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

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OF BANKRUPTCY JUDGES’ CORE JURISDICTION
AFTER *STERN* v. *MARSHALL***

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This article explores the implications of the Supreme Court’s *Stern v. Marshall* decision, both from an “internal” bankruptcy perspective and in the context of the Court’s still-evolving general jurisprudence of non-Article III adjudications. The article concludes that the decision is best understood as essentially constitutionalizing the historical distinction between summary bankruptcy proceedings considered appropriate for adjudication by inferior tribunals, on the one hand, and plenary suits against adverse claimants that could only be tried in the superior courts of law or equity, on the other. Not only was this distinction firmly embedded in English bankruptcy practice contemporaneous with the Founding, but the Supreme Court itself employed this distinction in its jurisprudence placing prudential limitations upon the adjudicatory authority of non-Article III referees in bankruptcy under the long-lived Bankruptcy Act of 1898. This suggests that a historical explanation for the permissible adjudicatory powers of non-Article III bankruptcy judges (favored by Justice Scalia) may ultimately prevail over Justice Brennan’s flirtations with an account grounded in a public rights theory.

Key Words: bankruptcy courts, bankruptcy judges, bankruptcy jurisdiction, core jurisdiction, non-core jurisdiction, summary jurisdiction, plenary jurisdiction, bankruptcy referees, bankruptcy commissioners, supplemental jurisdiction, consent jurisdiction, Article I courts, non-Article III courts

**A “SUMMARY” STATUTORY AND CONSTITUTIONAL THEORY
OF BANKRUPTCY JUDGES’ CORE JURISDICTION
AFTER *STERN* v. *MARSHALL***

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by

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

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

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

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¹458 U.S. 50 (1982).

²131 S. Ct. 2594 (2011).

³28 U.S.C. § 157(b)(2)(C) (2006).

⁴*Stern*, 131 S. Ct. at 2620.

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

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

I. THE HISTORICAL EVOLUTION OF BANKRUPTCY ADJUDICATIONS

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

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

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

A. "BANKRUPTCY" PROCEEDINGS IN ENGLAND

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

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

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

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

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

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

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

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

B. EARLY AMERICAN BANKRUPTCY STATUTES

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

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

⁸See *Ex parte Matthews*, 26 Eng. Rep. 1266, 1267 (Ch. 1754); THOMAS COOPER, *THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND* 117 (Fred. B. Rothman & Co. 1992) (1801).

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

¹⁰Ch. 9, 5 Stat. 440 (repealed 1843), *reprinted in* 10 *COLLIER ON BANKRUPTCY* 1738-45 (James Wm. Moore et al. eds., 14th ed. 1978).

¹¹Ch. 176, 14 Stat. 517 (amended 1868, 1870, 1872, 1873, 1874 & 1876 and repealed 1878), *reprinted in* 10 *COLLIER ON BANKRUPTCY*, *supra* note 10, at 1746-82.

¹²1867 Act § 1; 1841 Act § 6.

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

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

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

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

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

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

¹⁵*Christy*, 44 U.S. (3 How.) at 313.

¹⁶*Id.* at 314.

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

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

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

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

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

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

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

²¹1841 Act § 6. In England, assignee suits against adverse claimants, because they were not encompassed within English "bankruptcy" jurisdiction, thus required plenary suit in a court of law or equity. Justice Story nonetheless concluded that the 1841 Act's general summary jurisdiction of "proceedings in bankruptcy" in the district courts encompassed assignee disputes with adverse claimants, notwithstanding the fact that this permitted the assignee to proceed summarily (rather than through a plenary suit) against an adverse claimant in the district court. See *Christy*, 44 U.S. (3 How.) at 314, 317. Although subsequent bankruptcy statutes were generally construed to require plenary proceedings in actions to recover money or property from adverse claimants in either federal district or circuit court, Justice Story's original notion, that such actions are subsumed within the scope of general federal bankruptcy jurisdiction, endured. See Brubaker, *Bankruptcy Jurisdiction Theory*, *supra* note 19, at 765-77.

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

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

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

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

C. THE BANKRUPTCY ACT OF 1898

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

1. *Summary Versus Plenary Jurisdiction*

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

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

²⁶In fact, each of the three early “temporary” bankruptcy statutes was repealed, in large part, because of the relative inconvenience of the federal courts. See H.R. REP. NO. 55-65, at 126-27 (1897); 1 COLLIER ON BANKRUPTCY, *supra* note 10, ¶ 0.04, at 8; 1 FRANK O. LOVELAND, A TREATISE ON THE LAW AND PROCEEDINGS IN BANKRUPTCY § 5, at 10, § 6, at 12 (4th ed. 1912); 1 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 7, at 17, § 8, at 18, § 9, at 19 (James H. Henderson ed., 5th ed. 1950).

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

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

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

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

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

2. Summary Versus Plenary Process

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

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

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

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

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

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

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

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

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

3. *Referees' Jurisdiction in Summary Proceedings*

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

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

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

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

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

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

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

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

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

⁴³1898 Act § 38(6).

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

preme Court decided in *Weidhorn v. Levy* that “the referee is to exercise powers *not* equal to or co-ordinate with those of the court or judge,”⁴⁵ the Court was devising a prudential limitation on the adjudicatory powers of the non-Article III referees, without any congressional guidance as to what those limits (if any) must or should be. Indeed, as the Court expressly acknowledged in *Katchen v. Landy*, the Court itself was the principal architect of the full extent of the non-Article III referees’ adjudicatory powers, which “in the absence of congressional definition . . . is a matter to be determined by decisions of this Court.”⁴⁶ Pursuant to the Court’s decisions, a referee had no jurisdiction over plenary matters;⁴⁷ the referee’s summary jurisdiction, though, was indistinguishable from that of the district court, including the power to enter final orders reviewable only by appeal⁴⁸ and carrying the full collateral preclusiveness of *res judicata*.⁴⁹

D. THE BANKRUPTCY REFORM ACT OF 1978 AND THE *MARATHON* DECISION

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

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

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

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

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

⁴⁸See *Weidhorn*, 253 U.S. at 271; 2A COLLIER ON BANKRUPTCY, *supra* note 10, ¶¶ 39.16, 39.28.

⁴⁹See *Katchen*, 382 U.S. at 334; *Page v. Ark. Natural Gas Corp.*, 286 U.S. 269, 270-72 (1932); 2A COLLIER ON BANKRUPTCY, *supra* note 10, ¶ 39.29.

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

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

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

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

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

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

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

⁵³See U.S. CONST. art. III, § 1.

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

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

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

⁵⁷458 U.S. 50 (1982).

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

⁵⁹*Id.* at 89-92 (Rehnquist, J., concurring).

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

E. THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

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

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

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

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

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

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

⁶³28 U.S.C. § 151 (2006).

⁶⁴See *id.* § 152(a)(1).

⁶⁵*Id.* § 1334(a)-(b).

⁶⁶*Id.* § 157(a).

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

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

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

II. THE STATUTORY LIMITS OF BANKRUPTCY JUDGES’ CORE JURISDICTION

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

⁶⁷*Id.* § 157(b)(1).

⁶⁸*Id.* § 157(c)(1).

⁶⁹*Id.* § 157(b)(1); *see id.* § 158.

⁷⁰*See id.* § 157(c)(2).

⁷¹*See id.* § 157(c)(1).

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

Marshall opinion, an earlier 2006 Supreme Court case⁷³ that addressed an equally vague and perplexing procedural issue—the so-called “probate exception” to federal jurisdiction.⁷⁴

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

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

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

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

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

preme Court affirmed.⁷⁵

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

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

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

A. HOW TO CODIFY AN UNKNOWN CONSTITUTIONAL LIMIT?

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

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

⁷⁶ANIMAL HOUSE (National Lampoon 1978). If unfamiliar with this particular scene, a clip is available at <http://www.youtube.com/watch?v=zDAmPIq29ro>.

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

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

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

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

⁷⁷*Stem*, 131 S. Ct. at 2604.

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

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

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

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

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

B. CORE PROCEEDINGS THAT DO NOT "ARISE UNDER" THE BANKRUPTCY CODE NOR "ARISE IN" THE BANKRUPTCY CASE?

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

⁸⁰See *supra* notes 10-18 and accompanying text.

⁸¹*Ex parte Christy*, 44 U.S. (3 How.) 292, 313 (1845).

⁸²*Stern*, 131 S. Ct. at 2605.

⁸³*Id.*

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

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

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

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

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

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

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

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

judgments on those actions.⁸⁹

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

C. CORE PROCEEDINGS EITHER “ARISE UNDER” THE BANKRUPTCY CODE OR “ARISE IN” A BANKRUPTCY CASE

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

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

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

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

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

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

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

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

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

⁹²*Id.* at 857 (footnotes omitted).

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

1. *The Statutory List of Core Proceedings*

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

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

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

⁹³*Stern*, 131 S. Ct. at 2604.

⁹⁴*Id.* at 2605.

⁹⁵*Id.* at 2604.

⁹⁶*Id.* at 2605.

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

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

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

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

⁹⁷*Id.* at 2604.

⁹⁸*Id.* at 2620.

sions of law to the district court in such statutory core proceedings⁹⁹ based on their all-encompassing authorization to “hear and determine” the matter and enter any and all “appropriate orders.”¹⁰⁰ The greater statutory authority to enter final orders necessarily includes the lesser statutory authority to enter provisional findings and conclusions. Furthermore, the fact that the district court is the principal repository of original jurisdiction over the matter,¹⁰¹ with the discretionary power to withdraw the reference from the bankruptcy judge at any time,¹⁰² means that there are no obstacles whatsoever to the district court (1) directing the parties to timely and specifically object to any of the bankruptcy judge’s provisional findings and conclusions, (2) reviewing *de novo* the provisional findings and conclusions entered by the bankruptcy judge, and (3) entering any final order or judgment after conducting that *de novo* review. That this procedure is exactly the same as the process specifically authorized and directed in noncore related-to proceedings,¹⁰³ of course, does *not* mean that this same process is *not* statutorily authorized for core proceedings. Indeed, the statute fully authorizes this process whenever it is appropriate, because to do otherwise would be unconstitutional.¹⁰⁴

D. THE WAIVABLE NATURE OF THE STATUTORY ALLOCATION OF ADJUDICATORY AUTHORITY

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

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

¹⁰⁰28 U.S.C. § 157(b)(1) (2006).

¹⁰¹See *id.* § 1334(b).

¹⁰²See *id.* § 157(d).

¹⁰³See *id.* § 157(c)(1).

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

¹⁰⁵28 U.S.C. § 157(b)(5).

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁰*Id.* at 2607.

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

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

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

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

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

III. THE CONSTITUTIONAL LIMITS OF BANKRUPTCY JUDGES' CORE JURISDICTION

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

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

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

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

A. THE CONSTITUTIONAL CONTEXT

Article III, § 1 of the Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹¹⁶

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

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

¹¹⁶U.S. CONST. art. III, § 1.

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

¹¹⁸ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 4.1, at 222 (5th ed. 2007).

¹¹⁹JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION § 10.3, at 327 (2d ed. 2011).

nals, however, “do not admit of easy synthesis,”¹²⁰ to say the least. The Court’s decision in *Marathon* is emblematic.

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

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

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

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

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

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

¹²³*Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

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

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

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

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

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

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

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

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

¹²⁶*Id.* at 2624, 2625–26.

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

3. *Seventh Amendment Decisions as Article III Precedent*

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

In certain situations, of course, Congress may fashion causes of action that are closely *analogous* to common law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable. Congress' power to do so is limited, however, just as its power to place adjudicative authority in non-Article III tribunals is circumscribed. . . .

[I]f [such] a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. . . . [I]f the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no indepen-

¹²⁷See Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 S. CT. REV. (forthcoming 2012).

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

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

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

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

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

4. Constitutionalization of the 1898 Act Summary-Plenary Dichotomy

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

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

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

¹³²382 U.S. 323 (1966).

¹³³498 U.S. 42 (1990).

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

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

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

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

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

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

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

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

¹³⁷*Id.* at 71.

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

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

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

The balance of the *Granfinanciera* Court’s reasoning—employing the *Marathon* distinction between those proceedings that do and those that do not involve “the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power”—clearly relied upon the 1898 Act’s divide between summary and plenary proceedings to draw that distinction. The Court’s conclusion that a trustee’s fraudulent conveyance suit is *not* “integral to the restructuring of debtor-creditor relations”¹⁴³ ultimately turned on the fact that such a suit would have been a plenary *in personam* “controversy at law” against an “adverse claimant” under the 1898 Act¹⁴⁴ and, thus, not within the *in rem* jurisdiction of referees over summary bankruptcy proceedings (such as adjudication of creditors’ claims against the estate):

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

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

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

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

¹⁴²382 U.S. 323 (1966).

¹⁴³*Granfinanciera*, 492 U.S. at 58.

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

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

¹⁴⁶*Id.* at 60.

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

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

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

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

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

¹⁴⁷*Id.*

¹⁴⁸*Id.* at 61.

¹⁴⁹*Id.* at 60.

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

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

¹⁵²498 U.S. 42 (1990).

¹⁵³382 U.S. 323 (1966).

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

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

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

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

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

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

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

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

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

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

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

¹⁵⁷*Katchen*, 382 U.S. at 328.

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

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

¹⁶⁰*Katchen*, 382 U.S. at 328.

¹⁶¹*Id.* at 336.

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

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

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

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

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

B. THE *STERN V. MARSHALL* CONSTITUTIONAL HOLDING

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

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

¹⁶³*Katchen*, 382 U.S. at 328.

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

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

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

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

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

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

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

¹⁶⁵11 U.S.C. § 323(a) (2006).

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

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

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

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

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

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

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

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

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

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

Justice Brennan’s plurality *Marathon* opinion, in describing the limits on 1898 Act summary jurisdiction of referees that the 1978 Reform Act exceeded, *twice* noted that *with consent* referees could hear and finally determine otherwise-plenary suits, citing *MacDonald v. Plymouth County Trust Co.*¹⁷² Justice Rehnquist’s concurrence repeatedly¹⁷³ emphasized defendant *Marathon*’s objection to the bankruptcy court deciding the action at issue as a determinative feature in the unconstitutionality of the bankruptcy court’s judgment.¹⁷⁴ The dissents of both Chief Justice Burger (describing the holding of the Court)¹⁷⁵ and Justice White¹⁷⁶ also expressly stated their under-

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

¹⁷⁰286 U.S. 263 (1932).

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

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

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

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

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

standing that consent of the litigants to final adjudication in a non-Article III bankruptcy court would cure any unconstitutionality under the Court's holding, "just as [was the case] before the 1978 Act was adopted."¹⁷⁷ Similarly, the *Thomas* Court's oft-quoted¹⁷⁸ subsequent characterization of the *Marathon* holding expressly includes the proviso "without the consent of the litigants."¹⁷⁹

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

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

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

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

¹⁷⁷*Id.*

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

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

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

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

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

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

[O]ur prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural interests. See, e.g., [*Marathon*, 458 U.S. at], at 90 (Rehnquist, J., concurring in judgment) (noting lack of consent to non-Article III adjudication); *id.*, at 95 (White, J., dissenting) (same). . . .

[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication. See, e.g., 458 U.S. at 80 n.31; *id.*, at 91 (Rehnquist, J., concurring in judgment); *id.*, at 95 (White, J., dissenting).¹⁸¹

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

¹⁸⁰Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833, 850-51 (1986) (citations omitted).

¹⁸¹*Id.* at 848-49 (citations omitted).

¹⁸²*Id.* at 849.

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

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

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

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

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

¹⁸³*Id.* at 850.

¹⁸⁴382 U.S. 323 (1966).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹⁵*Id.* at 2614 n.7.

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

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

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

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

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

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

¹⁹⁸See *supra* notes 5–49 and accompanying text.

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

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

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

5. Supplemental Jurisdiction in Non-Article III Adjudications

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

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

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

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

²⁰²382 U.S. 323 (1966).

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

²⁰⁴498 U.S. 42, 44 (1990).

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

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

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

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

Recall that section 23 of the 1898 Act, to a very large extent, affirmatively denied federal bankruptcy jurisdiction in suits by the bankruptcy estate on a debtor’s state-law cause of action. However, the Supreme Court’s sanction of ancillary jurisdiction over compulsory counterclaims in *Moore v. New York Cotton Exchange* [270 U.S. 593, 609-10 (1926)] raised the possibility of ancillary jurisdiction over a bankruptcy estate’s state-law action, when asserted as a counterclaim to a creditor’s claim against the estate. This prospect first took shape in the context of equitable receivership proceedings and eventually gained widespread acceptance in bankruptcy. In *Alexander v. Hillman*, [296 U.S. 222 (1935)] the Court applied *Moore*’s ancillary jurisdiction principles to counterclaims by a receiver against creditors who had filed claims in federal receivership proceedings. The lower courts, relying upon *Hillman*, concluded that a bankruptcy trustee’s compulsory counterclaims against a creditor likewise were within the jurisdiction of the federal bankruptcy court, notwithstanding the circumscription of section 23.²⁰⁸

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

²⁰⁷See *Katchen*, 382 U.S. at 325-36.

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

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

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

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

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

²⁰⁹*Id.* at 786.

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

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

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

²¹³*Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 852 (1986).

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

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

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

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

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

²¹⁴*Katchen*, 382 U.S. at 333 n.9.

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

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

²¹⁷*Stern*, 131 S. Ct. at 2618.

²¹⁸*Katchen*, 382 U.S. at 333 n.9.

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

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

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

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

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

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

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

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

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

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

C. THE IMPLICATIONS OF *STERN V. MARSHALL*'S CONSTITUTIONAL DECISION

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

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

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

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

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

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

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

Moreover, given that this *in rem* principle (though wholly metaphorical and apparently infinitely malleable²³⁰) was nonetheless the theoretical foundation of the Court's entire jurisprudence regarding the summary jurisdiction of 1898 Act referees, bankruptcy judges' core jurisdiction is presumptively constitutional with respect to all other matters that were uncontroversially within referees' summary jurisdiction under the 1898 Act. The *Stern v. Marshall* Court's willingness to regard and treat both *Katchen v. Landy* and *Langenkamp v. Culp* as if they were binding precedent for purposes of Article III is a very persuasive indication that the Court has indeed constitutionalized the 1898 Act summary-pleenary distinction and will continue to uphold core jurisdiction in the non-Article III bankruptcy courts over any matter that was incontrovertibly within 1898 Act referees' summary jurisdiction.²³¹

²²⁷382 U.S. 323 (1966).

²²⁸498 U.S. 42, 44 (1990).

²²⁹*Katchen*, 382 U.S. at 329–30.

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

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

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

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

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

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

²³³See Pfander, *supra* note 167.

²³⁴U.S. CONST. art. I, § 8, cl. 9.

²³⁵*Id.* art III, § 1.

²³⁶Pfander, *supra* note 167, at 715.

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

²³⁸Pfander, *supra* note 167, at 720.

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

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

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

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

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

²³⁹McCoid, *supra* note 5, at 30.

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

²⁴¹Pfander, *supra* note 167, at 720.

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

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

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

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

Notwithstanding the *Stern v. Marshall* holding that a bankruptcy court “lack[s] the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim,”²⁴⁴ bankruptcy courts continue to have much adjudicatory authority over (including the power to finally decide) many nonbankruptcy state-law counterclaim issues. After *Stern v. Marshall*, final adjudication of a nonbankruptcy state-law counterclaim is properly within a non-Article III bankruptcy judge’s core jurisdiction only to the extent that the bankruptcy judge must address factual and legal issues involved in the counterclaim in order to fully and finally dispose of the creditor’s claim against the estate. Of course, any issues relevant to the counterclaim that are actually litigated and decided by a final order of the bankruptcy judge, in disposing of the creditor’s claim, will thereafter bind the parties under the issue preclusion principles of collateral estoppel²⁴⁵ (and on direct appeal, will receive the same deference as any other final appealable order—most significantly, factual findings will only be reversed if clearly erroneous).

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

²⁴³Pfander, *supra* note 167, at 770.

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

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

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

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

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

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

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

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

²⁴⁸*Id.* at 2607.

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

3. General Supplemental Core Jurisdiction

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

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

²⁴⁹*Id.* at 2620 (emphasis added).

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

²⁵¹28 U.S.C. § 157(b)(2)(C) (2006).

²⁵²*See id.* § 157(b)(2)(A) & (O).

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

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

broader supplemental summary jurisdiction implications of *Katchen v. Landy* as unconstitutional under Article III²⁵⁵ clearly indicates that any broad, general notion of supplemental core jurisdiction is also unconstitutional. Bankruptcy judges' general supplemental jurisdiction is at best noncore "related to" jurisdiction.²⁵⁶

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

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

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

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

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

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

²⁵⁸See Baird, *supra* note 99.

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

²⁶⁰28 U.S.C. § 157(b)(2)(I) (2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷¹See *supra* notes 29-49 and accompanying text.

²⁷²28 U.S.C. § 157(b)(1) (2006).

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

²⁷⁴See *supra* notes 120-64 and accompanying text.

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

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

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

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

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

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

²⁷⁷287 U.S. 92 (1932).

²⁷⁸See *Granfinanciera*, 492 U.S. at 48–50, 55–56.

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

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

²⁸¹*Stern*, 131 S. Ct. at 2614.

²⁸²*Id.* at 2614 n.7.

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

The notion that bankruptcy courts can, consistent with Article III, render final judgment on any claim whose source of law is the Bankruptcy Code is as dubious as the notion that the “public rights” doctrine can ever sustain non-Article III bankruptcy adjudications. Indeed, one of the five Justices joining the *Stern v. Marshall* majority opinion, Justice Scalia, wrote separately to express his disagreement with both of those suggestions: “Article III gives no indication that state-law claims have preferential entitlement to an Article III judge”²⁸⁵ “Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v Benson*, in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary.”²⁸⁶

For any Bankruptcy Code cause of action, therefore, that could not have

²⁸³*Granfinanciera*, 492 U.S. at 60; see also Young, *supra* note 189, at 868 (“The Court has continued to make clear its special concern when a new federal right is conferred in forced substitution for preexisting rights in admiralty and at common law.”).

²⁸⁴There is no dispute that actions to recover preferential or fraudulent transfers were often brought at law in late 18th century England.” *Granfinanciera*, 492 U.S. at 42–43. “As we noted in *Schoenthal v. Irving Trust Co.*: ‘In England, long prior to the enactment of our first Judiciary Act, common law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts.’” *Id.* at 43 (citation omitted). See Gibson, *supra* note 164, at 169 (“Throughout its opinion, the Court equated fraudulent conveyances and preference actions, and thus seemingly indicated that the article III, as well as the seventh amendment, analysis would be the same for these types of proceedings.”).

Whether the Court was correct in treating preference and fraudulent transfer actions as indistinguishable, though, is another matter. See Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 714–18 (1985); Bruce A. Markell, *Toward True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital*, 21 IND. L. REV. 469, 473–75 (1988); McCoid, *supra* note 5, at 19–28.

²⁸⁵*Stern*, 131 S. Ct. at 2621 (Scalia, J., dissenting).

²⁸⁶*Id.* (citation omitted).

been within the summary *in rem* jurisdiction of referees under the 1898 Act, the statutory designation of such a Code claim as “core” is constitutionally suspect. The cause of action that immediately comes to mind here (other than a preference or fraudulent conveyance suit) is a damages action under the Code’s bankruptcy discrimination statute, first codified in 1978, although that statute’s conceptual relationship to the Bankruptcy Code’s automatic stay and discharge injunction injects considerable ambiguity into the issue.²⁸⁷ Moreover, in the bankruptcy discrimination statute, Congress did “‘creat[e] a new cause of action, and remedies therefor, unknown to the common law,’ because traditional rights and remedies were inadequate to cope with a manifest public problem.”²⁸⁸ Perhaps that rationale can be used to sustain bankruptcy judges’ core jurisdiction over damages suits under the bankruptcy discrimination statute. *Stern v. Marshall*, though, forces us to bracket the entire category of core “arising under” proceedings and question whether the federal-law nature of any particular bankruptcy right or claim, in and of itself, will justify a non-Article III bankruptcy judge finally adjudicating that right.

5. *Judicial Code § 157(c)(2) Consent*

As explored above,²⁸⁹ there is also reason for some concern about the constitutionality of § 157(c)(2), which gives bankruptcy judges authority to enter final judgment in noncore “related to” proceedings with the parties’ consent. Justice Roberts’ opinion, however, contains considerable comfort that, at least with respect to bankruptcy adjudications, final adjudication by a non-Article III arbiter with litigant consent is constitutionally sound.

The *Schor* decision did not definitively resolve the role of litigant consent in validating otherwise unconstitutional non-Article III adjudications. That decision, by its terms, held that waiver of the right to final judgment from an Article III judge was effective only to the extent that litigants’ personal rights to independent, impartial adjudications are at stake. Moreover, while acknowledging that Article III’s judicial independence safeguard[s] “serve[] to protect primarily personal, rather than structural interests,”²⁹⁰ the Court also stated that to the extent structural separation-of-powers concerns are at stake, “notions of consent and waiver cannot be dispositive because [Article III’s independence] limitations serve institutional interests that the parties cannot be expected to protect.”²⁹¹ Indeed, the Court did not consider

²⁸⁷See generally Ralph Brubaker, *The Bankruptcy Discrimination Statute and Discriminatory Hiring Decisions: Turning Textualism’s Hierarchy Upside Down*, 31 BANKR. L. LETTER, June 2011, at 1, 1-4. Bankruptcy referees had summary jurisdiction to issue injunctions necessary to preserve the integrity of bankruptcy relief. See Brubaker, *Nondebtor Releases and Jurisdiction*, *supra* note 30, at 22-25.

²⁸⁸*Granfinanciera*, 492 U.S. at 60.

²⁸⁹See *supra* notes 169-81 and accompanying text.

²⁹⁰*Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986).

²⁹¹*Id.* at 851.

Schor's consent dispositive and, therefore, conducted a further balancing inquiry to assess the impact upon structural separation-of-powers interests from the non-Article III adjudication in that case.

Where, then, does that leave the validity of litigant consent to bankruptcy court adjudications in which it is otherwise unconstitutional for the bankruptcy judge to render final judgment? Given the many cumulative signals from the Court regarding the propriety of litigant consent to otherwise unconstitutional non-Article III bankruptcy adjudications (discussed above),²⁹² it would be precipitous and unwarranted, absent some contrary indication from the Court itself, to conclude that § 157(c)(2) is unconstitutional. Moreover, the same is true with respect to litigant consent to final judgment from a bankruptcy judge in those statutory core proceedings in which (in light of *Stern v. Marshall*) it is otherwise (absent litigant consent) unconstitutional for the bankruptcy judge to enter final judgment. As discussed above,²⁹³ there is undoubtedly statutory authority for final judgment by bankruptcy judges in such core proceedings,²⁹⁴ and given the Court's favorable indications to date regarding the validity of litigant consent in bankruptcy adjudications, a presumption of constitutionality for litigant consent is fully warranted, unless and until the Court indicates otherwise.

From *Stern v. Marshall* itself, one of the most encouraging signs for the validity of litigant consent is the Court's willingness to regard *Katchen v. Landy's* statutory construction decision about the scope of referees' summary jurisdiction as Article III precedent. This is significant given that the Supreme Court itself, in *MacDonald v. Plymouth County Trust Co.*,²⁹⁵ also construed highly ambiguous language in the 1898 Act as nonetheless authorizing summary referee jurisdiction over an otherwise-plenary suit with the consent of the litigants.

It might seem extremely curious (and even perhaps illegitimate) that the Court would transmogrify these statutory construction decisions into Article III decisions, when that constitutional issue was never raised nor explicitly considered.²⁹⁶ As the jurisprudence of non-Article III adjudications illustrates, though, if a given non-Article III adjudication is unconstitutional and is a nonwaivable defect, appellate courts can, often have, and indeed have an obligation to raise that defect *sua sponte*. That the Supreme Court itself, therefore, never did so while, over an extended period of time, actively shaping the contours of bankruptcy referees' summary jurisdiction (including in a

²⁹²See *supra* notes 169–81 and accompanying text.

²⁹³See *supra* notes 109–15 and accompanying text.

²⁹⁴See 28 U.S.C. § 157(b)(1) (2006).

²⁹⁵286 U.S. 263 (1932).

²⁹⁶See, e.g., *Marathon*, 458 U.S. at 80 n.31 (Brennan, J., plurality opinion) (cautiously discussing the implications of the Court's many decisions regarding referees' summary jurisdiction under the 1898 Act).

case directly raising the validity of litigant consent, no less) does provide some indication that the Court saw no constitutional obstacles to referees exercising non-Article III adjudicatory powers in summary proceedings,²⁹⁷ including summary referee jurisdiction on consent of the litigants.

The other very encouraging signal for the validity of litigant consent from the *Stern v. Marshall* decision itself is in that portion of the Court's opinion construing § 157, which "allocates the authority to enter final judgment between the bankruptcy court and the district court."²⁹⁸ Citing to the litigant consent provision in § 157(c)(2), the Court stated that *nothing* in § 157's allocation is "jurisdictional" in the sense of codifying nonwaivable limitations such as subject-matter jurisdiction.²⁹⁹ Section 157, though, is clearly codifying Article III's constitutional limitations on bankruptcy judges' adjudicatory powers, and if those limitations are nonwaivable, then it is for precisely the same reasons that subject-matter jurisdiction limitations are nonwaivable (as the Court itself stated in *Schor*).³⁰⁰ That the *Stern v. Marshall* Court clearly and explicitly stated that § 157, by its nature, codifies waivable rights, therefore, provides a very persuasive indication (1) that the Court likely does believe that litigant consent or waiver will cure any constitutional infirmity in a final adjudication by a non-Article III bankruptcy judge and (2) that the Court likely will treat *MacDonald v. Plymouth County Trust Co.* as if it were an Article III precedent.

Moreover, as a practical matter, structural separation-of-powers concerns—"intended . . . to protect each branch of government from incursion by the others"³⁰¹—do not pose any significant threat to the independence and impartiality of non-Article III bankruptcy judges, as the system is currently structured (particularly since appointment decisions reside in the Article III judiciary itself). Bankruptcy judges' limited tenure does not produce realistic

²⁹⁷Justice White, in his *Marathon* dissent, certainly thought that to be a proper implication of the Court's summary jurisdiction decisions under the 1898 Act. See *id.* at 99 (White, J., dissenting). Troy McKenzie criticizes this historical reliance on summary jurisdiction jurisprudence as anachronistic, pointing out (accurately) that the summary-plenary dichotomy was initially employed under the 1898 Act to limit the scope of federal bankruptcy jurisdiction, which implicates judicial federalism and not non-Article III adjudications concerns of judicial independence and separation-of-powers. See McKenzie, *supra* note 231. The Supreme Court, though, *also* employed the summary-plenary dichotomy in determining the appropriate limits on the final adjudicatory powers of non-Article III referees, which is a non-Article III adjudications concern that does *not* implicate judicial federalism. See *supra* notes 39–49 and accompanying text.

²⁹⁸*Stern v. Marshall*, 131 S. Ct. 2594, 2607 (2011).

²⁹⁹See *id.* at 2607.

³⁰⁰"To the extent this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction . . ." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986).

³⁰¹*Stern*, 131 S. Ct. at 2609.

fears of potential “incursion” into bankruptcy judges’ decision making from Congress or presidential administrations, except in the most exceptional and rare circumstances.³⁰²

The most salient potential prejudicial influences on bankruptcy judges’ decisions likely come from the bankruptcy bar.³⁰³ However, those potential prejudices (and even speculative hypothetical incursions from the other political branches) seem to be just as (if not more) potent in proceedings in which bankruptcy judges can (at least under the Court’s current jurisprudence) unquestionably render final judgment, as they are in noncore “related to” proceedings. If these potential threats to bankruptcy judges’ independence and the integrity of the bankruptcy system are of constitutional significance, then they warrant seriously entertaining arguments (such as Professor Pfander’s) that the entire system of non-Article III bankruptcy judges is unconstitutional. If such a prospect is simply beyond the pale, though, then litigant consent to final judgment from bankruptcy judges in non-core proceedings, in and of itself, poses a truly inconsequential marginal threat to the structural integrity of the bankruptcy system. Indeed, that may well explain why the Court consistently seems unconcerned by non-Article III bankruptcy adjudications with litigant consent.

For those formalist justices comprising the *Stern v. Marshall* majority, upholding final bankruptcy court adjudications by consent of the litigants may also provide a convenient means by which to cabin and distinguish the *Schor* functional balancing approach. Litigant consent, of course, removes any concerns that a non-Article III adjudication will compromise the litigants’ personal interests in an arbiter who is (actually and, as importantly, widely perceived to be) independent and impartial, which is not a concern to which functional balancing (in the absence of litigant consent) is particularly (if at all) sensitive. Indeed, functional balancing seems most attuned and responsive to structural separation-of-powers concerns surrounding non-Article III adjudications. It seems entirely plausible, therefore, that the Court will ultimately conclude that the only proper realm for such functional balancing is in determining the validity of litigant consent to a particular non-Article III adjudication. In the context of non-Article III bankruptcy adjudications, it seems likely that the Court will ultimately uphold the validity of litigant consent.

³⁰²For example, in the *Chrysler* reorganization, although there were no indications of impropriety vis-à-vis the bankruptcy judge, objecting secured creditors in *Chrysler* did make very public allegations that the Obama administration was bringing improper pressure to bear on other secured creditors. See Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375, 1393–94.

³⁰³See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 797–807 (2010).

CONCLUSION

Thirty years after *Marathon*, the full implications of that decision are still not known—a frustrating inscrutability that the *Stern v. Marshall* decision itself both highlights and perpetuates. The most sensible interpretation of the Court's cumulative jurisprudence of non-Article III bankruptcy adjudications is that the Court has constitutionalized its 1898 Act case law limiting non-Article III bankruptcy arbiters' final adjudicatory powers to traditional summary matters. The Court's entire jurisprudence of non-Article III adjudications, though, appears to be up for grabs, and time may prove this analysis to be well off the mark. As the old aphorism goes (attributed variously to Niels Bohr, Robert Storm Petersen, Samuel Goldwyn, Mark Twain, and Yogi Berra), it's tough to make predictions, especially about the future.

