Brooklyn Law Review

Volume 78 | Issue 3 Article 5

2013

"Why the Fuss?": *Stern v. Marshall* and the Supreme Court's Understanding of Bankruptcy Court Jurisdiction

Joshua C. Gerber

NOTES

"Why the Fuss?"

STERN V. MARSHALL AND THE SUPREME COURT'S UNDERSTANDING OF BANKRUPTCY COURT JURISDICTION

Estragon: Let's go.
Vladimir: We can't.
Estragon: We're waiting for Godot.
Vladimir: Ah![1]

INTRODUCTION

In the 1982 landmark case, *Northern Pipeline v. Marathon*, the Supreme Court ruled that the broad jurisdiction granted to bankruptcy courts under the Bankruptcy Reform Act of 1978 was unconstitutional.[2] The Court ruled that Congress could not confer such broad jurisdiction on a non-Article III court because bankruptcy judges lack the life tenure and guaranteed salary that the Constitution requires of judges who exercise the judicial power of the United States.[3] The ruling was significant because it marked the first time the Supreme Court had checked Congress's power to create a non-Article III tribunal. In 1984, Congress responded by narrowing the scope of bankruptcy court jurisdiction. The bankruptcy community was dubious that the changes had solved the constitutional problems.[4] In the ensuing years, like Samuel Beckett's characters Estragon and Vladimir, bankruptcy attorneys waited for the Supreme Court to revisit

---

[1] SAMUEL BECKETT, WAITING FOR GODOT 10 (Grove Press 1954).
[2] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70-71 (1982).
[3] U.S. CONST. art. III, § 1.
[4] *See* Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 BANKR. L. LETTER No. 8, Aug. 2011, at 1-16.

the issue.[5] At the beginning of each Supreme Court session, members of the bankruptcy community predicted that *this* would be the year when the Court would finally address the constitutionality of the bankruptcy system.[6] Finally, after twenty-seven years of silence, the bankruptcy equivalent of Godot arrived in the most unlikely form—a probate dispute between a former Playboy model turned reality television star and her significantly older stepson, which ultimately was resolved by the Supreme Court.

In June of 2011, the Supreme Court reexamined the constitutionality of bankruptcy court jurisdiction in *Stern v. Marshall*.[7] The Court once again narrowed the scope of bankruptcy court jurisdiction and ruled that a bankruptcy court could not enter a final judgment on a counterclaim brought by Vickie Lynn Marshall—who was better known by her stage name, Anna Nicole Smith—against Pierce Marshall, the son of Vickie's deceased husband.[8] Anticipating the concern that *Stern* would cause in the bankruptcy community, Chief Justice Roberts repeatedly emphasized the narrowness of the Court's holding.[9] In the closing paragraphs of the majority opinion, the Chief Justice asked, "If our decision today does not change all that much, then why the fuss?"[10]

This note attempts to answer that question. Indeed, this note's thesis is that *Stern* does not, in fact, "change all that much," but rather reflects the fact the Supreme Court is much "fussier" about policing the contours of bankruptcy court jurisdiction than it is about policing the jurisdiction of other non-Article III tribunals. This note argues that the Supreme Court applies a separate, stricter, and more formal interpretation of Article III when scrutinizing the boundaries of bankruptcy court jurisdiction than it applies when performing the same kind of analysis with respect to other non-Article III adjudicative bodies. Part I of this note traces the development of the Supreme Court's Article III jurisprudence with respect to the evolving scope of bankruptcy court jurisdiction. Part I reveals that, when confronted with challenges to the jurisdiction of non-Article III courts, the Supreme Court has historically taken a pragmatic

---

[5] ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 803, 811 (6th ed. 2009).

[6] *Id.* at 811.

[7] Stern v. Marshall, 131 S. Ct. 2594, 2600 (2011).

[8] *Id.*

[9] *Id.* at 2620.

[10] *Id.*

approach—except in cases dealing with the judicial power of bankruptcy courts. Part II discusses the background, procedural history, and holding of *Stern*. Part III argues that the Court's literal application of Article III in *Stern v. Marshall* reflects the analytical framework by which the Supreme Court has and will continue to assess the constitutionality of bankruptcy court jurisdiction, even as the Court continues to apply a more pragmatic approach in cases involving other types of non-Article III tribunals. Additionally, Part III attempts to explain why the Court has adopted this analytical framework exclusively in the bankruptcy court context. Part IV suggests that, despite the Court's inclination to cabin the judicial power of bankruptcy courts, the holding of *Stern* is narrow. To demonstrate the likely limited impact of *Stern* on bankruptcy courts' power to efficiently restructure debtor-creditor relations, Part IV analyzes *Stern*'s effect on bankruptcy courts' authority to issue final judgments on fraudulent conveyance claims and on litigants' ability to consent to the jurisdiction of bankruptcy courts. Finally, this note concludes with recommendations for legislative enactments that could alter the Supreme Court's approach to bankruptcy court jurisdiction, making it more pragmatic and deferential.

I. THE SUPREME COURT'S INTERPRETATION OF ARTICLE III

A literal interpretation of Article III, Section 1 of the U.S. Constitution is impossible. Article III, Section 1, 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 behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.[11]

However, Article I, Section 8 of the Constitution provides that Congress has the power "[t]o constitute tribunals inferior to the Supreme Court . . . ."[12] A literal reading of Congress's Article I, Section 8 power to create inferior tribunals in conjunction with Article III's requirements suggests that all judges vested with the judicial power of the United States must enjoy life tenure and a guaranteed salary. If this requirement were enforced, the multitude of Article I adjudicators now in existence would be

---

[11] U.S. CONST. art. III, § 1.

[12] *Id.* art. I, § 8, cl. 9.

out of work—including, for example, magistrate judges and administrative law judges, not to mention bankruptcy judges. Therefore, the Supreme Court has repeatedly recognized that a literal interpretation of Article III is neither possible nor practical. Under what scholars have dubbed the "adjunct theory,"[13] the Court has routinely permitted Congress to create non-Article III courts to preside over matters that traditionally lie within the business of Article III judges.[14] This theory views non-Article III judges as merely "worker bees" who operate under the direct oversight of Article III judges.[15] In order to ease a perpetually overcrowded federal docket, the Court has in all but two instances—which both involved the authority of bankruptcy courts—adopted a pragmatic and flexible approach in analyzing the requirements of Article III.

This section will trace the development of the Court's application of Article III to congressionally created adjudicative bodies. At first glance, the Court's choice of factors to consider in determining whether a non-Article III judge may adjudicate a certain type of claim appears *ad hoc*. As Justice Scalia observed in his concurrence in *Stern v. Marshall*, these considerations seem "to have entered [the Court's] jurisprudence randomly."[16]

---

[13] Professor Fallon observed that there are two lines of Supreme Court cases that challenge a literal interpretation of Article III. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 921-26 (1988). The first line of cases involve what Fallon refers to as "so-called 'legislative courts'—adjudicative bodies created by Congress under Article I and not bound by Article III's guarantee that federal judges should enjoy life tenure and protection against reduction in salaries." *Id.* at 921. Fallon traces the origins of "legislative courts" to the nineteenth century case *American Insurance Co. v. Canter*, 26 U.S. 511, 545-46 (1828), in which Chief Justice Marshall "held that Congress may create non-Article III courts to adjudicate disputes in federal territories." Fallon, *supra*, at 922. The second line of cases, which derived from *Crowell v. Benson*, 45 F.2d 66, 67 (5th Cir. 1930), involves adjuncts and administrative agencies "established by Congress to administer [and adjudicate] statutory schemes of federal regulation." Fallon, *supra*, at 923. As Congress initially found constitutional authority to establish bankruptcy courts under the latter line of cases, *id.* at 928, this note will primarily focus on the interaction of adjunct courts and Article III. Practically speaking, however, the distinction between legislative courts and adjunct courts is insignificant. *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 201 (1983) (observing that, "[T]he differences between the two types of non-Article III bodies are, at least for constitutional purposes, superficial.").

[14] *See* Redish, *supra* note 13, at 198. "[S]ince early in the nation's history, the Supreme Court has recognized that Congress may, as an exercise of one or another of its enumerated powers, create courts whose judges do not receive the Article III salary and tenure protections." Such courts are commonly referred to as "Article I" or "legislative" courts. *Id.*

[15] LARRY W. YACKLE, FEDERAL COURTS 94 (3d ed. 2009) ("If [non-Article III courts] perform adjudicative duties *for* Article III courts, there is no serious conflict with Article III, and the separation of powers is preserved.").

[16] Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring).

However, the Court's seemingly scatter-shot approach to Article III jurisprudence appears less random and more coherent when viewed with an understanding that the Court scrutinizes the adjudicative authority of bankruptcy courts more closely than it does other non-Article III tribunals. The canonical cases demonstrate that the Court applies a bifurcated approach, whereby it rubber-stamps Congressional decisions to delegate adjudicative authority to non-Article III tribunals, except in cases involving the judicial power of bankruptcy judges.

A. Crowell v. Benson*: The Court Adopts a Pragmatic Approach to Article III*

The first major Supreme Court opinion of the modern era in which the Court employed a pragmatic, rather than literal, approach to Article III was *Crowell v. Benson*.[17] In *Crowell*, J.B. Knudsen, a longshoreman, was injured while working on a derrick barge owned by his employer, Charles Benson. The barge was moored in the Mobile River in Alabama.[18] Knudsen brought a claim against Benson under the 1927 Harbor Workers' Compensation Act.[19] Deputy Commissioner Crowell of the U.S. Employees' Compensation Commission adjudicated the claim, finding in favor of Knudsen and awarding him damages.[20] In the district court, Benson challenged the enforcement of the award on the ground that Knudsen was not acting within the scope of his employment at the time of his injury and that therefore the claim "was not within the jurisdiction of the Deputy Commissioner."[21] The district court ordered a hearing so that it could review *de novo* the determination of law made by the Deputy Commissioner.[22] Subsequently, the district court reversed the Deputy Commissioner's decision, vacating the award on the ground that Knudsen was not in the employ of Benson at the time of the injury.[23] The Circuit Court of Appeals affirmed, and the Supreme Court granted certiorari.[24]

---

[17] 285 U.S. 22, 56-58 (1932).
[18] Crowell v. Benson, 45 F.2d 66, 67 (5th Cir. 1930).
[19] *Crowell*, 285 U.S. at 36-37.
[20] *Id.*
[21] *Id.* at 37 (internal quotation marks omitted).
[22] *Id.*
[23] *Id.*
[24] *Id.*

The question confronting the Court was whether "Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of [a question of fact]."[25] Thus, the Court addressed whether a non-Article III federal tribunal could constitutionally adjudicate a federal claim between two private parties. The Court had a choice. First, the Court could adopt a literal interpretation of Article III, ruling that any federal adjudicative body that did not satisfy the literal requirements of Article III was unconstitutional. Alternatively, the Court could harmonize Articles I and III by adopting a practical interpretation of Article III. The Court chose the latter approach, ruling that administrative law courts are "instruments" of and subject to review by Article III courts.[26] The Court acknowledged the "utility and convenience of administrative agencies for the investigation and finding of facts within their proper province," but, notably, the Court considered the possibility that the power of non-Article III tribunals needed some limitations.[27] In order to strike the proper balance, the Court took its cue from the federal statute, which authorized only Article III courts to enforce an employee's claim for damages against his employer. The Court devised a compromise that made available to workers, such as Knudsen, expedited administrative review of their claims, while providing Article III courts the authority to supervise the decisions and enforce the awards of adjudicative bodies that Congress had provisionally vested with the judicial power of the United States.[28]

In balancing the complexities of the modern administrative state with the Court's obligation to adhere to Article III's explicit commands, the Court distinguished between the determination of questions of fact and questions of law made by administrative courts. The Court explained that "[t]here is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of

---

[25] *Id.* at 56.

[26] YACKLE, *supra* note 15, at 96.

[27] *Crowell*, 285 U.S. at 57.

[28] As Professor Judith Resnik observes, "In a Solominic move, the Court 'split the difference;' it upheld Congress' decision to place adjudicatory power in a non-Article III institution and yet simultaneously permitted the Article III judge's ruling to stand, and Benson, the employer, to prevail." Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 594 (1985).

fact in constitutional courts shall be made by judges."[29] The Court ruled that, upon review, the factual findings of administrative law judges "shall be final" so long as they are "supported by evidence and within the scope of [the judge's] authority,"[30] but Article III courts would conduct a *de novo* review of any determinations of law.[31]

B. United States v. Raddatz*: The Federal Magistrate System Affirmed*

Magistrate judges have been around in one form or another since the Judiciary Act of 1789.[32] They possessed only very limited authority, however, until Congress incrementally expanded it by enacting several pieces of legislation during the

---

[29] *Crowell*, 285 U.S. at 51.

[30] *Id.* at 46. ("[T]here can be no doubt that the act contemplates that as to questions of fact, airing with respect to injuries to employees within the purview of the act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specifically assigned to that task."); *see also* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1375 (1953) ("[T]he apparently solid thing about *Crowell* is the holding that administrative findings of non-constitutional and jurisdictional facts may be made conclusive upon the courts, if not infected with any error of law, as a basis for judicial enforcement of a money liability of one private person to another.").

[31] *Crowell*, 285 U.S. at 64. At Harvard Law School in the 1950s, Professor Henry Hart warned students in his Federal Courts class that, while reading *Crowell*, to not make the "simple mistake[]" of "concentrat[ing] on what [the Court] said Congress could *not* do." Hart, *supra* note 30, at 1374-75 (emphasis added). Professor Hart was referring to the perception that, post-*Crowell*, the Court had seemingly reduced administrative law judges to mere fact-finders whose declarations of law would not carry weight upon review in an Article III court. Rather, *Crowell* revealed that the Court was willing to take a pragmatic approach to Article III and not require Congress to adhere to its literal requirements. Since then, there has been a proliferation of administrative law judges throughout the federal system. As of the year 2000, the federal government employed nearly 1300 administrative law judges. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 367 (5th ed. 2003). *Crowell*'s legacy is evident in how Article III judges have come to rely on their Article I counterparts to keep a backlogged judicial system moving. Indeed, observing the impact of *Crowell*, Professor Fallon, notes,

> [T]he legal doctrine validating adjudication by administrative agencies establishes the impracticability of Article III literalism . . . . Anticipating the vital role of administrative adjudication, *Crowell* sought to preserve the role of the article III courts not by excluding agencies from adjudication altogether, but by requiring de novo review of the most important agency decisions in private cases.

Fallon, *supra* note 13, at 925.

[32] Judiciary Act of 1789, ch. 20, 1 stat. 73.

1960s and 1970s, culminating with the passage of the 1979 Federal Magistrates Act.[33] The Supreme Court upheld the constitutionality of the newly redesigned and more robust magistrate system in *United States v. Raddatz*, reasoning that Congress's approach "strikes the proper balance between the demands of due process and the constraints of Art. III."[34]

Raddatz was indicted for receiving a firearm in violation of a federal statute.[35] Before trial, Raddatz filed a motion to suppress certain inculpatory statements he made to federal officers.[36] The district court referred the motion to a magistrate.[37] After holding an evidentiary hearing, the magistrate recommended in his report and findings that the motion to suppress be denied.[38] On appeal, the district court reviewed *de novo* the record of the hearing and accepted the magistrate's recommendation.[39] Raddatz was found guilty and appealed from the district court judgment on the ground "that the review procedures established by § 636(b)(1) permitting the district court judge to make a *de novo* determination of contested credibility assessments without personally hearing the live testimony, violated . . . Art. III of the United States Constitution."[40] The Supreme Court disagreed, reasoning that although the district judge could choose to hold a *de novo* evidentiary hearing, Article III did not compel the district judge to "personally . . . hear the controverted testimony" so as "to make an independent evaluation of

---

[33] The Federal Magistrate Act of 1968 authorized magistrates "to serve as special masters, to provide 'assistance to district judges in the conduct of pretrial discovery proceedings in civil or criminal actions,' and to conduct 'preliminary review of motions for posttrial Relief[.]'" FALLON ET AL., *supra* note 31, at 404. Amendments enacted in 1976 expanded the authority of magistrate judges even further. *See* 28 U.S.C. § 636(b)(1)(A) (2006). Significantly, a magistrate judge's finding under § 636(b)(1)(A) is subject to review only under the highly deferential "clearly erroneous" standard. Moreover, an Article III judge may authorize a magistrate judge to "conduct hearings, including evidentiary hearings." *Id.* § 636(b)(1)(B). However, the magistrate judge may only make "proposed findings of fact" on such "dispositive" motions "with the presiding judge still required to make a 'de novo' determination of those findings to which objections is raised." FALLON ET AL., *supra* note 31, at 404. Under the 1979 Act, with the consent of the parties, magistrate judges could now "conduct any or all proceedings in a jury trial or nonjury civil matter and order the entry of judgment in the case, when specifically designated to exercise such jurisdiction by the district court." 28 U.S.C. § 636(c)(1). Losing parties could then appeal to the Circuit Court of Appeals. *Id.* § 636(c)(3).

[34] United States v. Raddatz, 447 U.S. 667, 683-84 (1980).

[35] *Id.* at 669.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 671-72.

[39] *Id.* at 672.

[40] *Id.* at 677. Raddatz also alleged a violation of the Due Process Clause of the Fifth Amendment, which the Court ultimately rejected. *Id.* at 680-81.

credibility."[41] The district judge had the discretion to determine how much "weight" to give the magistrate's "proposed findings of facts and recommendations."[42] Ultimately, the Court held that no Article III violation occurred because Raddatz's evidentiary hearing took place "under the district court's total control and jurisdiction."[43] Although magistrate judges have power to propose findings and recommendations on a broad variety of claims and motions, Congress had ensured that the presiding district court judge, as in *Crowell*, retained the final word on such decisions.[44]

C. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[45] the Supreme Court for the first time invalidated the adjudicative authority of a non-Article III federal tribunal. To understand the full significance of the Court's decision in *Northern Pipeline*, a brief detour through the history of the perpetually shifting contours of bankruptcy court jurisdiction is required.

1. The Origin of Bankruptcy Court Jurisdiction

Until the passage of the Bankruptcy Act of 1898 (the 1898 Act), except in the cases of a handful of responses to periodic financial panics that occurred during the nineteenth century, Congress did not make broad use of its Article I,

---

[41] *Id.* at 672-73.

[42] *Id.* at 683.

[43] *Id.* at 681-84 (Blackmun, J., concurring) ("Thus, although the statute permits the district court to give the magistrate's proposed findings of fact and recommendations 'such weight as [their] merit commands and the sound discretion of the judge warrants,' . . . that delegating does not violate Art. III so long as the ultimate decision is made by the court."). The fact that the district court retains the ultimate control is central to why the Court approved of the magistrate system. *See id.* at 684-86 ("[W]e confront a procedure under which Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.").

[44] *See id.* at 681 (upholding the 1976 amendments to the Federal Magistrates Act because the "[decision-making process of magistrates] takes place under the district court's total control and jurisdiction"). Congress heard *Crowell*'s holding loud and clear when it expanded the power of magistrate judges. According to Professor Resnik, "Congress . . . mimicked the *Crowell* dependency model (deputy commissioner as supervised by and reliant upon an Article III judge) when it authorized increased powers for magistrates." Resnik, *supra* note 28, at 596.

[45] *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

Section 8 power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[46] The 1898 Act designated the district courts as "courts of bankruptcy" and authorized them to appoint bankruptcy "referees" for six-year terms to preside over bankruptcy proceedings within each district.[47] Bankruptcy referees did not become known as "bankruptcy judges" until the Supreme Court promulgated the Rules of Bankruptcy Procedure in 1973.[48]

Under the 1898 Act, the scope of jurisdiction confided to bankruptcy referees was, according to Professors Warren and Westbrook, "arcane and confusing."[49] The 1898 Act distinguished between proceedings that fell within the "plenary jurisdiction" of the district court and those that fell within the "summary jurisdiction" of the bankruptcy court.[50] In this "convoluted, bifurcated scheme," actions that were within the court's "plenary jurisdiction" were ordinary civil actions that could only be adjudicated in an Article III district court, whereas actions within the court's "summary jurisdiction" were bankruptcy-related actions that the bankruptcy court had authority to hear and decide.[51] In essence, bankruptcy referees had authority to hear and enter final judgments in proceedings directly related to bankruptcy proceedings, in proceedings directly related to liquidating the debtor's property and distributing it to creditors, and, upon the consent of the parties, in proceedings involving nonbankruptcy claims that would otherwise fall within the plenary jurisdiction of the district court.[52]

In practice, however, the authority of bankruptcy referees was less clear than these labels might suggest, and bankruptcy court jurisdiction was persistently challenged by nondebtors, who sought to avoid litigating in bankruptcy courts by claiming that they had not truly consented to bankruptcy court jurisdiction or that their claims or the trustee's claims

---

[46] U.S. CONST. art. I, § 8. *See generally* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41. WM. & MARY L. REV. 743, 768 (2000) ("Bankruptcy would not become a permanent institution in this country until 1898."); Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, The Judicial Conference, and the Legislative Process*, 22 HARV. J. LEGIS. 1, 2-12 (1985); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6-32 (1995).

[47] Countryman, *supra* note 46, at 2-12.

[48] *Id.*

[49] WARREN & WESTBROOK, *supra* note 5, at 800.

[50] *See generally* Countryman, *supra* note 46, at 2-3.

[51] *Id.*

[52] *Id.* at 2-12. *See infra* Part IV.B for a discussion of the abilities of parties to consent to the jurisdiction of the bankruptcy court.

against them were not related to the bankruptcy.[53] According to a report of the House Committee on the Judiciary, the division of jurisdiction under the 1898 Act caused several problems:

> The first is delay. Not only are the proceedings in non-bankruptcy cases likely to be paced more slowly with longer intervals between successive steps, but the dockets of the non-bankruptcy courts are likely to be more crowded . . . . Another objection . . . is the extra expense entailed by the estate in litigating outside the bankruptcy court . . . . The most serious objection . . . is the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding.[54]

In 1978, Congress undertook the first comprehensive overhaul of federal bankruptcy law since the 1898 law was enacted. In designing the Bankruptcy Reform Act of 1978 (the 1978 Act), Congress set out to resolve the confusion and procedural difficulties created by the 1898 Act, especially the confusion that had resulted from the 1898 Act's bewildering distinction between plenary and summary jurisdiction. Following what it believed to be the path carved by the Court's affirmation of the adjunct theory in *Crowell* and *Raddatz*, Congress established "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district."[55] The 1978 Act authorized the President, with the advice and consent of the Senate, to appoint bankruptcy judges.[56] Unlike district court judges, however, bankruptcy judges would enjoy neither the Article III protection of lifetime tenure—they would serve fourteen-year terms—nor the protection of a guaranteed salary.[57] The 1978 Act provided that all decisions by the bankruptcy court were subject to appellate review within each federal circuit.[58]

In an attempt to simplify and expand the jurisdiction of bankruptcy courts, the 1978 Act granted bankruptcy courts authority over "all civil proceedings arising under title 11 or

---

[53] *See* Countryman, *supra* note 46, at 2-12.

[54] H.R. REP. NO. 95-595, at 44-45 (1977).

[55] 28 U.S.C. § 151(a) (1982). Bankruptcy Court judges are subject to removal by the "judicial counsel of the circuit" on account of "incompetency, misconduct, neglect of duty, or physical or mental disability." *Id.*

[56] *Id.* §§ 152-153.

[57] *See id.* §§ 152-154. *See infra* Part III.D for a discussion on the debate concerning whether to grant Article III status to bankruptcy judges which arose in the lead up to passing the 1978 Act.

[58] *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 55 (1982) (describing the review process for bankruptcy appeals).

arising in or related to cases under title 11."[59] Although, as Professor Brubaker has pointed out, "[Congress], somewhat ironically, thought that the powerful breadth of the jurisdictional provisions would 'leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes,'"[60] the bankruptcy community's understanding of the constitutional power of the bankruptcy court was about to be thrown into flux.[61]

2. *Northern Pipeline v. Marathon*

In a surprising move that caught Congress and bankruptcy lawyers off guard,[62] the Court held that the judicial power vested in bankruptcy judges under the 1978 Act violated Article III and thus was unconstitutional.[63] The facts of the case are straightforward. After Northern Pipeline Construction Company (Northern Pipeline) filed a Chapter 11 petition in the Bankruptcy Court for the District of Minnesota, it commenced a common law breach of contract action against Marathon Pipeline Company (Marathon) in bankruptcy court.[64] Marathon moved to dismiss the suit, asserting that the 1978 Act's conferral of jurisdiction to a federal bankruptcy court to hear a state common law contract claim violated Article III's requirement that the judicial power of the United States be vested only in judges who enjoy lifetime tenure and a guaranteed salary.[65]

Writing for a plurality of the Court, Justice Brennan recounted why the Framers had intentionally distributed

---

[59] 28 U.S.C. § 1471(b) (1982) (amended 1984).

[60] Brubaker, *supra* note 46, at 799 (footnote omitted).

[61] The 1970 National Bankruptcy Review Commission recommended to Congress that the reformulated bankruptcy courts receive a broad grant of jurisdiction. NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 727 (1997). According to the 1970 Commission Report:

> The constitutionality of a grant of jurisdiction in such comprehensive terms should not be subject to any serious doubt. The jurisdictional grants to the court of bankruptcy by the Acts of 1841 and 1867 were almost as extensive, and the Supreme Court gave the provisions of those Acts generous construction and approval of their constitutionality. There appears to be no reason why Congress cannot in the exercise of its power under the Bankruptcy Clause of the Constitution confer jurisdiction over all litigation having a significant connection with bankruptcy.

Id.

[62] *Id.*

[63] *N. Pipeline Constr. Co.*, 458 U.S. at 50.

[64] *Id.* at 56-57.

[65] *Id.*

power among the tripartite federal government and concluded that Article III is "an inseparable element of the constitutional system of checks and balances."[66] Justice Brennan stated that "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."[67] The "attributes" to which Justice Brennan referred were the Constitution's explicit requirement that judges exercising the judicial power of the United States enjoy life tenure and a guaranteed salary. Justice Brennan explained that the requirements of Article III operate as a structural safeguard to ensure that the judiciary remains truly fair and independent.[68] Inasmuch as the 1978 Act provided that bankruptcy judges would be appointed for fixed terms, Justice Brennan concluded, "There is no doubt that the bankruptcy judges created by the Act are not Art. III judges."[69]

In what appears to be a dramatic about-face from prior precedent, the four-Justice plurality declared that Congress's authority to delegate adjudicative power to non-Article III tribunals "reduce[s] to three narrow situations," which include the authority to create "territorial courts," the authority to adjudicate court martial proceedings, and the authority to adjudicate cases involving "public rights."[70] Although the Court's turn toward a literal application of Article III signified a departure from the more pragmatic approach it had adopted in *Crowell* and *Raddatz*, the Court's newfound appreciation for formalism should not be overstated. Significantly, the plurality's formal understanding of Article III and its limited approval of Congress's authority to create non-Article III tribunals lacked support among the other five Justices and thus failed to become controlling law.[71] The only point that a majority of the Justices did agree on was the decision to invalidate the 1978 Act's broad jurisdictional grant to the bankruptcy courts because Congress had unconstitutionally vested the essential attributes of judicial power in a non-Article III court.[72]

---

[66] *Id.* at 58.
[67] *Id.* at 59.
[68] *Id.* at 60-61.
[69] *Id.*
[70] *Id.* at 64-67.
[71] *Id.*
[72] *Id.* at 86.

3. The Fallout from *Northern Pipeline*

In response to *Northern Pipeline*, Congress enacted the 1984 Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Amendments).[73] The 1984 Amendments narrowed the 1978 Act's broad grant of jurisdiction to bankruptcy courts by distinguishing between "core" and "non-core" claims.[74] Bankruptcy judges were given authority to enter orders and final judgments with respect to "core" claims. With respect to claims that were "non-core-but-related-to" the bankruptcy case, bankruptcy courts were authorized only to make proposed findings of facts and conclusions of law that would be reviewed *de novo* by district courts.[75] However, following the magistrate model and the long-standing tradition of consent under the old referee system, Congress authorized bankruptcy judges to enter final judgment on "non-core-but-related-to" claims so long as both parties consented.[76]

In the immediate aftermath of *Northern Pipeline*, scholars predicted disastrous consequences for the future of bankruptcy proceedings.[77] In reality, however, business in the bankruptcy courts continued as usual under the 1984 Amendments. Over the coming decades, *Northern Pipeline* never became the life-altering event that bankruptcy experts had initially predicted.[78] Although *Northern Pipeline* has never been explicitly overruled, two subsequent opinions appeared to limit *Northern Pipeline* to its facts and offer a more functional understanding of Article III than the plurality adopted in *Northern Pipeline*.

---

[73] *See* Tabb, *supra* note 46, at 38-40.

[74] 28 U.S.C. § 157 (2006). Under § 157(b), Congress provided a non-exhaustive list of core claims. *See id.*

[75] *Id.* § 157(c)(1).

[76] *Id.* § 157(c)(2).

[77] In the year following *Northern Pipeline*, Professor Redish predicted, "The *Northern Pipeline* decision creates serious and acute problems for Congress and for the future of all federal bankruptcy adjudication." Redish, *supra* note 13, at 204. Furthermore, after discussing the perceived consequences of *Northern Pipeline*, Professor King declared, "The Supreme Court has created a mess." Lawrence P. King, *The Unmaking of a Bankruptcy Court: Aftermath of* Northern Pipeline v. Marathon, 40 WASH. & LEE L. REV. 99, 117-18 (1983).

[78] Professor McKenzie observes, "The doctrinal developments after *Northern Pipeline*, as well as the de facto development of bankruptcy court practice since that time, have resurrected much of the autonomy that Congress granted to bankruptcy judges in 1978 and that the Supreme Court had attempted to quash." Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 766 (2010).

D. Thomas v. Union Carbide Agricultural Products Co.

Just three years after its decision in *Northern Pipeline*, the Court returned to a pragmatic approach to Article III. In *Thomas v. Union Carbide Agricultural Products Co.*,[79] the Court affirmed Congress's ability to authorize the use of binding arbitration to resolve disputes arising from a federal cause of action.[80]

The case involved the data-consideration and data-compensation provision (the provision) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[81] FIFRA provides that to obtain Environmental Protection Agency (EPA) approval of a pesticide, manufacturers must "submit research data to the [EPA] concerning the product's health, safety, and environmental effects."[82] If a competing manufacturer subsequently applies for EPA approval of a similar product, the EPA may use the first company's research to assess the competitor's product.[83] But to prevent free riding, FIFRA requires that the competitor provide adequate compensation to the company that produced the research.[84] If the competitors cannot agree on an appropriate amount of compensation, the statute provides that "either [party] may invoke binding arbitration. The arbitrator's decision is subject to judicial review only for 'fraud, misrepresentation, or other misconduct.'"[85]

Initially, the plaintiffs—a group of thirteen pesticide manufacturers—brought a claim against the EPA, challenging the provision's constitutionality under Article I and the Fifth Amendment.[86] In the wake of the Court's decision in *Northern Pipeline*, however, the plaintiffs amended their complaint to include allegations that the FIFRA's use of binding arbitration to resolve disputes among competitors violated Article III because FIFRA "allocate[s] to arbitrators the functions of judicial officers [while] severely limiting review by an Article III court."[87]

The tone of the Court's opinion, written by Justice O'Connor, differs drastically from the tone adopted by the Court in *Northern Pipeline*. Instead of rhapsodizing on the

---

[79] Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568 (1985).
[80] *Id.* at 569.
[81] *Id.* at 571.
[82] *Id.*
[83] *Id.* at 571-75.
[84] *Id.* at 572-73.
[85] *Id.* at 573-74.
[86] *Id.* at 575-76.
[87] *Id.* at 576.

sanctity of Article III in the introductory paragraphs, as Justice Brennan did in *Northern Pipeline*, the Court emphatically embraced a functional approach to Article III jurisprudence with the declaration that "[a]n absolute construction of Article III is not possible."[88] The Court narrowly limited the holding of *Northern Pipeline*, stating that the "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 consent of the litigants, and subject only to ordinary appellate review."[89] Although both *Crowell* and *Thomas* seemingly dealt with state common law claims—respectively, a contract dispute between an employee and employer, and a dispute over a property interest—the Court distinguished both cases from *Northern Pipeline*. The defining characteristic enabling Congress to channel both claims to non-Article III courts is that in each instance a federal statute "displaced a traditional cause of action and affected a pre-existing relationship based on a common-law" claim.[90] Significantly, Justice O'Connor cast *Thomas* as reflecting "the enduring lesson of *Crowell*," and in so doing, focused on the "substance" of FIFRA in order to determine whether it contravened Article III.[91] The Court abandoned a formal reading of Article III and instead balanced the "substance" of the delegation of adjudicatory authority against the purpose behind Article III's safeguards of a guaranteed salary and life tenure to assess whether Congress's decision to delegate damaged the integrity and independence of the judiciary.[92]

E. Commodity Futures Trading Commission v. Schor

Four years after *Northern Pipeline*, the Supreme Court confronted another instance of a non-Article III tribunal adjudicating a state common law claim. In 1974, when Congress revamped the Commodities Exchange Act (CEA), it created the Commodities Futures Trading Commission (CFTC) to oversee the implementation of the regulatory regime.[93] The CFTC was charged with adjudicating certain disputes between

---

[88] *Id.* at 583.
[89] *Id.* at 584-85.
[90] *Id.* at 587.
[91] *Id.* at 584-87.
[92] *Id.* at 590-91.
[93] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 836-38 (1986).

professional commodity brokers and their disgruntled clients arising from alleged violations of the CEA. Two years later, in 1976, the "CFTC promulgated a regulation" enabling it "to adjudicate counterclaims arising out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint."[94] Such counterclaims included *state* common law counterclaims. Of course, the ruling in *Northern Pipeline* a few years later arguably called the constitutionality of the CFTC's authority to adjudicate state common law counterclaims into question.

Schor, an investor, filed a complaint with the CFTC against ContiCommodity Services, Inc. (Conti), a brokerage house.[95] Schor alleged that his debit balance resulted from Conti's violations of the CEA.[96] Unaware that Schor had filed a claim with the CFTC, "Conti . . . filed a diversity action in federal district court to recover the debit balance."[97] Schor then filed a counterclaim in Conti's district court suit, alleging the same CEA violations that were the subject of the CFTC proceeding.[98] Eventually, Conti voluntarily dismissed its claim in federal court and agreed to litigate Schor's claim before the CFTC.[99] Conti asserted its claim to recover the debit balance in the form of a counterclaim in Schor's CFTC action.[100] The administrative law judge found in favor of Conti on both Schor's claim and Conti's counterclaim.[101] On appeal, in the aftermath of *Northern Pipeline*, the U.S. Court of Appeals for the D.C. Circuit ruled that the CFTC's authority to adjudicate a state common law counterclaim was unconstitutional.[102] The Supreme Court granted certiorari to resolve the issue.

Again writing for the majority, Justice O'Connor acknowledged that the Court's ad hoc approach to Article III, from *Crowell* to *Thomas*, does "not admit of easy synthesis."[103] This time, however, the Court formally introduced a multifactor balancing test to determine whether Congress has constitutionally authorized a non-Article III tribunal to adjudicate the business of Article III Courts, or whether

---

[94] *Id.* at 837.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 837-38.
[99] *Id.* at 838.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 848-59.
[103] *Id.* at 847.

Congress has acted in a way that "impermissibly threatens the institutional integrity of the Judicial Branch."[104] The Court identified several factors that should be considered, with no single factor being solely determinative. Thus, a court should consider: (1) "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts"; (2) "conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; (3) "the origins and importance of the right to be adjudicated"; and (4) "the concerns that drove Congress to depart from the requirements of Article III."[105] Applying this new balancing test to the facts of *Schor*, the Court concluded that the CFTC's authority over a limited class of state law claims did not violate the structural integrity of Article III.[106]

II. *STERN V. MARSHALL*: THE SUPREME COURT ONCE AGAIN NARROWS THE SCOPE OF BANKRUPTCY COURT JURISDICTION

A. The Love of the Last Tycoon

In the early 1990s, before finding fame as a model and reality television star under the stage name Anna Nicole Smith, twenty-four-year-old Vickie Lynn Marshall worked the day shift as a table dancer at Gigi's, a gentlemen's club in Houston.[107] Vickie found herself working as a stripper out of a desperate need to pay her bills and support her son.[108] Born in 1905, the blue-blooded J. Howard Marshall had, over a lifetime in the oil and natural gas industry, amassed a fortune that made him one of the 400 richest people in America and the richest man in Texas.[109] By October of 1991, as he mourned the recent deaths of both his wife of thirty years and his mistress of ten years, the heartbroken octogenarian had, by all accounts,

---

[104] *Id.* at 851. As Professor Yackle observed, the Court's application of a balancing test on a case-by-case basis "is not the most intellectually satisfying analysis of constitutional questions." YACKLE, *supra* note 15, at 111. Although the Court's precedents do not form a neat narrative, as Justice O'Connor admits, perhaps a close factual inquiry on a case-by-case basis is preferable to the adoption of a bright-line rule when the stakes are so high—as they are in all of these Article III disputes.

[105] *Schor*, 478 U.S. at 851.

[106] *Id.* at 857.

[107] For a thorough history of the lives of J. Howard and Vickie, see generally *In re* Marshall, 275 B.R. 5, 11-25 (C.D. Cal. 2002).

[108] *Id.* at 20.

[109] *Id.* at 11, 18.

lost the will to live.[110] At the suggestion of his chauffeur, who had hoped to lift his boss's spirits, J. Howard made a fortuitous daytime trip to Gigi's.[111] There, J. Howard met Vickie and was smitten.[112] Within a week, J. Howard told Vickie of his plans to marry her.[113] For over two years, Vickie rebuffed J. Howard's proposals of marriage, but she finally agreed to marry him, which resulted in their wedding in June of 1994.[114] In August 1995, J. Howard died of heart failure.[115] Although J. Howard had spent his final years spending millions of dollars on Vickie, he failed to include her in his will.[116] She claimed that she was entitled to half of J. Howard's estate. Her significantly older stepson, Pierce Marshall, the younger of J. Howard's two sons, vigorously resisted her claim.

B. The Procedural History of Stern v. Marshall

An analysis of the contentious and lengthy legal battle between Vickie and Pierce is worthy of its own epic work.[117] For that reason, this note will focus only on one strand of the litigation.[118] Shortly before J. Howard's death in 1995, Vickie brought a claim for tortious interference against Pierce in Texas state probate court.[119] Vickie alleged that Pierce had fraudulently induced J. Howard on his deathbed to transfer all his assets to a living trust.[120] Pierce denied the allegation and contended that J. Howard had intended that he be the sole beneficiary of the estate.[121] Deprived of the inheritance that she expected to receive, and defending a lawsuit brought against her by a former employee,[122] Vickie filed a bankruptcy petition in the Bankruptcy Court for the Central District of California (the Bankruptcy Court) in January of 1996.[123] In May of the

---

[110] *Id.* at 13, 16-17, 20-21.
[111] *Id.* at 21.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 23.
[115] *See id.* at 33.
[116] Marshall v. Marshall, 547 U.S. 293, 300 (2006).
[117] For a discussion of the lengthy dispute between Vickie and Pierce that has been litigated in several state and federal courts, see generally *id.* at 300-05.
[118] Stern v. Marshall, 131 S. Ct. 2594 (2011).
[119] *See id.* at 2601.
[120] *Id.*
[121] *Id.*
[122] Brubaker, *supra* note 4, at 3.
[123] Voluntary Petition Under Chapter 11, *In re* Marshall, 253 B.R. 550 (C.D. Cal. 2000) (No. 2:96-BK-12510).

same year, Pierce filed a proof of claim in Vickie's bankruptcy case, alleging that Vickie had defamed him by instructing her lawyers to tell reporters that Pierce had defrauded her out of her inheritance.[124] In response, Vickie filed a counterclaim for tortious interference—a claim identical to her claim in the Texas probate court—alleging that Pierce had denied her the inheritance promised to her by the late J. Howard.[125]

In September of 2000, the Bankruptcy Court entered a judgment in favor of Vickie on her counterclaim for tortious interference, and awarded her over $400 million in compensatory damages and $25 million in punitive damages.[126] Pierce filed a posttrial motion under 28 U.S.C. § 157(d)[127] in California district court, arguing that Vickie's counterclaim, which was based on Texas common law, was not a "core proceeding" under § 157(b)(2)(C)[128] and that therefore the Bankruptcy Court lacked jurisdiction to adjudicate it.[129] After several appeals, reversals, and a first trip to the Supreme Court in 2006, where a separate jurisdictional question was resolved,[130] the Supreme Court granted certiorari to resolve the question of "whether a bankruptcy court judge who did not enjoy [Article III] tenure and salary protections had the authority under 28 U.S.C. § 157 and Article III to enter final judgment on a counterclaim filed by Vickie . . . against Pierce . . . in Vickie's bankruptcy proceedings."[131]

C. Analysis of Stern v. Marshall*:* Northern Pipeline *Revisited and Resurrected*

In his opinion for the majority, Chief Justice Roberts ruled that although Vickie's counterclaim qualified as "core," and although the Bankruptcy Court had the statutory

---

[124] *Stern*, 131 S. Ct. at 2601.

[125] *Id.*

[126] *Id.* Just several months later, in April of 2001, a Texas probate court held a jury trial on the dispute. This jury ruled in Pierce's favor, finding that J. Howard's will, which excluded Vickie, was valid. *Marshall*, 547 U.S. at 302.

[127] *See* 28 U.S.C. § 157(d) (2006) ("The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.").

[128] *Id.* § 157(b)(2)(C). "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 . . . ." *Id.* § 157(b)(1)-(2). *See infra* Part I.C.3 for an explanation of the "core" and "non-core" distinction that defines the scope of bankruptcy court jurisdiction.

[129] *See In re* Marshall, 275 B.R. 5, 9 (C.D. Cal. 2002).

[130] *Marshall*, 547 U.S. at 300, 301-05.

[131] *Stern*, 131 S. Ct. at 2600.

authority to enter a final judgment on the claim,[132] the structural safeguards of Article III precluded the Bankruptcy Court from exercising that authority. The Chief Justice cast the majority opinion in *Stern* in the same mold as Justice Brennan's plurality opinion in *Northern Pipeline*. *Northern Pipeline* opened with an homage to Article III and a discussion of why its safeguards are vital to the independence of those who exercise the judicial power of the United States. *Stern* opened with the same overture.[133] Moreover, in adopting *Northern Pipeline*'s holding that a bankruptcy court cannot constitutionally enter a final judgment on a state law contract claim that is not essential to the resolution of the bankruptcy, the Chief Justice wrote, "Substitute 'tort' for 'contract,' and that statement directly covers this case."[134] However, unlike Justice Brennan, who in *Northern Pipeline* invalidated the 1978 Act's *entire* jurisdictional scheme, Chief Justice Roberts, quite significantly, emphasized that the holding in *Stern* is extremely narrow.[135]

Although the majority opinion suggested that the ruling in *Northern Pipeline* predetermined the outcome of *Stern*, Justice Breyer, in his dissent, argued that the Court should have applied an alternative analysis.[136] The dissent took issue with the Chief Justice's decision to align *Stern* with the analysis in *Northern Pipeline*,[137] arguing that the majority "overstates the importance of an analysis that did not command a Court majority in *Northern Pipeline*."[138] Consequently, according to the dissent, the majority opinion gave short shrift to the line of cases descending from *Crowell* that calls for a pragmatic interpretation of Article III—especially the Court's most recent pronouncement in *Schor*, which, as Justice Breyer pointed out, *did* command a majority of the Court and therefore should represent the controlling precedent.[139] In turn, Justice Breyer applied the balancing test from *Schor*—a more flexible and pragmatic standard—to the facts before the Court.[140] Justice Breyer concluded that the bankruptcy court should have the authority to hear Vickie's counterclaim

---

[132] *See* 28 U.S.C. § 157(b)(2)(C).
[133] *Stern*, 131 S. Ct. at 2600-01.
[134] *Id.* at 2608-09.
[135] *Id.* at 2620.
[136] *Id.* at 2621-22 (Breyer, J., dissenting).
[137] *Id.*
[138] *Id.*
[139] *Id.* at 2622, 2626.
[140] *Id.* at 2626; *see supra* Part I.E.

because such power is necessary "to create an efficient, effective bankruptcy system."[141]

III. *STERN* SIGNIFIES A SEPARATE AND MORE FORMAL ARTICLE III ANALYSIS FOR BANKRUPTCY COURTS

Until handing down the decision in *Stern v. Marshall*, the Supreme Court had remained silent on the constitutionality of the 1984 Amendments for nearly thirty years.[142] Congress and the bankruptcy community knew that the 1984 Amendment "toe[d] the constitutional line."[143] In the aftermath of *Thomas* and *Schor*, during the great period of silence on the issue, as each Supreme Court session opened and closed without any development, Congress and the bankruptcy community gradually came to accept *Northern Pipeline* as a one-shot deal—an aberration in an otherwise complex and murky line of precedents whose only unifying characteristics were the Court's pragmatism and deference to Congress.[144]

The outcome in *Stern v. Marshall* did more than shatter this sense of complacency. It signified that *Northern Pipeline* is still good law, and it demonstrated that the *Northern Pipeline* approach stands independent of the balancing test adopted in *Schor*.[145] The first wave of criticism of *Stern* argued that the *Northern Pipeline* approach has overtaken the *Schor* balancing test and now stands as the Court's primary analytical framework for Article III.[146] This note, however, argues that the Court appears to have adopted a bifurcated approach to determining the constitutionality of non-Article III

---

[141] *Stern*, 131 S. Ct. at 2630.

[142] *See generally* NAT'L BANKR. REV. COMM'N, *supra* note 61, at 732.

[143] *See* Brubaker, *supra* note 4, at 1.

[144] According to Professor Yackle, "In light of [*Thomas*] and *Schor*, everyone understands that the Court will rarely find reliance on non-Article III adjudicators invalid." YACKLE, *supra* note 15, at 111.

[145] In an article published prior to *Stern*, Professor McKenzie argues that the Court's balancing test adopted in *Schor* is an ill fit for bankruptcy courts. McKenzie, *supra* note 78, at 754. Professor McKenzie's instincts anticipated the ruling of *Stern* and support this note's thesis that the Court has accepted that there is something different about bankruptcy courts that necessitates a special and stricter application of Article III.

[146] *See e.g.*, Ralph Brubaker, *Article III's Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges' Core Jurisdiction*, 31 BANKR. L. LETTER, No. 9, Sept. 2011, at 3. Even before *Stern*, scholars never considered that *Northern Pipeline* was a separate analytical framework applicable only to bankruptcy courts. For example, Professor Chemerinsky argued that *Northern Pipeline* should be overruled on the grounds that the Court has abandoned the plurality's approach in *Northern Pipeline* by replacing it with the more pragmatic approach introduced in *Thomas* and later refined in *Schor*. Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule* Northern Pipeline, 65 AM. BANKR. L.J. 311, 317-20 (1991).

adjudicators. Much of the confusion and criticism surrounding *Northern Pipeline* stemmed from the fact that it did not make sense in light of the Court's other Article III jurisprudence.[147] But the development of the case law becomes much clearer upon understanding that the formal approach to Article III applied in *Northern Pipeline* reflects an analytical framework that is separate and distinct from the *Schor* balancing test, reserved exclusively for bankruptcy courts.[148] For all non-Article III adjudicators that are not bankruptcy courts, the Court will continue to apply the *Schor* balancing test. When assessing the adjudicative power of bankruptcy courts, however, the Court will apply the more formal and literal understanding of Article III articulated in *Northern Pipeline*, which limits bankruptcy courts to entering final judgments on claims that are essential to the resolution of the bankruptcy.

This section discusses the possible reasons why the Supreme Court applies a stricter Article III analysis to bankruptcy courts than to other non-Article III tribunals. It attributes the Court's unique approach to bankruptcy court jurisdiction as a result of issues relating to due process, the Court's efforts to reduce the size of the federal docket, a lack of a practical understanding of bankruptcy law by the *Northern Pipeline* plurality and *Stern* majority, and a long-standing rivalry between Article III and bankruptcy judges.

A. An Issue of Due Process

Although the line of cases from *Crowell* through *Stern* has cast the question of whether a non-Article III tribunal has the constitutional authority to adjudicate certain claims as an Article III issue, the same question can be characterized as an issue of due process. Indeed, in his dissent in *Crowell*, Justice Brandeis argued that the Court did not face an Article III question but rather a question of due process.[149] Whether the administrative court had the authority to adjudicate Knudsen's Workers' Compensation claim was entirely dependent on

---

[147] McKenzie, *supra* note 78, at 770.

[148] This is not the first instance of the Supreme Court applying a special analysis to bankruptcy courts. For example, although the Supreme Court has ruled that Congress cannot use any of its Article I powers to abrogate state sovereign immunity, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996), the Court has recently created a special exception to the general rule that allows Congress to use its Article I Bankruptcy Power to abrogate state sovereign immunity, *see* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 359 (2006).

[149] Crowell v. Benson, 285 U.S. 22, 87-88 (1932) (Brandeis, J., dissenting).

whether the parties were afforded their constitutional right to due process, which Justice Brandeis described as a "requirement of judicial process."[150] Justice Brandeis's suggestion that the question be viewed through the lens of due process reverberates through the line of cases descending from *Crowell*, offering an explanation for why the Court applies a more heightened and formal Article III inquiry in the case of bankruptcy courts than in the case of other non-Article III courts.[151]

In *Schor*, Justice O'Connor seemingly relocated Justice Brandeis's due process argument to Article III. Justice O'Connor noted that Article III protects not only "structural interests"—such as the integrity and independence of the judicial branch—but also "personal" interests, like the right to an impartial and independent adjudicator.[152] To support this proposition, Justice O'Connor cited, among other sources, Justice Brandeis's dissent in *Crowell*.[153] Importantly, as Justice O'Connor explained in *Schor* and as Chief Justice Roberts pointed out in *Stern*,[154] litigating parties may, in certain situations, waive their right to an Article III judge by consenting to the jurisdiction of non-Article III tribunals, without violating both Article III and the maxim that parties may never waive the requirement of subject-matter jurisdiction.[155] The fact that the nondebtor defendants in *Northern Pipeline* and *Stern* could have consented to the subject-matter jurisdiction of the bankruptcy court reveals that, in bankruptcy cases, the Court is concerned with ensuring that the parties are afforded due process.[156] In other words, if the parties themselves believe that

---

[150] *Id.*

[151] According to Professor Chemerinsky, "The Court properly has recognized that Article I courts are impermissible only when they are incompatible with due process or separation of powers." Chemerinsky, *supra* note 146, at 311.

[152] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

[153] *Id.*

[154] Stern v. Marshall, 131 S. Ct. 2594, 2607 (2011). This note argues that *Stern* has not affected the ability of litigants to consent under 28 U.S.C. § 157(c)(2) (2006). However, some commentators argue that *Stern* has invalidated the ability of parties to consent to the jurisdiction of the bankruptcy court. *See infra* Part IV.B for a discussion of consent.

[155] *Schor*, 478 U.S. at 849 ("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 an Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication.").

[156] *Id.* at 848. Nevertheless, there will be certain cases in which the structural interests at stake will surpass the personal interests of the parties, making waiver impossible. Justice O'Connor explains: "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.

the bankruptcy court provides them with adequate process—a fair opportunity to litigate their dispute before an impartial adjudicator—then their consent cures the Article III defects arising from the fact that bankruptcy judges lack life tenure and a guaranteed salary.

The Court is appropriately more wary of potential due process violations before bankruptcy courts than before other non-Article III adjudicators. Compared to other non-Article III adjudicators, who also lack life tenure and a guaranteed salary, bankruptcy judges hear an incredibly wide variety of legal claims involving huge financial stakes and exercise extraordinary power with minimal oversight by district courts.[157] A district court reviews *de novo* any conclusions of law made by an administrative judge as well as any ruling on a dispositive motion made by a magistrate judge.[158] In comparison, a district court reviews the decision of a bankruptcy court on "core claims" under the more deferential standard of "clearly erroneous" and reviews *de novo* only a bankruptcy court's proposed findings of fact and conclusions of law on "non-core-but-related-to" claims.[159] The reality, however, is that district courts relish the opportunity to pass bankruptcy work to bankruptcy courts and rarely distinguish between "core" and "non-core" when reviewing decisions by bankruptcy judges.[160] Whether a bankruptcy judge has submitted a final judgment on a core proceeding or submitted proposed findings of fact and conclusions of law on a "non-core-but-related-to" claim, district courts are quick to affirm with the same rubber stamp.[161] Perhaps buried in the subtext of *Stern* is a message from the Supreme Court to both Congress and the district courts to better supervise the activity of the bankruptcy courts.[162]

---

[157] McKenzie, *supra* note 78, at 751.

[158] *See supra* Part I.B.

[159] *See* 28 U.S.C. § 158 (2006); *id.* § 157(c)(1). According to Professor McKenzie, "[A]ppellate review by Article III courts does not serve as an effective check on non-Article III judges in bankruptcy cases." McKenzie, *supra* note 78, at 751. Indeed, Article III courts have very little interest in bankruptcy proceedings and tend not to vigorously review the appeals that work their way up the federal system. *Id.*

[160] *See* Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1068 n.28 (1994) ("As a practical matter, there may be precious little difference in how a given district judge reviews cases involving 'recommendations' in non-care matters and those involving 'final judgments' in core matters.").

[161] *Id.*

[162] Perhaps the Court has let its Article III doctrine stay intentionally murky and ambiguous. In a blog post published several months before the Court handed down *Stern*, Professor McKenzie reflected on the forthcoming decision and suggested that "[a] little studied ambiguity keeps the system operating without letting matters get out

Compared to other non-Article III tribunals, bankruptcy courts have tremendous power to grant remedies without the aid of district courts.[163] The agency court in *Crowell*, for example, was forced to rely on the district court to enforce any damages awarded in an administrative proceeding.[164] Demonstrating the Court's awareness of this distinction, Justice Brennan observed in *Northern Pipeline* that bankruptcy courts "exercise all ordinary powers of district courts, including the power to preside over jury trials, . . . the power to issue writs of habeas corpus, . . . and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11 . . . ."[165] The Court is thus attuned to the fact that bankruptcy judges, who lack life tenure and salary protection, have the authority to grant extraordinary remedies both in law and equity. For that reason, the Court keeps bankruptcy courts on a shorter leash than it does other non-Article III tribunals by vigorously monitoring the boundaries of the bankruptcy court's jurisdiction through the application of a more formal understanding of Article III.

B. Reducing Litigation in the Federal Judicial System

Another explanation for the Court's more formal approach to Article III and its decision in *Stern* to narrow the scope of bankruptcy jurisdiction may be found in the modern Court's antagonism toward litigation. Professor Siegel contends that the defining characteristic of the Rehnquist Court was its "palpable hostility to litigation."[166] A primary objective of the Rehnquist Court was to limit access to federal courtrooms by

---

of hand." Troy McKenzie, *Anna Nicole Smith*, *Equity, and Article III*, CREDIT SLIPS (Jan. 24, 2011, 4:08 PM), http//www.creditslips.org/creditslips/2011/01/anna-nicole-smith-equity-and-artilce-iii.html.

[163] Professor Samahon writes, "Bankruptcy judges are not mere judicial pawns, but the knights of the federal judicial hierarchy." *See* Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 234 (2008). Bankruptcy courts commonly oversee some of the largest and most significant business matters of the era. *See, e.g.*, California v. Enron Corp. (*In re* Enron Corp.), 05 CIV. 4079 (GBD), 2005 WL 1185804 (S.D.N.Y. May 18, 2005) (Enron Corp. bankruptcy); *In re* Lehman Bros. Holdings Inc., 08-13555 (JMP), 2008 WL 4902202 (Bankr. S.D.N.Y. Nov. 6, 2008) (Lehman Brothers bankruptcy).

[164] *See infra* Part I.A.

[165] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 (1982); *see also* 11 U.S.C. § 105(a) (2006) (granting equity jurisdiction to the bankruptcy courts). *See* KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 223-31 (LexisNexis 2008).

[166] Andrew M. Siegel, *From Bad to Worse? Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851, 861-62 (2008).

limiting the scope of federal remedies and federal rights of action, placing limitations on punitive damages, and making it more difficult for plaintiffs to collect attorney's fees.[167] Picking up where the Rehnquist Court left off, the Roberts Court has demonstrated an even more hostile attitude toward litigation.[168] The Roberts Court has taken aggressive action to trim the overtaxed and understaffed federal docket.[169] With approximately 1,410,653 bankruptcy filings[170] and the commencement of 289,969 civil actions[171] at the district level in 2011, and with only 179 circuit judges,[172] 677 district judges,[173] and 350 bankruptcy judges[174] to preside over these matters, the Chief Justice has legitimate concerns about reducing the volume of litigation filed in the federal judicial system. One obvious way to scale back the number of filings in federal courts is to reduce the

---

[167] *See generally* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

[168] Chief Justice Roberts's judicial philosophy is grounded in the belief that the "federal judiciary has grown too expansive." Andrew M. Siegel, *Litigation Hostility in the Early Roberts Court*, PRAWFSBLAWG (June 6, 2007), http://prawfsblawg.blogs.com/prawfsblawg/2007/06/hostility_to_li.html. The Chief Justice's hostile view toward litigation and efforts to restrict access to the federal judicial system is not without its critics. Professor Spencer argues that the Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), restricts the ability of members of "societal out-groups" to bring claims against the dominant societal groups. A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 199-200 (2010). Furthermore, Professor Siegel describes litigation as "one of the most democratic institutions we have," and, by restricting access to it, the Court has harmed the American democratic system. Siegel, *supra* note 166, at 862.

[169] Notably, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal*, 556 U.S. 662, the Roberts Court abandoned a plaintiff-friendly pleading regime in favor of a heightened pleading standard that requires plaintiffs to plead their claims with greater specificity. Professor Siegel observes, "I have previously suggested that litigation hostility was the single most important theme of the Rehnquist era, but the theme certainly did not dominate the Rehnquist Court's jurisprudence to the extent that it has dominated the [Roberts] Court's thus far." Siegel, *supra* note 166, at 861-62. Between 25 and 30% of the Rehnquist Court's cases dealt with access to the federal court system while the percentage has dramatically risen under the Roberts Court. *Id.* Indeed, the 2006 Supreme Court has become known as "the year [the Court] closed the courts." *Id.*

[170] The United States Courts website tracks the judicial business of Article III and bankruptcy courts. *See Judicial Caseload Indicators*, U.S. CTS., http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/Dec11Indicators.pdf (last visited Jan. 20, 2013).

[171] *Id.*

[172] The United States Courts website also provides statistics about the number of Article III judges in service. *See Federal Judgeships*, U.S. CTS., http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx (last visited Jan. 20, 2013).

[173] *Id.*

[174] The Federal Judicial Center website provides statistics about the number of bankruptcy judges in service. *See History of the Federal Judiciary*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/judges_bank.html (last visited Jan. 20, 2013).

jurisdictional scope of federal tribunals—the approach utilized in *Stern*. Whether the elimination of counterclaims from the bankruptcy court's core jurisdiction will reduce the workload of bankruptcy and district courts remains to be seen.[175] In any event, the ruling in *Stern* makes litigating state law claims that are not closely related to the ongoing bankruptcy considerably more burdensome for all parties.[176]

Lurking in the background of the majority opinion in *Stern* are federalism issues that overlap with the Court's hostility toward federal litigation. The Chief Justice suggested that a bankruptcy court in California had no business adjudicating Vickie's state law counterclaim, which was only tangentially related to her bankruptcy filing, especially in light of the fact that the same claim was simultaneously being litigated in a Texas probate court.[177] Given his goal of preserving judicial resources and reducing the volume of federal litigation, the Chief Justice was likely quite frustrated with this duplication of judicial effort. The Chief Justice concluded that Vickie's state law claim should be resolved by an expert on such claims—a state court in Texas.[178]

C. The Stern *Majority Lacks a Practical Understanding of Bankruptcy Law*

Another possible explanation for the Supreme Court's distinctive approach to bankruptcy court jurisdiction is that the Justices forming the majority in *Stern* and the plurality in *Northern Pipeline* lacked a working knowledge of the bankruptcy process. As a result, they view a powerful bankruptcy court with jurisdiction over state claims as a threat to the integrity of Article III, not as a necessity to the effective and efficient resolution of bankruptcy proceedings.[179] In his

---

[175] *See infra* Part IV.A for a discussion of how bankruptcy and district courts are treating certain state law claims post-*Stern*.

[176] *See infra* Part IV.A.

[177] Stern v. Marshall, 131 S. Ct. 2594, 2599, 2619-20 (2011). As a nod to principles of Federalism, the Chief Justice cites to the United States Code. *See id.* at 2619-20. "Section 1334(c)(2) . . . requires that bankruptcy courts abstain from hearing specified non-core, state claims that '*can be timely adjudicated[] in a State forum of appropriate jurisdiction*.'" *Id.* (emphasis added).

[178] *Id.* at 2619-20. "Section 1334(c)(1) . . . provides that bankruptcy courts may abstain from hearing any proceeding, including core matters, 'in the interest of comity with State courts or respect for State law.'" *Id.* at 2620.

[179] The members of the Supreme Court are aware that, after years of service on the Court, their practical understanding of legal practice on the ground in courtrooms across the country may be outdated. In a profound moment of candor in

study of the history of the Supreme Court's bankruptcy jurisprudence, Professor Klee observes that, "Because Justices at a particular time may be unfamiliar with bankruptcy law, the Court may render a decision that causes more problems than it resolves."[180] That might explain why the majority opinion in *Stern* dismissed the possibility of any practical consequences of narrowing the scope of bankruptcy jurisdiction, while the dissent vehemently disagreed with the majority's operating assumption.[181] Four of the five Justices in the majority—Chief Justice Roberts and Justices Alito, Scalia, and Thomas—are new textualists, who resolve bankruptcy questions by focusing on the plain meaning of the Constitution and statutory provisions in question.[182] On the other hand, the author of the dissent, Justice Breyer—a notable scholar of administrative law[183]—examines bankruptcy questions from a less theoretical perspective and pragmatically "looks to the purpose the statute addresses as a point of first inquiry."[184] Whereas the new textualists of the majority were concerned with weighty separation-of-powers issues and protecting Article III from even "slight encroachment[]" by Congress and the bankruptcy courts,[185] the author of the dissent, who has had substantial exposure to the nuances of bankruptcy practice, is concerned with providing debtors and creditors with "an efficient, effective federal bankruptcy system."[186] Similarly, in his dissent in

---

questioning his decision to dissent to the 1993 Amendments to the Federal Rules of Civil Procedure, Justice Scalia reflected,

> Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes [to the Federal Rules], generally abstained from doing so later on, acknowledging that his expertise had grown stale. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended.

146 F.R.D. 401, 513.

[180] KLEE, *supra* note 165, at 5. *See infra* Part IV for a discussion of the potential implications of *Stern*.

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

[182] *See* KLEE, *supra* note 165, at 14 n.47.

[183] *See generally, e.g.*, STEPHEN BREYER, ADMINISTRATIVE LAW AND REGULATORY POLICY (1992).

[184] *See* KLEE, *supra* note 165, at 14 n.47.

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

[186] *Id.* at 2629 (Breyer, J., dissenting). Justice Breyer offers a hypothetical based on an actual bankruptcy case in which a tenant, who had previously filed for bankruptcy, brings a counterclaim against a creditor—her landlord—for committing several housing violations under state law. As a result of *Stern*, those claims would have to be brought in state court, delaying the debtor-tenant's access to relief and making the relief more costly. *Id.* at 2629-30.

Northern Pipeline, Justice White criticized the plurality for failing to comprehend that "the bankruptcy judge is constantly enmeshed in state-law issues."[187] Justice White lambasted the plurality for deciding the case on the "intricacies of the separation-of-powers doctrine" when "abstract theory . . . has little to do with the reality of bankruptcy proceedings."[188]

D. Stern *Reflects a Longstanding Antipathy of Article III Judges Toward Bankruptcy Courts*

A more controversial explanation for the Supreme Court's decision to twice reign in the adjudicative authority of bankruptcy courts harks back to the long-standing turf war between Article III judges and bankruptcy judges.[189] As noted earlier, the judicial officers who are now known as bankruptcy judges were formerly known as bankruptcy referees.[190] In 1973, however, as bankruptcy law became a more prominent practice area, the Supreme Court promulgated the new Rules of Bankruptcy Procedure, which conferred the title "bankruptcy judges" on those erstwhile referees.[191] Although in certain federal districts the new bankruptcy judges were permitted by their Article III counterparts to wear black robes, most federal districts prohibited bankruptcy judges from riding in the Article III judges' elevators, parking in the Article III judges' spaces, and eating in the dining rooms reserved for Article III judges.[192] This antipathy of Article III judges toward bankruptcy judges reportedly stems from the fact that bankruptcy judges preside over a multitude of issues that are the traditional business of Article III judges, who viewed

---

[187] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 96-99 (1982) (White, J., dissenting). Fittingly, before serving on the Supreme Court, Justice White was a prominent corporate attorney who "developed [a] specialized knowledge of bankruptcy [law]" while "negotiating real estate deals . . . [and] structuring financial mechanisms for various commercial transactions." DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 227 (1998).

[188] *N. Pipeline Constr. Co.*, 458 U.S. at 96-99 (1982) (White, J., dissenting).

[189] *See* Dan Schecter, *Statutory Power of Bankruptcy Courts to Hear and Determine Compulsory State-Law Counterclaims Against Non-Bankrupt Claimants Is Unconstitutional*, 2011 COMM. FIN. NEWSL. 51 (2011).

[190] Countryman, *supra* note 46, at 22.

[191] *Id.*

[192] *Id.* Reflecting on his experience as a judicial law clerk twenty-two years ago, Professor Lawless recalls that the bankruptcy judges in his district were not allowed to ride in elevators reserved for "regular federal judges." Bob Lawless, *Anna Nicole Smith May Be More Than Just the Only Loser on This One*, CREDIT SLIPS (Jan. 23, 2011, 4:33 PM), http//www.creditslips.org/creditslips/2011/06/anna-nicole-smith-may-be-more-than-just-the-only-loser-on-this-one.html.

widening the scope of bankruptcy jurisdiction as an encroachment of their exclusive domain.[193]

The tense relationship between Article III judges and bankruptcy judges hit fever pitch during the congressional hearings held in the run up to the passage of the 1978 Act.[194] As Congress contemplated expanding the scope of bankruptcy jurisdiction, Congress wrestled with the related issue of whether to grant bankruptcy judges Article III status.[195] Both the bankruptcy bar and bankruptcy judges favored the move to Article III status, viewing it as a way to elevate the status of the bankruptcy profession, which was perceived as a second-tier practice area until the restructuring boom of the 1980s and 1990s. The most vocal critics of the change in status of bankruptcy judges were Article III judges, who were antagonistic to bankruptcy practice and believed that bestowing Article III status on bankruptcy judges would diminish the prestige of Article III judges.[196] During a congressional hearing, for instance, when asked by the counsel to the Subcommittee on Improvements in Judicial Machinery whether bankruptcy judges should have law clerks to assist them with their work, District Judge Wesley E. Brown responded, "I do not think they need a law clerk. That is why they were appointed in the first place . . . ."[197]

At another hearing on the issue, Judge Simon H. Rifkind referred to bankruptcy judges as "assistants to [Article III] judges." Moreover, Judge Rifkind testified, "A significant increase in the number of Article III judges as is contemplated by the proposed law would, in my opinion, dilute the prestige of district judges," which would make it more difficult to lure the most qualified and talented lawyers away from private practice to serve on the federal bench.[198]

---

[193] *Id.*

[194] *See generally* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 141-83 (2001). See *supra* Part I.C for a discussion of the 1978 Act.

[195] SKEEL, *supra* note 194, at 157.

[196] *Id.* at 157-58.

[197] *Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary United States Senate*, 95th Cong. 429 (1977) (statement of Judge Wesley E. Brown, U.S. District Court, Wichita, Kansas).

[198] *Bankruptcy Court Revision: Hearings on H.R. 8200*, *Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) (statement of Hon. Simon H. Rifkind, Immediate Past President, American College of Trial Lawyers).

The result was that Congress voted to grant broad jurisdiction to the bankruptcy courts without officially granting them Article III status.[199] The jurisdictional grant of the 1978 Act represented a compromise—an attempt to placate both the bankruptcy community and the Article III judges.

The climax of the dispute occurred when Chief Justice Warren Burger actively lobbied President Carter to not sign the 1978 Act.[200] This intervention of the Chief Justice into the legislative process was unprecedented. Chief Justice Burger shared the same fears as his colleagues on the district courts that the appointment of "inferior" bankruptcy judges would dilute the prestige and talent of Article III courts.[201] According to Professor Skeel, during the debate, Chief Justice Burger quite tellingly asked a legal scholar, "Would *you* accept a bankruptcy judgeship?"[202] Ultimately, President Carter did sign the 1978 Act into law despite such opposition. However, the Supreme Court would have the final word on the debate a few years later, when it ruled in *Northern Pipeline* that the broad jurisdictional grant was unconstitutional.[203]

Although the Court's composition has changed since then, the majority opinion in *Stern* appears to embody the same antipathy toward bankruptcy judges, and it is just as protective of the Article III domain as its predecessor. In the closing paragraphs of *Stern*, perhaps referencing bankruptcy judges and the bankruptcy bar, Chief Justice Roberts observed, "Slight encroachments create new boundaries from which legions of power can seek new territory to capture."[204]

IV. THE IMPLICATIONS OF *STERN V. MARSHALL* ON THE FUTURE OF BANKRUPTCY COURTS' AUTHORITY

Stern has already elicited a frenetic response in courtrooms and among the legal academy. As of February 16, 2013, a little over a year and a half after the Supreme Court handed down *Stern v. Marshall*, the case had been cited by 705

---

[199] SKEEL, *supra* note 194, at 158.

[200] *Id.*

[201] *Id.*

[202] *Id.* (emphasis added).

[203] *See supra* Part I.C.

[204] Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011) (citing Reid v. Covert, 354 U.S. 1, 39 (1957)).

courts nationwide and by 571 scholarly sources.[205] In an epigraph to his opinion, the Chief Justice likened the procedural history of *Stern* to the litigation in the novel *Bleak House*, about which Charles Dickens wrote, "This suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises."[206] The same thing might be said about *Stern*'s aftermath. In a recent article, one commentator astutely noted, "The issues surrounding *Stern* seem to be proliferating on a weekly basis and cannot all be addressed here."[207] For that reason, this section will focus only on two issues that have already caused a flurry of speculation among commentators. This section will first discuss *Stern*'s effect on bankruptcy courts' ability to enter final judgments on fraudulent conveyance claims. Finally, this section will discuss *Stern*'s impact on the ability of parties to consent to the bankruptcy courts' authority to enter a final judgment on "non-core-related-to" matters that are not necessary to the resolution of the bankruptcy. This section argues that *Stern*'s holding should be applied narrowly, and that the case should have no impact on the bankruptcy court's authority to hear fraudulent conveyance claims nor on a litigant's ability to consent to bankruptcy court jurisdiction.

A. Stern *Does Not Preclude a Bankruptcy Court from Entering a Final Judgment on a Fraudulent Conveyance Claim*

One immediate consequence of *Stern* has been speculation as to whether bankruptcy courts have the authority to enter final judgments on fraudulent conveyance claims. Although the Bankruptcy Code contains a fraudulent transfer provision,[208] such claims have their origin in early-

---

[205] According to the KeyCite tool on Westlaw.com, *Stern v. Marshall* has been cited by 25 Circuit Court of Appeals, 201 district courts, 472 bankruptcy courts, and 6 state courts (as of Feb. 16, 2013).

[206] *Stern*, 131 S. Ct. at 2600 (citing CHARLES DICKENS, BLEAK HOUSE, in 1 WORKS OF CHARLES DICKENS 4-5 (1891)). *Compare* Schecter, *supra* note 189 (arguing that *Stern* will not be a "game-changer"), *with* HON. NANCY C. DREHER, BANKRUPTCY LAW MANUAL § 2:12 n.10 (arguing that *Stern*'s impact will be broad).

[207] Frank Volk, *First Impressions: Interpreting* Stern, 30-JAN AM. BANKR. INST. J., 22 (2011). In a section on its bankruptcy blog appropriately titled "*The* Stern *Files*," the law firm Weil, Gotshal & Manges LLP monitors and analyzes *Stern*'s impact on noteworthy bankruptcy cases. *See* Kyle Ortiz, *The* Stern *Files*, WEIL BANKR. BLOG (Aug. 23, 2011), http://business-finance-restructuring.weil.com/category/stern-files/#axzz2ILR4w800.

[208] 11 U.S.C. § 548 (2006).

seventeenth-century English common law.[209] According to 28 U.S.C. § 157(b)(2)(H), "proceedings to determine, avoid, or recover fraudulent conveyances" are "core" claims.[210] As discussed earlier, if a claim is "core," a bankruptcy court may hear it and enter a final judgment on the claim.[211] Post-*Stern*, litigants have argued that fraudulent conveyance claims so closely resemble Vickie's counterclaim that the same logic should apply, prohibiting bankruptcy courts from entering a final judgment on them.[212] If that were the case, bankruptcy courts would only be able to issue proposed findings of facts and conclusions of law that would be reviewed *de novo* by the district court.[213] On the other hand, others argue that even if the Supreme Court's separate, stricter analytical approach to Article III for bankruptcy courts is applied, bankruptcy courts will likely retain the authority to enter final judgments on fraudulent conveyance claims.

As Bankruptcy Judge Robert D. Drain of the Southern District of New York observed in a recent opinion, "Reasonable people may differ over whether *Stern*'s prohibition on the bankruptcy court's issuance of a final judgment extends to fraudulent transfer claims."[214] Indeed, as federal district and bankruptcy court judges attempt to make sense of *Stern*'s impact on this issue, they are slowly dividing into two opposing camps. The first camp favors a broad reading of *Stern* that prohibits bankruptcy courts from entering final judgments on fraudulent conveyance claims.[215] By contrast, the second camp argues that *Stern* must be read narrowly and that the authority of bankruptcy courts to enter final judgments on such claims remains unchanged.[216]

---

[209] Fraudulent conveyance claims trace their origin back to the Star Chamber in England. *See* Twyne's Case, 3 Coke, 80 (1601).

[210] 28 U.S.C. § 157(b)(2)(H) (2006).

[211] *Id.* Congress has created a federal right of action for the trustee in bankruptcy to pursue the recovery and avoidance of fraudulent transfers. *See* 11 U.S.C. § 548 (2006).

[212] *See e.g.*, Picard v. Flinn Invs., LLC, 463 B.R. 280, 286 (S.D.N.Y. 2011).

[213] *See supra* Part I.C.3.

[214] Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 186 (Bankr. S.D.N.Y. 2011).

[215] *See e.g.*, Exec. Benefits Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), No. 11-35162, 2012 WL 6013836, at *2-10 (9th Cir. Dec. 4, 2012); Waldman v. Stone, 698 F.3d 910, 919 (6th Cir. 2012); Kirschner v. Agoglia, 476 B.R. 75, 79-82 (S.D.N.Y. 2012); Stettin v. Regent Capital Partners, LLC (*In re* Rothstein, Rosenfeldt, Adler, P.A.), No. 11-62612-CIV, 2012 WL 882497, at *3-4 (S.D. Fla. Mar. 14, 2012); Heller Ehrman LLP v. Arnold & Porter, LLP (*In re* Heller Ehrman LLP), 464 B.R. 348, 352-54 (N.D. Cal. 2011).

[216] *See e.g.*, KHI Liquidation Trust v. Wisenbaker Builder Servs., Inc. (*In re* Kimball Hill, Inc.), 480 B.R. 894, 899-904 (N.D. Ill. 2012); Feuerbacher v. Moser, No.

In *In re Heller Ehrmann LLP*, Judge Charles R. Breyer of the U.S. District Court for the Northern District of California ruled that *Stern* prevents a bankruptcy court from entering a final judgment on a fraudulent conveyance claim.[217] Judge Breyer was not persuaded by the debtor's argument that *Stern* applies narrowly and only to counterclaims such as Vickie's.[218] Nor was he persuaded by the argument that fraudulent conveyance claims are necessary for the complete resolution of a bankruptcy proceeding.[219] Instead, Judge Breyer relied on the plurality opinion in *Northern Pipeline*, which limited Congress's authority to create non-Article III adjudicative bodies to three specific exceptions,[220] including territorial courts, military courts, and the adjudication of public rights.[221] Because the adjudication of a fraudulent conveyance claim does not fall within any of the three exceptions, Judge Breyer reasoned that the bankruptcy court lacked authority to enter a final judgment on the claim.[222]

On the opposite coast, Judge Drain ruled that *Stern*'s holding does not prohibit bankruptcy courts from entering a final judgment on fraudulent conveyance claims.[223] Unlike Judge Breyer, Judge Drain placed great significance on Chief Justice Roberts's declaration that *Stern* should be read narrowly.[224] Although the adjudication of a fraudulent conveyance claim does not fall within one of the three exceptions specified by the *Northern Pipeline* plurality, Judge Drain observed, citing Justice Scalia's concurrence, that "there are at least seven different reasons given in the [*Stern*] Court's opinion for concluding that an Article III judge was required to adjudicate [Vickie's]

4:11-CV-272, 2012 WL 1070138, at *5-9 (E.D. Tex. Mar. 29, 2012); Bohm v. Titus (*In re* Titus), 467 B.R. 592, 633-34 (Bankr. W.D. Pa. 2012); *In re Refco Inc.*, 461 B.R. at 183-94.

[217] *In re Heller Ehrman LLP*, 464 B.R. at 350, 352-54.

[218] *Id.* at 352.

[219] *Id.* at 353.

[220] *Id.* at 353-54. *See supra* Part I.C for a discussion of *Northern Pipeline*.

[221] In *Granfinanciera S.A. v. Nordberg*, 492 U.S. 31 (1989), the Supreme Court ruled that a bankruptcy trustee's right to bring a fraudulent conveyance claim was a private right, not a public right. *Id.* at 34. The Court explained that a "public right" included "but [was] not limited to a matter arising between the Government and others," which also "extends to a seemingly 'private' right that is closely intertwined with a federal regulatory program that Congress has power to enact." *Id.*

[222] *In re Heller Ehrman LLP*, 464 B.R. at 354. In *In re Bellingham*, the Ninth Circuit adopted Judge Breyer's reasoning and reached the same conclusion that bankruptcy courts lack the authority to enter final judgments on fraudulent conveyance claims. Exec. Benefits Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), No. 11-35162, 2012 WL 6013836, at *2-10 (9th Cir. Dec. 4, 2012).

[223] Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 185 (Bankr. S.D.N.Y. 2011).

[224] *Id.* at 191.

lawsuit."[225] Judge Drain placed less significance on the *Northern Pipeline* plurality opinion and instead located the authority for bankruptcy courts to enter final judgments on fraudulence conveyance claims in two places.[226]

First, although fraudulent conveyance claims were originally creatures of common law, Congress created a federal right of action to pursue such claims in bankruptcy courts.[227] This is significant because *Northern Pipeline* and *Stern* dealt with claims that were derived exclusively from state common law. This means that a fraudulent conveyance claim brought in a bankruptcy court under federal law more closely resembles the federal claims brought in *Crowell*, *Thomas*, and *Schor* than the state common law claims brought in *Northern Pipeline* and *Stern*. Citing *Stern*, Judge Drain pointed out that "[u]nlike the state law tortious interference claim in *Stern*, the Trustee's fraudulent transfer claim here 'flow[s] from a federal statutory scheme'" and is "completely dependent upon adjudication of a claim created by federal law."[228] Thus, because a bankruptcy court—a court created by Congress—is adjudicating a congressionally created right of action, the constitutional concerns that arose in *Northern Pipeline* and in *Stern* are likely not in play.

Second, Judge Drain found support in Justice Scalia's concurrence in *Stern* that "Article III judges are required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary."[229] Fraudulent transfer claims have played a critical role in the resolution of bankruptcy cases since the 18th century.[230] If the question were ever to reach the Supreme Court, Justice Scalia could provide the swing-vote in what might be another 5-4 decision permitting bankruptcy courts to enter final judgments on fraudulent conveyance claims because of established historical practice.

Judge Drain's narrow reading of *Stern*, which retains the "core" status of fraudulent conveyance claims, is preferable to Judge Breyer's broader reading for several reasons. First, Chief Justice Roberts repeatedly emphasized that the holding

---

[225] *Id.* at 186-87 (citing Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring)).

[226] *Id.* at 187.

[227] *Id.*; *see e.g.*, 11 U.S.C. § 548 (2006).

[228] *In re Refco Inc.*, 461 B.R. at 187 (citing Stern v. Marshall, 131 S. Ct. 2594, 2614 (2011)).

[229] *Id.* at 186-87 (citing Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring)).

[230] *Id.* at 187.

of *Stern* is narrow. In contrast, in *Northern Pipeline*, the Supreme Court was quite clear about its intention to invalidate the bankruptcy court regime in its entirety.[231] Had the Court meant to achieve that result again, it would not have repeatedly emphasized the narrowness of its ruling. Furthermore, fraudulent conveyance claims *are* an integral part of most bankruptcy cases. As Judge Drain explained, "Such claims often play a prominent role in bankruptcy cases, either because of their sheer numbers or because of the effect that the potential avoidance of a transfer, lien, or obligation may have on creditors' recoveries."[232]

Unlike Vickie's counterclaim, which was tangentially related to her bankruptcy case, fraudulent conveyance claims play a central role in the restructuring of debtor-creditor relations. This is especially true in modern business bankruptcy cases involving transfers of large amounts of money to third parties—for example, in cases involving Ponzi schemes and other frauds.[233] If fraudulent conveyance claims are no longer "core" and the bankruptcy court cannot enter a final judgment, litigants will have more opportunities to engage in gamesmanship.[234] The defendant in a fraudulent conveyance action could, for example, begin litigating the claim in bankruptcy court. However, if the proceeding appeared to be going in the plaintiff's favor, the defendant could seek to have the claim removed to a potentially more favorable forum. Also, litigation in the bankruptcy court moves at a quicker pace than in the district court. This could incentivize deep-pocketed defendants to remove fraudulent conveyance claims to district courts or state courts in order to prolong the litigation and deter cash-strapped debtors from pursuing claims. Eliminating fraudulent conveyance claims from the core jurisdiction of bankruptcy courts would encourage a "constitutionally required game of jurisdictional ping-pong between courts [that] would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."[235]

---

[231] *See supra* Part I.C.2.

[232] *In re Refco Inc.*, 461 B.R. at 188.

[233] *Id.*

[234] *See* Adam Lewis et al., Stern v. Marshall*: A Jurisdictional Game Changer?*, J. BANKR. L. 2011.09-8 (2011).

[235] Stern v. Marshall, 131 S. Ct. 2594, 2630 (2011) (Breyer, J., dissenting).

B. Stern *Likely Will Not Affect Consent*

In the aftermath of *Stern*, the bankruptcy community is also pondering whether litigants can still consent to bankruptcy courts' authority to enter a final judgment on "non-core-related-to" matters that are not necessary to the resolution of the bankruptcy.[236] In other words, could Pierce have consented to having a bankruptcy judge enter a final judgment on Vickie's counterclaim? In *Schor*, Justice O'Connor framed Article III as not only a protector of broad "structural interests" but also as a protector of "personal interests."[237] In certain instances, when the structural interests in play are *de minimis*, parties may waive their right to an Article III adjudicator and permit, for example, a bankruptcy court to enter a final judgment on a claim.[238] Post-*Stern*, the issue becomes whether the Article III structural interests that compelled the result in *Stern* are of such magnitude that even the consent of both litigants could not cure the constitutional defects that troubled the Chief Justice and other Justices in the majority.

The majority opinion does not expressly decide whether parties may consent to bankruptcy court jurisdiction. In fact, *Stern* contains conflicting statements that have caused confusion among bankruptcy commentators.[239] In one passage, Chief Justice Roberts stated, "The 'experts' in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay."[240] Reading this sentence in isolation would seem to suggest that the majority no longer considers consent an option because of the broader separation of powers issues. In the very next paragraph, however, Chief Justice Roberts appears to suggest that consent to jurisdiction is still possible. The Chief Justice stated that *Stern*'s holding was reached simply by substituting the word "tort" for "contract" into the holding of *Northern Pipeline*, which "establish[ed] only that

---

[236] 28 U.S.C. § 157(c)(2) (2006). *See e.g.*, *Professor Kenneth N. Klee on* Stern v. Marshall, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 2011 U.S. LEXIS 4791 (2011), 2011 EMERGING ISSUES 5743; Richard Lieb, *The Supreme Court*, *in* Stern v. Marshall*, by Applying Article III of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders*, 20 J. BANKR. L. & PRAC., no. 4 (Sept. 2011).

[237] *See supra* Part III.A.

[238] *See supra* Part III.A.

[239] *Compare* Schecter, *supra* note 189 (arguing that consent is still valid), *with* Peter C. Blain, *Bankruptcy 2011: A Brave New World*, ASPATORE, 2011 WL 6471010 (Dec. 2011) (arguing that *Stern* suggests that consent is no longer an option).

[240] *Stern*, 131 S. Ct. at 2615.

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."[241] Thus, on its face, the majority opinion is internally inconsistent with respect to its treatment of consent.

The majority's contradictory statements regarding consent have created the first *Stern* circuit split.[242] In *In re Bellingham*, the Ninth Circuit recently held that *Stern* does not affect a litigant's ability to waive his right to have a non-core claim adjudicated by an Article III court and to consent to have the claim adjudicated by a bankruptcy court.[243] However, in *Waldman v. Stone*, the Sixth Circuit ruled that a litigant's right to Article III adjudication of a non-core claim was not waivable.[244] This split has arisen as a result of the Sixth and Ninth Circuits' different interpretations of *Schor*. In *Schor*, the Court explained that Article III protects "structural interests," such as the integrity and independence of the judicial branch, while also protecting "personal interests" like the right to an impartial and independent adjudicator.[245] Although litigants may never waive rights relating to structural interests, litigants can waive rights relating to personal interests.[246] The Sixth Circuit characterized the right to an Article III adjudication of a non-core claim as a "nonwaivable structural principle."[247] Citing *Schor*, the Sixth Circuit described consent as a way for Congress to shift the judicial power of the United States to judges who lack the protections of Article III, "for the purpose of emasculating constitutional courts."[248] On the other hand, while also quoting *Schor*, the Ninth Circuit characterized a litigant's right to an Article III adjudication as personal and thus "subject to waiver."[249]

---

[241] *Id.* (emphasis added).

[242] Kyle J. Ortiz & Doron Kenter, Stern *Files: The Circuit that Originally Gave Us* Stern *Creates the First* Stern *Circuit Split*, WEIL BANKR. BLOG (Dec. 6, 2012), http://business-finance-restructuring.weil.com/jurisdiction/stern-files-the-circuit-that-originally-gave-us-stern-creates-the-first-stern-circuit-split/#axzz2ILR4w800.

[243] Exec. Benefits Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), No. 11-35162, 2012 WL 6013836, at *11 (9th Cir. Dec. 4, 2012).

[244] Waldman v. Stone, 698 F.3d 910, 917-18 (6th Cir. 2012).

[245] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

[246] *Id.*

[247] *Waldman*, 698 F.3d at 917.

[248] *Id.* at 918 (quoting *Schor*, 478 U.S. at 850).

[249] Exec. Benefits Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), No. 11-35162, 2012 WL 6013836, at *11 (9th Cir. Dec. 4, 2012) (quoting *Schor*, 478 U.S. at 848).

Despite the Sixth Circuit's ruling, consent under 28 U.S.C. § 157(c)(2) is likely to remain permissible for two reasons. First, Justice Scalia, in his concurrence, suggested that non-Article III courts should only be permitted to adjudicate Article III claims if there is historical precedent for doing so.[250] In *Waldman*, the Sixth Circuit failed to acknowledge the long line of historical precedent that permits litigants to consent to bankruptcy court jurisdiction. According to a 1945 note in the *Yale Law Journal*, "although claimants to property involved in bankruptcy proceedings are ordinarily entitled to plenary suit in a state or federal forum in accordance with Section 23 of the [1898 Act], their rights may be adjudicated [in the bankruptcy court] . . . when [both litigants] consent."[251] Plenary suits under the 1898 Act can be thought of as analogous to "non-core-but-related-to" claims. Furthermore, a line of Supreme Court cases dating back to 1902 affirmed parties' ability to consent to jurisdiction under the 1898 Act.[252] In *Macdonald v. Plymouth County Trust Co*., the Court held, "We 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."[253] Considering the long-standing tradition of permitting consent in cases filed under the 1898 Act and the Supreme Court's recurring approval of consent throughout the first part of the twentieth century, the modern Court is likely to leave the ability of parties to consent to bankruptcy court jurisdiction undisturbed.

Second, a determination of consent as unconstitutional could have far-reaching consequences that extend beyond the arena of bankruptcy courts. The Committee on Courts and the Administrative System of the National Bankruptcy Conference suggests that if consent under § 157(c)(2) were ruled unconstitutional, then the provision under the Federal Magistrate Act that permits litigants to consent to the adjudication of claims by magistrate judges would, by analogy,

---

[250] Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring).

[251] Note, *Implied Consent to Summary Jurisdiction in Bankruptcy Proceedings*, 54 YALE L.J. 461 (1945) [hereinafter *Implied Consent*].

[252] *Id.* at 461 n.5. *See, e.g.*, Macdonald v. Plymouth Cnty. Trust Co., 286 U.S. 263 (1932); Harrison v. Chamberlin, 271 U.S. 191 (1926); Galbraith v. Vallely, 256 U.S. 46 (1921); Louisville Trust Co. v. Leonard Comingor, 184 U.S. 18 (1902).

[253] *Macdonald*, 286 U.S. at 267.

also be unconstitutional.[254] According to the bankruptcy counsel for the National Association of Attorneys General, the consent provisions for both magistrate and bankruptcy courts "will rise and fall together."[255] Perhaps in an attempt to resolve any confusion surrounding this issue and keep the federal docket moving efficiently, the Fifth Circuit raised, *sua sponte*, the question of whether *Stern* affected litigants' ability to consent to magistrate judges' authority to enter a final judgment on state law counterclaims.[256] The Fifth Circuit interpreted *Stern*'s holding narrowly and held that magistrates did in fact maintain such authority.[257]

Jurisdiction by consent in both the context of bankruptcy courts and magistrate courts makes litigation more efficient and less costly for litigants, and it also lightens the already bulging docket of the district courts. If consent were found unconstitutional, it could have profound consequences on the efficiency of the federal judicial system. The Supreme Court likely will refrain from disturbing an area of law that lower courts and litigants have come to rely on so profoundly.[258]

CONCLUSION: THE WAITING RESUMES

Following the Supreme Court's ruling in *Northern Pipeline*, in which the Court invalidated the entire jurisdictional grant to bankruptcy courts in one fell swoop, Congress passed the 1984 Amendments to narrow the jurisdiction of bankruptcy courts in an attempt to cure the constitutional infirmities that prompted the Court to act. Now, post-*Stern*, the question is what should Congress do? In theory,

---

[254] *See* Comm. on Courts & the Admin. Sys., *The Scope and Implications of* Stern v. Marshall *131 S. Ct. (2011)*, NAT'L BANKR. CONF., Oct. 26, 2011, *available at* http://ssrn.com/abstract=1979503. Under the Federal Magistrate Act, with the consent of the parties, magistrate judges "conduct any or all proceedings in a jury trial or nonjury civil matter and order the entry of judgment in the case." 28 U.S.C. § 636(c)(1) (2006). *See supra* Part I.B for a discussion of the constitutionality of magistrates.

[255] Karen Cordry, *Bankruptcy: Not So Special Anymore*, 30-JAN AM. BANKR. INST. J. 12, 67 (2012).

[256] Technical Automation Servs. v. Liberty Surplus, 673 F.3d 399, 401, 404-05 (5th Cir. 2012).

[257] *Id.* at 407.

[258] On June 24, 2013, the Supreme Court granted certiorari in *In re Bellingham* to resolve the issue of whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent. Exec. Benefits Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), No. 11-35162, 2012 WL 6013836 (9th Cir. Dec. 4, 2012), *cert. granted*, 81 U.S.L.W. 3582 (U.S. June 24, 2013) (No. 12-1200).

Congress could respond in three ways. But only one course of action truly makes sense.

First, Congress could pass a new set of amendments to redraw and further narrow the boundaries of bankruptcy court jurisdiction, as it did after *Northern Pipeline*. This response is overkill if the Chief Justice is to be taken at his word, for he wrote that *Stern*'s holding is narrow and only applies to counterclaims like Vickie's. Whereas in *Northern Pipeline*, the Court invalidated the entire bankruptcy jurisdiction scheme, the Court in *Stern* opted to use a scalpel instead of a cleaver, ruling only that the bankruptcy court could not enter a final judgment on a state law counterclaim, which did not require resolution in order to administer the bankruptcy case pending before it. If Congress were to dismantle the bankruptcy regime and start from scratch, it would upset the expectations of both the litigants and the federal courts that have learned how to navigate and rely on the current system.

Second, Congress could make bankruptcy courts more like magistrate courts. Congress could do this by heightening the appellate review standard for decisions rendered by bankruptcy courts on "core" claims, making the standard more comparable to that used by district courts when reviewing magistrate judges' decisions on dispositive motions. Currently, magistrate judges' decisions on dispositive motions are reviewed *de novo* while decisions on "core" claims by bankruptcy judges are reviewed under the deferential "clearly erroneous standard."

Furthermore, Congress could reduce the wide scope of remedies that bankruptcy courts are permitted to grant, which would make bankruptcy courts more like magistrate courts and other administrative law courts. Like the court in *Crowell*, for example, the bankruptcy court would depend on the district court for the enforcement of orders and judgments. While any change that would bring bankruptcy courts more in line with other non-Article III tribunals may soften the Court's strict application of Article III to bankruptcy courts, heightened appellate review of core claims coupled with the reduction of bankruptcy courts' remedial powers would have devastating consequences for litigants. Bankruptcy courts were created to provide debtors and creditors an alternative forum to resolve their disputes outside the traditional litigation channels, which are typically costly and time consuming. In the world of bankruptcy, time is money. If the debtor is truly going to receive a fresh start and the creditors are going to receive their fair share of the debtor's assets, asset values can only be

preserved if the bankruptcy court maintains authority to grant powerful remedies in a timely fashion, without worrying about having their orders constantly overturned on appeal.

The last option is for Congress to do nothing. Although this may seem like the least constructive option, it is likely the best course of action. As the federal courts start to realize the narrowness of *Stern*'s holding, and as commentators have taken time to digest it, business in the bankruptcy courts will likely continue as usual—with the occasional district court briefly putting down its rubber stamp to scrutinize a bankruptcy court decision more closely than usual. As the Chief Justice made clear, *Stern* will not change the status quo. For now, in the fashion of Estragon and Vladimir, the bankruptcy community resumes waiting for more definitive answers from the Supreme Court on the constitutionality of bankruptcy court jurisdiction.

Joshua C. Gerber[†]

[†] J.D., Brooklyn Law School, 2013; B.A., Cornell University, 2008. I thank Professor Frederic Bloom for being my faithful guide through the chaotic universe of federal courts. A special thank you to Judge Martin Glenn, who, despite his busy docket, found time to discuss the intricacies of *Stern* with me, and to Judge Roy Babitt, who shared with me his transcripts of the congressional hearings on the 1978 Bankruptcy Reform Act and who has taught me much about history, bankruptcy, and otherwise. I am also in debt to Joshua Card, Rachel Tischler, Daniel Wityk, and Paul Sweeny of the *Brooklyn Law Review* for their insights and guidance. Finally, I thank my parents and Jackelyn Tannenholtz for their love and support.