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S. TODD BROWN*

Consent, Coercion, and Bankruptcy Administration

INTRODUCTION

THE SUPREME COURT'S 1982 PLURALITY DECISION in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹ remains one of the most controversial bankruptcy decisions in the Court's history.² *Northern Pipeline* limited Article I bankruptcy courts³ authority to hear and decide disputes that fall within the "core"⁴ of the bankruptcy power, but declined to provide much guidance concerning the parameters of these bankruptcy-specific "public rights."⁵ Scholars and practitioners who expected the Court to abandon *Northern Pipeline*,⁶ however, were in for a rude awakening when the Court issued its decision in *Stern v. Marshall*⁷ in 2011. Writing for the majority, Chief Justice Roberts not only reaffirmed the constitutional limits of the Article I bankruptcy courts as outlined in *Northern Pipeline*, but also indicated that litigant consent is insufficient to overcome these limits.⁸

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

2. See, e.g., Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 311–12 (1991) (emphasizing the *Northern Pipeline* decision was "fatally flawed" and arguing that Congress – and not the Supreme Court – should decide the status and jurisdiction of bankruptcy courts); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 991 (1988) (arguing *Northern Pipeline* "was not only badly reasoned but wrongly decided").

3. See *infra* notes 30–31, 59–61 and accompanying text; *Stern v. Marshall*, 131 S. Ct. 2594, 2627 (2011) (Breyer, J., dissenting) (noting that while Congress exercised "its Article I power" when it created bankruptcy courts, this did not "endanger the independence of the Judicial Branch," i.e. Article III courts). This essay uses the terms "non-Article III court" and "Article I court" interchangeably to describe the status of bankruptcy courts.

4. See *infra* notes 56–57 and accompanying text.

5. See *infra* notes 47–53 and accompanying text.

6. Brook Gotberg, *Preferences Are Public Rights*, 2013 WIS. L. REV. 1355, 1379 (2013) ("[P]rior to *Stern*, the trend in thinking appeared to be that *Northern Pipeline* was outdated and likely to be limited to its facts, if not actually overturned.").

7. 131 S. Ct. 2594 (2011).

8. See discussion *infra* Section I.B.

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Although the *Stern* majority characterized its decision as “a ‘narrow’ one,”⁹ lower courts have since struggled to define the parameters of the bankruptcy courts’ authority.¹⁰ Which issues do bankruptcy courts have the power to hear and decide consistent with Article III? May the parties to a proceeding consent to adjudication of other matters before a bankruptcy court? If so, must this consent be express, or may it be merely implied?

In 2015, *Wellness International Network, Ltd. v. Sharif*¹¹ placed these questions squarely before the Court. Writing for the majority, Justice Sotomayor noted the public and private rights question before deciding the matter solely on the consent question.¹² Specifically, the majority concluded that bankruptcy courts may hear and decide questions of private right with the knowing and voluntary consent of the parties.¹³ While noting that “it is good practice for courts to seek express statements of consent or nonconsent,”¹⁴ the majority determined that the Constitution requires only implied consent.¹⁵ Thus, the opinion should have allayed some of the concerns about the constitutionality of the modern bankruptcy court structure going forward.

Yet the Court’s views concerning the parameters of “public rights” in bankruptcy are only marginally clearer now than they were before *Stern*.¹⁶ Justice Thomas and Justice Scalia have questioned whether the public rights doctrine is the proper framework for evaluating the work that bankruptcy courts may or may not perform.¹⁷ In contrast to the broad reasoning of his opinion for the majority in *Stern*, Chief Justice Roberts’ *Wellness* dissent explained in narrow terms why the case involved a question that bankruptcy courts could decide.¹⁸ The other justices appear content to accept the public and private rights dichotomy in spite of the Court’s

9. *Stern*, 131 S. Ct. at 2620.

10. See Frank Volk, *First Impressions: Interpreting Stern*, 30 AM. BANKR. INST. J. 22, 22 (Dec. 2011/Jan. 2012) (noting lower courts’ difficulties to discern the implications of *Stern* and observing the “burden of uncertainty, commingled with busy dockets and the perceived loss of predictability, has caused considerable, and understandable, consternation at times”).

11. 135 S. Ct. 1932 (2015).

12. *Id.* at 1942 n.7.

13. *Id.* at 1948.

14. *Id.* at 1948 n.13.

15. *Id.* at 1947–48.

16. This essay uses the term “public rights” as employed in *Northern Pipeline* sparingly and only where it is necessary to capture the rationale of the cases that rely upon the public rights doctrine. The Supreme Court has not grounded its recent decisions in this doctrine.

17. See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1967 (2015) (Thomas, J., dissenting) (“Bankruptcy courts clearly do not qualify as territorial courts or courts-martial, but they are not an easy fit in the ‘public rights’ category, either.”); *Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (noting that bankruptcy does not fall within any of the exceptions to Article III, including public rights); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 66 (1989) (Scalia, J., concurring) (“The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine.”).

18. *Wellness*, 135 S. Ct. at 1954 (Roberts, C.J., dissenting).

consistent refusal to articulate a clear framework for distinguishing the two in bankruptcy.

The limited guidance on what is and is not within bankruptcy courts' authority is problematic for several reasons. Historically, much of the administration of bankruptcy cases has been left to non-Article III decision makers and today there is little institutional support for transforming bankruptcy courts into Article III courts.¹⁹ Additionally, a system that hinges upon litigant consent may afford aggressive litigants with opportunities to leverage the threat of additional transaction costs and delays associated with Article III court proceedings (or, at least, requiring *de novo* review of bankruptcy court recommendations). At a minimum, greater clarity concerning the parameters of the bankruptcy courts' authority to adjudicate without the parties' consent should reduce this potential gamesmanship and enhance efficiency.

This essay recounts the Court's decisions in this area and demonstrates that they collectively suggest an effort to return bankruptcy administration to something that resembles its traditional design.²⁰ While the Court has been reluctant to restrict the bankruptcy courts' more administrative functions, it has limited their role in private rights disputes to a *de facto* adjunct status in the absence of consent.²¹ Moreover, this essay suggests that the collective lesson of *Stern* and *Wellness* is that Congress may not manufacture consent to adjudication in bankruptcy court through undue coercion.²² As explained, this current hybrid system of administrative review and consent may check the necessary constitutional boxes, but it provides little assurance that the objectives of Article III will be realized; further, it generates delays and costs that significantly undermine the administrative efficiencies of utilizing non-Article III bankruptcy courts.²³

I. BACKGROUND

On the surface, Congress' power to establish bankruptcy courts lacking the protections of Article III is limited:

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,

19. See Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy* 47 (Coase-Sandor Inst. for Law and Econ., Working Paper No. 711, 2014), http://chicagounbound.uchicago.edu/law_and_economics/721/ ("There are no signs that Congress is inclined to do so, or that the judiciary will be pushing for such a resolution.").

20. See discussion *infra* Parts I, II.

21. See discussion *infra* Section II.C.

22. See discussion *infra* Section II.B.

23. See discussion *infra* Part II.

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*receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.*²⁴

Yet the Court has repeatedly rejected a “conclusory reference to the language of Article III”²⁵ when considering the various non-Article III bodies that appear to exercise judicial power.²⁶ Instead, the Court has alternated between a formalist approach in some cases and a functionalist approach in others.²⁷ This has led to a body of law with “frequently arcane distinctions and confusing precedents.”²⁸

The Bankruptcy Code of 1978 (the “Code”) tested the limits of Article III. The law provided bankruptcy courts with jurisdiction over substantially all “civil proceedings arising under . . . or arising in or related to cases under the Code.”²⁹ With respect to these matters, the bankruptcy judges held largely the same powers as other Article III court judges, including the power to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Code.³⁰ Notwithstanding the breadth and depth of their judicial roles, bankruptcy court judges were limited to 14-year terms, could be removed by the judicial conference for the applicable circuit prior to the expiration of their terms, and were not entitled to the salary protections of Article III.³¹

Although framing the new bankruptcy courts in this way promised to enhance administrative efficiency and resolve significant political resistance to earlier proposals,³² the constitutionality of this streamlined structure under Article III was, at best, uncertain.³³ A mere four years after the adoption of the Code, a divided Su-

24. U.S. CONST. art. III, § 1.

25. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986).

26. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 756–57 (2010).

27. *Id.* See also William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21–22 (1998) (contrasting formalism versus functionalism).

28. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) (quoting *N. Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982)).

29. 28 U.S.C. § 1471(b) (Supp. IV 1976) (repealed 1984).

30. See S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 179, 194 n.92 (2012) (referencing 11 U.S.C. § 105(a) (2006)) (“The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.”).

31. See *id.* at 194.

32. The political and administrative considerations that led to the original bankruptcy court structure have been examined extensively over the years. See, e.g., *id.* at 192–94 (outlining the effort to enhance administrative efficiency by expanding the bankruptcy courts’ jurisdiction and the resistance to elevating these courts to Article III status); Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 – Part Two: The Third Branch Reacts*, 81 AM. BANKR. L. J. 165, 170–71 (2007) (discussing the hostility of Article III judges in affording bankruptcy judges Article III status, i.e., as “judges” rather than “referees”).

33. See generally Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297 (1981) (reviewing the various arguments in support of the Article I

preme Court declared the system unconstitutional in *Northern Pipeline*.³⁴ Congress reshaped the bankruptcy courts two years later,³⁵ and this revised system escaped review by the Court for more than a quarter century.³⁶ During this time, bankruptcy courts exercised jurisdiction over a broad range of questions that fell within their statutory “core” jurisdiction.³⁷ After the Court’s 2011 decision in *Stern*, however, it was unclear whether and to what extent bankruptcy courts had the constitutional power to hear and decide at least some of these “core” matters.³⁸ The Court’s subsequent decisions provided some clarity concerning the administration of bankruptcy cases after *Stern*, but others remain unanswered.³⁹

This section highlights the Court’s rationale in *Northern Pipeline*, the legislative effort to respond to the decision, and the Court’s attempts to reconcile the modern bankruptcy system with Article III in recent years.⁴⁰

bankruptcy courts and arguing that they fail to overcome the framers’ goal of ensuring judicial independence). As Professor Krattenmaker noted, precedent in this area was “so vague and inconsistent as to prove meaningless at best.” *Id.* at 298–99. *See also* Thomas G. Krattenmaker, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 561 (1980) (concluding that the 1979 Magistrate Act violated Article III).

34. 458 U.S. 50, 50–52, 87 (1982) (plurality opinion).

35. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

36. Between 1984 and 2011, the Court heard issues relating to the 1984 Amendments, but not substantively on “core” versus “non-core” proceedings until *Stern v. Marshall*, 131 S. Ct. 2594 (2011). *See, e.g.*, *Union Bank v. Wolas*, 502 U.S. 151, 156–57 (1991) (examining the legislative history of the 1984 Amendments and holding that payments on long-term debt, as well as payments on short-term debt, could qualify for the ordinary course of business exception to trustee’s power to avoid preferential transfers under the Bankruptcy Code); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989) (holding that petitioner corporations were entitled to their constitutional Seventh Amendment right to a trial by jury because fraudulent conveyance actions, although designated as core proceedings that could be adjudicated by bankruptcy judges, were matters of private rather than public rights).

37. 28 U.S.C. § 157(b)(2) (1988) defined fifteen “core” subject matters over which bankruptcy courts have jurisdiction. *See, e.g.*, *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987) (holding that the district court could exercise subject-matter jurisdiction over non-core proceeding where dispute was sufficiently related to pending bankruptcy and where the dispute could have a conceivable effect on the bankruptcy estate); *Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 168–69 (1st Cir. 1987) (indicating that “core proceedings” was meant to be interpreted broadly, close to, or congruent with constitutional limits); *Volpert v. Ellis (In re Volpert)*, 177 B.R. 81, 87–89 (Bankr. N.D. Ill. 1995) (examining the legislative history of the Bankruptcy Amendments and holding that if the proceeding is of a type that is within a bankruptcy court’s core jurisdiction, a bankruptcy judge has authority to impose sanctions under 28 U.S.C. § 1927).

38. *See, e.g.*, *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942 (2015) (holding that litigants may validly consent to adjudication by bankruptcy courts); *White v. Kubotek Corp.*, 487 B.R. 1, 7–9 (D. Mass. 2012) (determining that notwithstanding the ruling in *Stern*, the Bankruptcy Court clearly had subject matter jurisdiction to interpret its prior order).

39. *See, e.g.*, *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2168 (2014) (holding that when a bankruptcy court is presented with a *Stern* claim, the proper course is for the bankruptcy court to issue proposed findings of fact and conclusions of law for *de novo* review by a district court). However, the Court declined to decide whether the petitioner was entitled to review of its fraudulent conveyance claims by an Article III court, regardless of parties’ consent to adjudication by a bankruptcy court. *Id.* at 2715.

40. *See infra* Parts I.A, I.B.

A. Northern Pipeline *and the 1984 Amendments*

In *Northern Pipeline*, the debtor pursued a breach of contract action against Marathon Pipe Line Co. (Marathon) in bankruptcy court.⁴¹ Marathon sought to dismiss the case, arguing that bankruptcy judges lacked constitutional authority to preside over the dispute.⁴² The bankruptcy court denied the motion to dismiss, and the district court reversed.⁴³ Upon granting certiorari, a majority of the Court agreed that the Article I bankruptcy courts lacked constitutional authority to hear and decide the matter.⁴⁴

Justice Brennan’s plurality opinion (joined by Justice Marshall, Justice Blackmun, and Justice Stevens) stressed the structural importance of an “independent Judiciary” in the federal system.⁴⁵ Given that the Constitution “commands that the independence of the Judiciary be jealously guarded” through “clear institutional protections,” Justice Brennan reasoned that bankruptcy judges must enjoy these protections to exercise the sweeping jurisdiction contemplated under the new law.⁴⁶

The plurality acknowledged that the Court had previously recognized congressional authority to establish legislative courts: territorial courts, courts-martial, and those that preside over matters involving “public rights.”⁴⁷ The first two types of legislative courts were not instructive, and the plurality readily distinguished the third.

Specifically, the plurality explained that “public rights” involve “matters arising ‘between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,’ and only to matters that historically could have been determined exclusively by those departments.”⁴⁸ When Congress creates a statutory right, it “clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.”⁴⁹ The power to delegate this role to an Article I decision maker is merely “incidental” to the right itself; it is part and parcel of the exercise of the legislative power to create the right.⁵⁰

41. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56 (1982).

42. *Id.* at 56–57.

43. *Id.* at 57.

44. *Id.* at 87 (plurality opinion). *Id.* at 91–92 (Rehnquist, J., concurring). Six justices – Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Stevens, and Justice Rehnquist, joined by Justice O’Connor – indicated that a bankruptcy court did not have authority to adjudicate the lawsuit.

45. *Id.* at 59–60.

46. *Id.*

47. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 66–70 (1982).

48. *Id.* at 67–68 (internal citations omitted).

49. *Id.* at 83.

50. *Id.* at 83–84.

The plurality then distinguished these public rights from private rights, defined as “the liability of one individual to another under the law,”⁵¹ such as the contract dispute between the debtor and Marathon. When the right exists independent of the legislative enactment, requiring adjudication of a private right before an Article I tribunal is not a mere extension of the legislative authority to create rights. Adjudication of these private rights lies “at the core of the historically recognized judicial power,”⁵² and “such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art[icle] III courts.”⁵³

Subsequent to the Court’s decision in *Northern Pipeline*, the bankruptcy system operated in accordance with the “Interim Emergency Rule.”⁵⁴ This rule operated under the legal fiction that bankruptcy matters were pending before the federal district courts (which, as Article III courts, were authorized to exercise the powers contemplated under the Code), who automatically referred all bankruptcy cases to the bankruptcy courts for administration.⁵⁵ With respect to related proceedings (commonly referred to as “core” matters), bankruptcy judges entered final orders as they had before.⁵⁶ The bankruptcy courts effectively performed all of the work in “nonrelated proceedings” (commonly referred to as “non-core”) too, but could only issue proposed findings of fact and conclusions of law; “the district court actually signed the orders.”⁵⁷ Many at the time understood the need for the rule, though they also viewed it as “unworkable and of doubtful constitutionality.”⁵⁸

When Congress finally restructured the bankruptcy courts, it largely tracked the Interim Emergency Rule.⁵⁹ Under the Bankruptcy Amendments and Federal Judgeship Act of 1984,⁶⁰ the judicial council for each circuit was authorized to appoint bankruptcy judges (to 14-year terms) as adjuncts to the federal district courts; these bankruptcy judges were authorized to hear any or all bankruptcy cases and proceedings referred to them by Article III courts.⁶¹ Bankruptcy judges were authorized to adjudicate “core” proceedings, and they could also hear and decide “non-core”

51. *Id.* at 71–72.

52. *Id.* at 70.

53. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982).

54. See Vern Countryman, *Emergency Rule Compounds Emergency*, 57 AM. BANKR. L.J. 1, 1–2 n.1 (1983); 1 COLLIER ON BANKRUPTCY 3-6 to 3-7, 3-110 to 3-113 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).

55. Countryman, *supra* note 54, at 1–2, n.1.

56. *Id.*

57. 1 THOMAS J. SALERNO & JORDAN A. KROOP, BANKRUPTCY LITIGATION AND PRACTICE: A PRACTITIONER’S GUIDE § 3.05[C], at 3–10 (4th ed. Supp. 2012).

58. Stuart Taylor Jr., *Fate of Bankruptcy System in Doubt*, N.Y. TIMES, Dec. 20, 1982, at D1. See also Countryman, *supra* note 54, at 3.

59. Brown, *supra* note 30, at 197.

60. Pub. L. No. 98-353, 98 Stat. 333.

61. 28 U.S.C. § 152(a)(1) (1984).

proceedings with the consent of the parties.⁶² If any party did not consent to adjudication of non-core matters before the bankruptcy judge, the judge could nonetheless make proposed findings of fact and conclusions of law subject to *de novo* review by the district court.⁶³

Although this legislative solution did not fully address the constitutional concerns raised in *Northern Pipeline*, it effectively precluded reconsideration of the revised bankruptcy court system for nearly three decades. Bankruptcy courts exercised broad authority over the cases and proceedings before them, and district courts effectively withdrew the reference or reviewed matters *de novo* when challenges to the bankruptcy courts' authority under *Northern Pipeline* arose.⁶⁴ In the absence of such challenges, bankruptcy courts and practitioners largely came to accept the constitutional validity of the delegation of authority under this structure. As one judge noted, "in exercising my delegated authority, I have entered countless orders as final without a second thought about the legitimacy of what I was doing."⁶⁵

B. *Stern v. Marshall*

The first significant challenge to this structure, *Stern v. Marshall*,⁶⁶ "involved an expansive but widely embraced view of consent, a procedural history that effectively precluded *de novo* review, and a series of appeals driven by both the high stakes of the litigation and a degree of personal animus that was severe enough to survive the passing of the original litigants."⁶⁷

The debtor, Vickie Lynn Marshall (better known as Anna Nicole Smith) (hereinafter "Vickie"), filed for Chapter 11 bankruptcy ostensibly as a result of a default judgment against her in a matter involving her former housekeeper,⁶⁸ but much of the case centered on her ongoing litigation concerning the estate of her late hus-

62. *Id.* § 157.

63. *Id.* § 157(c)(1).

64. *See, e.g., In re Grabill Corp.*, 967 F.2d 1152, 1158 (7th Cir. 1993) (directing the district court to withdraw reference of an adversary proceeding from the bankruptcy court and conduct a jury trial); *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1396 (2d Cir. 1990) (holding that Cooper's adversary proceeding was "core" within the meaning of 28 U.S.C. § 157(b)(2) (1988) and reversing the district court, which had withdrawn the reference from the bankruptcy court's jurisdiction); *In re Transcon Lines*, 121 B.R. 837, 841 (C.D. Cal. 1990) (discussing how § 157(c)(1) of the 1984 Bankruptcy Act requires *de novo* review by the district court of "non-core" matters and that withdrawal of a case to district court is appropriate if parties do not consent to bankruptcy jurisdiction).

65. *Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 321 (Bankr. W.D. Mich. 2011).

66. 131 S. Ct. 2594 (2011).

67. Brown, *supra* note 30, at 203.

68. The suit between Vickie and the housekeeper was settled soon after the bankruptcy filing. Charles Lane, *Anna Nicole Smith's Supreme Fight*, WASH. POST, Mar. 1, 2006, at A01.

band, J. Howard Marshall II.⁶⁹ In May 1996, E. Pierce Marshall, J. Howard's son, initiated an adversary proceeding in Vickie's Chapter 11 case seeking a determination that certain of her contingent liabilities in this litigation were not dischargeable pursuant to Section 523(a) of the Bankruptcy Code.⁷⁰ Two months later, Pierce filed a proof of claim in the bankruptcy case and attached a copy of the complaint from the adversary proceeding.⁷¹ Vickie objected to the proof of claim and asserted several counterclaims.⁷²

Although Pierce argued that the bankruptcy court lacked jurisdiction over the litigation concerning J. Howard's estate,⁷³ the court concluded that Pierce consented to its adjudication of the matter by filing a proof of claim.⁷⁴ The bankruptcy court granted Vickie summary judgment with respect to Pierce's claim on November 5, 1999.⁷⁵ Nearly a year later, the bankruptcy court awarded her nearly \$450 million in damages on her counterclaim.⁷⁶

On appeal, Pierce challenged the judgment on several grounds, one of which being that the counterclaim was a non-core matter requiring Article III adjudication under *Northern Pipeline*.⁷⁷ The district court agreed and conducted an extensive, independent review.⁷⁸ Before the court could enter judgment, however, the state probate court entered a final order in the matter in Pierce's favor. Pierce then moved for summary judgment in the district court, asserting that the court was bound to the probate court's findings under various theories of claim and issue preclusion.⁷⁹ The district court rejected the motion and entered judgment in favor of Vickie for nearly \$90 million.⁸⁰

69. *Stern*, 131 S. Ct. at 2600.

70. *Marshall v. Marshall (In re Marshall)*, 264 B.R. 609, 616 (C.D. Cal. 2001).

71. *Id.*

72. *Id.* (including counterclaims for fraudulent transfer, tortious interferences with inheritance, breach of fiduciary duty, abuse of process, fraud, promissory estoppel, and breach of contract).

73. *Marshall v. Marshall (In re Marshall)*, 257 B.R. 35, 36 (Bankr. C.D. Cal. 2000) ("E. Pierce Marshall continues to complain that this court lacks jurisdiction over this adversary proceeding because this claim belongs in the probate case now in trial in Texas. Notably, however, he has never brought a motion on this subject on proper notice pursuant to this court's motion rules. For this reason alone this issue has never been properly brought before this court, and E. Pierce Marshall is entitled to no relief on this subject.").

74. *Id.* at 37 ("E. Pierce Marshall filed his claim against the bankruptcy estate in this case. He thus voluntarily submitted himself to the bankruptcy court's equity jurisdiction as to all claims by the estate against him, including the claims asserted in this adversary proceeding.").

75. *In re Marshall*, 264 B.R. at 616.

76. *Marshall v. Marshall (In re Marshall)*, 264 B.R. 609, 617 (C.D. Cal. 2001).

77. *Id.* at 614.

78. *Id.* at 618–32.

79. *Marshall v. Marshall (In re Marshall)*, 271 B.R. 858, 862 (2001) (C.D. Cal. 2001).

80. *Marshall v. Marshall (In re Marshall)*, 275 B.R. 5, 58 (C.D. Cal. 2002) (concluding Vickie was entitled to \$44,292,767.33 in compensatory damages, plus punitive damages in the same amount).

Initially, the Ninth Circuit resolved the dispute on other grounds.⁸¹ When it finally addressed the *Northern Pipeline* question, the Ninth Circuit concluded that the bankruptcy court “exceeded its statutory grant of power and the constitutional limitations on that power when it purported to enter a final judgment” and, accordingly, that “the findings of the Texas probate court should be afforded preclusive effect because it is the earliest final judgment on matters relevant to this proceeding.”⁸² Although 28 U.S.C. § 157(b)(2)(C) provided that core proceedings include counterclaims by the estate against persons filing claims against the estate, the panel refused to read this language as “permit[ting] the bankruptcy court to consider under § 157(b)(2)(C) counterclaims that are factually and legally unrelated to the claim being asserted against the bankruptcy estate” because such a reading “would certainly run afoul of the Court’s holding in *Marathon*.”⁸³ Given that the counterclaim at issue involved such factually and legally unrelated matters – a point driven home by the fact that the bankruptcy court addressed them separately several months after the original claim was resolved – the appellate panel reversed.⁸⁴

When *Stern* reached the Supreme Court, the majority agreed with the debtor’s contention that the plain language of 28 U.S.C. § 157(b)(2)(C) authorized bankruptcy courts to enter final orders on all counterclaims.⁸⁵ The majority further concluded that: (i) this grant of authority was unconstitutional;⁸⁶ and (ii) Pierce did not consent to bankruptcy court jurisdiction over the counterclaim by filing a proof of claim.⁸⁷

First, the majority rejected the idea that a counterclaim might qualify as a “public right” because it was “not a matter that could be pursued only by grace of the other branches . . . or one that ‘historically could have been determined exclusively by’ those branches.”⁸⁸ It did not “flow from a federal statutory scheme,” and its resolution was not “‘completely dependent upon’ adjudication of a claim created by federal law.”⁸⁹ Rather, the counterclaim was merely a claim under state common law between two private parties.⁹⁰ Thus, although the Court had recognized that limited referral of matters in a “particularized area of law” to a specialized administrative body may be consistent with Article III, this dispute involved a court “with substan-

81. However, the Supreme Court of the United States reversed the appellate decision. *Marshall v. Marshall* (*In re Marshall*), 547 U.S. 293, 299–300, 315 (2006).

82. *Marshall v. Stern* (*In re Marshall*) 600 F.3d 1037, 1039–40 (9th Cir. 2010).

83. *Id.* at 1057.

84. *Id.* at 1057, 1065.

85. *Stern v. Marshall*, 131 S. Ct. 2594, 2605, 2608 (2011).

86. *Id.* at 2608 (“Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie’s counterclaim, Article III of the Constitution does not.”).

87. *Id.* at 2614–15, n.8.

88. *Id.* at 2614 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982)).

89. *Id.* at 2614.

90. *Id.*

tive jurisdiction reaching any area of the *corpus juris*.”⁹¹ Further, if “such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous ‘public right,’ then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.”⁹²

Second, the majority expressed concern that creditors “have no choice but to file their claims in bankruptcy proceedings if they want to pursue the claims at all,” so “the notion of ‘consent’ does not apply in bankruptcy proceedings as it might in other contexts.”⁹³ Congress has the power to require creditors to file a proof of claim to have their private right to payment against a debtor considered; in so doing, creditors consent to the steps necessary to have that claim evaluated and paid according to the Code.⁹⁴ In some circumstances, a court must consider all legal and factual questions relevant to the disposition of other claims between the debtor and the creditor.⁹⁵ In *Stern*, however, resolution of Pierce’s claim “in no way” affected the disposition of the estate’s counterclaim.⁹⁶ Rather, the counterclaim was an independent right of action aimed at augmenting the estate, which, under *Northern Pipeline*, must be decided by an Article III court.⁹⁷

In sum, instead of eliminating the divisions of authority required by *Northern Pipeline*, the Court’s decision in *Stern*: (i) reaffirmed that bankruptcy courts may decide certain matters but may not exercise the “judicial Power of the United States;”⁹⁸ (ii) established that bankruptcy courts thus lacked the power to enter orders in at least some matters designated as “core” under the statute;⁹⁹ (iii) rejected the broad conception of consent adopted by the bankruptcy court;¹⁰⁰ and (iv) questioned whether litigant consent was a sufficient basis to authorize bankruptcy court adjudication over non-core claims in light of the institutional interests protected by Article III.¹⁰¹

C. Executive Benefits Insurance Agency v. Arkison

91. *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011).

92. *Id.*

93. *Id.* at 2615, n.8.

94. *Id.* at 2629 (Breyer, J., dissenting).

95. *Id.* at 2617. In *Stern*, there was overlap between Vickie’s counterclaim and Pierce’s defamation claim that led the lower courts to conclude the counterclaim was compulsory. *Id.*

96. *Id.* at 2616.

97. *Stern v. Marshall*, 131 S. Ct. 2594, 2616 (2011).

98. *Id.* at 2611.

99. *Id.* at 2620; *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2172 (2014).

100. *Stern* at 2615, n.8.

101. *Id.* at 2616.

CONSENT, COERCION, AND BANKRUPTCY ADMINISTRATION

Notwithstanding the majority's admonition that its decision was "a 'narrow' one,"¹⁰² *Stern* quickly became "the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court."¹⁰³ Some litigants – including many who initially brought the proceedings in bankruptcy court – argued that their constitutional rights to an Article III forum had been violated in matters that had already been decided by bankruptcy judges without any challenge to their authority to do so.¹⁰⁴ Thus, in *Stern*'s wake, the lower courts struggled with several questions, including, among others:

1. Drawing the line between "core" claims that bankruptcy courts have the power to adjudicate without all of the parties' consent and "core" claims they may not hear and decide (so-called "Stern claims") under Article III;¹⁰⁵
2. Whether bankruptcy courts may adjudicate Stern claims with the consent of the parties consistent with Article III;¹⁰⁶ and
3. Whether Article III may be satisfied if district courts approach bankruptcy court decisions concerning Stern claims as reports and recommendations subject to *de novo* review.¹⁰⁷

*Executive Benefits Insurance Agency v. Arkison*¹⁰⁸ brought the second and third issues before the Court during the October 2013 term.¹⁰⁹ *Arkison* centered on a Chapter 7 trustee's fraudulent conveyance suit against the former owner and principal of the debtor (Paleveda) and a new company Executive Benefits Insurance Agency (EBIA) to which certain assets of the debtor had been transferred.¹¹⁰ The bankruptcy court granted the trustee's motion for summary judgment against EBIA, and EBIA appealed.¹¹¹ The district court reviewed the record *de novo* and separately entered

102. *Id.* at 2620.

103. *In re Ambac Fin. Grp., Inc.*, 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011).

104. *See Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2172 (2014).

105. *Id.* at 2172–73. *See also infra* notes 121–24 and accompany text.

106. *Id.* at 2172. 28 U.S.C. § 157 (1988) permits a bankruptcy court to adjudicate a claim to final judgment in core proceedings per Section 157(b) and in non-core proceedings with the consent of all parties per § 157(c)(2), *id.* at 2174, but *Stern v. Marshall*, 131 S. Ct. 2594 (2011) did not address how bankruptcy courts should proceed under circumstances when a core claim may *not* be adjudicated under § 157(b), *id.* at 2172 (emphasis added).

107. *Id.* at 2168. *Arkison* resolved the unanswered adjudication issue from *Stern*, holding that 28 U.S.C. § 157 (1988) nevertheless permitted bankruptcy courts to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court. *Id.*

108. 134 S. Ct. 2165 (2014).

109. *Id.* at 2165, 2172. *See also supra* notes 106–07 and accompanying text.

110. *Id.* at 2169.

111. *Id.*

judgment in favor of the trustee.¹¹² EBIA appealed to the Ninth Circuit. After EBIA filed its opening brief, the Supreme Court entered its decision in *Stern*.¹¹³ EBIA subsequently moved to dismiss its appeal, arguing that Article III does not authorize bankruptcy courts to enter final orders in fraudulent conveyance disputes.¹¹⁴

The Ninth Circuit rejected EBIA's argument and affirmed the judgment in favor of the trustee, Arkison.¹¹⁵ Taking together the Supreme Court's guidance in *Stern* and *Granfinanciera, S.A. v. Nordberg*,¹¹⁶ the appellate panel characterized the fraudulent conveyance action as one involving a private right.¹¹⁷ First, the panel concluded that EBIA impliedly consented to adjudication before the bankruptcy court.¹¹⁸ Second, it reasoned that the bankruptcy court's judgment could "be treated as proposed findings of fact and conclusions of law, subject to *de novo* review by the District Court."¹¹⁹

The Supreme Court granted certiorari with respect to both issues, but Justice Thomas, writing for a unanimous Court, resolved the matter solely on the second.¹²⁰ The Court noted that many lower courts "have described *Stern* claims as creating a statutory 'gap.'"¹²¹ Under this reasoning, a *Stern* claim may not be adjudicated in bankruptcy court like other claims that are designated as "core" under 28 U.S.C. § 157.¹²² Yet the statute also seemed to limit the submission of proposed findings of fact and conclusions of law to the district court for *de novo* review only to claims that are designated as "non-core" under 28 U.S.C. § 157(b).¹²³ In light of this "statutory gap," some lower courts reasoned that district courts were required "to hear all *Stern* claims in the first instance."¹²⁴

The Court rejected the argument that *Stern* claims fall into any sort of "statutory gap."¹²⁵ Rather, since 28 U.S.C. § 151¹²⁶ explicitly provides for the severability of

112. *Id.*

113. *Id.*

114. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2169 (2014).

115. *Id.*

116. 492 U.S. 33 (1989).

117. *Arkison*, 134 S. Ct. at 2169. *Granfinanciera* held that a fraudulent conveyance claim under Title 11 is not a matter of public right for purposes of Article III. *Id.* at 2169, n.3.

118. *Id.* at 2169.

119. *Id.* at 2172.

120. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170, n.4 (2014). Given the Court's determination that *de novo* review and entry of judgment was constitutionally sufficient, it did not address whether EBIA consented to bankruptcy court adjudication or if "Article III permits a bankruptcy court, with the consent of the parties, to enter a final judgment on a *Stern* claim." *Id.*

121. *Id.* at 2172.

122. *Id.* at 2172–73.

123. *Id.* at 2173.

124. *Id.*

125. *Id.*

126. 28 U.S.C. § 151 (1984). Section entitled "separability" provides that "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application

provisions that are invalidated, *Stern* claims such as the fraudulent conveyance action in *Arkison* proceed as non-core under 28 U.S.C. § 157(c).¹²⁷

This did not fully resolve the matter, however, because the lower courts did not follow the approach for adjudicating non-core claims under section 157(c).¹²⁸ Nonetheless, the Court concluded that EBIA received the review it was entitled to under Article III.¹²⁹ Specifically, after the district court reviewed the matter *de novo*, it issued a reasoned opinion noting that “there were no disputed issues of material fact and that the trustee was entitled to judgment as a matter of law.”¹³⁰ Consistent with its statutory authority over bankruptcy matters, the district court entered a separate judgment in favor of the trustee.¹³¹ Thus, EBIA “received the same review from the District Court that it would have received if the Bankruptcy Court had treated the fraudulent conveyance claims as non-core proceedings under § 157(c)(1).”¹³²

Arkison provided some much needed guidance concerning the adjudication of *Stern* claims. The decision reinforced that bankruptcy courts may hear, but not decide, *Stern* claims as adjuncts to the district courts.¹³³ Thus, when district courts enter separate judgments following *de novo* review, Article III is satisfied even where the process outlined in section 157(c) has not been followed to the letter.¹³⁴ Moreover, *Arkison* confirmed that standing orders directing bankruptcy courts to treat *Stern* claims as non-core claims, as adopted by some jurisdictions, are consistent with the constitutional and statutory framework.¹³⁵

D. Wellness International Network, Ltd. v. Sharif

Many in the bankruptcy community were disappointed that *Arkison* did not address whether bankruptcy courts could enter final judgments with respect to *Stern* claims given litigants’ consent.¹³⁶ By the time the Court considered *Arkison*, two other Cir-

of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby.”

127. Exec. Benefits Ins. Agency v. *Arkison*, 134 S. Ct. 2165, 2173 (2014).

128. *Id.* at 2172–73 (citing the Ninth Circuit’s failure to proceed with the *Stern* claim as “non-core” as an example of the routine failure of federal courts to do so post-*Stern*).

129. *Id.* at 2175.

130. *Id.*

131. *Id.*

132. *Id.*

133. Exec. Benefits Ins. Agency v. *Arkison*, 134 S. Ct. 2165, 2173 (2014).

134. *Id.* at 2174–75.

135. *Id.* at 2173. *E.g.*, *In re* Standing Order of Reference re: Title 11, No. 12-MISC-32 (S.D.N.Y. Jan. 31, 2012).

136. See, e.g., Richard L. Costella & Kristen M. Siracusa, *Colusa Mushroom: Is Clarity on Court Jurisdiction Beginning to Bloom Post-Bellingham?*, 33 AM. BANKR. INST. J. 26, (2014) (following the grant of certiorari in *Arkison*, the bankruptcy community “eagerly expected additional guidance from the Court on the issues of

cuit courts – the Sixth¹³⁷ and the Seventh¹³⁸ – had concluded that litigant consent could not cure the constitutional deficiency. On the other hand, the Ninth Circuit’s decision to the contrary remained unaltered by *Arkison*.¹³⁹ The bankruptcy community did not need to wait long for this issue to be addressed; the Court granted Wellness International’s petition for a writ of certiorari three weeks after *Arkison* was decided.¹⁴⁰

Wellness involved an adversary proceeding initiated by Wellness International, in which the company sought, among other things, a declaration that a trust overseen by the Chapter 7 debtor (Sharif) was his alter ego and, accordingly, that the trust’s assets were property of the estate.¹⁴¹ The bankruptcy court entered a default judgment in favor of Wellness International, and Sharif appealed.¹⁴²

The Court decided *Stern* prior to the briefing in the appeal, but Sharif neglected to mention the opinion in his brief.¹⁴³ After briefing was complete, Sharif asserted that the bankruptcy court lacked constitutional authority to enter a final order in the dispute under *Stern* and, accordingly, that the district court should treat the bankruptcy court’s order as a report and recommendation.¹⁴⁴ The district court refused to consider the argument because it was not raised in a timely manner and affirmed the bankruptcy court’s decision.¹⁴⁵

The Seventh Circuit reversed.¹⁴⁶ The panel drew upon the *Stern* majority’s discussion of the structural interests implicated by the design of the bankruptcy court system, and reasoned that Sharif could raise the argument at any time on appeal.¹⁴⁷ The panel further concluded that: (i) the limitation on bankruptcy court authority

bankruptcy court jurisdiction that have been confounding both lawyers and judges since *Stern* was decided,” but the Court “sidestepped” the consent question).

137. Waldman v. Stone, 698 F.3d 910, 918 (6th Cir. 2012).

138. Wellness Int’l Network Ltd. v. Sharif, 727 F.3d 751, 766 (7th Cir. 2013).

139. Compare *In re Bellingham Ins. Agency v. Exec. Benefits Ins. Agency*, 702 F.3d 553, 567 (9th Cir. 2012), *aff’d*, 134 S. Ct. 2165 (2014) (holding noncreditor consent to have non-core issues decided in bankruptcy court sufficient to permit bankruptcy judge to make a final judgment) with *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2175 (2014) (ducking the question of whether noncreditor consent cures constitutional defect). The Seventh Circuit also rejected the district courts’ practice of treating bankruptcy court orders in *Stern* matters as reports and recommendations subject to *de novo* review because Title 28 does not authorize bankruptcy courts to hear such matters. *Wellness*, 727 F.3d at 776 (7th Cir. 2013). In light of this “statutory gap,” the Seventh Circuit concluded that the reference to the bankruptcy court must be immediately withdrawn and tried before the district court. *Id.* at 776. As noted in the previous section, the Supreme Court’s unanimous decision in *Arkison* effectively closed this statutory gap. See *supra* notes 121–22 and accompanying text.

140. Wellness Int’l Network Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013) *cert. granted*, 82 U.S.L.W. 3496 (July 1, 2014) (No. 13-935).

141. Wellness Int’l Network Ltd. v. Sharif, 135 S. Ct. 1932, 1940 (2015).

142. *Id.* at 1941.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Wellness Int’l Network Ltd. v. Sharif, 727 F.3d 751, 768 (7th Cir. 2013).

to decide *Stern* claims may not be cured by litigant consent;¹⁴⁸ (ii) the bankruptcy court exceeded its constitutional authority in ruling on the alter ego claim because it stemmed from state law rather than from the bankruptcy itself and was “indistinguishable from the tortious-interference counterclaim in *Stern*,”¹⁴⁹ and (iii) Sharif’s proposed remedy – requiring the district court to treat the bankruptcy court order as a report and recommendation – was not authorized if the alter ego claim was not “non-core” under Title 28 (the “statutory gap” rationale subsequently rejected in *Arkison*).¹⁵⁰ Given the absence of any briefing on the last issue, the Seventh Circuit remanded with instructions for the district court to “determine whether the alter-ego claim is a core or non-core proceeding.”¹⁵¹

The Supreme Court granted certiorari on two questions:

1. Whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor’s possession is property of the bankruptcy estate means that such action does not “stem[] from the bankruptcy itself” and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action.

*2. Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant’s conduct is sufficient to satisfy Article III.*¹⁵²

Writing for the 6-3 majority, Justice Sotomayor focused on the second question regarding consent, and noted at the outset that adjudication by consent is “nothing new.”¹⁵³ Congress established non-Article III forums to assist litigants with the resolution of their disputes, and the litigants are free to choose whether they will make use of these forums.¹⁵⁴ Drawing upon precedent in cases involving other alternative forums,¹⁵⁵ the majority stressed that this choice – the decision to consent or with-

148. *Id.* at 771.

149. *Id.* at 774–75.

150. *Id.* at 776–77.

151. *Id.* at 777.

152. *Wellness Int’l Network Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013) *cert. granted*, 82 U.S.L.W. 3496 (July 1, 2014) (No. 13-935).

153. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942 (2015).

154. *Id.*

155. *Id.* at 1942–44 (discussing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); *Gomez v. United States*, 490 U.S. 858 (1989); *Peretz v. United States*, 501 U.S. 923 (1991)).

hold consent – demonstrated that the right to an Article III adjudicator is personal and thus subject to waiver.¹⁵⁶

With respect to the second prong of the consent question – whether consent must be express or may be implied – the majority ultimately concluded that consent may be implied, so long as it is knowing and voluntary.¹⁵⁷ The majority stressed that “it is good practice for courts to seek express statements of consent or nonconsent,” and statutes and procedural rules “may require express consent even where the Constitution does not.”¹⁵⁸ Although the question before the Court centered on what *Article III* requires, the majority’s analysis centered on precedent that addressed only the constitutional parameters of consent.¹⁵⁹ A conclusion that the Constitution requires express consent, “would be in great tension” with the Court’s prior determination that “the Article III right is substantially honored’ by permitting waiver based on ‘actions rather than words.’”¹⁶⁰

The three dissenting justices would have also reversed and remanded on the first question, concluding that the alter ego claim against Sharif fell well within the core of the bankruptcy power.¹⁶¹ However, the dissenting justices vigorously rejected the majority’s reasoning regarding the question of litigation consent. Specifically, the Chief Justice noted that framers viewed separation of powers as “sacred.”¹⁶² In “diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability.”¹⁶³ In light of the institutional interests that this design serves and the values it protects – interests and values that do “not belong to any branch of the Government but to the Nation as a whole” – no branch has the power to “consent to a violation of the separation of powers.”¹⁶⁴ If no branch may consent to such a violation, “surely a private litigant may not do so.”¹⁶⁵ Even in *Commodity Futures Trading Commission v. Schor*,¹⁶⁶ a decision the majority relied upon extensively, the Court acknowledged that litigant consent is insufficient when “the structural component of Article III ‘is implicat-

156. *Id.* at 1944.

157. *Id.* at 1948 (“It bears emphasizing, however, that a litigant’s consent—whether express or implied—must still be knowing and voluntary.”).

158. *Id.* at 1948 n.13.

159. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1947–48 (2015) (discussing the implied consent standard articulated in *Roell v. Withrow*, 538 U.S. 580, 589, 590 (2003) and explaining that “[n]othing in the Constitution requires that consent to adjudication by a bankruptcy court be express”).

160. *Id.* at 1947–48 (quoting *Roell v. Withrow*, 538 U.S. 580, 589, 590 (2003)).

161. *Id.* at 1953–54 (Roberts, C.J., dissenting).

162. *Id.* at 1954 (quoting James Madison, 1 ANNALS OF CONG. 581 (1789) (Joseph Gales ed., 1834)).

163. *Id.* at 1954.

164. *Id.* at 1955.

165. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1955 (2015).

166. See discussion of *Schor* in the introduction to Part II, *infra*.

ed.”¹⁶⁷ Thus, *Stern* expressly found that authorizing non-Article III courts to adjudicate the counterclaims at issue in that case would “compromise the integrity of the system of separated powers and the role of the Judiciary in that system.”¹⁶⁸ In sum, “allowing bankruptcy courts to decide *Stern* claims by consent would impermissibly threaten the institutional integrity of the Judicial Branch.”¹⁶⁹

The Chief Justice characterized the majority’s rationale as involving “an imaginative reconstruction of *Stern*,” which, as noted, he authored four years earlier.¹⁷⁰ Although *Stern* referenced the fact that Pierce “did not truly consent” to resolution of the counterclaims in bankruptcy court, this was one of many facts which distinguished *Stern* from other proceedings.¹⁷¹ Moreover, Chief Justice Roberts stressed the holding was grounded in the understanding that Pierce *could not* have consented “given the nature of bankruptcy.”¹⁷²

Of course, the dissenting justices’ views are not binding on the lower courts, but they are significant – and perhaps surprising – in what they suggest about congressional authority to assign certain matters to non-Article III tribunals without consent of the parties.¹⁷³ Notwithstanding the Chief Justice’s strong reservations about intrusions into the judicial function, he expressly conceded that non-Article III adjudicators may preside over certain bankruptcy proceedings consistent with Article III.¹⁷⁴ Justice Scalia joined in the *Wellness International* dissent, which suggests that he is not as strongly opposed to a narrow bankruptcy exception as may have been previously thought.¹⁷⁵ Justice Thomas did not join the Chief Justice’s discussion of the public rights exception,¹⁷⁶ yet he too observed: “No doubt certain aspects of bankruptcy involve rights lying outside the core of the judicial power.”¹⁷⁷ Among these rights, he noted the right to discharge and the claims allowance process.¹⁷⁸ Ra-

167. *Wellness*, 135 at 1956 (Roberts, C.J., dissenting) (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850–51 (1986)).

168. *Id.* (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011)).

169. *Id.* at 1957.

170. *Id.*

171. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1957 (2015) (explaining that the “one affirmative reference to the lack of consent . . . came amid a long list of factors distinguishing the proceeding in *Stern* from the proceedings in *Schor* and other ‘public rights’ cases”).

172. *Id.*

173. *See id.* at 1957–58 (“It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions. Such delegations threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised.”).

174. *Id.* at 1952.

175. *See id.* at 1950.

176. *See id.* He did join, however, in Part I, which rejected the majority’s consent rationale.

177. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1967 (2015) (Thomas, J., dissenting).

178. *Id.* at 1967 (describing the right to discharge as “[t]he most obvious” of those rights “lying outside the core of the judicial power” and opining that, “together with the claims allowance process that proceeds it, [the right to discharge] can act conclusively on the core private rights of the debtors’ creditors”).

ther than attempt to squeeze these bankruptcy exceptions into the public rights doctrine, he suggested that “bankruptcy courts and their predecessors more likely enjoy a unique, textually based exception, much like territorial courts and courts-martial do.”¹⁷⁹

II. ANALYSIS: BANKRUPTCY RIGHTS, COERCION AND CONSENT

Where does the Court’s recent attention to the intersection of Article III and the bankruptcy power leave the bankruptcy system? Part of the difficulty in answering this question – and, specifically, defining the public rights doctrine – is the extent to which the Court’s discussions of consensual and non-consensual adjudication overlap. The Court has consistently stressed the former in finding non-Article III adjudication consistent with the Constitution.¹⁸⁰ Only rarely has it found that such adjudication complies with the dictates of Article III in the absence of express or implied consent.¹⁸¹

Thus, in *Commodity Futures Trading Commission v. Schor*,¹⁸² the Court found that the Commodity Futures Trading Commission (CFTC) acted within its constitutional authority by exercising jurisdiction over state law counterclaims in a former client’s action against its former broker.¹⁸³ Although acknowledging that adjudication over the counterclaim broke from the traditional agency model, the majority refused “to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical ‘slippery slope’ may deposit us.”¹⁸⁴ Moreover, the plaintiff consented to the CFTC’s jurisdiction when he pursued an administrative resolution of his claim against the broker and expressly demanded that the broker litigate the counterclaim in the administrative proceeding.¹⁸⁵ Drawing upon the reasoning of *Katchen v. Landry*,¹⁸⁶ a case under the Bankruptcy Act, the Court reasoned that Congress could empower the non-Article III tribunal to preside over counterclaims that “arose out of the same transaction.”¹⁸⁷

In the absence of consent, non-Article III tribunals have been deemed constitutional only where they exercised exceedingly limited, specialized authority to decide

179. *Id.*

180. *See, e.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985) (holding that FIFRA’s binding arbitration provision, a non-Article III adjudication, did not violate the Constitution); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 841 (1986) (holding that the authority of the Commodity Futures Trading Commission to hear state counterclaims, a non-Article III adjudication, did not violate the Constitution when litigants consented).

181. *See infra* note 184.

182. 478 U.S. 833 (1986).

183. *Id.* at 845.

184. *Id.* at 852.

185. *Id.* at 850.

186. 382 U.S. 323 (1966).

187. *Schor*, 478 U.S. at 852.

questions that could have easily been subject to legislative action.¹⁸⁸ In *Thomas v. Union Carbide Agricultural Products Co.*, for example, the Court characterized the *Northern Pipeline* plurality as “establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.”¹⁸⁹ *Thomas* involved a requirement under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that registrants submit data-sharing compensation disputes to binding arbitration.¹⁹⁰ Under FIFRA, registrants must submit research data concerning a pesticide’s health, safety, and environmental effects to the Environmental Protection Agency (EPA).¹⁹¹ Compiling and filing this data can be expensive, and FIFRA requires subsequent registrants to compensate first submitters for the use of their data.¹⁹² Where these costs were disputed, FIFRA provided that either party could invoke binding arbitration.¹⁹³ In upholding this framework, the Court reasoned that “the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively determined by the Executive and Legislative Branches,’ the danger of encroaching on the judicial powers is reduced.”¹⁹⁴

In *Northern Pipeline*, *Stern*, and *Wellness*, the Court stressed this distinction.¹⁹⁵ Indeed, it is possible that this distinction was critical to one or both of the justices¹⁹⁶ who sided with the majorities in both *Stern* (nonconsensual and exceeded the constitutional authority) and *Wellness* (consensual and within the limits of Article III). This section thus distinguishes cases that centered on litigant consent from those that authorized Article I adjudication without consent.¹⁹⁷ In the process, this discussion demonstrates that some seemingly clear divisions in the Court’s decisions are, at best, fuzzy and suggests a nuanced interpretation of the Court’s seemingly incompatible visions of consent in *Wellness* and *Stern*.¹⁹⁸ From there, this section

188. See *supra* note 184.

189. 473 U.S. 568, 584 (1985).

190. *Id.* at 571.

191. *Id.*

192. *Id.* at 572.

193. *Id.* at 573.

194. *Id.* at 589 (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 62 (1982)). For much the same reason, Justice Brennan found that this framework withstood scrutiny under the *Northern Pipeline* standard. See *id.* at 600–01 (Brennan, J., concurring) (“Although a compensation dispute under FIFRA ultimately involves a determination of the duty owed one private party by another, at its heart the dispute involves the exercise of authority by a Federal Government arbitrator in the course of administration of FIFRA’s comprehensive regulatory scheme. As such it partakes of the characteristics of a standard agency adjudication”).

195. See *supra* Sections I.A–I.C.

196. Justices Kennedy and Alito sided with the majority in both cases.

197. See *infra* Sections II.A–II.C.

198. See *infra* Sections II.A–II.C.

touches upon the long-standing question of whether *de novo* review actually advances the objectives of Article III.¹⁹⁹

A. Mandatory Adjudication and Bankruptcy Rights

To suggest that *Thomas* and *Schor* indicate the demise of *Northern Pipeline* is an oversimplification. *Northern Pipeline* presented a unique and significant separation of powers problem for the Court because (i) the Bankruptcy Code embraced the “most expansive federal bankruptcy jurisdiction in our history”²⁰⁰ and (ii) for the first time, it empowered judges lacking the protections of Article III to adjudicate substantially all of the proceedings that fell within this jurisdiction.²⁰¹ Although any one proceeding or type of proceeding may not have suggested a break from Article III, the bankruptcy courts’ statutory authority was hardly limited to allocating the costs of a public scheme (as in *Thomas*)²⁰² or resolving claims that are “completely dependent upon adjudication of [reparation] claim[s] created by federal law” (as in *Schor*).²⁰³ The Court’s subsequent decisions in this area similarly reflect discomfort with reframing private rights matters (subject to Article III protections in the federal system) as questions of public right (subject to summary adjudication, perhaps before an Article I judge) merely due to the bankruptcy of one of the parties.²⁰⁴

The Court has not rejected the idea that the power to “[establish] laws with respect to the subject of bankruptcies” includes a legislative power to create specialized Article I courts to administer bankruptcy cases.²⁰⁵ Justice Brennan’s plurality opinion in *Northern Pipeline* noted that legislative courts have historically been limited to the review of “matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments, and only to matters that historically could have been determined exclusively by those departments.”²⁰⁶ In *Northern Pipeline* and again in *Granfinanciera*, the Court acknowledged that “public rights” need not be a matter “between the government and others.”²⁰⁷ At most, the Court has (i)

199. See *infra* Section II.C.

200. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 790 (2000).

201. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53–54 (1982).

202. *Thomas v. Union Carbide Agric. Prods. Co.* 473 U.S. 568 (1985).

203. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856 (1986).

204. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55–56 (1989); *Beard v. Braunstein*, 914 F.2d 434, 441 (3d Cir. 1990).

205. U.S. CONST. art. I, § 8, cl. 4. As noted in Part II.A.2.b, *infra*, even justices who have previously expressed doubts on this question appeared to reverse course in *Wellness*.

206. *N. Pipeline*, 458 U.S. at 67–68.

207. *Granfinanciera*, 492 U.S. at 54; *N. Pipeline*, 458 U.S. at 69. But see *Granfinanciera*, 492 U.S. at 66 (Scalia, J., concurring) (“The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine.”).

operated from the premise that such a legislative power exists and (ii) identified certain actions that fall outside that power.²⁰⁸

Yet the Court's guidance concerning the parameters of congressional power to assign adjudicative authority to bankruptcy courts has been sparse. *Granfinanciera*, borrowing from *Thomas*, acknowledged that a "seemingly 'private' right" may be "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."²⁰⁹ By contrast, where "a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court."²¹⁰ Thus, the Court has recognized that there is some degree of overlap between legislative, executive and judicial functions, but how far do these gray areas extend?

Historical practice ostensibly provides some additional guidance, but it, too, is limited. In *Stern*, the majority distinguished public rights that Congress may create and elect against "bring[ing] within the cognizance of the courts of the United States," from private rights that Congress "cannot 'withdraw from judicial cognizance.'"²¹¹ The latter include any matter that, "from its nature, is the subject of a suit at common law, or in equity, or admiralty."²¹² For much of American colonial history, however, there was "no separation between executive, legislative and judicial roles" generally, and the "distinctions between different bodies or courts were blurred."²¹³ Thus, certain functions that might be considered "judicial" today were left to quasi-judicial officers in bankruptcy²¹⁴ and other matters.²¹⁵

Similarly, some have suggested that the design of the Bankruptcy Act of 1800²¹⁶ (1800 Act) demonstrates that the early Congresses understood that several seeming-

208. See *Granfinanciera*, 492 U.S. at 54 ("The crucial question, in cases not involving the Federal Government, is whether 'Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.'").

209. *Id.*

210. *Id.* at 54–55.

211. *Stern v. Marshall*, 131 S. Ct. 2594, 2612 (2011).

212. *Id.*

213. Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 253, 260–61 (1967) ("The judicial systems of American colonies present a pattern unfamiliar to the modern lawyer. The first striking feature was the lack of separation of powers between the different functions of government, a principle which is accepted today as fundamental.").

214. See generally Ralph Brubaker, A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After *Stern v. Marshall*, 86 AM. BANKR. L. J. 121 (2012); Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567 (1998) (analyzing English and early American bankruptcy laws).

215. See Surrency, *supra* note 213.

216. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (amended 1801, 1802 and repealed 1803).

ly judicial functions in bankruptcy did not fall within the judicial power.²¹⁷ Specifically, the 1800 Act empowered commissioners, who were not Article III judges, to engage in certain administrative and judicial functions.²¹⁸ The latter included, among other things, the ability to: (i) summon and interrogate those believed to be in possession of the bankrupt's property, issue warrants to those who did not appear, and commit them and others who refused to answer to prison;²¹⁹ (ii) make the initial determination as to whether the person charged was a bankrupt under the Act;²²⁰ (iii) allow creditors to prove their debts;²²¹ (iv) order the distribution of the estate;²²² (v) certify to the district judge that the requirements for discharge were satisfied;²²³ and (v) authorize the release of the bankrupt from prison.²²⁴

The powers that the 1800 Act withheld or authorized only with the consent of the parties are equally telling. The commissioner took possession of the bankrupt's property, books, and records which were subsequently transferred to assignees for administration.²²⁵ Assignees were authorized to stand in the shoes of the bankrupt for the purpose of collecting debts owed to him, but the 1800 Act did not provide for a resolution of these disputes before the commissioner.²²⁶ Moreover, any creditor of the bankrupt could (i) refuse to submit his claim to the judgment of the commissioner and (ii) demand a jury trial before the circuit court.²²⁷ Thus, although the 1800 Act adopted certain extra-judicial means of administering bankruptcy cases, disputes that had been handled by the superior courts of England were reserved to the federal trial courts under the 1800 Act.²²⁸

Given the framers' focus on delineating the different functions of government as a means of limiting the powers of each branch, it is unsurprising that at least some members of the Court have erred on the side of limiting potential encroachments into the judicial role, even though colonial and early post-colonial practice may have assigned some seemingly judicial functions to non-judicial or quasi-judicial

217. See, e.g., Plank, *supra* note 214, at 606 ("The actions taken shortly after the adoption of the Constitution confirm the framers' understanding of the benefits and permissibility of a summary bankruptcy procedure by non-Article III judges with a right of review by an Article III judge.").

218. *Id.* at 607–09.

219. 1800 Act, §§ 14–15.

220. *Id.* at § 3.

221. *Id.* at § 6.

222. *Id.* at §§ 29–30.

223. *Id.* at § 36. However, the district judge was authorized the issue the discharge where such a certification was "unreasonably denied." *Id.*

224. *Id.* at § 60.

225. Bankruptcy Act of 1800, § 5.

226. *Id.* at § 13.

227. *Id.* at § 58.

228. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 719–20 (2004). This distinction between extra-judicial administrative functions and judicial functions "evolved into the familiar bankruptcy distinction between 'summary' and 'plenary' proceedings." *Id.* at 719.

officers.²²⁹ At most, colonial practice and the 1800 Act support the view that certain matters referred to bankruptcy courts under the Code need not be decided by Article III courts, but matters that the Court has treated as involving primarily private rights may not be adjudicated by non-Article III courts without consent.

Even with the Court's limited direct guidance concerning the parameters of bankruptcy rights, some lines have been drawn. *Stern* reinforced the Court's distinction between "rights that are (a) created by the legislative scheme to restructure debtor-creditor relations; (b) necessarily incorporated as part of the substantive design of that scheme; and (c) private matters, regardless of whether they are relabeled under the Code."²³⁰ The remainder of the discussion analyzes these disputes separately.

1. Applying the Express Provisions of Bankruptcy Law

Some rights – including eligibility for bankruptcy relief, automatic stay, dismissal, conversion to another chapter, administrative provisions concerning the appointment and duties of the trustee and estate professionals, and the right to a discharge and limitations on that right – are creations of bankruptcy law and are central to its operation.²³¹ To that end, the power of the bankruptcy courts to hear and decide disputes concerning most aspects of bankruptcy administration appears to be unaffected by *Northern Pipeline* and subsequent decisions.²³²

To date, however, the Court has consistently framed fraudulent conveyance actions as those involving private rights, notwithstanding the fact that such actions are incorporated into bankruptcy law.²³³ For example, in *Granfinanciera*, the Court rejected the suggestion that actions to recover fraudulent conveyances, which are incorporated in the Bankruptcy Code, transformed the existing private right to such actions under state law into "public rights" that could be adjudicated by bankruptcy courts without consent of the parties.²³⁴ Congress did not "create a new cause of action, and remedies therefor, unknown to the common law."²³⁵ "Rather, Congress simply reclassified a pre-existing, common-law cause of action that was not inte-

229. See Surrency, *supra* note 213; see also Brubaker, *supra* note 214.

230. Brown, *supra* note 30, at 214.

231. See, e.g., *In re USA Baby, Inc.*, 674 F.3d 882, 884 (7th Cir. 2012) (conversion); *In re City of Detroit*, 498 B.R. 776, 784 (Bankr. E.D. Mich. 2013) (eligibility); *Calderon v. Bank of Am. Corp.* (*In re Calderon*), 497 B.R. 558, 567 (Bankr. E.D. Ark. 2013) (seeking damages for violation of the automatic stay); *Mahanna v. Bynum*, 465 B.R. 436 (W.D. Tex. Nov. 28, 2011)(dismissal); *Turner v. First Cmty. Credit Union* (*In re Turner*), 462 B.R. 214 (Bankr. S.D. Tex. July 11, 2011) (automatic stay).

232. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 752 (2010).

233. *Id.* at 769.

234. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. at 51–52.

235. *Id.* at 60 (quoting *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 461 (1977)).

grally related to the reformation of debtor-creditor relations.”²³⁶ It was a “purely taxonomic change” that did not alter the underlying nature of the right.²³⁷

The classification of preference actions is more challenging. On the one hand, preferences are unique to bankruptcy law even if they are commonly brought in conjunction with fraudulent conveyance actions.²³⁸ As the name suggests, a preference action asserts that a debtor took steps prior to the commencement of his case that effectively preferred certain creditors over others.²³⁹ Specifically, in paying certain debts and not paying others, the debtor ensured that the former received payments from a limited fund (the assets of the debtor) that, under the bankruptcy priority scheme, should have been shared with other creditors.²⁴⁰ To address this potential for abuse, the preference provisions of bankruptcy law afford the estate distinct and separate grounds for recovering these payments even where they may not be subject to recovery in a common law fraudulent conveyance action.²⁴¹ Thus, some have suggested that preference actions are public rights subject to adjudication by non-Article III courts.²⁴²

On the other hand, the Supreme Court has suggested that defendants in preference actions do not involve public rights. In *Schoenthal v. Irving Trust Co.*, the Court reasoned that preference suits “constitute no part of the proceedings in bankruptcy but concern controversies arising out of it.”²⁴³ In *Langenkamp v. Culp*, the Court noted, in dicta, that a preference defendant who has not filed a proof of claim is entitled to a jury trial because the action “amounts to a legal action to recover a monetary transfer.”²⁴⁴ Moreover, it may be difficult to reconcile a system that treats fraudulent conveyances as private rights and preference actions as public rights

236. *Granfinanciera*, 492 U.S. at 60.

237. *Id.* at 61.

238. *See Frank v. Michigan ex rel. Mich. Unemployment Agency Dep’t of Consumer & Indus. Servs.*, 263 B.R. 538, 542 (E.D. Mich. 2000) (stating that preferences actions are unique bankruptcy devices).

239. *See* 11 U.S.C. § 547 (2012).

240. *Id.*

241. *Id.*

242. *See Burch v. Seaport Capital, LLC (In re Direct Response Media, Inc.)*, 466 B.R. 626, 644 (Bankr. D. Del. 2012) (“The Court adopts the Narrow Interpretation and holds that *Stern* only removed a non-Article III court’s authority to finally adjudicate one type of core matter, a debtor’s state law counterclaim asserted under § 157(b)(2)(C). By extension, the Court concludes that *Stern* does not remove the bankruptcy courts’ authority to enter final judgments on other core matters, including the authority to finally adjudicate preference and fraudulent conveyance actions like those at issue before this Court.”); *In re Apex Long Term Acute Care-Katy, L.P.*, 465 B.R. 452, 463 (Bankr. S.D. Tex. 2011) (“The entire purpose of the cause of action, then, is to enforce the Bankruptcy Code’s equality of distribution. In this respect, preferential transfer actions are fundamentally different from fraudulent transfer actions, although the two causes of action superficially resemble False Fraudulent transfer actions are not necessarily asserted against entities that were ever legitimate creditors of the debtor. Preferential transfer actions, in contrast, are part of the administration of the estate: they are concerned with determining the amounts of claims under the Bankruptcy Code.”).

243. *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94–95 (1932).

244. 498 U.S. 42, 45 (1990).

notwithstanding their distinct foundations in the law.²⁴⁵ Thus, several courts have concluded that efforts to augment the estate through a preference action involve private rights and, accordingly, must be heard by an Article III court.²⁴⁶

2. Questions of Private Right that Inform Bankruptcy Law

Some common proceedings in bankruptcy – including the claim allowance process and certain individual debtor exemptions – refer to non-bankruptcy law merely to inform the understanding and consideration of rights that are created under the Code.²⁴⁷ Where the underlying rights are not in dispute, administration of these claims appears largely indistinguishable from the administration of other questions that arise under bankruptcy law. Conversely, as noted previously, resolving disputed questions concerning these underlying rights before a non-Article III adjudicator has not always been available in the absence of litigant consent.²⁴⁸

One example of the uncertain lines between public and private rights in bankruptcy is the bankruptcy court’s authority to decide whether property qualifies as property of the estate. This is a question of federal bankruptcy law, but section 541 of the Code (i) looks to the debtor’s rights under non-bankruptcy law to identify the nature of the debtor’s interests in property²⁴⁹ and (ii) does not purport to alter these non-bankruptcy rights.²⁵⁰ Where these non-bankruptcy rights are not in dispute, the question is simply whether the Code treats the relevant property interest as property of the estate.²⁵¹

However, where the underlying property right is unliquidated and disputed, a strict reading of the public rights cases may suggest a need for Article III adjudication. Although there is no doubt that the trustee succeeds to the debtor’s interest in

245. See *Moyer v. Koloseik (In re Sutton)*, 470 B.R. 462, 471 n.29 (Bankr. W.D. Mich. 2012) (“Is this aspect of the bankruptcy process any more a public right than the collection of a receivable, which is certainly another crucial aspect of the process? Or, to put it differently, why is the recipient of a million dollar preference not entitled to the same protection of an Article III judge as the guy who owes the estate \$20 on an open account?”). This may be particularly troublesome given that the overwhelming majority of modern bankruptcy cases are voluntary and similar questions, such as creditor arrangements, were historically overseen by common law courts. *Id.*

246. See, e.g., *In re Innovative Commc’n Corp.*, 2014 U.S. Dist. LEXIS 73592, at *10 (D.V.I. May 30, 2014) (finding preference actions are not public rights subject to bankruptcy court adjudication); see also *Pryor v. Tromba*, 2014 U.S. Dist. LEXIS 47969, at *13 (E.D.N.Y. Apr. 7, 2014); *Penson Fin. Servs. v. O’Connell (In re Arbc Capital Mgmt., LLP)*, 479 B.R. 254, 265 (S.D.N.Y. 2012).

247. *Brown*, *supra* note 30, at 214–15.

248. Act of Apr. 4, 1800, ch. 19, § 58, 2 Stat. 19, 35 (repealed 1803).

249. See, e.g., *Wilson v. Bill Barry Enters., Inc.*, 822 F.2d 859, 861 (9th Cir. 1987).

250. See, e.g., *In re Jones*, 768 F.2d 923, 927 (7th Cir. 1985) (“The estate’s rights are limited to those had by the debtor: ‘whatever rights a debtor had at the commencement of the case continue in bankruptcy—no more, no less.’”) (quoting *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984)).

251. See, e.g., *Fisher v. Apostolou*, 155 F.3d 876, 880 (7th Cir. 1998) (“The nature of a debtor’s interest in property is determined by state law, but the question whether the resulting interest should count as ‘property of the estate’ for § 541 purposes is an issue of federal law.” (citation omitted)).

the cause of action, it is not clear whether Congress may empower a bankruptcy court to adjudicate the cause of action to augment the estate. Unlike litigating disputed claims against the estate, which will most often arise out of an objection to the creditor's proof of claim,²⁵² the other party may be a stranger to the bankruptcy case and refuse to consent to non-Article III adjudication. Thus, although the causes of action in *Northern Pipeline* and *Stern* were property of the estate, the bankruptcy courts lacked constitutional authority to hear and decide them.

There is a certain danger in drawing lines that are too fine or too blunt in this area. *Northern Pipeline* and *Stern* could be read to bar all actions to augment the estate, save for those that will "necessarily be resolved in the claims allowance process."²⁵³ Similarly, if the line to be drawn is between disputed and undisputed rights to property, a recalcitrant bankrupt or estate debtor could simply manufacture a legal or equitable challenge to the debtor's ownership, thus transforming liquid estate property into a contested right of action requiring litigation in an Article III or state court.

In his dissent, Chief Justice Roberts indicated that *Wellness* presented such a fact pattern:²⁵⁴ the debtor in that case argued that property he previously claimed to own was, in fact, property of a trust that he oversaw as trustee.²⁵⁵ Such a "merely colorable" claim to an asset, the Chief Justice noted, was the sort of matter that bankruptcy referees had the power to address under the Bankruptcy Act of 1898.²⁵⁶ Thus, the alter ego claim was not an attempt to reclaim a right that passed to a third party, as in a fraudulent conveyance; it was an action to determine the extent of the estate's interest in property held by the debtor at commencement.²⁵⁷

252. Filing a proof of claim has long been sufficient to establish consent to resolution of any underlying questions necessary to establish the validity and amount of the claim before the bankruptcy court. *See, e.g.,* Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (finding that filing a proof of claim triggers the claim allowance process and subjects the claimant to the bankruptcy court's equitable power to decide all matters that are part of the process); Katchen v. Landy, 382 U.S. 323, 333 n.9 (1966) ("Our decision is governed by the 'traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.'" (quoting Gardner v. New Jersey, 329 U.S. 565, 573 (1947))); (Cent. Vt. PSC v. Herbert, 341 F.3d 186, 191 (2d Cir. 2003) ("By filing the proof of claim, the creditor consents to the bankruptcy court's broad equitable jurisdiction."); *In re G.I. Indus., Inc.*, 204 F.3d 1276, 1280 (9th Cir. 2000) ("By filing the proof of claim, Benedor voluntarily subjected the agreement [underlying the claim] to the bankruptcy court's jurisdiction. . . .").

253. *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011).

254. 135 S. Ct. 1932, 1953–54 (2015) (Roberts, C.J., dissenting).

255. *Id.* at 1940 (majority opinion).

256. *Id.* at 1953 (Roberts, C.J., dissenting). Indeed, the power of the referee to adjudicate claims of ownership to property in the actual or constructive possession of the state was recognized under the 1898 Act. *See, e.g.,* Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940); Straton v. New, 283 U.S. 318 (1931); Isaac v. Hobbs Tie & Timber Co., 282 U.S. 734 (1931). Likewise, summary adjudication was appropriate where a party asserting a merely colorable claim had actual or constructive possession of property. *See, e.g.,* May v. Henderson, 268 U.S. 111 (1925); Am. Fin. Co. v. Cuppard, 45 F.2d 154 (5th Cir. 1930); *In re Gant*, 52 F.2d 220 (M.D.N.C. 1931).

257. *Wellness*, 135 S. Ct. at 1954 (Roberts, C.J., dissenting).

B. Consent

1. The Personal Right to Article III Adjudication

As the *Wellness* majority observed, “[a]djudication by consent is nothing new.”²⁵⁸ The Bankruptcy Act of 1800 authorized commissioners to hear and decide claim disputes, and claimants were required to opt out of this process if they wanted an Article III adjudicator.²⁵⁹ Under the Bankruptcy Act of 1898, the referees’ power to adjudicate certain disputes hinged upon express or implied consent.²⁶⁰

The Constitution requires only that consent be knowing and voluntary.²⁶¹ In other contexts, the Court has clarified that “knowing” waivers of constitutional rights refers to “intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”²⁶² “Voluntary” implies that the consent is freely given, not subject to undue duress or coercion.²⁶³ Although the *Wellness* majority did not go further, precedent provides some insight into the parameters of consent in bankruptcy going forward.

First, express consent, already required for statutory “non-core” claims under the Bankruptcy Rules,²⁶⁴ will be sufficient. Indeed, given the severability analysis in *Arkison*, Justice Alito suggested that this requirement may apply to *Stern* claims.²⁶⁵ The *Wellness* majority also noted that “it is good practice for courts to seek express statements of consent or nonconsent, both to ensure irrefutably that any waiver of the right to Article III adjudication is knowing and voluntary and to limit subsequent litigation over the consent issue.”²⁶⁶

Second, a reviewing court will likely find knowing and voluntary consent where the litigant requests relief in bankruptcy court. This is consistent with *Schor*, which the majority cited extensively,²⁶⁷ and follows from invoking the court’s jurisdiction to resolve a dispute.

258. *Id.* at 1942 (majority opinion).

259. Act of Apr. 4, 1800, ch. 19, § 58, 2 Stat. 19, 35 (repealed 1803).

260. Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 683 (1985).

261. *Wellness*, 135 S. Ct. at 1948.

262. *Brady v. United States*, 397 U.S. 742, 748 (1970). Thus, a party must be aware of a right or privilege in order to waive it. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

263. See *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984) (“The purported waiver of the right to an Article III trial would not be an acceptable ground for avoiding the constitutional question if the alternative to the waiver were the imposition of serious burdens and costs on the litigant.”).

264. FED. R. BANKR. P. 7012(b).

265. *Wellness*, 135 S. Ct. at 1949 (Alito, J., concurring).

266. *Id.* at 1948 n.13 (majority opinion).

267. *Id.* at 1943–45.

Third, the Court has previously recognized that filing a proof of claim similarly invokes the claims resolution process in bankruptcy and thus indicates consent to bankruptcy court adjudication of all matters necessary to consider the claim.²⁶⁸ Although some language in *Stern* may be read to suggest otherwise,²⁶⁹ the majority stressed the distinction between resolving a counterclaim that involved the “same issue” as the claim allowance process versus inferring litigant consent to address numerous other unresolved issues that were not necessarily resolved in that process.²⁷⁰ Along the same lines, a debtor’s voluntary commencement of a bankruptcy case should suggest knowing and voluntary consent to the adjudication of the debtor’s rights in the bankruptcy case.

Fourth, even where the litigant does not expressly consent to adjudication, consent may be inferred where the litigant is made aware of the need for consent and does not withhold it. *Roell v. Withrow*, which the *Wellness* majority cited favorably in support of its conclusion, is instructive.²⁷¹ *Roell* asked whether implied consent to adjudication before a magistrate was sufficient under the Constitution.²⁷² The Court observed that demanding express consent would present “the risk of a full and complicated trial wasted at the option of an undeserving and possibly opportunistic litigant.”²⁷³ Thus, instead of holding that express consent was necessary for constitutional purposes, the Court reasoned that “the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge.”²⁷⁴

2. *The Institutional Interests in Article III Adjudication*

As noted in Part II, the *Stern* majority stressed the institutional interests protected by Article III, and this language suggested that litigant consent was not sufficient to overcome the Article III limits on bankruptcy court adjudication.²⁷⁵ *Wellness*, however, indicated that these concerns were overblown in the course of finding that bankruptcy courts could hear and decide *Stern* claims with litigant consent.²⁷⁶

However, reading *Wellness* as simply reversing *Stern* oversimplifies the analysis. The *Stern* majority highlights the risk that bankruptcy law and procedure limit liti-

268. *Katchen v. Landy*, 382 U.S. 323, 334 (1966) (citing *Wiswall v. Campbell*, 93 U.S. 347, 351 (1876)).

269. *See infra* Part II.B.2.

270. 131 S. Ct. 2594, 2616 (2011).

271. 538 U.S. 580, 590 (2003).

272. *Id.* at 582.

273. *Id.* at 590.

274. *Id.*

275. *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011).

276. 135 S. Ct. 1932, 1947 (2015) (“To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court.”).

gants' alternatives for vindicating private rights. An independent judiciary is fundamental in the federal system.²⁷⁷ The Court's interest in preserving independence is protected in no small part by limiting the exercise of the "judicial power of the United States" to judges with the tenure and salary protections of Article III.²⁷⁸ Where Congress cannot require adjudication in a non-Article III forum directly, inferring "consent" to such adjudication from an act that a litigant *must* perform to have his private right to payment recognized has the same practical effect (in *Stern*, filing a proof of claim in a Chapter 13 case).²⁷⁹ As the Court has noted elsewhere, consent under undue duress, even when generated by governmental authority, is not truly voluntary.²⁸⁰

Contrasting *Stern* with *Wellness* on this point is difficult because the latter did not ultimately address whether the debtor, Sharif, actually consented to non-Article III adjudication.²⁸¹ At most, we can infer that a majority of the Court is unwilling to say that the "nature of bankruptcy" precludes meaningful consent in all cases.²⁸² The majority's emphasis on *Roell* suggests that it saw the underlying question as more one of waiver or forfeiture (e.g., Sharif's failure to raise an Article III question until late in the appeal) rather than consent.

It may also be possible that some of the justices were swayed by distinctions between Sharif's rights and conduct in *Wellness* and Pierce Marshall's rights and conduct in *Stern*. It is one thing to say that Congress may condition the debtor's pursuit of a statutory right to discharge upon consent to an administrative forum.²⁸³ It is another thing entirely to strip a creditor of his pre-existing property rights against the debtor unless he "consents" (by filing a proof of claim) to non-Article III adju-

277. THE FEDERALIST NO. 78, at *4 (Alexander Hamilton) (WEST, 1788 WL 492).

278. *Wellness*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting).

279. *Id.* at 1948 (majority opinion) ("[T]he Article III right is substantially honored' by permitting waiver based on 'actions rather than words.' The implied consent standard articulated in *Roell* supplies the appropriate rule for adjudications by bankruptcy courts under § 157." (quoting *Roell v. Withrow*, 123 S. Ct. 1696, 1703 (2003)) (internal citations omitted)).

280. See *Stern*, 131 S. Ct. at 2614 (finding that one party "did not truly consent to resolution of [the] claim in the bankruptcy court proceedings" because "[h]e had nowhere else to go if he wished to recover from [the] estate"); *Wellness*, 135 S. Ct. at 1957 (Roberts, C.J., dissenting) (noting "the litigant in *Stern* did not consent because he *could not* consent given the nature of bankruptcy"). Specifically, the absence of an "alternative forum to the bankruptcy court" for pursuing a claim necessarily precludes "consent" in any meaningful form. *Id.*

281. *Wellness*, 135 S. Ct. at 1948–49.

282. Justices Scalia and Thomas joined the Chief Justice's dissent in *Wellness*, but Justices Kennedy and Alito, who joined in the *Stern* majority, did not. Compare *id.* at 1938, with *Stern*, 131 S. Ct. at 2599.

283. The right to a discharge in bankruptcy is statutory, not constitutional. *United States v. Kras*, 409 U.S. 434, 446 (1973) ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy."). *Id.* at 447 (A discharge in bankruptcy "obviously is a legislatively created benefit, not a constitutional one, and, as noted, it was a benefit withheld, save for three short periods, during the first years of the Nation's life. The mere fact that Congress has delegated to the District Court supervision over the proceedings by which a petition for discharge is processed does not convert a statutory benefit into a constitutional right of access to a court. Then, too, Congress might have delegated the responsibility to an administrative agency.").

dication of his claim and any other matters that may have some relationship to the claim, however tangential those relationships may be.²⁸⁴

C. Bankruptcy Courts as Adjuncts and de novo Review

Certain Supreme Court decisions upholding non-Article III adjudication are distinguishable from those that rejected non-Article III adjudication in another critical respect: the former involved true adjuncts to Article III courts. In *Stern*, for example, the majority stressed that the administrative adjudicator whose role had been found constitutionally valid in *Crowell v. Benson* “had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court.”²⁸⁵ Similarly, other scholars and practitioners have suggested that the problem with comparing modern bankruptcy courts to commissioners under the Bankruptcy Act of 1800 is that they “no longer perform an administrative function but act solely as neutral and independent tribunals for the resolution of disputes.”²⁸⁶ This observation was echoed in *Stern*:

*Nor can the bankruptcy courts under the 1984 Act be dismissed as mere adjuncts of Article III courts, any more than could the bankruptcy courts under the 1978 Act. The judicial powers the courts exercise in cases such as this remain the same, and a court exercising such broad powers is no mere adjunct of anyone.*²⁸⁷

The lower courts have responded, in part, by reviewing cases involving unsettled “public rights” questions *de novo*. The district court in *Arkison* adopted this philosophy (albeit not in accordance with 28 U.S.C. § 157(c)(1)), and the Court unanimously endorsed the lower courts’ approach.²⁸⁸ With the Court’s blessing, one may anticipate that this trend toward treating bankruptcy court orders as proposed findings of fact and conclusions of law in close cases will accelerate. Indeed, even where a party expressly withholds consent, “the most likely response will be to have the

284. Similar to the Supreme Court, the Ninth Circuit struggled with such an expansive view of consent grounded in the filing of a proof of claim. See *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037, 1057 (9th Cir. 2010). Although the Ninth Circuit framed its decision to avoid a constitutional question, in refusing to rule that the counterclaim fell within the bankruptcy court’s core jurisdiction, the Ninth Circuit stressed the same constitutional concerns as the Supreme Court majority. Compare *id.* at 1058-59, with *Stern*, 131 S. Ct. at 2611.

285. *Stern*, 131 S. Ct. at 2612 n.6.

286. Pfander, *supra* note 228, at 770.

287. *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011).

288. See *supra* Section I.C.

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bankruptcy judge hear the matter and submit proposed findings of fact and conclusions of law to the district judge.”²⁸⁹

As Lawrence P. King noted upon the passage of the 1984 Bankruptcy Amendments, this approach “is rife with problems and temptations.”²⁹⁰ The “major temptation is for the district court to rubber-stamp the proposed findings and conclusions of the bankruptcy judge.”²⁹¹ To date, however, the Court has not been presented with an opportunity to test how far a district court must go to satisfy Article III through *de novo* review. This is not terribly surprising given that any court that does little or no more than it would in an ordinary appeal is unlikely to tip its hand. In such cases, the “constitutional protection for [A]rticle III judges to adjudicate noncore proceedings has been accomplished semantically and cosmetically. Little or no change actually will occur.”²⁹²

CONCLUSION

The current bankruptcy law originally assumed that the bankruptcy courts would exercise broad jurisdiction over all matters arising in, arising under and related to any given bankruptcy case.²⁹³ They were not mere adjuncts to Article III courts, and their power to hear and decide matters did not generally hinge upon the litigants’ consent.²⁹⁴ They were courts in every meaningful sense, though bankruptcy judges lacked the tenure and salary protections of Article III.²⁹⁵ After *Northern Pipeline*, Congress attempted to preserve as much of this system as possible by broadly defining “core” claims.²⁹⁶ Although this approach may not have captured the constitutional limits of bankruptcy court power correctly, the core/non-core distinction provided much needed guidance for practitioners and the courts.²⁹⁷

Stern undermined the predictability of the statutory core/non-core division of power; in its wake, seemingly any “core” claim could be subject to challenge.²⁹⁸ As noted in Part II.A-B, even questions that are central to bankruptcy administration are not above challenge. Moreover, in the time since *Stern*, the Court has provided

289. G. Ray Warner, *Wellness: To Consent or Get the Bankruptcy Judge Anyway*, GT RESTRUCTURING REV. (May 29, 2015), <http://www.gtlaw-restructuringreview.com/2015/05/wellness-to-consent-or-get-the-bankruptcy-judge-anyway/>.

290. King, *supra* note 260, at 681.

291. *Id.*

292. *Id.* at 682.

293. See *supra* note 29 and accompanying text.

294. See *supra* note 30 and accompanying text.

295. See *supra* note 31 and accompanying text.

296. See, e.g., James F. Martin, *The Bankruptcy Amendments and Federal Judgeship Act of 1984: A Step Backward in Reducing Jurisdictional Delay*, 19 J. MARSHALL L. REV. 219, 224–25 (1985).

297. See *supra* notes 62–63 and accompanying text.

298. See *supra* Section II.B.

little guidance concerning the questions that bankruptcy courts may decide in the absence of litigant consent.²⁹⁹

Even so, the Court's recent decisions suggest a partial return to pre-*Stern* normalcy.³⁰⁰ Members of the Court appear to tolerate a bankruptcy exception to Article III, and *Wellness* reinforced that litigants are free to litigate in bankruptcy court but in so doing, may be bound by the court's decision.³⁰¹ The limits of both bases for bankruptcy court jurisdiction remain unclear. *Arkison* provided a roadmap for converting the statutory design into one where bankruptcy courts truly act as adjuncts in non-core matters.³⁰² Yet in so doing, *Arkison* also enhanced the likelihood that cases at the margins will be treated as non-core by default and subject to *de novo* review.³⁰³ This should serve to reduce *Stern* claim appeals beyond the district courts,³⁰⁴ but also suggests that the Court will have fewer opportunities to clarify the bankruptcy public rights framework in the future.³⁰⁵

In sum, the current bankruptcy system retains the constitutional window dressing of the 1984 Amendments without the predictability of the statutory core/non-core division.³⁰⁶ It remains to be seen how far the Code, bankruptcy rules and courts may go in extracting consent from litigants, but *Wellness* may be read to sanction more coercion rather than less.³⁰⁷ Although it is perhaps unbecoming to suggest that district courts will be less than diligent in performing *de novo* review, it is nonetheless a risk, particularly because of courts' reluctance to examine whether any given review truly affords litigants constitutional protections.³⁰⁸ The sky may not be falling on the bankruptcy system, but the hodgepodge of procedural mechanisms supporting it going forward hardly honor the "sacred" place of separation of powers under the Constitution, and they certainly do not serve as a model of administrative efficiency.

299. See *supra* Sections II.C., II.D.

300. See *supra* Sections II.C., II.D.

301. See *supra* Section II.C.

302. See *supra* Section II.C.

303. See *supra* Section II.C.

304. Although this essay does not discuss the implications for appeals to bankruptcy appellate panels, this view is grounded in the understanding that district courts will review *Stern* claims where a litigant does not consent to bankruptcy court adjudication. See, e.g., *Roundtable Discussion: Executive Benefits Insurance Agency v. Arkison*, 22 AM. BANKR. INST. L. REV. 543, 560–63 (2014) (discussing the Bankruptcy Appellate Panel (BAP) structure after *Arkison*).

305. See generally Part II.

306. See *supra* notes 32–39 and accompanying text.

307. See *supra* Section I.C.

308. See *supra* Section I.C.