 n.31 (Brennan, J., plurality opinion) (cautiously discussing the implications of the Court's many decisions regarding referees' summary jurisdiction under the 1898 Act).

case directly raising the validity of litigant consent, no less) does provide some indication that the Court saw no constitutional obstacles to referees exercising non-Article III adjudicatory powers in summary proceedings,[297] including summary referee jurisdiction on consent of the litigants.

The other very encouraging signal for the validity of litigant consent from the *Stern v. Marshall* decision itself is in that portion of the Court's opinion construing § 157, which "allocates the authority to enter final judgment between the bankruptcy court and the district court."[298] Citing to the litigant consent provision in § 157(c)(2), the Court stated that *nothing* in § 157's allocation is "jurisdictional" in the sense of codifying nonwaivable limitations such as subject-matter jurisdiction.[299] Section 157, though, is clearly codifying Article III's constitutional limitations on bankruptcy judges' adjudicatory powers, and if those limitations are nonwaivable, then it is for precisely the same reasons that subject-matter jurisdiction limitations are nonwaivable (as the Court itself stated in *Schor*).[300] That the *Stern v. Marshall* Court clearly and explicitly stated that § 157, by its nature, codifies waivable rights, therefore, provides a very persuasive indication (1) that the Court likely does believe that litigant consent or waiver will cure any constitutional infirmity in a final adjudication by a non-Article III bankruptcy judge and (2) that the Court likely will treat *MacDonald v. Plymouth County Trust Co.* as if it were an Article III precedent.

Moreover, as a practical matter, structural separation-of-powers concerns—"intended . . . to protect each branch of government from incursion by the others"[301]—do not pose any significant threat to the independence and impartiality of non-Article III bankruptcy judges, as the system is currently structured (particularly since appointment decisions reside in the Article III judiciary itself). Bankruptcy judges' limited tenure does not produce realistic

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[297]Justice White, in his *Marathon* dissent, certainly thought that to be a proper implication of the Court's summary jurisdiction decisions under the 1898 Act. *See id.* at 99 (White, J., dissenting). Troy McKenzie criticizes this historical reliance on summary jurisdiction jurisprudence as anachronistic, pointing out (accurately) that the summary-plenary dichotomy was initially employed under the 1898 Act to limit the scope of federal bankruptcy jurisdiction, which implicates judicial federalism and not non-Article III adjudications concerns of judicial independence and separation-of-powers. *See* McKenzie, *supra* note 231. The Supreme Court, though, *also* employed the summary-plenary dichotomy in determining the appropriate limits on the final adjudicatory powers of non-Article III referees, which is a non-Article III adjudications concern that does *not* implicate judicial federalism. *See supra* notes 39–49 and accompanying text.

[298]Stern v. Marshall, 131 S. Ct. 2594, 2607 (2011).

[299]*See id.* at 2607.

[300]"To the extent this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction . . . ." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–51 (1986).

[301]*Stern*, 131 S. Ct. at 2609.

fears of potential "incursion" into bankruptcy judges' decision making from Congress or presidential administrations, except in the most exceptional and rare circumstances.[302]

The most salient potential prejudicial influences on bankruptcy judges' decisions likely come from the bankruptcy bar.[303] However, those potential prejudices (and even speculative hypothetical incursions from the other political branches) seem to be just as (if not more) potent in proceedings in which bankruptcy judges can (at least under the Court's current jurisprudence) unquestionably render final judgment, as they are in noncore "related to" proceedings. If these potential threats to bankruptcy judges' independence and the integrity of the bankruptcy system are of constitutional significance, then they warrant seriously entertaining arguments (such as Professor Pfander's) that the entire system of non-Article III bankruptcy judges is unconstitutional. If such a prospect is simply beyond the pale, though, then litigant consent to final judgment from bankruptcy judges in non-core proceedings, in and of itself, poses a truly inconsequential marginal threat to the structural integrity of the bankruptcy system. Indeed, that may well explain why the Court consistently seems unconcerned by non-Article III bankruptcy adjudications with litigant consent.

For those formalist justices comprising the *Stern v. Marshall* majority, upholding final bankruptcy court adjudications by consent of the litigants may also provide a convenient means by which to cabin and distinguish the *Schor* functional balancing approach. Litigant consent, of course, removes any concerns that a non-Article III adjudication will compromise the litigants' personal interests in an arbiter who is (actually and, as importantly, widely perceived to be) independent and impartial, which is not a concern to which functional balancing (in the absence of litigant consent) is particularly (if at all) sensitive. Indeed, functional balancing seems most attuned and responsive to structural separation-of-powers concerns surrounding non-Article III adjudications. It seems entirely plausible, therefore, that the Court will ultimately conclude that the only proper realm for such functional balancing is in determining the validity of litigant consent to a particular non-Article III adjudication. In the context of non-Article III bankruptcy adjudications, it seems likely that the Court will ultimately uphold the validity of litigant consent.

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[302]For example, in the *Chrysler* reorganization, although there were no indications of impropriety vis-à-vis the bankruptcy judge, objecting secured creditors in *Chrysler* did make very public allegations that the Obama administration was bringing improper pressure to bear on other secured creditors. *See* Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of* Chrysler *and* GM, 2010 U. ILL. L. REV. 1375, 1393–94.

[303]*See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 797–807 (2010).

CONCLUSION

Thirty years after *Marathon*, the full implications of that decision are still not known—a frustrating inscrutability that the *Stern v. Marshall* decision itself both highlights and perpetuates. The most sensible interpretation of the Court's cumulative jurisprudence of non-Article III bankruptcy adjudications is that the Court has constitutionalized its 1898 Act case law limiting non-Article III bankruptcy arbiters' final adjudicatory powers to traditional summary matters. The Court's entire jurisprudence of non-Article III adjudications, though, appears to be up for grabs, and time may prove this analysis to be well off the mark. As the old aphorism goes (attributed variously to Niels Bohr, Robert Storm Petersen, Samuel Goldwyn, Mark Twain, and Yogi Berra), it's tough to make predictions, especially about the future.

No. 12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,

v.

PETER H. ARKISON,
TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7
TRUSTEE OF THE ESTATE OF
BELLINGHAM INSURANCE AGENCY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN COLLEGE OF BANKRUPTCY IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

Amicus, the American College of Bankruptcy (the "College"), has never before submitted a brief to this Court.[1] The College was formed in 1989 as an honorary association of bankruptcy and insolvency professionals. Membership is by invitation only. Its eight hundred fellows include individuals associated with all facets of bankruptcy practice: commercial and consumer bankruptcy attorneys, corporate turnaround advisors, United States trustees, bankruptcy trustees, investment bankers, insolvency accountants, law professors, judges, government officials, appraisers, and others involved in all aspects of the bankruptcy and insolvency community.

The College has typically avoided intervening in legal and political controversies, and it has never before filed an *amicus* brief in any court. The College's advocacy efforts are dedicated to the overall improvement of bankruptcy jurisprudence and the fair, efficient and effective functioning of the bankruptcy process.

The College is filing its first-ever amicus brief in this case because the referral of *Stern* claims to bankruptcy judges with litigant consent is essential to the effective and efficient administration of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of *amicus* briefs and their letters of consent are on file with the Court.

bankruptcy cases and consistent with longstanding historical practice in this country. If the Court finds that Article III bars litigants from voluntarily consenting to the adjudication of *Stern* claims by bankruptcy judges, it will throw the bankruptcy system into disarray, as well as cast doubt on the constitutionality of the magistrate system and other well-established schemes for consensual referrals to non-Article III adjudicators. As a non-partisan, diverse group of experienced bankruptcy professionals with expertise across all dimensions of bankruptcy and insolvency, the College has a substantial interest in the questions presented and a unique perspective on their proper resolution.

SUMMARY OF ARGUMENT

This Court gave assurances, in *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011), that the decision was not a watershed, but rather "does not change all that much." Petitioner's position, however, seriously tests that premise.

The College is convinced that Petitioner's proposed ruling, notwithstanding Petitioner's efforts to minimize its impact, would fundamentally threaten the orderly administration of our bankruptcy system. Proceedings will become mired waiting on action by district courts (already strained by increased dockets, decreased funding, and delays on judicial confirmations), while bankruptcy judges will be unable to effectively push cases forward.

Many business bankruptcy cases involve operating businesses with hundreds, if not thousands, of employees, vendors, landlords, service providers and other creditors and parties. Delay in

bankruptcy exacerbates losses and threatens the employment and livelihoods of substantial numbers of people and their families. Bankruptcy estates are necessarily limited, and the additional burden on such estates that would come to pass if Petitioner's position is upheld would be devastating.

It is no answer, as Petitioner suggests, to assign blame for this prospect to the Constitution. Article III simply does not command adoption of Petitioner's position, and indeed, a settled history of this Court's decisions refutes it.

For nearly two centuries, this Court has permitted litigants to forego their right to an Article III forum, even without any express statutory authorization to do so. In bankruptcy cases, this Court's Article III jurisprudence has honored the traditional distinction, imported from England, between summary proceedings to administer a bankruptcy estate, and plenary suits at law and in equity seeking to augment the estate. Litigants are entitled to adjudication of traditionally-plenary claims in an Article III court, but also have historically been permitted to consent to adjudication of such claims by non-Article III judges.

This case presents the perfect opportunity for the Court to clarify an area of the law that has grown increasingly tangled over the past half-century with a decisive holding that, with or without statutory authorization, litigants can consent to final adjudication of claims otherwise protected by Article III by a non-Article III bankruptcy judge.

Where Article III bars the bankruptcy judge from entering final judgment in a statutory core

proceeding (a "*Stern* claim") without litigant consent, the Court should nonetheless hold that the bankruptcy judge can submit proposed findings of fact and conclusions of law to the district court. Section 157(b)(1)'s grant of authority to bankruptcy judges, as limited by *Stern*, includes this lesser power, which is expressly acknowledged by the language and structure of the statute itself. A holding to that effect would also be consistent with this Court's tradition of minimizing the damage to a statutory scheme when only part of the scheme is unconstitutional.

ARGUMENT

I. This Court Has Consistently Permitted Litigants To Consent To Adjudication Of Disputes By Non-Article III Judges

It is impossible to understand the intertwined statutory and constitutional issues at stake in this case without examining the historical roots of today's bankruptcy system and this Court's role in the evolution of that system. This inquiry reveals a history of consistent acceptance of litigant consent to adjudication by non-Article III judges. It also reflects a healthy dose of pragmatism in accommodating the need for efficacious administration of bankruptcy estates.

A. The English Roots Of Our Bankruptcy System

Both the Framers' and this Court's understanding of bankruptcy-related adjudications grew out of the English bankruptcy system of

centuries ago, which set rigid, formalistic limits on the jurisdiction of so-called bankruptcy commissioners. Although the nomenclature of bankruptcy tribunals has changed over the years, the substantive limits on their jurisdiction have largely remained the same. From the very earliest days of bankruptcy practice in this country, the scope of non-Article III commissioners' (or referees' or bankruptcy judges') bankruptcy jurisdiction has been crafted to replicate the old British limits, with one key difference: consenting litigants have always been able to opt into a non-Article III adjudication.

Under the English system, the authority of the bankruptcy commissioners extended to whatever property the estate representative (now known as the trustee) possessed. All matters involving such property were considered "summary," including determinations of the validity of creditors' claims to a share of such property. On the other hand, any action concerning property possessed adversely by another party—for example, a suit by the trustee seeking to recover money or property for the estate—was considered "plenary," and could only be brought as a separate suit in a superior court of law or equity.

Bankruptcy commissioners decided summary matters in the first instance, but lacked authority to entertain plenary matters. The latter were reserved for a formal plenary suit in a court of law or equity. Accordingly, it is likely that the Framers viewed the Article III "judicial power" in bankruptcy cases as the power to adjudicate plenary suits against adverse claimants. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of*

Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall, 86 AM. BANKR. L.J. 121, 166-67 (2012).

B. The Early American Practice Of Non-Article III Adjudications With Litigant Consent

During the first century of the Republic, this Court repeatedly affirmed the practice of referring Article III cases and controversies to non-Article III adjudicators for entry of final judgment in accordance with the report of the referee, where litigants consented to such referrals. Litigant consent (and *not* congressional authorization thereof) was the crucial linchpin in the validity of these non-Article III adjudications.

The Court explicitly rejected challenges—conceptually very similar to Petitioner's—to the validity of such judgments in two separate cases while emphasizing the importance of litigant consent. In *Heckers v. Fowler*, involving a consensual referral of a civil suit to a referee, the plaintiff alleged that the Article III court "erred in allowing the reference" and permitting the adjudication to be "conducted by a judicial officer unknown to the courts of the United States." 69 U.S. 123, 125, 127 (1864) (objecting that "[e]ven if it is a judgment *in* the [federal] Circuit Court, it is not a judgment *of* the court"). The Court rebuffed that challenge, and upheld the propriety of the referee's report constituting a final judgment with consent of the litigants:

> [The] [p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common

> law, and the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference, and duly accepted, is now universally regarded in the State courts as the proper foundation of judgment.

Id. at 131 (collecting cases). *See id.* at 130 (stating that "[u]pon principle we can see no objection to the introduction of the same practice in the courts of the United States" (quoting *York & Cumberland R.R. Co. v. Myers*, 59 U.S. 246, 252 (1855)); *id.* at 128 (noting that the practice "is coeval with the organization of our judicial system").

A quarter-century later, in *Kimberly v. Arms*, the Court not only affirmed the propriety of referring a case to a non-Article III "special master," 129 U.S. 512, 524-25 (1889), but took pains to emphasize that litigant consent was required and that its absence would render the reference illegitimate:

> [It is not] competent for the court to refer the entire decision of a case to [the master] without the consent of the parties. . . . But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, . . . the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent.

Id. at 524 (emphasis added). Moreover, the Court noted that "reference of a whole case to a master ... has always been within the power of a court of

chancery, with the consent of parties," and indeed, "[t]he power is incident to all courts of superior jurisdiction." *Id.* at 524-25.

Furthermore, the Court tacitly approved the practice of referring consenting litigants to non-Article III adjudicators by upholding judgments in such cases with the legitimacy of the reference resting on litigant consent. *See, e.g., York & Cumberland R.R.*, 59 U.S. at 252, 253 (affirming referee's judgment in a breach-of-contract case and explaining that the referee can only rule on matters submitted to him by the consent of all parties); *Alexandria Canal Co. v Swann*, 46 U.S. 83, 89 (1847).

Specifically in the bankruptcy context, the Court held that litigants could, by consent, opt to have non-Article III bankruptcy referees adjudicate a plenary suit. In *Newcomb v. Wood*, 97 U.S. 581 (1878), a bankruptcy assignee (the then-equivalent of a bankruptcy trustee) sued Stephen Newcomb in district court to recover for the benefit of the bankruptcy estate certain property held adversely by Mr. Newcomb. With both parties' consent, the district court referred the case to a panel of three referees "with power to hear and determine all questions of law and fact, and report thereon to the court." *See id.* at 581. In accordance with the referees' report and over Mr. Newcomb's objections, the district court entered judgment in favor of the assignee. This Court affirmed the judgment, rejecting Mr. Newcomb's argument that the district court "erred . . . [i]n appointing referees in said cause":

> The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration . . . . In such an agreement there is nothing contrary to law or public policy.

Id. at 583.

Petitioner attempts to distinguish *Kimberly* and *Heckers* on the ground that the non-Article III masters and referees did not enter final judgment; the referring Article III court entered the judgment. Pet. Br. 31. That is misleading, though, because the referees' reports *were* binding on the Article III court, with the same effect as a final judgment—only reversible under a standard akin to appellate review. *See Heckers*, 69 U.S. at 127 (the order of reference expressly provided "that on filing the report of the said referee with the clerk of the court, judgment be entered in conformity therewith, the same as if the cause had been heard before the court"); *Kimberly*, 129 U.S. at 524 (the master's "findings, like those of an independent tribunal, are to be taken as presumptively correct," subject to revision only "when there has been a manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise"). *See also Newcomb*, 97 U.S. at 583 (defendant not entitled to *de novo* retrial in the district court because the parties' "agreement to submit the controversy to referees" indicated "clearly that they intended the [referees'] award should be final and conclusive").

C. The Bankruptcy Act Of 1898

Enacted against the backdrop of the traditional summary/plenary distinction, the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) ("1898 Act"), vested bankruptcy jurisdiction in the federal district courts and granted district judges broad authority to refer bankruptcy matters to non-Article III bankruptcy referees. The 1898 Act was less specific than predecessors in demarcating the boundaries of referee authority, so it often fell to the Court to step in to do so, guided by traditional norms of bankruptcy law and constitutional considerations.

Read literally, the 1898 Act allowed district judges to delegate practically the entirety of their bankruptcy jurisdiction to non-Article III bankruptcy referees. Section 38 of the 1898 Act granted bankruptcy referees jurisdiction to "perform such of the duties as are by this Act conferred on courts of bankruptcy." *See* COLLIER ON BANKRUPTCY appx. A, pt. 3(a), at 3-32 (16th ed. 2013) (reprinting the Bankruptcy Act of 1898, as amended through date of repeal). Moreover, section 1 defined the term "court" to include both the district court and the referee, and section 36 required referees "to take the same oath of office as that prescribed for judges of United States courts." Congress therefore authorized a referee to act as the court in a referred matter, with "all jurisdiction given the courts of bankruptcy." 2A COLLIER ON BANKRUPTCY ¶ 38.08[2], at 1415 (James Wm. Moore et al. eds., 14th ed. 1978).

But the statute was not read literally, because this Court interpreted the scope of the referees' powers to coincide with the traditional

summary/plenary distinction. For instance, in *Weidhorn v. Levy*, 253 U.S. 268, 269 (1920), after a case had already been referred generally (*i.e.*, without limitation) to the bankruptcy referee, the bankruptcy trustee filed a plenary suit before the referee against the bankrupt's brother to recover a fraudulent transfer. The referee overruled the brother's objection to the referee's jurisdiction and entered a final decree on the merits in favor of the trustee. *Id.* This Court held that a "general reference" could not authorize the referee to handle a plenary matter:

> [W]e conclude that . . . a referee, by virtue of a general reference . . . has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party . . . and affecting property not in the custody or control of the court of bankruptcy.

Id. at 274.

The Court's holding relied on the traditional summary/plenary distinction rather than the literal language of the Act. Without specific guidance from the Act itself, the Court concluded that it would be inappropriate in light of the historical tradition for a bankruptcy referee to adjudicate a plenary suit. *See id.* at 273. In summary proceedings, however, the Court treated the referee as the equal of the judge, allowing him to enter final orders reviewable only by appeal and having the same preclusive effects as a district court decision. *See id.* at 271-72; *Katchen v. Landy*, 382 U.S. 323, 334 (1966); *Page v. Ark. Natural Gas Corp.*, 286 U.S. 269, 270-72 (1932). *See*

generally 2 COLLIER (14th ed.), *supra*, ¶ 22.05; 2A *id.* ¶¶ 38.02, 39.01[5], 39.16, 39.28-.29.

It was not just Congress, therefore, but also the Court that superintended limitations on referees' adjudicatory powers. An elaborate jurisprudence defining the scope of summary matters appropriate for final adjudication by a non-Article III referee unfolded. *See* 2A COLLIER (14th ed.), *supra*, ¶ 38.09[2]; 2 *id.* ¶¶ 23.02-23.11 (collecting extensive case law). Indeed, this Court openly acknowledged that, in administering the 1898 Act, Congress left the Court significant latitude in specifying the full scope of referees' jurisdiction. *See Katchen*, 382 U.S. at 328 ("Congress has often left the exact scope of summary proceedings in bankruptcy undefined, and this Court has elsewhere recognized that in the absence of congressional definition this is a matter to be determined by decisions of this Court..."); *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 431 & n.7 (1924) ("Congress has, also (subject to the constitutional guaranties), power to determine to what extent jurisdiction conferred [on the bankruptcy courts], . . . shall be exercised by summary proceedings and to what extent by plenary suit. It has not done so in terms. In the absence of congressional definition of the scope of summary proceedings, it has been determined by decisions of this Court."); 2 COLLIER (14th ed.), *supra*, ¶ 23.04[2], at 455-56 (stating that "[t]hese general principles regarding the summary jurisdiction of the bankruptcy court have been affirmed and reaffirmed in a chain of decisions beginning with *White v. Schloerb* [178 U.S. 542 (1900)] and extending down to the present date").

As part of its 1898 Act jurisprudence defining the scope of non-Article III referees' adjudicatory powers, this Court held in *MacDonald v. Plymouth Cnty. Trust Co.*, 286 U.S. 263, 267 (1932), that a plenary suit—otherwise triable only in an Article III district court—could be adjudicated by a non-Article III referee with the parties' consent. By expressly analogizing to the ability to waive one's constitutional right to a jury trial (and expressly distinguishing non-waivable structural limitations such as subject matter jurisdiction), this Court acknowledged the waivable nature of litigants' constitutional right to final judgment from an Article III judge in plenary matters, *see id.* at 267, citing *Patton v. United States*, 281 U.S. 276 (1930), a case decided on constitutional grounds. The Court's holding, therefore, relied on the premise that the right to adjudication of plenary proceedings in an Article III district court is an individual right, waivable by the parties.

The Court later cited *MacDonald* in cases acknowledging the referee's jurisdiction to decide plenary matters among consenting litigants. *See, e.g.*, *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269, 272 (1932) (citing *MacDonald* and holding that "the referee is a court [according to the 1898 Act] and that, respondent's predecessor having consented to litigate the issues . . . and answer before the referee, the latter had jurisdiction to decide the issues"); *Cline v. Kaplan*, 323 U.S. 97, 99 (1944) (citing *MacDonald* for the proposition that the bankruptcy court lacks jurisdiction over a plenary claim "unless the claimant consents to its adjudication in the bankruptcy court").

Petitioner attempts to minimize *MacDonald* as merely "decided on statutory grounds." Pet. Br. 31 n.3 (internal quotation marks omitted). However, as was true of the entirety of this Court's 1898 Act jurisprudence demarcating the limits of referee's adjudicatory powers, *nowhere* did the statute specify comprehensively what referees could (or could not) adjudicate with (or without) litigant consent.[2] The statute expressly authorized referees to exercise the same "jurisdiction to ... perform such duties as are by this Act conferred on courts of bankruptcy," 1898 Act § 38, *without* any further distinction (provided solely by this Court) between summary and plenary proceedings. As the lower courts recognized, *MacDonald* was not merely a statutory construction decision interpreting the consent provision of 1898 Act § 23b. *See, e.g.*, *Morrison v. Rocco Ferrera & Co.*, 554 F.2d 290, 296-97 (6th Cir. 1977) (concluding that *MacDonald* permitted a referee to finally adjudicate a plenary suit with litigant consent in Chapter X bankruptcy cases in which Section 23b was entirely inapplicable). Rather, *MacDonald* was simply another in the long line of this Court's decisions crafting prudential limitations on the adjudicatory powers of non-Article III referees.

Moreover, "a mere act of Congress cannot amend the Constitution." *Brown v. Walker*, 161 U.S. 591, 619 (1896). Petitioner's attempt to distinguish *MacDonald*, therefore, also implausibly suggests that this Court turned a blind eye to the structural

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[2] The Court's discussion of Section 23b's consent provision, *MacDonald*, 286 U.S. at 265-68, spoke solely to federal subject-matter jurisdiction, which in *MacDonald* was *not* dependent upon "consent of the defendant" at all because *MacDonald* involved a suit under Section 60b. *Id.* at 265-66.

constraints of Article III when it explicitly stated that it could "perceive *no reason* why the privilege of claiming the benefits of the procedure in a plenary suit, secured to suitors under § 60b and § 23b, may not be waived by consent, as any other procedural privilege of the suitor may be waived." 286 U.S. at 267 (emphasis added).

In making that statement, the *MacDonald* Court cited the case of *Chicago, Burlington & Quincy Ry. Co. v. Willard*, and its extensive discussion of the principle that restrictions on federal courts' subject matter jurisdiction "cannot be waived, and the want of it will be error at any stage of the cause," including on appeal, "and cannot be overlooked by the court, even if the parties ... consent that it may be waived." 220 U.S. 413, 419-21 (1911) (quoting *Ayers v. Watson*, 113 U.S. 594, 598 (1885), and *Thomas v. Ohio State Univ.*, 195 U.S. 207, 211 (1904)). That principle, of course, is founded in the structural constitutional guarantees of Article III. *See CFTC v. Schor*, 478 U.S. 833, 850-51 (1986). By expressly dismissing the applicability of such concerns in *MacDonald*, therefore, the Court did not ignore its obligation to police litigant dilution of structural constitutional constraints, as Petitioner suggests. Rather, the Court acknowledged that such structural constitutional concerns simply were not implicated by litigant consent to a non-Article III referee's adjudication of a plenary suit.

II. In *Marathon* And Later Cases, This Court Has Continued To Permit Non-Article III Adjudication With Litigant Consent

A. The Constitutional Right To Final Judgment From An Article III Court In The Absence Of Litigant Consent

Contrary to Petitioner's attempt to brush aside this Court's extensive 1898 Act jurisprudence as mere statutory interpretation, this Court has repeatedly treated those cases as Article III precedent.

In *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982), the non-Article III bankruptcy court had entered final judgment in a suit to recover damages brought by the representative of a bankruptcy estate. The Court found this to be unconstitutional because there must be some "limiting principle" for determining the extent to which "Congress may create courts free of Article III's requirements." *Id.* at 73 (Brennan, J., plurality opinion).

The *Marathon* holding maintains the traditional historical understanding of the kinds of plenary suits requiring adjudication by an Article III court.

> [T]he Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority

> of Congress subject to the general prescriptions of Art. III.

Id. at 70.

The *Marathon* Court, though, could "discern no such exceptional grant of power applicable in the case[] before" the Court, *id.* at 71, which was precisely of the kind consistently recognized as requiring a plenary suit against an adverse claimant since well before the Founding. See *id.* at 90 (Rehnquist, J., concurring) (reasoning that "the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional [plenary] actions at common law tried by the courts at Westminster in 1789"). *See generally* Brubaker, *supra*, 86 AM. BANKR. L.J. at 122-32, 152. And such a plenary suit, absent consent of the litigants, had *never* been entrusted to final adjudication by a non-Article III judicial officer prior to the 1978 statute that *Marathon* struck down.

In *Granfinanciera, SA v. Nordberg*, 492 U.S. 33 (1989), the Court relied directly on the 1898 Act cases and the summary/plenary distinction to determine that a defendant in a fraudulent conveyance action was constitutionally entitled to an Article III court and a jury trial. The Court reasoned that "if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature." *Id.* at 54. Citing *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932), the Court explained that fraudulent conveyance "actions brought by a trustee in

bankruptcy were deemed separate, plenary suits to which the Seventh Amendment applied." *Granfinanciera*, 492 U.S. at 50. The Court also relied on *Katchen v. Landy*, which held that litigants had no Seventh Amendment rights in summary proceedings. 382 U.S. at 336-40. Acknowledging that Congress has now statutorily abolished the "distinction between plenary and summary proceedings, on which the Court relied in *Schoenthal* and *Katchen*," the Court in *Granfinanciera* invoked the constitutional implications of that long-standing historical distinction by holding that Congress could not even "purport[ ] to abolish jury trial rights in what were formerly plenary actions" "merely by relabeling the cause of action to which it attaches" and assigning jurisdiction to finally adjudicate that action to non-Article III bankruptcy judges. 492 U.S. at 60-61. *See id.* at 58 (stating that *Schoenthal* and *Katchen* did not "rest[] on an accident of statutory history").

Most recently, in *Stern*, this Court re-affirmed the constitutional significance of the summary/plenary distinction when it concluded that the nature of the damages action brought by the estate representative in that case was "the very type of claim that [the Court] held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court"—i.e., a traditionally-plenary suit "that simply attempts to augment the bankruptcy estate." 131 S. Ct. at 2616.

B. In Cases Where Litigants Consent, Structural Concerns Are Assessed By A Pragmatic Functional Analysis

Petitioner would have this Court believe that the constitutional right to final judgment from an Article III judge, recognized in *Marathon*, *Granfinanciera*, and *Stern*, is solely in service of structural protections that cannot be waived by litigants. As this Court has emphasized, however, "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect *primarily* personal, rather than structural interests," and "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." *Schor*, 478 U.S. at 848-49 (emphasis added).

Significantly, in *none* of the Court's bankruptcy cases holding that the traditionally-plenary action at issue must be adjudicated by an Article III court—*Marathon*, *Granfinanciera*, *Stern*—did the litigants *consent* to final adjudication by a non-Article III bankruptcy court. In the absence of consent, this Court's formal, categorical approach to the constitutional right makes sense in order to preserve inviolate the individual litigants' personal right to final adjudication of a traditionally-plenary suit by an independent Article III court.

The Court's holdings in those cases, particularly *Marathon*, went to great lengths to emphasize the

absence of litigant consent. The plurality opinion in *Marathon*, in describing the limits on the summary jurisdiction of 1898 Act referees that the 1978 statute had unconstitutionally exceeded, *twice* noted that *with consent* referees could finally adjudicate suits that otherwise (absent litigant consent) had to be tried in an Article III trial court, citing the *MacDonald* case. 458 U.S. at 53, 79-80 n.31. Justice Rehnquist's concurrence highlighted Marathon's objection to the bankruptcy court deciding the action at issue as a determinative feature in the unconstitutionality of the bankruptcy court's judgment. *Id.* at 89, 91 (Rehnquist, J., concurring). And the dissents of both Chief Justice Burger (describing the holding of the Court), *id.* at 92, and Justice White, *id.* at 95, also indicated their understanding that consent of the litigants to final adjudication in a non-Article III bankruptcy court would cure any unconstitutionality under the Court's holding, "just as" was the case "before the 1978 Act was adopted." *Id.* Likewise, the *Stern* Court emphasized that "Pierce did not truly consent to the resolution of Vickie's claim in the bankruptcy court proceedings." 131 S. Ct. at 2614.

By contrast, where the parties *have* effectively consented to a non-Article III adjudication, "consent significantly changes the constitutional analysis." *Peretz v. United States*, 501 U.S. 923, 932 (1991). *See Schor*, 478 U.S. at 849 (emphasizing that "Schor indisputably waived any right he may have possessed to full trial" of the claim at issue "before an Article III court"); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589-92 (1985) (noting

the importance of consent in the agency adjudication process at issue).

Consent removes any concern for the litigants' personal right to an Article III adjudication, and thus, only Article III's structural guarantees are at stake. To the extent the consensual adjudication at issue implicates such structural concerns (e.g., through potential inter-branch incursions), this Court has conducted a pragmatic, functional assessment that is responsive to the structural values furthered by Article III. In doing so, this Court has focused upon substance rather than form, examining whether the non-Article III adjudication at issue truly poses a threat to separation of powers and the integrity of the judicial branch.

In *Thomas*, the Court held that Article III did not bar the adjudication of claims related to a voluntary pesticide-registration program through binding non-Article III arbitration. 473 U.S. at 587. "In assessing the degree of involvement required by Article III," the Court explained that "practical attention to substance" should "inform application of Article III." *Id.* In particular, the Court listed potential considerations such as "the origin of the right at issue" and Congress's reasons for the forum selection. *Id.* It explained that applying Article III simplistically would "throw[] into doubt" many "quasi-adjudicative activities carried on by administrative agencies." *Id.* And in *Schor*, 478 U.S. at 851, in upholding a consensual agency adjudication, this Court "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the [non-Article III adjudication] will have on

the constitutionally assigned role of the federal judiciary."

Most significantly, though, in *Peretz*, 501 U.S. at 937-39, after reviewing the relevant features of the Federal Magistrates Act, this Court was "convinced that no such structural protections are implicated by the [consensual] procedure" at issue.

C. Structural And Functional Considerations Point To Permitting Bankruptcy Judges To Adjudicate *Stern* Claims With Litigant Consent

Where litigants consent to the bankruptcy court's jurisdiction over their *Stern* claim, this Court's precedent permits adjudication by the bankruptcy judge because structural concerns are not implicated and the functional consequences of forcing litigants into district court are significant. A comparison with magistrate adjudications and their compatibility with Article III underscores these points.

In the magistrate context, the Court wanted to ensure the preservation of "a litigant's right to insist on trial before an Article III . . . judge insulated from interference with his obligation to ignore everything but the merits of a case." *Roell v. Withrow*, 538 U.S. 580, 588 (2003). Where litigants had consented, though, the Court concluded that structural constitutional considerations were obviated by the fact that magistrates were fully within the control of Article III judges, who were "waiting in the wings, fully able to correct errors." *Peretz*, 501 U.S. at 938 (quoting *United States v. Raddatz*, 447 U.S. 667, 685-86 (1980)).

Similarly, the Court's structural concerns are allayed when litigants consent to final adjudication of *Stern* claims by a bankruptcy court. In fact, precisely the same relevant structural protections attendant to consensual magistrate adjudications are also present in the bankruptcy context: Article III judges have full discretionary powers of referral and withdrawal, handle all appointments and removals of bankruptcy judges, and can review any decision consistent with the appellate procedures that are available. "[T]o the extent that 'de novo review is required to satisfy Article III concerns'" for *Stern* claims, "'it need not be exercised unless requested by the parties.'" *Peretz*, 501 U.S. at 939 (quoting *United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir. 1985) (Kennedy, J.)).

"Because 'the entire process takes place under the district court's total control and jurisdiction,' there is no danger . . . 'of emasculating' constitutional courts." *Peretz*, 501 U.S. at 937 (quoting *Raddatz*, 447 U.S. at 681, and *Schor*, 478 U.S. at 850). Consequently, "no such structural protections are implicated" by bankruptcy courts' adjudication of *Stern* claims with litigant consent. *Peretz*, 501 U.S. at 937.

In *Peretz* and *Roell*, the Court also identified numerous functional advantages flowing from magistrate adjudications: the need to "relieve the district courts' 'mounting queue of civil cases' and thereby 'improve access to the courts for all groups,'" *Roell*, 538 U.S. at 588, "[to] check[] the risk of gamesmanship," *id.* at 590, to pursue "judicial efficiency," *id.*; *Peretz*, 501 U.S. at 929, 934, to maximize the compatibility of the process employed

with "the mix of congressional objectives," *Roell*, 538 U.S. at 589, to minimize the risk of secondary litigation, *id.* at 591 n.7, and to facilitate exploration of "constructive experiments that are acceptable to all participants," *Peretz*, 501 U.S. at 933, 934. Although this Court confirmed in *Marathon*, *Granfinanciera* and *Stern* that such concerns cannot justify forcing litigants to resolve traditionally-plenary suits in bankruptcy court, it has understood that such concerns are compelling in cases involving consenting litigants. As described in Part V, *infra*, the functional consequences of barring consenting litigants from the bankruptcy court would be significant. Accordingly, this Court's precedent points decidedly toward permitting bankruptcy court adjudications of *Stern* claims with litigant consent.

D. The Consequences Of A Categorical Article III Bar To Bankruptcy Court Adjudication By Consenting Litigants

If the Court finds that Article III bars consenting litigants from submitting traditionally-plenary suits to the jurisdiction of the bankruptcy court, severe repercussions will extend well beyond bankruptcy litigation. Bankruptcy Appellate Panels and Section 157(c)(2), which authorizes bankruptcy judges to finally adjudicate a non-core proceeding "with consent of all the parties," will be rendered unconstitutional. And, if Section 157(c)(2) is unconstitutional, then so too is Section 636, the consent provision of the Federal Magistrates Act. *See* 1 COLLIER ON BANKRUPTCY ¶ 3.03[4], at 3-54 (16th ed. 2013) ("The inspiration for 28 U.S.C. § 157(c)(2) is 28 U.S.C. § 636(c)(1), which deals with

the powers of United States magistrate judges in like situations.").

Finding Section 157(c)(2) unconstitutional on Article III grounds—inevitable under Petitioner's position—would be inconsistent with *Stern*, in which this Court explicitly *rejected* the notion that the constitutional right to final judgment from an Article III judge in a traditionally-plenary suit is a non-waivable structural right. Citing the litigant consent provision in Section 157(c)(2), *Stern* recognized that *nothing* in Section 157's allocation of adjudicatory authority as between the district court and the bankruptcy court is "jurisdictional" in the sense of codifying nonwaivable limitations such as subject-matter jurisdiction. 131 S. Ct. at 2607.

Through Section 157 (enacted in response to *Marathon*), Congress sought to codify Article III's constitutional limitations on bankruptcy judges' adjudicatory powers. If those limitations are nonwaivable (as Petitioner argues), that would have to be attributable to the kinds of nonwaivable structural constraints that surround subject matter jurisdiction. *See Schor*, 478 U.S. at 850-51 (stating that "[t]o the extent that this [Article III] structural principle *is* implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction" (emphasis added)). This Court in *Stern*, however, explained that Section 157, by its nature, codifies *waivable* rights. *See* 131 S. Ct. at 2607. Like the *MacDonald* Court, then, the *Stern* Court expressly acknowledged that structural constitutional concerns simply are *not* implicated by

litigant consent to adjudication of a traditionally-plenary suit by a non-Article III bankruptcy court.

A determination that bankruptcy judges cannot issue final judgments in certain matters even upon the consent of the parties would also jeopardize the constitutionality of the Bankruptcy Appellate Panels ("BAPs"), three-judge panels of bankruptcy judges that, with consent of all parties, hear bankruptcy appeals in the First, Sixth, Eighth, Ninth, and Tenth Circuits. The purpose of BAPs is to reduce delay and cost to the parties, and they exist as an alternative to appeals to the district courts. See 28 U.S.C. § 158(b)(1). Removing the jurisdiction of the BAPs would necessarily push hundreds of the BAP cases onto district court dockets in the five circuits where BAPs have been established.

Likewise, if litigant consent does not permit opting out of Article III adjudication, Section 636(c)(1)'s broad grant of authority to magistrate judges, pursuant to litigant consent, would logically be unconstitutional. *See* 28 U.S.C § 636(c)(1) (permitting magistrates to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case"). After all, the relevant structural protections surrounding Section 636 are equally present in bankruptcy: extensive oversight by an Article III judge, both in terms of appellate review and the ability to reacquire the case if necessary. Petitioner's position would even call into doubt the constitutionality of the Federal Arbitration Act. *See, e.g.*, Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189 (2008).

Petitioner would, no doubt, attempt to distinguish Sections 157(c)(2) and 636(c)(1) on the ground that they contain explicit consent provisions authorized by Congress. However, for the reasons explained in Part III below, this is an untenable distinction. Congress cannot authorize by statute that which Article III forbids. Try as it might, there is no way for Petitioner to escape the consequence that its proposed ruling would yield broader doctrinal repercussions that would significantly impair the day-to-day functioning of the federal courts.

III. Litigant Consent Need Not Be Explicitly Authorized By Congress

Petitioner's alternate argument is that Article III may permit *Stern* claims to be resolved by the bankruptcy court with litigant consent, but only with explicit statutory authorization. However, this view is inconsistent with this Court's prior decisions permitting litigant consent to a non-Article III forum without statutory authorization by Congress.

This Court has approved a number of non-Article III adjudications-by-consent with no statutory authorization whatsoever. *See Heckers*, 69 U.S. at 128 (upheld over the specific objection that "there is no act of Congress which confers any such authority" because "Federal Courts[] have authority to make and establish all necessary rules for the orderly conducting [of] business in the said courts"); *Kimberly*, 129 U.S. at 524-25 ("it has always been within the power of a court of chancery with the consent of parties, to order such a reference," which "power is incident to all courts of superior

jurisdiction"); *Newcomb*, 97 U.S. at 583 ("[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration"). Most significantly, this Court's *MacDonald* decision, discussed above, addressed precisely the issue that Petitioner's alternative argument raises and directly contradicts Petitioner's position.

MacDonald was decided against the backdrop of (1) an overly broad statutory grant to non-Article III referees of "jurisdiction to . . . perform such of the duties as are by this Act conferred on courts of bankruptcy," 1898 Act § 38, (2) this Court's decision in *Weidhorn v. Levy* that, despite that broad all-inclusive jurisdictional grant, referees could *not* adjudicate a plenary suit, and (3) no explicit grant of statutory authority for referees to adjudicate plenary suits with litigant consent. Regarding plenary suits, therefore, referees' jurisdictional grant under the 1898 Act was overly broad in precisely the same manner that this Court held Section 157(b)(2)(C) to be unconstitutionally overbroad in *Stern* and that the Ninth Circuit below held Section 157(b)(2)(H) to be unconstitutionally overbroad. While Petitioner suggests that the absence of any explicit statutory authorization for bankruptcy judges to finally adjudicate such *Stern* claims with litigant consent is a bar thereto, the *MacDonald* Court held that referees *could* finally adjudicate plenary suits with litigant consent in the face of precisely the same supposed "statutory gap" that Petitioner decries. *See MacDonald*, 286 U.S. at 264-68.

Additionally, in cases involving non-consenting parties defending against plenary actions by the bankruptcy trustee, this Court acknowledged that

litigants could consent to the bankruptcy court's jurisdiction, despite the absence of any explicit statutory authorization. *See Tabuel-Scott-Kitzmiller Co., Inc. v. Fox*, 264 U.S. 426, 433-34, 438 (1924) ("[I]n no case where it lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (*without consent*) adjudicate in a summary proceeding the validity of a substantial adverse claim[]") (emphasis added); *Harrison v. Chamberlin*, 271 U.S. 191, 193 (1926) ("[A] court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant.").

In enacting Section 157 in response to *Marathon*, Congress sought to give bankruptcy judges as much adjudicatory authority as is constitutionally permissible. While Congress misjudged the location of the constitutional line regarding *Stern* claims, that does not mean that Congress would want to deny bankruptcy judges the authority to finally adjudicate *Stern* claims with litigant consent where Article III permits it. Indeed, Congress's unrestricted grant to bankruptcy judges of final-judgment jurisdiction over *Stern* claims suggests that the opposite presumption is appropriate, as the holding of *MacDonald* also confirms.

Section 157(c)(2) reflects Congress's intent that in any proceeding in which the parties have a constitutional right to final judgment from an Article III judge, bankruptcy judges should have the authority to finally adjudicate that proceeding with the parties' consent. The entire purpose and function of the non-core category to which Section

157(c)(2) applies is to capture those proceedings in which the parties have a constitutional right to final judgment from an Article III judge. To deny this authority to bankruptcy judges for *Stern* claims simply because Congress may have misread this Court's guidance in *Marathon* would affirmatively frustrate Congress's intent. *Cf. Roell*, 538 U.S. at 586-91 (implied consent sufficed for a magistrate adjudication, despite lack of explicit statutory authorization, because of "textual clues . . . complemented by a good pragmatic reason to think that Congress intended to permit implied consent"). And the same is true of the other supposed "statutory gap" into which (Petitioner asserts) *Stern* claims purportedly fall.

IV. The Current Bankruptcy Structure Allows Bankruptcy Judges To Enter Appropriate Findings On *Stern* Claims

The text of Section 157 demonstrates that bankruptcy courts may issue proposed findings of fact and conclusions of law in *Stern* proceedings. Although *Stern* removed bankruptcy judges' power to enter final judgment in those core proceedings which "simply attempt[] to augment the bankruptcy estate," *see* 131 S. Ct. at 2616, the general statutory authorization to "hear and determine" core claims, 28 U.S.C. § 157(b)(1), includes the lesser power to issue proposed findings of fact and conclusions of law.

By removing bankruptcy judges' power to enter final judgment in certain core proceedings, *Stern* effectively invalidated a portion of the authorization in Section 157(b)(1) to finally "determine" a so-called

Stern claim, but the balance of that statutory provision remains fully applicable:

> Bankruptcy judges may *hear and determine* . . . all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments . . . .

28 U.S.C. § 157(b)(1) (emphasis added). "Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (internal quotation marks and citation omitted).

Section 157(b)(1)'s general—and uncontested—authorization for a bankruptcy judge to "hear" a core proceeding must be read in light of Section 157(c)(1), which likewise contains a general authorization for bankruptcy judges to "hear" non-core proceedings. Section 157(c)(1) also specifies (in its second sentence) that included within the general authorization to "hear" the proceeding is the more specific direction to "submit proposed findings of fact and conclusions of law to the district court." If submission of proposed findings and conclusions is a component part of "hearing" a proceeding under Section 157(c)(1), then it is also a component part of "hearing" a *Stern* proceeding under Section 157(b)(1).

Alternatively, even if Section 157(c)(2)'s specific authorization of proposed findings and conclusions is necessary because that step is *not* subsumed within the "hearing" of a proceeding, then the second sentence is simply allocating the greater power to "determine" the proceeding as between the

bankruptcy court and the district court in a manner that reserves the ultimate "determination" by entry of a final order to the district court. In that case, when Sections 157(b)(1) and (c)(1) are read in conjunction, it becomes apparent that the lesser power to "submit proposed findings of fact and conclusions of law" is subsumed within the greater power to "determine" a proceeding, which is expressly granted to bankruptcy judges in *Stern* proceedings by Section 157(b)(1). *Stern* did *not* invalidate any lesser powers contained within the power to "hear and determine" a core proceeding and "enter appropriate orders" therein.

Petitioner's all-or-nothing argument would not merely limit the jurisdiction of the bankruptcy judge, but would also encroach upon the authority granted by Section 157 to the Article III district court. To comply with *Marathon*, Congress sought to make bankruptcy courts more adjunct-like, in part, by giving district courts full discretion to refer (or not refer) any bankruptcy proceeding to the bankruptcy court and also to withdraw reference of that proceeding, "in whole or in part," at any time, even *sua sponte*. *See* 28 U.S.C. § 157(a), (d). The district court's greater power to withdraw the reference "in whole" expressly includes the lesser power to withdraw a proceeding only "in part" by, for example, requesting provisional findings and conclusions from the bankruptcy court for *de novo* review before entry of a final judgment.

Such actions happen every day – both with bankruptcy judges and magistrate judges. Any Article III concerns are satisfied by the fact that the proposed findings (like those of a special master) are just that – *proposed*. An Article III judge acting

independently must decide what judgment should be entered.

V. Petitioner's Rule Would Significantly Impair The Bankruptcy System

The practical consequences of Petitioner's position is that litigants cannot consent to final adjudication of fraudulent transfer claims, or other *Stern* claims, in bankruptcy court, and that bankruptcy judges cannot even submit proposed findings of fact and conclusions of law on such claims. The fallout would be—in the words of one bankruptcy judge—"pretty horrific." Jolene Tanner, *Stern v. Marshall: The Earthquake That Hit The Bankruptcy Courts And The Aftershocks That Followed*, 45 LOY. L.A. L. REV. 587, 608 (2012) (citing interview with Judge Sheri Bluebond). Fraudulent conveyance and other avoidance claims are an integral part of almost every bankruptcy case. Placing them beyond the jurisdiction of bankruptcy courts would result in having one portion of the bankruptcy litigated in the bankruptcy court and another (often significant) portion in the district court. Some findings in both contexts, such as insolvency, overlap. A guiding purpose of modern procedure, reflected in at least nine federal rules (*see* Fed. R. Civ. Proc. 13-14 & 18-24), is to encourage (if not mandate) parties to resolve all of their disputes at one time. Petitioner's rule would yield a fragmented approach, with similar claims tried by different courts on different timetables, with no hope of consistency in adjudication.

As a result of the backlog of cases in the district courts (and particularly the priority that criminal matters constitutionally command), matters

withdrawn by district courts invariably take longer to resolve. According to the Federal Judicial Center ("FJC"), district courts averaged 12.7 months to decide civil cases before trial and 23.4 months to decide cases that go to trial. 2012 Annual Report, Administrative Office of the United States Courts, at www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx ("Judicial Business"). Given that companies in Chapter 11 bankruptcy are often a "melting ice cube," the pace of a civil case in the district courts is far too slow.

At the end of 2012, there were over 70,000 adversary proceedings pending in bankruptcy courts across the country—many of which are likely to be fraudulent transfer or other potential *Stern* claims that would have to be shifted to the district courts under Petitioner's rule. Judicial Business, Table F-8. There are approximately 334 bankruptcy judges and 611 district court judges. If those 334 bankruptcy judges each lost a significant portion of their workload, it would quickly overwhelm the district judges. Indeed, for every civil case filed in 2012, there were almost *five* new bankruptcy cases. Judicial Business, Caseload Highlights. The impact of these new cases on the district courts will be particularly hard as they are now feeling the effects of sequestration and other budgetary constraints, with their concomitant cuts of court budgets and staff.

Unfortunately, the district courts that are already in a judicial emergency will be the hardest hit by such a decision. For example, the Eastern District of California is already swamped, with 1,132 cases per judgeship, nearly twice the 600 cases that the FJC considers to create a judicial

emergency. The bankruptcy court in that district is also one of the Nation's busiest, with over a thousand businesses filing for bankruptcy in 2012. Judicial Business, Report F-5A. Commercial filings are complex and likely to result in fraudulent conveyance and other *Stern* claims—which would have to be decided by the district court under Petitioner's broad reading of *Stern*. For example, the bankruptcy of the Lyondell Chemical Company (No. 09-01037, Bankr. S.D.N.Y) spawned more than 600 adversary actions, many of which would have to be resolved in the district court under Petitioner's reading of *Stern*. The District of Delaware has even more cases per judgeship (1,165), and faces about a thousand commercial bankruptcy cases each year. Judicial Business, Report F-5A. The Central District of California is likewise in a judicial emergency, and had more than 3,500 commercial bankruptcies filed in 2012. *Id.* Those district court judges would have to shoulder many of those additional cases. Other districts, such as the Southern District of New York and the Northern District of Georgia, would be pushed into judicial emergencies by the new caseload attendant to an expansion of *Stern*.

In addition to the complex commercial cases, tens of thousands of (the million-plus) cases filed by individuals each year involve significant assets. Many of those cases also involve fraudulent transfer actions that would necessarily require the attention of district courts.

The elimination of the BAPs as unconstitutional, which would be required under Petitioner's

argument, would further exacerbate the strain on the district courts.

In the end, where the parties are willing to have their disputes heard by bankruptcy judges, an "unnecessary extension" of *Stern* "would be an inefficient use of judicial resources by overburdening the district court and foregoing the services of a bankruptcy court ready, willing and able to do its job." *Heller v. Arnold & Porter (In re Heller)*, No. 08-32514, Adv. No. 10-3203, 2011 WL 4542512, *1 (Bankr. N.D. Cal., Sept. 28, 2011). Petitioner's proposal would prevent parties from consenting to have their *Stern* disputes settled by bankruptcy judges, creating unnecessary delay and cost for the entire system.

CONCLUSION

For these reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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