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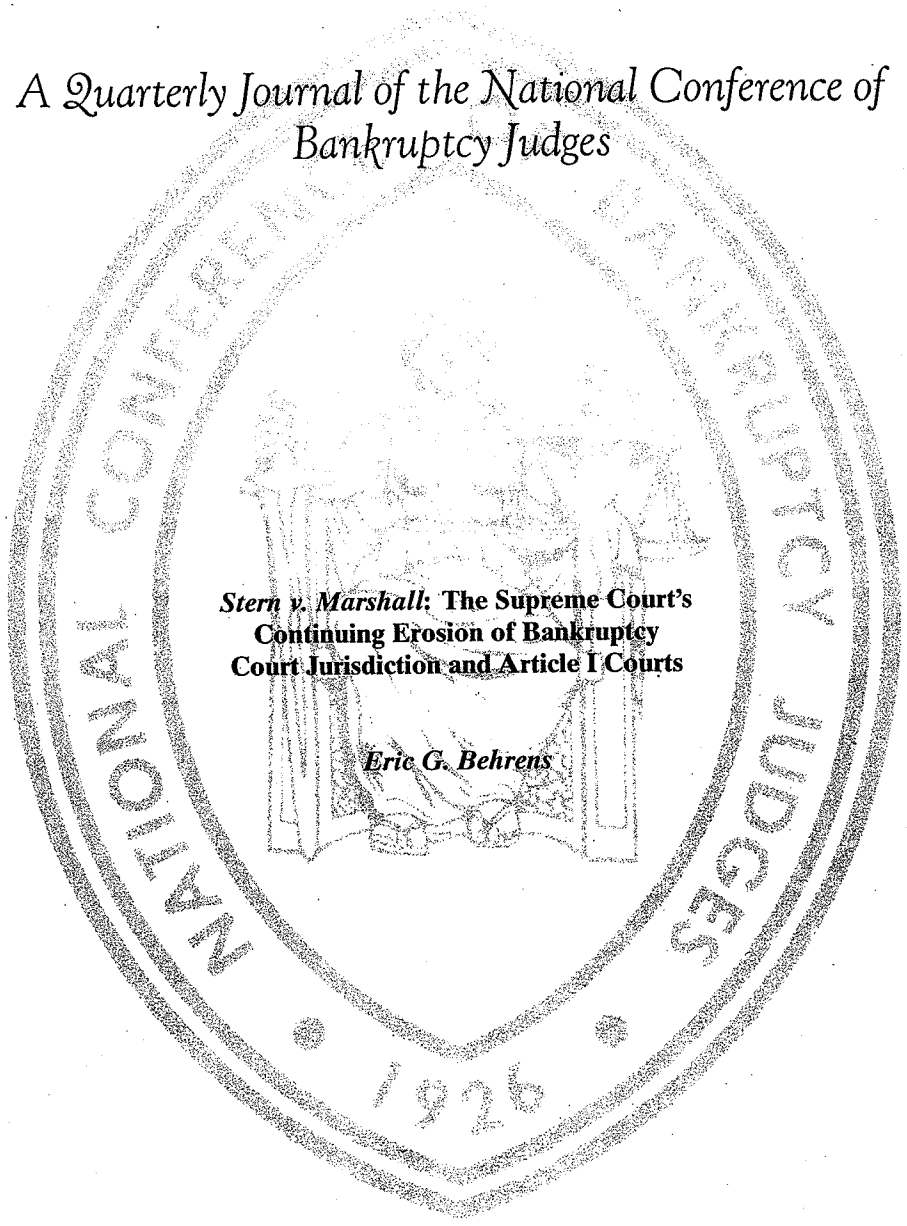

Stern v. Marshall: The Supreme Court's Continuing Erosion of Bankruptcy Court Jurisdiction and Article I Courts

Eric G. Behrens

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by

*Eric G. Behrens**

I. INTRODUCTION

In 1970, Congress established the "Commission on Bankruptcy Laws of the United States" to study and recommend changes to the Bankruptcy Act of 1898, in light of the commercial, technical, and financial developments of the previous seventy years.[1] Following almost a decade of study and deliberation, Congress renovated the procedural and substantive framework of the bankruptcy court system, and enacted the Bankruptcy Reform Act of 1978.[2]

As part of that legislation, Congress established a United States Bankruptcy Court in each federal judicial district to serve "as an adjunct to the district court."[3] The 1978 Act gave bankruptcy courts broader statutory authority than had been vested in the former office of the bankruptcy referee, including jurisdiction, pursuant to 28 U.S.C. § 1471, over all "'civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11,'" and "'all of the jurisdiction conferred by this section on the district courts'" in cases commenced under title 11.[4] That authority extended to conducting jury trials, issuing declaratory judgments, deciding causes of action owned by the debtor at the time the petition for bankruptcy was filed, and handling suits to recover accounts or other claims affecting the

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*Shareholder, Graves, Dougherty, Hearon & Moody, P.C., Austin, Texas. The author wishes to thank the Hon. Craig A. Gargotta, Hon. Frank R. Monroe, and James V. Hoeffner of Graves Dougherty Hearon & Moody, PC, for their suggestion of the subject matter for this article, and their review and comments.

[1]The Commission was established by Act of July 24, 1970, Pub. L. No. 91-354 (84 Stat. 468). *See* B APP. COLLIER ON BANKRUPTCY, at App. Pt. 4-227 & 4-229 (15th rev. ed.) (reprint of "Report of the Commission on the Bankruptcy Laws of the United States").

[2]11 U.S.C. § 101 (1978) (Pub. L. 95-598 (92 Stat. 2549)). The 1978 Act replaced the Bankruptcy Act of 1898 (also known as the "Nelson Act"), and enacted much of the current Bankruptcy Code.

[3]Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982) (quoting 28 U.S.C. § 151(a)); *see also id.* at 64 n.13 (same).

[4]*Id.* at 54 & n.3 (emphasis in original, quoting 28 U.S.C. § 1471(b)-(c)).

property of the bankruptcy estate.[5] Although the 1978 Act provided for bankruptcy judges to be appointed by the President and confirmed by the Senate, it did not give bankruptcy judges the same guaranteed salary and life tenure afforded district judges under Article III of the Constitution.[6]

Since 1978, the United States Supreme Court has revisited the question of bankruptcy court jurisdiction on several occasions, each time eroding the authority that Congress conferred on bankruptcy courts under the 1978 Act and its subsequent amendments. This article focuses on three of those decisions—*Northern Pipeline Co. v. Marathon Pipe Line Co.*,[7] *Granfinanciera, S.A. v. Nordberg*,[8] and *Stern v. Marshall*[9]—and on the state of bankruptcy court jurisdiction in their aftermath.

As described below, the practical impact of these decisions is to create a "jurisdictional ping-pong between courts,"[10] and to invalidate powers that bankruptcy judges and their predecessors have exercised since 1800. The decisions severely curtail the ability of bankruptcy courts to restructure debtor-creditor relations, and defeat Congress's intention to have specialized judges trained in this intricate branch of law handle matters affecting the bankruptcy estate.

II. THE BANKRUPTCY ACT OF 1978

For approximately eighty years, federal district courts used a "referee" system to decide most bankruptcy matters.[11] Under the 1898 Nelson Act and subsequent amendments, the bankruptcy referees served as specialized magistrates, whose final decisions were appealable to the district court.[12]

Following World War II, however, bankruptcy practice under the 1898 Act became increasingly outmoded and inefficient, particularly with the wide growth in consumer credit and attendant rise in bankruptcies.[13] Congress

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[5]*Id.* at 54-55 (citing 28 U.S.C. §§ 1471(b), 1480, 2201; and 11 U.S.C. § 105(a), among other examples).

[6]*Id.* at 53, 60-61 & n.12. Instead, 28 U.S.C. §§ 152-153 provided for fourteen year terms, subject to removal from office on various grounds including incompetency. Under 28 U.S.C. § 154, the salaries of bankruptcy judges were subject to adjustment under the Federal Salary Act, 2 U.S.C. §§ 351-361.

[7]*Id.*

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

[9]Stern v. Marshall, 131 S. Ct. 2594 (U.S. 2011).

[10]*Id.* at 2630 (Breyer, J., dissenting).

[11]*Marathon*, 458 U.S. at 53 (quoting 28 U.S.C. § 151(a)). The office of bankruptcy referee was established under the Bankruptcy Act of 1898 or "Nelson Act," Act of July 1, 1898, ch. 541 (30 Stat. 544). Beginning in 1973, referees were referred to interchangeably as "judge" pursuant to Bankruptcy Rule 901(7), in recognition of the increasingly judicial nature of the office. *Marathon*, 458 U.S. at 53 & n.2.

[12]*Id.* at 53. Under the referee system, the district court retained the power to withdraw a particular matter from the referee, and under Bankruptcy Rule 801, the final referee order was appealable to the district court. *Id.*

[13]Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93d. Cong. (1st Sess. 1973), reprinted in B APP. COLLIER, *supra* note 1, at App. Pt. 4-244, 4-251. The Commis-

noted in 1969 that the number of bankruptcies in the United States had increased exponentially in the past twenty years (and by 2010 that figure had increased several fold again).[14] The National Bankruptcy Conference, a group of leading bankruptcy judges, practitioners, and academics, began to lobby for an overhaul of the bankruptcy laws. The Conference's goal was for bankruptcy practice to reflect and meet current commercial and practical needs, but just as pressing, to establish "'an independent, prestigious bankruptcy court with broad jurisdiction and powers'" that would attract highly qualified attorneys to the bankruptcy court bench.[15]

Congress was receptive to the need for bankruptcy reform, noting that the governing 1898 Act was enacted "in the horse and buggy era of consumer and commercial credit" and had last been revised in 1938.[16] In 1970, Congress created a "Commission on the Bankruptcy Laws of the United States" to study and recommend changes to the 1898 Act.[17] The Commission produced a two-part report on July 30, 1973, making sweeping recommendations for reform of the system.[18]

A. The debate over Article I versus Article III status for bankruptcy judges

Article I, Section 8 of the federal Constitution empowers Congress to "constitute Tribunals inferior" to the Supreme Court, and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing

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sion also cited lack of uniformity in practices as a major factor in recommending an overhaul of the 1898 Act. *Id.* at 4-246. *See also* David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America 136 (Princeton Univ. Press 2003) ("Nearly everyone suspected the record number of bankruptcy filings was somehow related to the rise of consumer credit," which grew from $30 billion in 1945 to $569 billion in 1974).

[14]Carl Felsenfeld, *A Comment About a Separate Bankruptcy System*, 64 Fordham L. Rev. 2521, 2525 & n.22 (1996) (citing the Preamble to the enabling legislation for the Commission, S.J. Res. 88, 91st Cong. (1st Sess. 1969); *Stern*, 131 S.Ct. at 2630 (Breyer, J., dissenting, citing "almost 1.6 million filings last year"). *See also* B App. Collier, *supra* note 1, at App. Pt. 4-244 (between 1946 and 1967, the number of consumer bankruptcies ballooned from 10,196 new cases to 208,329, of which 191,729 were "nonbusiness or consumer debtors").

[15]Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 759 (2010).

[16]H.R. Rep. No. 95-595 at 3 (Sept. 8, 1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; Skeel, *supra* note 13, at 138 ("In the glare of this renewed scrutiny, the bankruptcy process was widely seen as inadequate, a throwback to an earlier era.").

[17]The Commission was established by Act of July 24, 1970, Pub. L. No. 91-354 (84 Stat. 468), but did not become fully operational until June 1, 1971. Public hearings commenced in March 1972. *See* B App. Collier, *supra* note 1, at App. Pt. 4-227, 4-229. *See also* S.J. Res. 88 (84 Stat. 468), 91st Cong. (2d Sess. 1970); S. Rep. 91-240, 91st Cong. (1st Sess. 1969); H.R. Rep. 91-927, 91st Cong. (2d Sess. 1970). Congressman Don Edwards introduced H.R. 6, "the immediate precursor of the bill that ultimately became law." *Id.*

[18]B App. Collier, *supra* note 1, at App. Pt. 4-219, 4-227. The first part consisted of its recommendations, and the second part was a draft bill.

Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[19] Article III, Section 1 provides that judicial power of the United States is vested in the Supreme Court and "in such inferior Courts as Congress may from time to time ordain and establish."

Under these powers, Congress has created both Article III judges (with life tenure and irreducible compensation) and Article I courts (which typically handle disputes within specialized practice areas, but without the tenure and salary guarantees of Article III judges).[20] Among the specialized areas that the Constitution uniquely entrusts to Congress, Article I, Section 8 gives Congress authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[21]

As part of the debate on bankruptcy reform, Congress grappled with whether to confer Article III protection on bankruptcy judges, or whether they should remain Article I judges. The creditors' lobby joined with bankruptcy judges and attorneys to urge Congress to grant Article III status to bankruptcy judges, believing that life-tenured judges would be more autonomous, more powerful, and enjoy more prestige, and that the bankruptcy court consequently would attract better judges. Both sides of the bankruptcy bar believed the bankruptcy system would operate more efficiently and effectively if its judges were given Article III status.[22]

Article III judges, however, were strongly opposed to elevating bankruptcy judges to their ranks. Troublingly, the Article III judges' opposition did not address whether the proposed reforms would remedy the problems that the congressional Commission cited in its report, but instead focused on whether their *own* status would be diluted by the elevation of bankruptcy judges.

Former district Judge Simon H. Rifkind testified in the House that bankruptcy judges should not be accorded Article III status, in part, because a "'significant increase in the number of Article III judges . . . would dilute the significance, and prestige, of district judgeships.'"[23] Similarly, Attorney Gen-

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[19]U.S. CONST. art. I, § 8, cl. 9, cl. 18.

[20]Article I courts include federal administrative agencies (e.g., the United States Tax Court, the Board of Patent Appeals and Inferences, and the United States Court of Federal Claims), and military courts-martial.

[21]U.S. CONST. art. I, § 8, cl. 4.

[22]McKenzie, *supra* note 15, at 760.

[23]Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 80 & n.100 (1997) (quoting Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, 95th Cong. (1977), at 9 (statement of former Judge Simon H. Rifkind)); SKEEL, *supra* note 13, at 157 ("Their [bankruptcy judges'] chief opposition came from other federal judges, who quite candidly worried that elevating bankruptcy judges would diminish their prestige.").

eral (and former circuit judge) Griffin Bell testified that bestowing Article III status on bankruptcy judges "would almost certainly operate to diminish the prestige and influence of our district courts."[24] Judge Edward Weinfeld, appearing on behalf of the Judicial Conference of the United States during 1968 Senate hearings, testified that the senators needed to "'bear in mind that the experts [i.e., bankruptcy referees] have points of view reflecting at times their separate interest'" and that it "'would seem to me that the Commission that we propose [i.e., without input from 'experts'] would be more concerned with broad-gaged [sic] policies.'"[25]

Judge Weinfeld's comments on the wisdom of excluding bankruptcy "experts" from the process because of their alleged "separate interest" were ironic: Weinfeld later stated that he did not disagree with Rifkind's and Bell's comments about the impact of the reforms on the status of the district bench, in which those judges emphasized the impact of reforms on the prestige of their own office instead of on bankruptcy practice.[26]

Article III judges even succeeded in excluding bankruptcy judges from appointment to the Commission to reform bankruptcy laws, further diminishing the bankruptcy experts' influence on the shaping of the courts.[27] The original congressional resolution to set up the Commission specified that it include at least two bankruptcy lawyers and two bankruptcy judges, but several district court judges and members of the Judicial Conference objected to their inclusion altogether.[28] The district judges ended up winning the debate, and no bankruptcy judges were appointed to the Commission.[29] As Professor Eric A. Posner observed, "Bankruptcy judges knew more than anyone else about the bankruptcy system, and the oddity of excluding them from the Commission was obvious enough to others—no testifying party outside the federal judiciary seconded Weinfeld's views."[30]

The district judges' dismissive attitude toward bankruptcy judges was representative of a widespread problem in the bankruptcy system prior to the

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[24]Bankruptcy Court Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary on H.R. 8200, 95th Cong., at 218 (statement of Griffin Bell, U.S. Att'y Gen.).

[25]Posner, *supra* note 23, at 74–75 & n.83 (bracketed material added, quoting Hearings on S.J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary, 90th Cong. 53, at 63 (1968) (testimony of Judge Edward Weinfeld)).

[26]When Judges Rifkind's and Bell's comments were read to Weinfeld, he responded "I don't disagree with those statements at all." Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: the Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 9 (1985).

[27]H.R. REP. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965 ("Their [Article III judges'] determined opposition led to exclusion of bankruptcy judges from the Commission on the Bankruptcy Laws of the United States.").

[28]SKEEL, *supra* note 13, at 138–39.

[29]*Id.* at 139.

[30]Posner, *supra* note 23, at 75 & n.84.

1978 Act. The 1977 House Report cited the low status of *bankruptcy* judges and the inability to attract qualified candidates as one of the three major flaws in the existing system, making the Article III judges' comments about the prestige of the *district* bench still more off-point. The House Report noted that "the low esteem in which bankruptcy judges generally are held, plus the subordinate position of the bankruptcy judges beneath the district judges, make it virtually impossible to attract the highest caliber judges to the bankruptcy bench." The Report added:

> The position of the bankruptcy judge beneath the district court has led to a serious morale problem among sitting bankruptcy judges, and a serious decline in the prestige and attractiveness of the job of bankruptcy judge. District judges frequently view bankruptcy judges as their assistants and as subordinate judicial officers of the district court. It is unusual that a judge who is, for bankruptcy purposes, essentially an appellate judge should view the trial judge as his assistant and his appointee. Among other factors, this subordinate position of the bankruptcy court has generated disrespect for it as an institution, which causes attorneys to avoid the system, even at great cost, and creditors, with millions of dollars at stake, to doubt the legitimacy of the operation and decisions of the bankruptcy court. The Judicial Conference's own actions have reflected the low regard that other judges have of bankruptcy judges. Their determined opposition led to exclusion of bankruptcy judges from the Commission on the Bankruptcy Laws of the United States.[31]

B. The compromise bill and Chief Justice Burger's lobbying of Congress

To attract qualified bankruptcy judges and restore morale, the House bill proposed to abolish the referee system and grant bankruptcy judges full Article III status.[32] The competing Senate bill, on the other hand, did not provide for bankruptcy judges to receive full Article III status, but instead would make them an appendage of the district court; the Senate version called for appointments to be made by the court of appeals (instead of the

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[31]H.R. Rep. No. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965. *See also* McKenzie, *supra* note 15, at 759 (the "low status and lack of autonomy of bankruptcy judges" was identified by the House as "one of the major problems with the bankruptcy system," citing H.R. Rep. No. 95-595, at 4).

[32]McKenzie, *supra* note 15, at 759-60 (citing H.R. Rep. No. 95-595, at 7 (1977)); Skeel, *supra* note 13, at 157-58 ("The House bill took the bankruptcy judges' side - proposing full Article III status").

President) but with a 12-year term.[33]

The congressional managers subsequently reached a compromise by which bankruptcy judges would serve as Article I judges with broader power and independence, but not with the life tenure or salary protection of Article III judges.[34] Bankruptcy judges would be appointed by the President, and their terms would be fourteen years (lengthened from the six-year term of referees).

Even though bankruptcy judges would not have Article III status, Chief Justice Warren Burger was nevertheless unsatisfied with the newly elevated status of the bankruptcy judges under the compromise, and made an extraordinary play to scuttle Congress's plan.[35] Burger, who earlier opted to appoint two federal district judges to the Commission instead of bankruptcy judges,[36] telephoned several senators to both threaten and cajole. For example, within a few days of the House's vote, Burger contacted Senators Strom Thurmond (the ranking Republican on the Senate Judiciary Committee) and Malcolm Wallop (a minority sponsor of the bill, also on the Committee) to convince them to delay Senate consideration of the bill.[37] Burger made an even more questionable attempt to strong-arm Senate Judiciary Committee member Dennis DeConcini and other senators, complaining "about presidential appointment of bankruptcy judges, their retirement benefits, and their status as adjuncts to the circuit courts." Senator DeConcini was quoted as saying Burger was "'very, very irate and rude,'" and "'not only lobbied, but pressured and attempted to be intimidating.'"[38]

In response, Senator DeConcini reportedly stated that Congress would not negotiate with the Chief Justice, because to do so would violate the doctrine of separation of powers (an irony that would be fully realized in *Marathon* and *Stern*). Undeterred, Burger telephoned DeConcini on Septem-

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[33]McKenzie, *supra* note 15, at 760 (citing S. REP. No. 95-989, at 16-18 (1978)), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5802-04.

[34]SKEEL, *supra* note 13, at 158. *See also Marathon*, 458 U.S. at 61 n.12 (the omission of Article III life tenure and irreducible compensation "was the result of a series of last-minute compromises between the managers of both Houses [of Congress]").

[35]Posner, *supra* note 23, at 75 n.85 (citing FRANK R. KENNEDY, THE ORIGINS AND GROWTH OF BANKRUPTCY AND REORGANIZATION LAWS IN THE 20TH CENTURY: AN ORAL HISTORY PERSPECTIVE 47 (1994)).

[36]KENNEDY, *supra* note 35, at 47.

[37]Countryman, *supra* note 26, at 10 (citing WASH. POST, Oct. 3, 1978, at C11, col. 5; WALL ST. J., Oct. 2, 1978, at 5, col. 1.); SKEEL, *supra* note 13, at 158 (Burger persuaded Thurmond and Wallop "to stop the Senate from voting on it").

[38]Posner, *supra* note 23, at 90 & nn.141-43 (quoting Bankruptcy Reform Act of 1978: Hearings on S. 2266 & H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., at 878-79 (1978) (letter from Chief Justice Warren Burger to Senator DeConcini (Nov. 7, 1977), and *Congress Approves New Bankruptcy System*, 34 CONG. Q. ALMANAC 179, 180 (1978)).

ber 28, 1978 and "'yelled at me that I was irresponsible,'" and stated that he was "'going to go to the president and get him to veto this.'"[39]

The Senate subsequently passed an amended compromise version, which accommodated some of the Chief Justice's objections. Under the amended version, (i) bankruptcy courts were to be adjuncts of the district courts (instead of the courts of appeals); (ii) the expanded bankruptcy jurisdiction was vested in the district courts in the first instance, although "all" of the jurisdiction was to be exercised by the bankruptcy courts, and (iii) although the President would make the appointments, (s)he was to give "due consideration to the recommended nominee or nominees of the Judicial Council of the Circuit" when appointing bankruptcy judges.[40]

After several years of congressional hearings, competing bills in the House and Senate, and multiple modifications suggested by the National Bankruptcy Conference and the National Conference of Bankruptcy Judges and Lawyers, Congress enacted the 1978 Act. President Carter signed it into law on November 6, 1978.

C. Key features of the 1978 Act

The 1978 Act is a uniform federal law that, with subsequent amendments, governs all bankruptcy matters today.[41] Among its innovations were expansions of Chapter 11 for reorganization and Chapter 13 for personal payment of debt.

The 1978 Act entirely replaced the referee system and established a United States Bankruptcy Court in each judicial district "as an adjunct to the district court for such district."[42] The 1978 Act provided the following attributes to bankruptcy judges:

- In contrast to the Constitution's guarantee of life tenure to Article III judges,[43] the 1978 Act provided that the President would appoint bankruptcy judges to 14-year terms of office, with the advice and consent of the Senate.[44]
- In contrast to the Constitution's "Compensation Clause" which guarantees that Article III judges' compensation "shall not be diminished

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[39]Countryman, *supra* note 26, at 11 (quoting Wash. Post, Oct. 3, 1978, at C1, col. 1, C11, col. 5). In other words, the head of the judicial branch made actual or threatened incursions into both the legislative and executive branches to block the elevation of bankruptcy judges.

[40]*Id.* at 11-12 & nn.81-82 (citing H.R. 8200, § 241(a), 124 Cong. Rec. 32, 385 & 33, 991 (1978) (Senate amendments to H.R. 8200)). Even then, Chief Justice Burger reportedly wrote President Carter, unsuccessfully urging him to veto. *Id.* at 12 (citing N.Y. Times, Nov. 19, 1978, at 39, col. 1).

[41]Christopher F. Carlton, *Greasing the Squeaky Wheels of Justice: Designing the Bankruptcy Courts of the Twenty-First Century*, 14 BYU J. Pub. L. 37, 40 (1999).

[42]28 U.S.C. § 151(a) (1976 & Supp. IV).

[43]U.S. Const. art. III, § 1; Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982).

[44]28 U.S.C. §§ 152, 153(a) (1976 & Supp. IV).

during their Continuance in Office,"[45] the salaries of the bankruptcy judges were set by statute and were subject to adjustment under the Federal Salary Act (under which in theory they could be adjusted downward).[46]

- In contrast to the "good Behaviour" clause's protection of Article III judges from removal from office except by impeachment,[47] the 1978 Act provided that bankruptcy judges could be removed by the "judicial council of the circuit" for "incompetency, misconduct, neglect of duty or physical or mental disability."[48]

Under the old referee system, decisions were appealed to the district court. The 1978 Act, however, authorized different appellate options. First, on a circuit-by-circuit basis, each circuit council could direct the chief judge to designate a Bankruptcy Appellate Panel or "BAP" of three bankruptcy judges to hear appeals; appeals from the BAP's ruling were to the circuit court of appeals.[49] The BAP's jurisdiction covered all appeals from final judgments, orders, and decrees of bankruptcy courts, and, with leave of the BAP, interlocutory appeals.[50] If a circuit chose not to create a BAP, the default remained that the district court would have appellate jurisdiction from the bankruptcy court's orders.[51] Third, if the parties agreed, a final judgment of a bankruptcy court could be directly appealed to the court of appeals (as if

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[45]U.S. CONST. art. III, § 1; *Marathon*, 458 U.S. at 59.

[46]*Marathon*, 458 U.S. at 59 (citing 2 U.S.C. §§ 351-361 (1976 & Supp. IV); 28 U.S.C. § 154 (1976 & Supp. IV)).

[47]*Marathon*, 458 U.S. at 59 (citing United States ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955)).

[48]28 U.S.C. § 153(b) (1976 & Supp. IV). Under the referee system, referees could be removed for "incompetency, misconduct, or neglect of duty." 11 U.S.C. § 62(b) (repealed).

[49]28 U.S.C. §§ 160, 1293 (1976 & Supp. IV); Tenth Circuit Bankruptcy Appellate Panel, *Introduction to the Bankruptcy Appellate Panel* at 2 (June 1, 2011).

[50]*Marathon*, 458 U.S. at 55 (citing 28 U.S.C. § 1482). The general rule remained that "appeals were to be heard by a district judge," but if the "circuit had established a BAP, all bankruptcy appeals were to be heard by the BAP, rather than the district court." Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 BYU L. REV. 545, 546-47 (citing 28 U.S.C. § 160); *In re* Dartmouth House Nursing Home, Inc., 30 B.R. 56, 61 (BAP 1st Cir. 1983) (under the 1978 "Reform Act, appeals from judgments, orders, and decrees of bankruptcy judges shall be heard by a panel of bankruptcy judges if the circuit council of a circuit so orders"); Comm'r of Mass., Dept. of Public Welfare v. Dartmouth House Nursing Home, Inc., 726 F.2d 26, 28-29 (1st Cir. 1984) ("Jurisdiction to hear appeals during the transition period is vested solely in the appellate panels if such panels have been adopted for the district."). The First and Ninth Circuits were the initial courts to establish BAPs, in 1979-80. *Id.* Following *Marathon*, however, "[n]ew statutory authority added the requirement that the parties consent to the appeal being heard by a bankruptcy appellate panel." Submission by the Bankruptcy Appellate Panel of the Ninth Circuit to the Commission on Structural Alternatives for the Federal Courts of Appeals (May 29, 1998); *see also* General Order No. 24, Judicial Council of the Ninth Circuit 2.01(b) (Dec. 27, 1982, amended March 23, 1983 & May 20, 1985) (the BAP may hear appeals to which all parties consent). An untimely objection to the reference, however, waived the right to Article III adjudication and was deemed a consent to have the BAP adjudicate the appeal. Jennings v. Coblentz (*In re* Jennings), 83 B.R. 752, 761-62 (D. Nev. 1988) (untimely objection outside of 21 days waived right and was a deemed consent).

[51]28 U.S.C. § 1334.

from a BAP).[52]

One of the 1978 Act's chief reforms was to broaden the bankruptcy court's jurisdiction. The Act gave bankruptcy courts jurisdiction not only over "all civil proceedings" arising under Title 11, but also over all civil proceedings "arising in or related to cases under Title 11."[53] The new jurisdictional grant also allowed bankruptcy courts to hold jury trials, issue declaratory judgments, issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction, and "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11."[54]

As the *Marathon* opinion later acknowledged, once a petition was filed under Title 11, the 1978 Act gave bankruptcy courts statutory authority to entertain cases involving both federal and state "claims that may affect the property of the estate," including suits to recover accounts, disputes involving exempt property, actions to avoid preferential payments or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy (which are assets of the bankruptcy estate).[55]

In an attempt to satisfy constitutional requirements, Congress in the first instance gave the district courts jurisdiction under 28 U.S.C. § 1471(a) and (b). Subsection (c) then *assigned* to bankruptcy courts "all the jurisdiction conferred by this section on the district courts," and specified that bankruptcy courts "shall exercise all of the jurisdiction conferred." In short, the bankruptcy courts would have the broad powers necessary to efficiently and fairly handle all matters affecting the bankruptcy cases before them, but that power would emanate from the district court, to whom the bankruptcy judges' orders also could be appealed.

III. THE WATERSHED *NORTHERN PIPELINE CO. V. MARATHON PIPE LINE CO.* DECISION

The 1978 Act took full effect in April 1984, after a transition period.[56] Even before that transition period ended, however, the Supreme Court issued its controversial (and analytically excoriated)[57] opinion in *Northern Pipeline*

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[52]28 U.S.C. § 1293(b).

[53]28 U.S.C. § 1471(b) (1976 & Supp. IV) (emphasis added); *Marathon*, 458 U.S. at 54.

[54]28 U.S.C. §§ 451, 1480, 1651 (1976 & Supp. IV); 11 U.S.C. § 105(a) (1976 & Supp. IV).

[55]*Marathon*, 458 U.S. at 54 (citing 28 U.S.C. § 1471(a), (c), and 1 W. COLLIER, BANKRUPTCY ¶ 3.01, pp. 3-47 to 3-48 (15th ed. 1982)).

[56]Pub. L. No. 95-598, § 402(b), 92 Stat. 2549, 2682.

[57]Both legal scholars and the dissenting Justices in *Marathon* ridiculed the plurality's attempt to explain and distinguish the Court's prior decisions regarding Article I and Article III courts. McKenzie, *supra* note 15, at 770 & n.122 (describing *Marathon*'s harsh reception); *Marathon*, 458 U.S. at 93 (White, J., dissenting) (stating the plurality's "simple reading" and "gross oversimplification" might be correct if the Court "were free to disregard 150 years of history," and that its attempt to pigeonhole the Court's prior decisions "creates an artificial structure that itself lacks coherence").

Co. v. Marathon Pipe Line Co., cut away at the 1978 jurisdictional reforms, and narrowed Congress's power to create Article I courts.

A. Procedural posture of the *Marathon* decision

The *Marathon* decision arose out of Northern Pipeline's filing of a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota, in January 1980.[58] Shortly after filing, Northern Pipeline initiated an action in the bankruptcy court against Marathon Pipe Line Co., alleging causes of action for breach of contract and warranty, misrepresentation, coercion, and duress. In response, Marathon filed a motion to dismiss, alleging that the 1978 Act "unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution."[59] The United States intervened to defend the validity of the legislation. The bankruptcy judge denied the motion to dismiss, but on appeal the district court concluded that Section 1471's delegation of authority to bankruptcy judges to try cases normally reserved to Article III judges was unconstitutional.[60]

The issue as framed by the Supreme Court was "whether the Bankruptcy Act of 1978 violates the command of Art. III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards" of life tenure and irreducible salary.[61] A divided Court concluded 'yes,' and affirmed the district court.[62]

B. The "judicial power of the United States" as a limitation on bankruptcy court jurisdiction

The *Marathon* plurality said that Article III's guarantees of life tenure and fixed and irreducible compensation were included in the Constitution to "ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government," and are an "inseparable element of the constitutional system of checks and balances."[63]

Under the 1978 Act, however, bankruptcy judges were appointed by the President for a finite fourteen-year term.[64] At least in the plurality's view, this made bankruptcy judges beholden to the Executive Branch in a manner

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[58]*Marathon*, 458 U.S. at 56.

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

[60]*Id.* at 57 & n.8 (citing Marathon Pipeline Co. v. Northern Pipeline Const. Co., 12 B.R. 946, 947 (D. Minn. 1981)).

[61]*Id.* at 62.

[62]A plurality of Justices Brennan, Marshall, Blackmun, and Stevens joined in the opinion. Then Justice Rehnquist and Judge O'Connor concurred. Chief Justice Burger, and Justices White and Powell, dissented.

[63]*Marathon*, 458 U.S. at 58-60.

[64]Statutory grounds for removal grounds included "incompetency, misconduct, neglect of duty or physical or mental disability." 28 U.S.C. § 153(b).

similar to Revolutionary War-era judges who were "dependent on [the English king's] will alone, for the tenure of their offices, and the amount and payment of their salaries."[65] Similarly, bankruptcy judges' salaries were adjustable under the Federal Salary Act and "are not immune from diminution by Congress," thereby also limiting their independence from the Legislative Branch.[66]

Article III, the plurality noted, commands that the "judicial power of the United States must be vested in courts whose judges enjoy the [tenure and salary] protections and safeguards specified in that Article."[67] Since bankruptcy judges theoretically lacked the judicial independence of Article III judges, the plurality concluded that Congress could not confer that judicial power in them, including in particular the authority to decide issues arising out of state law.[68] The *Marathon* plurality summarized that the 1978 Act "impermissibly removed most, if not all, of the essential attributes of the judicial power from the Article III district court and has vested those attributes in a non-Article III adjunct."[69]

C. *MARATHON*'S INCONSISTENCY WITH HISTORIC PRACTICE AND PRIOR DECISIONS

As the dissent in *Marathon* pointed out, however, bankruptcy matters are "for the most part, *private* adjudications of *little political significance*" to the executive and legislative branches.[70] The risk that a bankruptcy judge will decide private party disputes in a particular way, based on some fear that Congress or the President will tamper with his salary or tenure if he were to decide the matter differently, is remote or nonexistent. Only a few years earlier, in *United States v. Raddatz*, the Supreme Court *upheld* the constitutionality of jurisdiction conferred on magistrate judges under the 1978 Federal Magistrates Act,[71] even though they lack life tenure and Congress theoretically could reduce their compensation.[72]

In an attempt to explain the inconsistency between its decisions regarding the jurisdiction of magistrate judges and bankruptcy judges, *Marathon* stated there was no "serious" threat that the exercise of judicial power by magistrate judges would be subject to incursion by other branches, and that

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[65]*Marathon*, 458 U.S. at 60 (quoting the Declaration of Independence from O'Donoghue v. United States, 289 U.S. 516, 531 (1933)).

[66]*Id.* at 61.

[67]*Id.* at 62.

[68]*Id.* at 73.

[69]*Id.* at 87.

[70]*Id.* at 116-17 (emphasis added).

[71]United States v. Raddatz, 447 U.S. 667 (1980).

[72]Brendan Linehan Shannon, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253, 253-54 (1991).

the "primary" threat to magistrate judges' jurisdiction came from within the judicial branch instead of from the President or Congress (despite Congress's power to control their compensation).[73] The *Marathon* plurality did not explain why the threat of a serious incursion was any more realistic for bankruptcy judges than it is for magistrate judges, however, or why it was adopting a bright-line rule for bankruptcy judges (under which even a theoretical threat against judicial independence cannot be tolerated) but not for magistrate judges (who faced the same "threat" of salary reduction).[74]

Nor did the Court explain why a threat that the President and Congress will scrutinize the outcome of individual decisions is greater for bankruptcy judges than for other Article I courts whose authority has been upheld. The dissent observed that bankruptcy courts and similar Article I tribunals deal with issues "likely to be of little interest to the political branches," and that no one could seriously argue that the 1978 Act was an attempt by the "political branches of government to aggrandize themselves at the expense of the third branch."[75] Indeed, but for the lobbying of the Article III judges themselves, Congress had shown itself perfectly willing to give bankruptcy judges the same life tenure, irreducible salary, and independence that the third branch enjoys. Against the backdrop of legislative history and actual practice, there is no appreciable risk that Congress would scrutinize bankruptcy court decisions like "the King of Great Britain" and make bankruptcy judges "dependent on [their] will alone."[76]

Moreover, the plurality's recitation of history was at odds with the actual historic practice of bankruptcy courts, and how their jurisdiction was viewed shortly after the Constitution was adopted. Despite *Marathon*'s emphasis on historic treatment of Article I and Article III, the historic practice of bankruptcy in England and the United States both before and immediately after the adoption of the Constitution establishes that non-Article III judges initially adjudicated bankruptcy issues "under Article III of the Constitution."[77] Under the 1800 legislation which created the first American bankruptcy laws, bankruptcy commissioners were delegated original jurisdiction to initially decide disputes arising in connection with the bankruptcy, includ-

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[73]*Marathon*, 458 U.S. at 79 & n.30.

[74]Shannon, *supra* note 72, at 254 & n.7 (noting 28 U.S.C. § 634(b) provides that magistrate judges' salaries shall not be reduced, but that "[n]o constitutional provision, however, prevents Congress from amending the terms of the Act to effect a change in the magistrates' compensation structure.").

[75]*Marathon*, 458 U.S. at 115-16.

[76]*Id.* at 60.

[77]Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not be Article III Judges*, 72 AM. BANKR. L.J. 567, 610 (1998). *See also* Stern v. Marshall, 131 S.Ct. 2594, 2629 (U.S. 2011) (Breyer, J., dissenting) ("Congress established the first Bankruptcy Act in 1800. . . . From the beginning, the 'core' of federal bankruptcy proceedings has been 'the restructuring of debtor-creditor relations,'" quoting *Marathon*, 458 U.S. at 71).

ing power to "assign choses in action without limitation," and to order "the distribution of the estate to creditors who proved debts," with the right to appeal to the district court. The bankruptcy commissioners also exercised some authority to adjudicate claims by the estate against third parties. For example, the commissioners made "an initial determination . . . that claims against the third party or the property transferred by the bankrupt [to third parties] were the property of the bankrupt."[78] The bankruptcy commissioners could also: "[c]onvey any property, including debts owed to the bankrupt" that the debtor had conveyed prior to bankruptcy without valuable consideration, as if the debtor himself still held such property; compound with "the debtors of the bankrupt and setoff the amount of any mutual debts between the bankrupt and a creditor"; and, upon "proof made before the commissioners by examination or otherwise," determine whether "any person was concealing property of the debtor (including debts)" and order forfeiture of double the value of the property so concealed.[79] In light of this history, and the English bankruptcy practice which preceded it, it is "no stretch to say that Congress could authorize bankruptcy adjudicators to determine the liability of third parties on debts owed" to the debtor.[80]

This "grant of original jurisdiction to bankruptcy commissioners and not to Article III judges suggests that the early Congresses did not consider such original bankruptcy jurisdiction to fall within the 'judicial Power'" of the United States, and that the generation of the Framers distinguished "the 'judicial Power' from original bankruptcy adjudication."[81] In short, even in the era of the Framers, the exercise of authority by bankruptcy judges was not considered an encroachment on the judicial power of the United States or a violation of Article III's protections.

Later, the Court in *Stern* would ask whether even a very "[s]light encroachment" on judicial power represented "a threat to the separation of powers," and answered with an "emphatic" yes: *Stern* stated that a statute "may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely."[82] In making that pronouncement, however, the *Stern* majority omitted any mention of how it had distinguished the constitutionality of the Federal Magistrates Act in *Marathon*, or of its portrayal of the magistrate judges' "threat" as only small. The Federal Magistrates Act's slight encroachment on the judicial power of the United States, for magis-

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[78]Plank, *supra* note 77, at 613. Assignees of the debtor's property could then sue in a common law court or the equity court to enforce those contractual claims against third parties or to recover property that the debtor conveyed to third parties. *Id.*

[79]*Id.* at 604-05.

[80]*Id.* at 616.

[81]*Id.* at 609-10.

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

trate judges who are just as beholden to Congress for their compensation as are bankruptcy judges, should be equally intolerable under the *Stern* standard.[83]

D. Congress's powers to establish legislative courts and uniform bankruptcy laws

In *Marathon*, the United States argued that Congress had authority under Article I to establish bankruptcy courts as "legislative courts," which in multiple instances the Court has approved.[84] The *Marathon* plurality even acknowledged that the Court's "more recent cases clearly recognize that legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III. judicial power might also be extended."[85] Since the Constitution's only explicit reference to "bankruptcies" places that subject matter in the legislative branch, that would seem to make bankruptcy a particularly appropriate candidate for creation of a legislative court.

The *Marathon* plurality, however, categorically stated "Congress did not constitute the bankruptcy courts as legislative courts," and that Article III "bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws."[86]

The plurality's attempts to distinguish other categories of legislative courts that exercise Article III-type jurisdiction, however, seemed contrived. For example, the plurality explained that two categories of legislative courts—courts in territories that are not within a State, and military courts-martial—involve an extraordinary "constitutional grant of power" to Congress to control those "precise subject matter[s] at issue," citing Article I, Section 8 and Article IV of the Constitution.[87] But Congress's power to legislate in the "precise subject matter" of bankruptcy appears in the same constitutional section (Article I, Section 8) under which it is empowered to

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[83]In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court upheld non-Article III court adjudication (in arbitration, and with only limited appellate review) of reimbursement claims relating to registration of pesticides with a federal agency, despite the absence of the government as a party and the private nature of such disputes. Although that involved exercise of the judicial power, the Court acknowledged it posed no threat of encroachment.

[84]The plurality distinguished the three categories of legislative courts which either the Constitution or "historical consensus" empower Congress to create (e.g., non-Article III territorial courts in the District of Columbia and other territories where no State operates as sovereign, courts-martial—which have "been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue"—and "public rights" cases most typically entrusted to regulatory agencies as the prerogative of the political branches of government). *Marathon*, 458 U.S. at 64-71. The Court noted that these three exceptions, "properly constrained," "do not threaten the Framers' vision of an independent Federal Judiciary." *Id.* at 70 n.25.

[85]*Id.* at 64.

[86]*Id.* at 71-72, 76.

[87]*Id.* at 64-66.

establish courts-martial.[88]

As the dissent observed, "There is nothing in those Clauses [relating to courts-martial] that creates congressional authority different in kind from the authority granted to legislate with respect to bankruptcy."[89] Similarly, courts of the District of Columbia are Article I courts, and routinely decide private rights that were cognizable in common law, but Congress's power to establish those courts "does not seem to have any greater status than any of the other powers enumerated in Art. I, § 8," including Congress's express constitutional authority over the subject of bankruptcy.[90]

The plurality also distinguished a third category of legislative court involving the "public-rights doctrine," which the *Marathon* Court described as involving those "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."[91] In essence, they involve rights which are "closely intertwined with a regulatory scheme."[92]

Bankruptcy proceedings fit squarely within the public rights doctrine as defined by the Court. The Constitution's only reference to "bankruptcy" is under Article I, Section 8, where it grants Congress the exclusive power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[93] That makes the "subject of Bankruptcies" a "constitutional function of the . . . legislative department," which historically "could have been determined exclusively" by Congress—in short, *Marathon*'s very definition of a public rights function for which judicial power of the United States may be vested in non-Article III judges. Likewise, since the creation of United States bankruptcy laws in the era of the Framers, bankruptcy courts have exercised Article III-type judicial power in deciding bankruptcy matters.[94]

The *Marathon* Court recognized that "the restructuring of debtor-creditor relations" is at "the core of the federal bankruptcy power" and "may well be a 'public right.'"[95] Nevertheless, the Court distinguished the public right

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[88]U.S. CONST. art. I, § 8, cl. 4.

[89]*Marathon*, 458 U.S. at 104.

[90]*Id.* at 104-05 & n.8.

[91]*Id.* at 67-68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

[92]*In re* Clay, 35 F.3d 190, 192 (5th Cir. 1994) (citing *Marathon*, 458 U.S. at 67-70; Thomas v. Union Carbide Agric. Prods., 473 U.S. at 593-94).

[93]U.S. CONST. art. I, § 8, cl. 4.

[94]Plank, *supra* note 77, at 610 (non-Article III judges initially adjudicated bankruptcy issues "under Article III of the Constitution").

[95]*Marathon*, 458 U.S. at 71-72. The Court's hedging on whether even "restructuring of debtor-creditor relations" fits within the public rights doctrine is particularly puzzling and bizarre. If Article I

power, which the bankruptcy court could wield, from power to decide state-created private rights, which the Court stated "obviously is not" a public function within the bankruptcy court's power.[96] The plurality argued that restructuring of debtor-creditor relations "must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages."[97]

While making that conclusion, the Court ignored that restructuring of debtor-creditor relations and discharges in bankruptcy (the "core of the federal bankruptcy power") often *depend* upon the resolution of underlying private rights grounded in state law. Indeed, the debtor-creditor relationship itself, though at the core of bankruptcy power, is "created by *non*bankruptcy law."[98] The bankruptcy court allocates a debtor's assets among creditors, but as a preliminary matter the court also determines the validity and amount of the creditors' claims against the debtor, which often turn on deciding contract claims or other state law actions. If the bankruptcy court truly cannot adjudicate "the right to recover contract damages," its ability to determine the validity of claims against the debtor would also largely evaporate. As Justice White noted in *Marathon,* and Justice Breyer in *Stern*, countless decisions in the course of a bankruptcy require the bankruptcy judge to routinely decide state law rights and issues, just as they did under the old referee system.[99] The question whether a bankruptcy judge may reach state law issues goes beyond determining whether the public rights doctrine applies, to whether a bankruptcy judge who is powerless to resolve state law issues can effectively handle a reorganization at all.[100]

Although the *Marathon* plurality's distinctions of other Article I courts was uncompelling, it argued that there must be some "limiting principle" on Congress's ability to replace Article III tribunals with "a system of 'special-

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gives Congress sole dominion over "the subject of Bankruptcies" (it does), and if restructuring of those debtor-creditor relations is at "the core of the federal bankruptcy power" (as *Marathon* itself concedes and any schooled bankruptcy practitioner knows), how could legislation regarding those relations *not* be both a "constitutional function" of Congress, and one that historically "could have been determined exclusively," dating back to when the Framers adopted Article I? The *Marathon* plurality emphasized the balance of powers from the perspective of its own branch, even as it encroached on an Article I function reserved exclusively to the Legislative branch.

[96]*Id.*

[97]*Id.* at 71.

[98]Plank, *supra* note 77, at 615 (emphasis added).

[99]*Marathon*, 458 U.S. at 99-100; Stern v. Marshall, 131 S.Ct. 2594, 2630 (U.S. 2011) ("these types of disputes arise in bankruptcy court with some frequency").

[100]Justice Breyer cited the example of a tract of land in the debtor's possession, the ownership of which is disputed by a creditor in the bankruptcy court. Resolution of that dispute "requires the bankruptcy court to apply the same state property law that would govern in a state court proceeding. This kind of dispute arises with regularity in bankruptcy proceedings." *Stern*, 131 S.Ct. at 2626 (Breyer, J., dissenting).

ized' legislative courts."[101] That statement echoes the *Raddatz* dissent's comment that the Court will not "defer blindly to a congressional determination that an alternative tribunal is necessary."[102] No plausible reading of the 1978 Act, however, suggests that Congress was attempting to "supplant completely our system" of Article III courts with specialized courts in every area entrusted to the legislative branch.[103] As *Marathon* itself noted, Congress spent a decade studying bankruptcy laws before adopting the 1978 Act. *Marathon* made no mention of any similar congressional initiative, let alone any actual broad-based plan to create a whole "system" of legislative courts. If some limiting principle exists on Congress's authority to create legislative courts, it cannot be grounded on any ripened threat that Article III courts are being "supplant[ed] completely," nor on the *Marathon* Court's random distinctions between Congress's other Article I powers.[104]

E. Bankruptcy Courts as "Adjuncts" of the District Court

Congress provided that bankruptcy courts under the 1978 Act would serve "as an adjunct to the district court for such district;" bankruptcy jurisdiction in the first instance was conferred on the district court, and then delegated to the adjunct bankruptcy court, whose decisions were then subject to review by an Article III court.[105] The Supreme Court previously upheld similar jurisdictional provisions for federal magistrate judges and administrative agencies serving as adjuncts to Article III courts.[106] As Justice Breyer noted in his dissent in *Stern*, the Court's 1932 decision in *Crowell v. Benson* is widely regarded as demonstrating the constitutional basis for the authority of administrative agencies "to adjudicate private disputes."[107]

The plurality in *Marathon* distinguished those decisions, stating Congress could not assign "traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress," because to do so would be an unwarranted encroachment on the judicial power of the United States.[108]

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[101]*Marathon*, 458 U.S. at 73.

[102]United States v. Raddatz, 447 U.S. 667, 705 (1980).

[103]*Marathon*, 458 U.S. at 73. The plurality argued that it "threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of 'specialized' legislative courts." *Id.* However, nothing in the 1978 Act hints at an attempt to establish an entire "system" of Article I courts in every area the Constitution assigns to Congress, nor does *Marathon* suggest that Congress had similar legislation under development (let alone for one decade).

[104]Justice Scalia, in his concurrence in *Stern*, observed that the factors relied on by the *Stern* Court (and appearing in *Marathon* as well) seem "to have entered our jurisprudence almost randomly." *Stern*, 131 S.Ct. at 2621 (Scalia, J., concurring).

[105]28 U.S.C. § 151(a) (1976 & Supp. IV).

[106]Crowell v. Benson, 285 U.S. 22, 51-53 (1932) (agencies); *Raddatz*, 447 U.S. at 681-84 (magistrate judges).

[107]*Stern*, 131 S.Ct. at 2622 (citing *Crowell*, 285 U.S. 22).

[108]*Marathon*, 458 U.S. at 81-82, 84.

The concurring justices agreed that bankruptcy judges are not adjuncts because of the deferential standard of review their decisions received.[109] But again the dissent pointed out the inconsistency in the plurality's analysis. Other "adjuncts" adjudicated public and private rights all the time, with varying degrees of oversight, as had bankruptcy referees under the unchallenged former system. Justice White wrote that there was no logical basis for treating bankruptcy courts differently:

> By the plurality's own admission, Art. I courts can operate throughout the country, they can adjudicate both private and public rights, and they can adjudicate matters arising from congressional actions in those areas in which congressional control is "extraordinary."[110]

Justice White concluded that the "very fact of extreme specialization may be enough, and certainly has been enough in the past, to justify the creation of a [bankruptcy] legislative court."[111]

Although it found section 1471's jurisdictional grant unconstitutional, the *Marathon* Court decided not to make its decision retroactive to the enactment of the 1978 Act, but instead stayed the judgment until October 4, 1982 to "afford Congress an opportunity to reconstitute the bankruptcy courts or adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[112]

F. Harsh treatment by legal scholars

Legal scholars have eviscerated the plurality decision in *Marathon*, in particular the plurality's arbitrary exceptions and shallow attempts to distinguish the Court's prior Article I and III decisions. As stated by Professor Troy A. McKenzie,

> Scholarly treatment of *Northern Pipeline* [*v. Marathon* and other listed decisions] has generally been critical. At a mundane level, the cases do not sum up easily as a matter of doctrine. . . .
>
> On a more theoretical level, the scholarly literature has chewed over the Court's conceptual treatment of Article III and found it wanting. The categorical reasoning of *Northern Pipeline* has been judged harshly in light of the apparent arbitrariness of the exceptions carved out by Justice Brennan's

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[109] *Id.* at 91 (Rehnquist, J., concurring).
[110] *Id.* at 105.
[111] *Id.* at 117-18.
[112] *Id.* at 88.

> plurality opinion and the difficulty of reconciling them with historical practice.[113]

As Justice Scalia would later write in his concurrence to *Stern*, the "multifactors relied upon" by the majority in *Stern* (echoing factors cited by the plurality in *Marathon*) seem "to have entered our jurisprudence almost randomly."[114]

Likewise, commentators have criticized the plurality's sweeping holding that 28 U.S.C. § 1471 under the 1978 Act was unconstitutional on its face. Justice White stated that striking down section 1471 in its entirety "is a grossly unwarranted emasculation of the scheme Congress has adopted. Even if the Court is correct that such a state law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact."[115] Even Chief Justice Burger agreed.[116]

One view of *Marathon* is that it is a continuation of the dispute that arose during congressional hearings on the 1978 Act, and in particular the Article III judges' lobby against elevating the status of bankruptcy judges. The *Marathon* Court made its own sweeping incursion into Congress's constitutional authority both to establish Article I courts and to establish uniform laws on the "subject of Bankruptcies throughout the United States."

IV. THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984 (BAFJA), AND THE BANKRUPTCY REFORM ACT OF 1994

In response to *Marathon*, Congress spent two years trying to salvage the original purposes of the 1978 Act, while also addressing the *Marathon* plurality's conception of constitutional limitations. The fruit of this labor, the "Bankruptcy Amendments and Federal Judgeship Act of 1984" or "BAFJA," became law on July 10, 1984.[117]

In a replay of the 1978 jockeying, the House "sought to confer Article III status on bankruptcy judges," but the Senate favored reducing bankruptcy judges' independence and jurisdiction.[118] Again, Congress came short of conferring Article III status. Instead, it attempted to strengthen the concept that "the district courts were the ones with bankruptcy jurisdiction, [but]

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[113]McKenzie, *supra* note 15, at 770 & n.122.

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

[115]*Marathon*, 458 U.S. at 95.

[116]*Id.* at 92 (joining Justice White's dissenting opinion).

[117]Leslie R. Masterson, *Waiving the Right to a Jury: Claims, Counterclaims, and Informal Claims*, 85 AM. BANKR. L.J. 91, 105 (2011) (citing Pub. L. No. 98-353, 98 Stat. 333 (1984)).

[118]Stephen Roberts, *The Bankruptcy Amendments and Federal Judgeship Act of 1984: The Right Stuff*, 1987 NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 8, 46.

without interfering with bankruptcy judges' ability to run the show on a day-to-day basis."[119] To walk that line, Congress made bankruptcy judges a "unit of the district court to be known as the bankruptcy court for that district" who would serve as "judicial officers of the United States district court established under Article III of the Constitution."[120]

Under BAFJA, a district court in its discretion could refer all of its bankruptcy jurisdiction (cases under title 11, cases arising under title 11, cases arising in a title 11 case, and cases related to a title 11 case) to the bankruptcy court.[121] In "core proceedings," the bankruptcy court could enter final orders and judgments.[122] In non-core proceedings, however, bankruptcy courts could "only enter proposed findings and conclusions which are reviewed de novo" by the district court.[123] The district court also retained the right to withdraw the bankruptcy reference in a particular case.[124] Appeal from the bankruptcy judge's final judgments in a core proceeding would be to the district court, which reviewed them under traditional appellate standards.[125] In contrast, in a non-core proceeding—generally state-law based claims independent of title 11—the bankruptcy judge could render a final judgment only with the consent of the parties.[126] Absent such consent, the bankruptcy court could only make recommended findings of fact and conclusions of law, but jurisdiction would remain with the district court.

In other words, the bankruptcy judge would have to determine in each

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[119]SKEEL, *supra* note 13, at 158.

[120]98 Stat. 333, 336 (1984) (BAFJA § 104(a), now in 28 U.S.C. § 151); 28 U.S.C. § 152(a)(1).

[121]28 U.S.C. § 157(a)-(b).

[122]28 U.S.C. § 158(b). "Core proceedings" include, but are not limited to, multiple itemized categories under 28 U.S.C. § 157(b)(2).

[123]*In re* Jennings, 83 B.R. 752, 759 (D. Nev. 1988).

[124]Masterson, *supra* note 117, at 105 (citing 28 U.S.C. § 157(d)).

[125]28 U.S.C. § 158(a); Stern v. Marshall, 131 S.Ct. 2594, 2603-04 (U.S. 2011). After *Marathon*, the First and Ninth Circuits differed on whether BAPs could appropriately continue to operate, with only the Ninth Circuit allowing the BAP to continue. *Compare* Equitable Factors Co. v. Wallen (*In re* Wallen), 34 B.R. 785, 787-88 (BAP 9th Cir. 1983), *affirmed*, 742 F.2d 1461, 1463 (9th Cir. 1984) (finding jurisdiction of the BAP to hear appeal from the bankruptcy court), *with* Comm'r of Mass., Dept. of Public Welfare v. Dartmouth House Nursing Home, Inc., 726 F.2d 26 (1st Cir. 1984) (stating *Marathon* raises a "serious question regarding the constitutionality of the bankruptcy appellate panels after expiration of the stay," but without reaching that question, concluding that the First Circuit Council order requiring district courts "to adopt the emergency rule had the implicit effect of withdrawing from those panels their earlier conferred authority to hear appeals"). Under BAFJA, however, the judicial council of each circuit had authority under 28 U.S.C. § 158(b)(1) to establish a BAP. John H. Maddock, III, *Stemming the Tide of Bankruptcy Court Independence: Arguing the Case for District Court Precedent*, 2 AM. BANKR. INST. L. REV. 507, 507 n.12 (1994). However, it was not until 1996, following the Bankruptcy Reform Act of 1994—which required all circuits to create BAPs unless they determined that certain circumstances exist—that five circuits (including the First Circuit) established BAPs. Tenth Circuit Bankruptcy Appellate Panel, *History of the Bankruptcy Appellate Panel: Introduction to the Bankruptcy Appellate Panel* (June 1, 2011).

[126]28 U.S.C. § 157(c)(1)-(2); *see also* Carlton, *supra* note 41, at 43-44 & nn.43-47.

case which issues were "core" and subject to his jurisdiction outright, and which ones were non-core and would require resolution by an Article III judge.

BAFJA also provided that bankruptcy judges would be appointed by the courts of appeal for the circuits in which their districts are located.[127] By taking appointment away from the President, Congress apparently was making the process more parallel to federal magistrate judges; the *Marathon* plurality noted the "primary" threat to the magistrate judges' judicial independence came from within their branch of government, since they were appointed by the district court, and therefore did not depend on the political branches for their tenure in office.[128] Under BAFJA, and as it had been before the 1978 Act, the same was true for bankruptcy judges as well.

Congress took another look at the issue whether to give bankruptcy judges Article III powers in connection with the Bankruptcy Reform Act of 1994. On October 22, 1994, Congress created the National Bankruptcy Review Commission to study the Bankruptcy Code and to recommend any further amendments to it.[129] The Review Commission recommended that bankruptcy judges be given Article III status, including appointment by the President with life tenure. The Review Commission stated that elevating bankruptcy judges to Article III status "would increase the efficiency of the bankruptcy process by eliminating the costs of drawing jurisdictional lines between core and noncore proceedings and the costs thought to derive from the uncertainty over the constitutionality of the current definition of core proceedings."[130] In the end, however, Congress's 1994 bankruptcy reforms left unchanged "the power of bankruptcy judges to enter final judgments only in 'core' proceedings but not in 'non-core' proceedings."[131]

In the two years after BAFJA was enacted, the Court in *Thomas v. Union Carbide Agricultural Products Co.* and *Commodity Futures Trading Comm'n v. Schor* suggested that *Marathon* was only a narrow holding,[132] and that "practical attention to *substance* rather than doctrinaire reliance on *formal categories* should inform application of Article III."[133] As Justice Breyer later wrote in *Stern*, *Thomas* and *Schor* adopted a pragmatic approach that

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[127]28 U.S.C. § 152(a); *Stern*, 131 S.Ct. at 2610.

[128]Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 & n.31 (1982).

[129]Pub. L. No. 103-394, 108 Stat. 4107 (1994); *id.* § 603, 108 Stat. 4107, 4147 (1994) (describing four principle duties of the Review Commission).

[130]Plank, *supra* note 77, at 568.

[131]Roberts, *supra* note 118, at 44.

[132]Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 584 (1985) (*Marathon* "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.").

[133]*Id.* at 587 (emphasis added).

asks whether the delegation of authority poses "a genuine and serious threat" that one branch might aggrandize its own authority by encroaching on the authority exclusively given to another branch, instead of the plurality's formalistic approach in *Marathon*.[134] Under the pragmatic approach, adjudication of "private rights" by a non-Article III court would receive more scrutiny than adjudication of public rights, but such decision-making would "not necessarily [be] unconstitutional."[135] However, the Supreme Court returned to *Marathon*'s doctrinaire approach again in *Stern*, as discussed below, and categorically rejected even the "slight" encroachment it perceived from the bankruptcy court's adjudication of a counterclaim under the BAFJA amendments.

V. *GRANFINANCIERA, S.A. V. NORDBERG*, AND ITS HINT OF THINGS TO COME

Congress intended that core proceedings under BAFJA would constitutionally lie within the jurisdiction of bankruptcy judges. In *Granfinanciera*, however, the Court gave its first indication that it did not entirely agree with Congress's intent, holding that the Seventh Amendment guaranteed a defendant in a fraudulent transfer action a trial by jury, "notwithstanding Congress's designation of fraudulent conveyance actions as 'core proceedings' in 28 U.S.C. § 157(b)(2)(H) (1982 ed., Supp. V)."[136]

A. PROCEDURAL POSTURE OF *GRANFINANCIERA*

In *Granfinanciera*, the Chapter 11 trustee sued Granfinanciera, S.A. and another entity under Section 548 of the Bankruptcy Code to recover a constructively fraudulent conveyance by the debtor's corporate predecessor within one year of bankruptcy. Granfinanciera did not file any claim against the debtor. The district court referred the matter to the bankruptcy court, and Granfinanciera requested a trial by jury. The bankruptcy court denied the request for jury, however, because it deemed the fraudulent transfer suit a "core action" under 28 U.S.C. § 157(b)(2)(H), which under its view of English common law "was a non-jury issue."[137] The bankruptcy court entered judgment for the trustee, and both the district court and court of appeals affirmed.

Although the trustee sought monetary damages against Granfinanciera,

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[134]Stern v. Marshall, 131 S.Ct. 2594, 2624 (U.S. 2011) (Breyer, J., dissenting).

[135]*Id.* at 2625 (Breyer, J., dissenting). Justice Breyer noted that in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986), the Court likewise said it "declined to adopt formalistic and unbending rules" and opted instead to examine factors bearing on the "practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."

[136]Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989).

[137]*Id.* at 37.

the Eleventh Circuit Court of Appeals ruled that fraudulent conveyance actions are equitable in nature, and therefore the Seventh Amendment's right of jury trial did not apply to them, and that no statute made fraudulent transfer actions triable by jury.[138] It also held that Congress's designation of fraudulent conveyance actions as "core proceedings" under Section 157(b)(2)(H) made those actions triable by the bankruptcy court without a jury.

B. *GRANFINANCIERA*'S FLAWED LEGAL-EQUITABLE DISTINCTION

The *Granfinanciera* Court, however, reversed. The Court held that the purpose of the Seventh Amendment was to preserve the right to jury trial as it existed in 1791, and by extension preserved the guarantee of jury trial in "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided by English law courts in the late 18th century," prior to the merger of courts of law and equity, "as opposed to those customarily heard by courts of equity or admiralty" at that time.[139] The Court concluded that a fraudulent transfer claim would have been categorized as a "suit in common law" in late 18th century England, as opposed to an equitable action for which no right of jury trial existed.

Having concluded that a fraudulent transfer claim involves a legal cause of action, the Court held that "a person who has not submitted a claim against the bankruptcy estate" is entitled to a jury trial under the Seventh Amendment when sued by the trustee to recover a fraudulent monetary transfer, so long as Congress has not permissibly assigned the resolution of the claim to a non-Article III court which does not use juries as a factfinder.[140]

The Court's discussion of 18th century English legal and equitable practice, however, was both artificial and in conflict with actual historic practice. The *Granfinanciera* Court failed to mention that in 1791 England, the initial adjudication of bankruptcy issues was made by *bankruptcy commissioners*, appointed by the Lord Chancellor of England, and later reviewed by the law or equity courts in England.[141] Indeed, the *Granfinanciera* Court did not so much as mention the fact that England had bankruptcy commissioners in 1791, let alone analyze whether they decided analogous causes of action. As Professor Thomas E. Plank noted, *Granfinanciera*'s simplistic "legal-equitable distinction fails in this instance because it does not recognize bankruptcy as a *sui generis* creation of the legislature," nor did it accurately address "eighteenth-century fraudulent conveyance actions in the context of eighteenth-

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[138] *Id.*

[139] *Id.* at 41-42.

[140] *Id.* at 34.

[141] Plank, *supra* note 77, at 569.

century *bankruptcy* adjudication."[142]

Granfinanciera stated that one of the English decisions it purported to follow "demonstrates that fraudulent conveyance actions could be brought in equity," although it questioned whether suits to recover money could be maintained in equity.[143] In 18th century England, however, bankruptcy commissioners sitting without juries "initially adjudicated whether there had been a preferential or fraudulent transfer of the bankrupt's property," and took charge of the debtor's property "including property transferred before the issuance of the commission."[144]

If the right to jury trial in *Granfinanciera* depended on 18th century English practice (as the *Granfinanciera* Court said), then by analogy to 18th century English bankruptcy commissioners, any "jury trial need not occur until *after* the initial adjudication of a preferential or fraudulent conveyance by a bankruptcy judge," presumably by appeal or petition to the district court.[145]

Similarly, under an 18th century English model, the Court should have recognized Congress's power to decide that there is no right to jury trial in a trustee's action to enforce rights as to property of the estate, in the same way that 18th century Parliament granted extraordinary adjudicatory powers to bankruptcy commissioners, and used law courts and juries as a matter of legislative discretion rather than common law right.[146] In sum, the Court adopted an artificial 18th century English model to decide *Granfinanciera*, and ignored how *bankruptcy* practice had actually operated during that time period. The Court's failure even to mention English bankruptcy commissioners and the fraudulent transfer actions they handled is particularly strange, in

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[142]*Id.* at 617 (emphasis added).

[143]*Granfinanciera*, 492 U.S. at 45. As Justice White cited, however, the late eighteenth century English Chancery Court itself answered affirmatively, writing that courts of equity "'have most certainly been in the habit of exercising concurrent jurisdiction with the Courts of Law on the statutes of *Elizabeth* respecting fraudulent conveyances.'" *Id.* at 84 (quoting Hobbs v. Hull, 1 Cox Eq. Cas. 445, 445-46, 29 E.R. 1242 (1788)). Even under the *Granfinanciera* majority's focus of law vs. equity, historic practice stood against its holding.

[144]Plank, *supra* note 77, at 617 & n.284; *id.* at 581 & n.90.

[145]*Id.* at 617. Under the eighteenth century English practice, the adjudication whether or not the debtor made a fraudulent conveyance, or whether a person concealed property belonging to the debtor, was made by the bankruptcy commissioner. *Id.* at 581-82 (one of the actions triggering bankruptcy was "fraudulently conveying one's property to defraud one's creditors"); *id.* at 585 (commissioners could upon "due Proof thereof to be made before the said Commissioners . . . by Witness, Examination or otherwise" order any person concealing property of the debtor to forfeit double the value of the concealed property); *id.* at 617 (commissioners adjudicated whether a fraudulent transfer took place). The commissioners could then appoint provisional assignees to receive all of the bankrupt's property (with election of new assignees at the first meeting of creditors). *Id.* at 578 & n.70. The assignees could then "pursue any legal method of recovering property vested in them [by the commissioners] on their own authority," including through law courts or in chancery. *Id.* at 577, 591 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES at 486-87).

[146]*Id.* at 617.

light of the Court's stated goal of finding how analogous causes of action were ordinarily decided in late 18th century England. Justice White, in his dissent, observed that the Court's conclusion about the nature of fraudulent transfer actions was not "supportable either by reference to the state of American bankruptcy law prior to adoption of the 1978 Code, or by reference to the pre-1791 practice in the English courts."[147]

As Justice White stated in his dissent, the *Granfinanciera* decision was also irreconcilable with the Court's own decisions. In *Katchen v. Landy*, for example, the petitioner filed a claim in bankruptcy court, and the trustee resisted paying the claim based on the pre-1978 Act provision which prohibited payments to creditors holding void or voidable claims.[148] The petitioner demanded a jury trial on the preference issue, but the *Katchen* Court held that he had "'no Seventh Amendment right to a jury trial.'"[149] The *Granfinanciera* majority distinguished *Katchen* in part by saying it must be read as holding the Seventh Amendment right to jury trial "depends upon whether the creditor submitted a claim against the estate,"[150] but *Katchen* itself said that it made no difference to its holding whether the trustee urged a statutory objection to the creditor's claim "'or also seeks affirmative relief.'"[151]

Moreover, when *Katchen* was decided, the 1898 Act did not include fraudulent transfer actions among the proceedings covered by the Act. Based on the statute, the bankruptcy court would have lacked jurisdiction over the fraudulent transfer issue if the creditor had not invoked jurisdiction himself by filing a claim.[152] As Justice White wrote, it was only the "limits of the 1898 Act" that prevented *Katchen*'s holding from applying in all instances, and that left the creditor with a right to jury trial. Under BAFJA, however, Congress *did* expressly designate fraudulent transfer actions as "core" proceedings, wiping out any jury entitlement that might have existed when *Katchen* was decided. In short, "when Congress does commit the issue and recovery of a preference to adjudication in a bankruptcy proceeding, the Seventh Amendment is inapplicable," and in *Katchen*, "it was the fact that *Congress* had committed the determination and recovery of preferences to

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[147]*Granfinanciera*, 492 U.S. at 77.

[148]*Id.* at 71-72 (citing Katchen v. Landy, 382 U.S. 323 (1966)).

[149]*Granfinanciera*, 492 U.S. at 71-72 (citing *Katchen*, 382 U.S. at 337).

[150]*Granfinanciera*, 492 U.S. at 35. The Court noted multiple times that Granfinanciera was "a person who has not submitted a claim against a bankruptcy estate." *Id.* at 36; *id.* at 48 ("As in this case, the recipients of the payments apparently did not file claims against the bankruptcy estate."); *id.* at 50 (the Court does not address whether bankruptcy courts may conduct jury trials in trustee suits "against a person who has not entered a claim against the estate"); *id.* at 58 ("petitioners here, like the petitioner in *Schoenthal*, have not filed claims against the estate").

[151]*Id.* at 72 (quoting *Katchen*, 382 U.S. at 337).

[152]*Granfinanciera*, 492 U.S. at 72-73.

bankruptcy proceedings that was determinative in that case."[153]

While the Court held that Granfinanciera was entitled to a jury trial on the fraudulent transfer claim, the Court temporarily dodged (at least until *Stern*) the question whether the bankruptcy court could handle that proceeding. The *Granfinanciera* Court wrote:

> We do not decide today whether the current jury trial provision—28 U.S.C. § 1411 (1982 ed., Supp. V)—permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions. We do hold, however, that whatever the answers to these questions, the Seventh Amendment entitles petitioners to the jury trial they requested.[154]

Although the Court did not decide whether a bankruptcy court could conduct a jury trial, the Fifth Circuit addressed that issue in *In re Clay*.[155] Judge Higginbotham addressed the sole question "whether the bankruptcy judge has the constitutional and statutory authority to conduct the jury trial without the consent of the parties." Correctly reading the trend of the Supreme Court's decisions, he concluded they could not.[156] Judge Higginbotham noted that the authority to conduct a jury trial is an essential attribute of judicial power and hence an Article III court cannot delegate it.[157]

C. The Court's Revisitation of the Public Rights Doctrine

The *Granfinanciera* Court also revisited the public rights doctrine, under which the Court stated that Congress may assign the adjudication of new statutory public rights to an administrative agency with which a jury trial would be incompatible.[158] As the Court noted in *Marathon*, and again in *Granfinanciera*, "public rights" involve cases that "'arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'"[159]

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[153]*Id.* at 73, 75 (emphasis in original).
[154]*Id.* at 64-65 (footnote omitted).
[155]*In re* Clay, 35 F.3d 190 (5th Cir. 1994).
[156]*Id.* at 191.
[157]*Id.* at 193-94.
[158]*Granfinanciera*, 492 U.S. at 51.
[159]*Id.* at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22, 51 (U.S.)).

Granfinanciera stated when the government itself is not a party, the "crucial question" in deciding if the public rights doctrine applies is whether Congress acting for a valid legislative purpose "pursuant to its constitutional powers under Article I" has created a private right so closely integrated to its regulatory scheme as to be a matter appropriate for agency decision with limited Article III judicial involvement.[160] In both 19th century English and early American practice, restructuring of debtor-creditor relations and the handling of fraudulent transfer actions were entrusted to non-Article III judges. In the United States, the applicable law stems from Congress's authority under Article I, Section 8 to establish laws on the subject of bankruptcy. The plurality in *Marathon* even acknowledged that the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . may well be a 'public right,'" although it found the doctrine inapplicable in that case.

In *Granfinanciera,* however, the Court retreated even further from the public rights doctrine. The Court commented that *Marathon*'s reference that "restructuring of debtor-creditor relations . . . may well be a 'public right'" should "not suggest that the restructuring of debtor-creditor relations is in fact a public right."[161] Against that odd bit of double-speak, the Court stated that "[a]lthough the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions."[162]

To bolster that conclusion, the Court added that there "can be little doubt" that fraudulent transfer actions by trustees are quintessentially suits at common law that more nearly resemble state law contract claims to augment the bankruptcy estate than they do "creditors' hierarchically ordered claims to a pro rate share of the bankruptcy res."[163] But the history of bankruptcy commissioners in 18th century England raises plenty of doubt about whether fraudulent transfer actions are "legal." In his dissent to *Granfinanciera*, Justice White noted that the Court "calls into question the longstanding assumption of our cases and the bankruptcy courts that the equitable proceedings of those courts, adjudicating creditor-debtor disputes, are adjudications concerning 'public rights.'"[164]

One commentator wrote that after *Marathon* and *Granfinanciera*, one

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[160]*Id.* at 54. Justice Scalia, in his concurrence in *Granfinanciera*, would require at a minimum that the federal government be a party to the case for it to be one involving a "public right." *Id.* at 65-66.

[161]*Id.* at 56 & nn.11-12 (quoting Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982)).

[162]*Id.* at 55.

[163]*Id.* at 56.

[164]*Id.* at 89-90.

logical but extreme conclusion is that "these cases could indicate that much of what bankruptcy judges and their predecessors since 1800 have been doing exceeds their constitutional power," but that to reach this conclusion "one must do a better analysis than the Court did in these two decisions."[165] In *Stern*, however, the Court would do no better or more consistent a job of explaining its analysis, even as it diminished bankruptcy court jurisdiction even further.

VI. *STERN V. MARSHALL*

In *Stern v. Marshall*, the Supreme Court held that the bankruptcy court below could not constitutionally decide even a "core" bankruptcy matter over which Congress had expressly given it statutory jurisdiction, if the issue involves the exercise of "the judicial power of the United States."[166] Under that principle, *Stern* held that the bankruptcy court could not constitutionally decide the debtor's counterclaim against a creditor, despite the fact that the creditor had not only filed a proof of claim, but also had forfeited any objection to the bankruptcy court deciding his *own* common law claim against the debtor.[167]

In his dissent in *Stern*, Justice Breyer noted that "Congress' delegation of adjudicatory powers over counterclaims asserted against bankruptcy claimants constitutes an important means of securing a constitutionally authorized end," namely to establish uniform bankruptcy laws.[168] To be effective in that purpose, "a single tribunal must have broad authority to restructure [debtor-creditor] relations, 'having jurisdiction of the parties to controversies brought before them,' 'decid[ing] all matters in dispute,' and 'decree[ing] complete relief.'"[169] However, in the wake of the *Stern* decision—and its instruction that bankruptcy judges no longer can rely on statutory grants as reliable bases for jurisdiction—bankruptcy courts everywhere are questioning what matters they *can* decide.

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[165]Plank, *supra* note 77, at 638-39.

[166]Stern v. Marshall, 131 S.Ct. 2594, 2611 (U.S. 2011).

[167]In *Granfinanciera*, the Court framed the question before it as "whether a person who has not submitted a claim against a bankruptcy estate" had a right to a jury trial when sued by the trustee on an alleged fraudulent transfer. *Granfinanciera*, 492 U.S. at 36. Similarly, it noted a decision where, "[a]s in this case, the recipients of the payments apparently did not file claims against the bankruptcy estate." *Id.* at 48. The Court determined that the claim was legal rather than equitable, and consequently entitled the creditor to trial by jury - but the Court pointedly refused to decide at that time whether it was the bankruptcy court or district court which should preside over the jury trial. *Id.* at 64-65. Here in *Stern*, though, the creditor *did* file a proof of claim. The *Stern* Court nevertheless concluded that it saw "no reason to treat Vickie's counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*." *Stern*, 131 S.Ct. at 2618.

[168]*Stern*, 131 S.Ct. at 2628.

[169]*Id.* at 2629 (quoting Katchen v. Landy, 382 U.S. 323, 335 (1966) (internal quotation marks omitted)).

A. PROCEDURAL POSTURE OF THE *STERN* DECISION

In 1994, J. Howard Marshall II married Vickie Lynn Marshall ("Vickie"), who later became popularly known as Anna Nicole Smith. Marshall died shortly thereafter, and left the bulk of his estate to his son, E. Pierce Marshall ("Pierce"). Vickie filed for bankruptcy under Chapter 11 in 1996. Pierce brought a defamation claim against Vickie in the bankruptcy court, alleging Vickie had told the press (through her lawyers) that Pierce fraudulently controlled his father's assets. Vickie filed a compulsory counterclaim in the bankruptcy court, alleging that in the course of fraudulently controlling his father's assets Pierce had tortiously interfered with his father's alleged promise or intent to make an *inter vivos* gift to Vickie.

The bankruptcy court held that the counterclaim was a core proceeding, and ultimately rendered judgment in favor of Vickie. The district court reversed, stating that Vickie's counterclaim was non-core because it was only "somewhat" related to Pierce's claim. Treating the matter as a non-core proceeding, the district court handled the bankruptcy court's judgment as non-final recommendations to the court, and like the bankruptcy judge, decided the matter in Vickie's favor. Prior to the district judge's decision, a Texas state probate court had conducted a jury trial on the merits of the same dispute, and entered judgment in favor of *Pierce*.

The Ninth Circuit Court of Appeals reversed the district court, holding that the bankruptcy court lacked authority to enter final judgment on Vickie's counterclaim because it was not "so closely related to [Pierce's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." The Ninth Circuit further concluded that the district court should have given preclusive effect to the Texas probate court's final judgment, rendered prior to the district court's determination.[170]

Vickie's estate[171] argued that the court of appeals erroneously applied 28 U.S.C. § 157(b)(2)(C), because that statute categorically states that compulsory counterclaims are "core" proceedings. Pierce's estate[172] continued to assert that Vickie's counterclaim was a state-law-based tort claim, and therefore not a core proceeding, and that deciding the counterclaim was an unconstitutional exercise of power by the bankruptcy court.

B. *STERN*'S DISCUSSION OF BANKRUPTCY COURT JURISDICTION OVER STATE LAW CLAIMS

The *Stern* Court addressed two questions. First, the Court addressed

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[170]*Id.* at 2602-03.

[171]Vickie died on February 8, 2007, during the pendency of the bankruptcy.

[172]Pierce died on June 20, 2006, also during the pendency of the bankruptcy.

whether Congress gave the bankruptcy court statutory authority under 28 U.S.C. § 157(b) to issue final judgment on the debtor's counterclaim for tortious interference. On that question, the Court concluded "yes." The Court held that deciding the counterclaim was a "core proceeding" under the statute, and that § 157(b)(2)(C) "permits the bankruptcy court to enter a final judgment on [the debtor's] tortious interference counterclaim."[173] However, as to the second question, whether Congress's statutory grant of jurisdiction under Section 157 was constitutional, a divided Court concluded "no," and held the bankruptcy judge had no constitutional authority to enter final judgment on the debtor's state common law counterclaim.[174] On that ground, it affirmed the court of appeals.

The *Stern* Court returned to the same themes outlined in *Marathon*, reciting that the Framers included Article III's life tenure and irreducible salary protections to ensure that the judiciary remains independent from the executive and legislative branches, and to prevent incursion by the political branches into the judicial branch. To preserve such judicial integrity, *Stern* continued, Congress "may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'"[175]

As with the 1978 Act under *Marathon*, the *Stern* Court further concluded that bankruptcy courts under BAFJA were "no mere adjunct of anyone," because of the courts' power to resolve all matters of fact and law, and because of the limited appellate standards applicable to core proceedings.[176] Given bankruptcy courts' broad authority under BAFJA, the *Stern* Court concluded "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed an 'adjunct' of the court of appeals."[177] In sum, on core matters under BAFJA, *Stern* viewed bankruptcy courts as wielding the same power they had held under the 1978 Act.[178]

C. *Stern*'s Avoidance of *Marathon*'s Discussion of Magistrate Judge Jurisdiction

BAFJA, though, was written with an eye toward how *Marathon* had distinguished its earlier decision in *Raddatz*, which upheld the constitutional-

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[173]*Stern*, 131 S.Ct. at 2605.

[174]*Id.* at 2608.

[175]*Id.* at 2609 (quoting Den ex dem Murray v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855)). The *Murray's Lessee* Court held that the government's collection of a debt due from a customs agent was not one traditionally handled by the judiciary at the time the Constitution was enacted, and therefore the Constitution did not preclude the Court of Customs Appeals, a legislative court, from adjudicating the dispute.

[176]*Id.* at 2611.

[177]*Id.* at 2619.

[178]*Id.* at 2610.

ity of the Federal Magistrates Act. Justice Breyer wrote that "[u]nlike the 1978 Act which provided for the appointment of bankruptcy judges by the President," BAFJA now provided for appointment within the same judicial branch.[179] The *Marathon* plurality explained that the Court upheld the exercise of Article III powers by magistrate judges because there was little threat to their independence, largely because magistrate judges are appointed to office by the same branch in which they served, and therefore are not beholden to the political branches.[180]

Once Congress provided for the *same* method of appointment for bankruptcy judges under BAFJA (i.e., by the judicial branch), bankruptcy courts should have posed the same minimal threat that magistrate judges pose, and therefore should be entitled to exercise the same decision making power that *Raddatz* blessed for magistrate judges. Moreover, bankruptcy judges' salaries are tied to those of district judges, at exactly the same percentage that is provided for magistrate judges,[181] and *both* groups still face the same supposed threat that Congress might reduce their compensation.[182] The *Stern* Court, however, made no attempt to reconcile its inconsistent treatment of magistrate judges and bankruptcy judges. *Stern* never even mentions *Raddatz*.[183] Since *Stern* was decided, at least one circuit panel *sua sponte* raised and directed the parties to brief "whether the reasoning of *Stern* applies to magistrate judges, which, like bankruptcy judges, are not Article III judges, and whether, under *Stern*, a magistrate judge can enter final judgment in a [diversity] case tried to a magistrate judge by consent under 28 U.S.C. § 636(c)," where "state law provides the rule of decision."[184]

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[179]*Id.* at 2627 (appointments made by the "circuit judicial counsel" [sic]).

[180]Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 (quoting United States v. Raddatz, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring)).

[181]Compare 28 U.S.C. § 153(a) (bankruptcy judges receive salary "equal to 92 percent" of district judge salaries) with 28 U.S.C. § 634(a) (magistrate judges receive salaries "equal to 92 percent" of district judge salaries).

[182]Although 28 U.S.C. § 634(b) provides that magistrate judges' salaries shall not be reduced, "[n]o constitutional provision . . . prevents Congress from amending the terms of the Act" to lower their compensation. Shannon, *supra* note 72, at 254 & n.7.

[183]In his dissent, Justice Breyer outlined multiple other ways in which Article III judges under BAFJA maintain even greater control over bankruptcy court decisions than is true of other cases in which "this Court has upheld a delegation of adjudicatory power." *Stern*, 131 S.Ct. at 2627.

[184]Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., No. 10-20640 (5th Cir. Sept. 9, 2011) (per curiam) (September 9, 2011 Order of the Fifth Circuit Court of Appeals, Docket 00511597520, requiring the parties to prepare supplemental letter briefs on whether the holding of *Stern* applies also to magistrate judges). The panel noted that one of its members died after briefing and oral argument, and that the clerk would establish a schedule for supplemental letter briefs and oral argument by a regularly-constituted panel.

D. *Stern*'s Failure to Reconcile the Inconsistencies of the Public Rights Doctrine

The Court also rejected Vickie's argument that her claim involved a "public right" that could be decided by a non-Article III court, and instead characterized it as "one under state common law between two private parties" which was merely meant to augment the bankruptcy estate.[185]

Although the *Marathon* plurality stated that restructuring of debtor-creditor relations "may well be a 'public right,'" *Stern* stated *Marathon* did not mean to "suggest that the restructuring of debtor-creditor relations is in fact a public right."[186] *Stern* acknowledged that its discussion of the public rights exception since *Marathon* "has not been entirely consistent"—one would have to include *Stern* itself in that category—but stated that it was "still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action."[187] As one such example, *Stern* cited its decision in *Thomas*, in which the Court upheld the constitutionality of a non-Article III court adjudicating reimbursement claims relating to registration of pesticides with a federal agency.[188]

In *Thomas*, however, the government was not a party, and the dispute was between private litigants. That being the case, the *Stern* Court's categorization of *Thomas* as a public rights exception begs the question why Vickie's compulsory counterclaim under 28 U.S.C. § 157(b)(2)(C), or a claim asserted under any of Congress's other statutes relating to core proceedings, do not likewise "flow from a federal statutory scheme,"[189] let alone a statutory scheme over which Article I expressly gives Congress dominion.

In addition, the *Thomas* Court discussed whether an Article I tribunal, wielding power to decide a private dispute, posed a serious threat of encroachment on the judicial power of the United States, and concluded 'no.' However, the *Stern* Court jettisoned that analysis, without explaining why it was expedient in *Thomas* but not in *Stern* to tolerate a small threat of encroachment. *Stern* refused to tolerate even the "slight encroachment[ ]" that Vickie's counterclaim supposedly presented.[190]

E. Bankruptcy Courts' Application of *Stern*

In the short time since *Stern* was issued, some bankruptcy courts have found the holdings in *Stern* distinguishable under the public rights exception

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

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

[187] *Id.* at 2613.

[188] *Id.*

[189] *Id.* at 2614 ("In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme, as in *Thomas*, 473 U.S., at 584-585, 105 S.Ct. 3325[.]").

[190] *Id.* at 2620.

and/or because no state-created rights were at issue, or found that resolution of state law claims was appropriate because the issues were inextricably intertwined with the court's decision on matters arising under Title 11. Still others, however, have declined to exercise jurisdiction based on the principles stated in *Stern*, at least absent the consent of all the parties involved.

1. *The public rights doctrine*

In *Turner v. First Comm. Credit Union (In re Turner)*,[191] the debtor filed suit in the bankruptcy matter against an institution that had filed proofs of claim. The bankruptcy court observed that *Stern* at "first blush" would appear to be on all fours with the dispute.[192] In contrast to *Stern*, however, the debtor's suit in *Turner* arose out of alleged violations of the automatic stay imposed by Bankruptcy Code § 362(a), and sought recovery of damages for violation of the stay under another express Bankruptcy Code provision, § 362(k). The debtor's counterclaim was "purely a creature of the Bankruptcy Code," in contrast to the state-created rights alleged by the debtor in *Stern*. The *Turner* court therefore held that *Stern* had no application, and that the bankruptcy court had constitutional power to adjudicate the counterclaim.[193]

The *Turner* court reached the same conclusion, however, under the public rights exception. The court cited the Supreme Court's description of the doctrine in *CFTC v. Schor*, under which the exception arises when "Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches" because the "danger of encroaching on the judicial powers is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication."[194] The *Turner* court noted that the automatic stay is "one of the most important—if not the most important—features of the Bankruptcy Code," and is integral to the public bankruptcy scheme. The court added:

> This suit involves the adjudication of rights created under a complex public rights scheme, and therefore it falls within the Bankruptcy Court's constitutional authority. Under *Thomas v. Union Carbide Agricultural Products Co.*, a right closely integrated into a public regulatory scheme, even "a

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[191]*In re* Turner, No. 10-3300, 2011 WL 2708907 (Bankr. S.D. Tex. July 11, 2011).

[192]*Id.* at *3.

[193]*Id.* ("State law has no equivalent to these statutes; they are purely a creature of the Bankruptcy Code. Accordingly, because the resolution of this dispute is not based on state common law, Stern is inapplicable, and this Court has the constitutional authority to enter a final judgment in this suit pursuant to 28 U.S.C. §§ 157(a) and (b)(1).").

[194]Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853-54 (1986).

> seemingly 'private' right," may be resolved by a non-Article III tribunal 'with limited involvement by the Article III judiciary.' 473 U.S. 568, 593 (1985). The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including "the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts."
>
> Disputes that are integrally bound up in the claims adjudication process—and thus involve the exercise of the Bankruptcy Court's *in rem* jurisdiction over the estate—are part of the "public rights" exception. Disputes over rights created by the Bankruptcy Code itself as part of the public bankruptcy scheme also fall within the "public rights" exception.
>
> . . . Given the central role of the automatic stay in the bankruptcy scheme, the broad effect of the automatic stay, and the fiduciary duty imposed upon debtors, this Court concludes that enforcement of the automatic stay fits within the "public rights" exception. The automatic stay protects not just one person or entity, but rather protects all of those persons and entities affected by the filing of a bankruptcy petition.[195]

The bankruptcy court reached a similar result in *Husky Int'l Electronics v. Ritz* (*In re Ritz*),[196] on the issue whether the court had authority to exercise jurisdiction over a dispute concerning the debtor's discharge. Noting that the "right to a discharge is established by the Bankruptcy Code and is central to the public bankruptcy scheme," the court concluded it had jurisdiction under the public rights exception.[197] The court added that "[d]eterminations of whether a debtor meets the conditions for a discharge are integral to the bankruptcy scheme, and the Bankruptcy Court has the authority to make such determinations," as well as "the authority to determine when the statutorily established right to a discharge does *not* apply."[198]

Similarly, the court in *Sanders v. Muhs* (*In re Muhs*) noted that the determination of a debtor's right to discharge is integral to the public bankruptcy scheme, and citing *Thomas*, found that it had authority under the

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[195] *Turner*, 2011 WL 2708907 at *4-5 (citations omitted).

[196] *In re* Ritz, No. 10-3156, 2011 WL 3439246 (Bankr. S.D. Tex. Aug. 4, 2011).

[197] *Id.* at *5-6.

[198] *Id.* at *6 (emphasis in original).

public rights exception to determine that a debt was non-dischargeable.[199] The *Muhs* court wrote:

> . . . Following *Stern*, it is unclear whether the adjudication of a fraudulent transfer claim against a creditor who has filed a proof of claim falls within the public rights exception. The Court's authority over matters involving state-law causes of action is particularly questionable.
>
> The Court concludes, however, that it may exercise authority over essential bankruptcy matters under the "public rights" exception. Under *Thomas v. Union Carbide Agricultural Products Co.*, a right closely integrated into a public regulatory scheme may be resolved by a non-Article III tribunal. 473 U.S. 568, 593 (1985). The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including "the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts."[200]

Under the same doctrine, the court further noted that "the determination of the amount is integral to the determination of the exception itself," and the court specified the amount of debt it found was non-dischargeable.[201]

In *In re Okwonna-Felix*, the court acknowledged the *Stern* decision, but on the request of the debtor approved a settlement agreement under Bankruptcy Rule 9019, finding that it gives bankruptcy courts discretion to approve a compromise, and that "State law has no equivalent to Bankruptcy Rule 9019."[202] Like *Turner* and *Muhs*, the court found that it also had authority to approve the settlement under the public rights doctrine, and noted "the particular counterclaim in *Stern* did not constitute a 'public rights' dispute" because it focused on a "private right" counterclaim arising under state law.[203] The *Okwonna* court added, "The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations," and quoted the same aspects of *Central Virginia Community College* on which the *Muhs* court relied.[204]

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[199]*In re* Muhs, No. 10-1008, 2011 WL 3421546 (Bankr. S.D. Tex. Aug. 2, 2011).

[200]*Id.* at *1 (quoting Central Va. Cmty. College v. Katz, 546 U.S. 356, 363-64 (2006)).

[201]*Id.* at *2.

[202]*In re* Okwonna-Felix, No. 10-31663, 2011 WL 3421561 at *4 (Bankr. S.D. Tex. Aug. 3, 2011).

[203]*Id.* at *4-5.

[204]*Id.* at *5 (quoting *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006)).

2. *Resolution of inextricably intertwined state law claims*

Another court seized on *Stern*'s discussion whether the compulsory counterclaim necessarily would be decided in connection with ruling on the counter-defendant's proof of claim. The court in *In re Salander O'Reilly Galleries* addressed the question whether Botticelli's "Madonna and Child" was part of the debtor's estate.[205] A consignor attempted unsuccessfully to recover the painting, and filed a proof of claim in the bankruptcy.

The court found that the consignor's "requested relief is inextricably bound up with the resolution of the art claim and proof of claim it filed in this case, and falls squarely within the jurisdiction of the bankruptcy court."[206] The *Salander* court added, "Nowhere in *Marathon*, *Granfinanciera*, or *Stern* does the Supreme Court rule that the bankruptcy court may not rule with respect to state law when determining a proof of claim in the bankruptcy, or when deciding a matter directly and conclusively related to the bankruptcy."[207]

3. *Declining jurisdiction under Stern, absent consent of the parties*

At least some courts have cited *Stern*, however, as a basis for declining to exercise jurisdiction, with or without having the bankruptcy court make an initial determination with de novo review.

As noted by the district court in *Siegel v. FDIC*, after *Stern* "it is insufficient to simply meet Congress's definition of core under § 157(b)(2)(C)."[208] The *Siegel* court addressed whether to withdraw referral of a dispute over ownership of roughly $50 million in tax refunds from the bankruptcy court. The district court in *Siegel* noted, "Here, the Trustee's counterclaim over whether a bank or its parent holding company owns the tax refunds is a dispute between private parties," but found that "the Bankruptcy Court is the appropriate forum to first hear this case" based on its familiarity with the issues and its unique vantage point from the center of the bankruptcy proceedings. The court noted that having the bankruptcy court make the initial determination, with de novo review by the district court, would be an efficient use of resources.[209]

The bankruptcy court in *Samson v. Blixseth* (*In re Blixseth*) stated that "[f]raudulent conveyance claims in bankruptcy do not fall within the public rights exception" because they are quintessentially suits at common law that most closely resemble a contract claim.[210] The *Blixseth* court found that its

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[205] *In re* Salander O'Reilly Galleries, No. 07-30005, 2011 WL 2837494 (Bankr. S.D.N.Y. July 18, 2011).

[206] *Id.* at *6.

[207] *Id.* at *7.

[208] *In re* Siegel, No. 11-3969, 2011 WL 2883012 at *6 (C.D. Cal. July 15, 2011).

[209] *Id.*

[210] *In re* Samson, No. 10-0088, 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011).

exercise of jurisdiction over the trustee's fraudulent conveyance claim would be unconstitutional, and directed the parties to file a motion with the district court withdrawing its reference of that claim (absent which the court indicated it would dismiss the fraudulent conveyance counterclaim for want of jurisdiction). The court added, however, that "the equitable subordination and preferential transfer claims arise from the Bankruptcy Code and the claims allowance process, therefore, this Court's jurisdiction over those claims is constitutionally acceptable."[211]

In *Garden v. Central Nebraska Housing Corporation* (*In re Roberts*), the court found it lacked jurisdiction to decide motions for summary judgment on a dispute "between the deed of trust trustee and two bidders over the validity of [a sale of real property], and among the various creditors claiming an interest in the proceeds of the sale" and sent the matter to the district court for resolution.[212] The *Roberts* court explained, "[T]he United States Supreme Court has recently made clear that bankruptcy courts should refrain from impinging upon the exclusive jurisdiction of the Article III courts by entering judgments on state law claims involving non-debtor third parties."[213]

Likewise, the court in *Jones v. Mandel* (*In re Mandel*) held that it lacked jurisdiction under *Stern* to decide the debtors' counterclaim against an architect (who had filed a proof of claim) for restitution of amounts they paid him to design a home.[214] The bankruptcy court found that it did not have the constitutional authority to decide the counterclaim in the absence of the parties' express consent.[215] Other bankruptcy courts have taken the same approach, declining to exercise jurisdiction unless the parties indicate their mutual consent.[216]

F. WHAT ISSUES MAY A BANKRUPTCY JUDGE STILL DECIDE AFTER *STERN*?

In his *Marathon* dissent, Justice White noted that even under the old referee system, the referee's decision to allow or disallow the claims of creditors "could and usually did involve state-law issues," and as the plurality itself

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[211] *Id.* at *11.

[212] *In re* Roberts, No. 10-4097, 2011 WL 3035268 at *1 (Bankr. D. Neb. July 19, 2011).

[213] *Id.* at *2.

[214] *In re* Mandel, No. 10-4099, 2011 WL 2728415 at *3 (Bankr. E.D. Tex. July 12, 2011).

[215] *Id.*

[216] *See, e.g.*, Stoebner v. PNY Tech., Inc. (*In re* Polaroid Corp.), No. 10-4595, 2011 WL 2694316 at *4 (Bankr. D. Minn. July 7, 2011) (directing parties to "file express written statements as to whether their clients consent to entry of a final judgment," absent which the court could not entertain trustee's motion for partial summary judgment on contract claim); *In re* BearingPoint, Inc., No. 09-10691, 2011 WL 2709295 at *1, *8 (Bankr. S.D.N.Y. July 11, 2011) ("Whether my decision now is characterized as abstention, or as relief from my earlier order, the Trustee will not be required to bring suit in this Court" as previously ordered, particularly since to do so would potentially cause a *Bleak House* result in the "post-*Stern v. Marshall* environment.").

acknowledged, those types of decisions are at the core of the federal bankruptcy power.[217] "In other words, under both the old [1898] and new [1978] Acts, initial determinations of state-law questions were to be made by non-Art. III judges, subject to review by Art. III judges."[218] Justice Scalia appeared to acknowledge some aspect of the same principle in his concurrence in *Stern*, stating "[p]erhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate."[219]

With *Stern*, however, the Court continues to erode bankruptcy court jurisdiction, despite Congress's repeated efforts to expand such jurisdiction. Vickie's allegation against Pierce was a counterclaim, and the person against whom it was filed had not only filed a proof of claim based on state law defamation, but also expressly waived any challenge to the bankruptcy court deciding his state law defamation action.[220] As Justice Breyer's dissent notes, Pierce likely had an alternative forum to pursue his defamation claim, and instead chose to voluntarily appear in bankruptcy court to pursue it.[221] By subjecting himself to the bankruptcy court's authority, the Court had ample precedent to hold that the flip-side to Pierce's claim—Vickie's compulsory counterclaim—was also before the bankruptcy court, and that its resolution was integral to restructuring that debtor-creditor relationship.[222]

One bankruptcy court observed in the wake of *Stern* that "The broader applicability of the Supreme Court's decision remains unclear. Other types of disputes where bankruptcy courts have frequently entered final judgments may now require that an Article III court enter the final judgment. Indeed, a bankruptcy court's authority to enter a final judgment over certain disputes involving state law issues is now questionable."[223]

The *Stern* majority characterized its decision as a "narrow' one," explaining that resolution of the counterclaim required factual and legal determinations beyond a ruling on Vickie's objections to Pierce's proof of claim for defamation.[224] In the same decision, however, the majority stated:

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[217]Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 99 (1982)

[218]*Id.* at 100.

[219]Stern v. Marshall, 131 S.Ct. 2594, 2621 (U.S. 2011) (citing Plank, *supra* note 77, at 607-09).

[220]For Fed. R. Civ. P. 13(a) purposes, the counterclaim arose "out of the transaction or occurrence that is the subject matter of" Pierce's claim. *Stern*, 131 S.Ct. at 2626. The *Stern* majority did not question the compulsory nature of the counterclaim. *Id.* at 2617, 2619; *id.* at 2601 (Pierce filed a proof of claim); *id.* at 2606-07 (Pierce "consented" to bankruptcy court deciding his defamation claim, and forfeited any argument to the contrary). Pierce claimed that Vickie, through her lawyers, defamed him by telling the press Pierce had engaged in fraud to control his father's assets; Vickie asserted the flip side of that argument as a counterclaim, alleging that Pierce tortiously interfered with an *inter vivos* gift his father (and Vickie's husband) intended to give to Vickie.

[221]*Id.* at 2627-28.

[222]*Id.* at 2628 (Breyer, J., dissenting).

[223]*In re* Okwonna-Felix, 2011 WL 3421561 at *4 (Bankr. S.D. Tex. Aug. 3, 2011).

[224]*Stern*, 131 S.Ct. at 2617, 2620.

i) the "assignment" of a state law claim for resolution by a bankruptcy judge violates Article III, even if it consists of a counterclaim against a creditor who consented to having his own claim heard in the court;
ii) Congress cannot confer the government's "judicial Power' on entities outside Article III" (but as the *Stern* majority's and dissent's examples show, the Court has repeatedly affirmed the exercise of such power by Article I courts both before and after *Marathon*);
iii) Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty" (but the Court has permitted other Article I courts to handle common law disputes between private litigants); and
iv) the "'experts' in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay."[225]

So what private rights matters can a bankruptcy judge decide, after *Stern*? It appears clear that *Stern* applies only to affirmative claims by the estate against third parties, and not to claims against the estate (even if the latter arises under state law). As to claims against third parties, *Stern* suggests that if i) a creditor files a proof of claim (typically based on a private right arising under state law), thereby invoking the aid of the bankruptcy court, and ii) the bankruptcy court cannot rule on allowance of the proof of claim without also ruling on a claim *against* that same creditor (e.g., for preferential transfer), then bankruptcy court jurisdiction may still exist to decide such a state law claim lodged against the creditor.[226] In that specific instance, deciding the debtor's state law claim against the third party is inextricably intertwined with the claims allowance process which is at the core of bankruptcy court power, and unavoidable.

Otherwise, *Stern*'s broad rejection of bankruptcy jurisdiction over state law and other common law claims that could be decided by an Article III court, even in the context of a compulsory counterclaim against a creditor who has filed a proof of claim, suggests a severe narrowing of a bankruptcy court's ability to address any manner of claim arising under common law. Without a perfect match-up of issues, such that deciding the proof of claim necessarily resolves the debtor's claim, and vice versa, *Stern* would indicate

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[225]*Id.* at 2609-10, 2612, 2615, 2622-23.

[226]The Court distinguished its finding of jurisdiction in *Katchen v. Landy* because in that decision "it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue." *Id.* at 2616. Similarly, in *Langenkamp v. Culp*, the *Stern* Court noted, it held that a "preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because then 'the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship.'" *Id.* at 2617 (discussing Langenkamp v. Culp, 498 U.S. 42 (1990) (*per curiam*)).

that a bankruptcy judge cannot decide any state law or common law issue against a third party.

Justice White observed that "the Framers of the Bankruptcy Clause [U.S. Const. Art. I, § 8, cl. 4] 'clearly understood that they were not building a straight-jacket to restrain the growth and shackle the spirits of their descendants for all time to come,' but rather, were attempting to devise a scheme 'which, while firm, was nevertheless to be flexible enough to serve the varying social needs of changing generations.'"[227] In *Marathon, Granfinanciera*, and *Stern*, however the Court has adopted increasingly restricted interpretations of Congress's power under the Bankruptcy Clause which would invalidate bankruptcy court decisions even under the 1898 Act, when "initial determinations of state-law questions" were routinely made by bankruptcy and other non-Article III judges.[228] In the wake of these three opinions, the Court has left both district and bankruptcy courts with a "constitutionally required game of jurisdictional ping-pong between courts,"[229] the rules for which remain murky and in conflict with the Court's prior Article III decisions.

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[227]*Granfianciera*, 492 U.S. at 89 (quoting C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY 4 (1935)).

[228]Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 100 (1982).

[229]*Stern*, 131 S.Ct. at 2630 (Breyer, J., dissenting).