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A Constitutional Tango of Judicial Interpretation: The Instability of Bankruptcy Court Authority under Article III

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A CONSTITUTIONAL TANGO OF JUDICIAL INTERPRETATION: THE INSTABILITY OF BANKRUPTCY COURT AUTHORITY UNDER ARTICLE III

ABSTRACT

Despite historical and modern developments, the heart of bankruptcy law centers around providing fresh starts to those who find themselves in severe financial distress. Congress created bankruptcy courts to help efficiently and effectively facilitate this goal. However, the complexity of debtor-creditor relationships necessitates that most bankruptcy proceedings hear a variety of claims, some of which may not arise out of the bankruptcy itself but are still required for bankruptcy resolution. Consequently, the authority of bankruptcy courts to hear all relevant claims is an essential component of bankruptcy relief.

Article III of the United States Constitution states that judicial authority is vested in judges with life tenure and protected salaries. Based on opposing interpretations, a bankruptcy court may or may not be authorized to hear certain ancillary common law claims in a proceeding. A strict construction of Article III suggests that bankruptcy courts lack the necessary safeguards to exercise judicial authority. In contrast, a broad construction of Article III suggests that bankruptcy courts may exercise limited judicial authority in light of the practical benefits and minimal dangers. These two opposing canons of construction have shaped a volatile history of bankruptcy law.

This Comment explores the dynamic relationship between non-Article III bankruptcy courts and Article III judicial authority, and how this unstable relationship affects the facilitation of bankruptcy goals. This Comment suggests a balanced four-factor approach to when the Court inevitably redraws the constitutional lines of bankruptcy court authority. Lending sufficient weight to each factor will increase the likelihood that bankruptcy procedures properly adapt to rapid societal growth within a constitutional framework, while providing more predictability in bankruptcy law development.

INTRODUCTION

Financial struggle has been prevalent throughout history, and it has almost become a normal phase of life in today's market.[1] The real danger arises when those who find themselves in poor economic situations cannot prevent their struggles from escalating into severe financial distress.[2] Anticipating this ubiquitous problem centuries ago, the Framers of the United States Constitution decided it was necessary "to establish . . . uniform laws on the subject of bankruptcies throughout the United States."[3] As such, Congress was constitutionally authorized to create federal bankruptcy laws providing debtors with the opportunity to "start afresh."[4] The United States Supreme Court illustrated that the goal of bankruptcy was to "give to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future efforts, unhampered by the pressure and discouragement of preexisting debt."[5] To promote these ends, Congress ultimately created bankruptcy courts to support the federal district courts in efficiently adjudicating bankruptcy claims.[6]

Due to the complex nature of debtor-creditor relationships, the efficient facilitation of bankruptcy proceedings rests considerably on a bankruptcy court's authority to hear a comprehensive range of claims.[7] This broad authority is essential because bankruptcy proceedings seldom consist solely of one bankruptcy issue.[8] Rather, these proceedings often include numerous claims that do not arise from the bankruptcy itself, but are still vital to the resolution of bankruptcy disputes.[9] For example, a claim over an alleged breach of contracts is governed by state law, but must be resolved to determine the appropriate sum of valid claims against a debtor.[10] Congress recognized and addressed this necessity through the Bankruptcy Act of 1978, which empowered bankruptcy courts with the statutory authority to render final judgments on claims that were not primary bankruptcy issues.[11]

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1 *See United States Bankruptcies*, TRADINGECONOMICS.COM, http://www.tradingeconomics.com/united-states/bankruptcies (last visited Oct. 20, 2016).

2 *See id*.

3 U.S. CONST. art. I, § 8.

4 Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

5 *Id*.

6 28 U.S.C. § 151 (1984).

7 1 Collier on Bankruptcy 3.02[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

8 *See* Bankruptcy Servs. v. Ernst & Young (*In re* CBI Holding Co.), 529 F.3d 432, 454 (2d Cir. 2008).

9 *See id*.

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

11 Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

While bankruptcy courts had clear statutory authority, questions regarding whether bankruptcy courts had the necessary constitutional authority developed over time.[12] The central constitutional concern was that a bankruptcy court's ability to hear ancillary, non-bankruptcy claims challenged the structural separation of powers.[13] The United States Constitution creates a government framework that ensures a system of checks and balances—a structure intended to prevent a concentration of power by dividing the government into three distinct branches with separate and independent authority.[14] Though the intent was to avoid conflicts, the separation of powers generated frequent and fierce arguments regarding the corresponding boundaries of legislative and judicial authority.[15]

Bankruptcy court authority is one of the many casualties of this ongoing separation of powers debate, "a constitutionally required game of jurisdictional ping-pong between courts . . . ."[16] Over the last century, Supreme Court precedent has largely fluctuated between two opposing interpretations of a bankruptcy judge's authority to render final decisions in cases and controversies not arising from the bankruptcy itself.[17]

On one side, a strict construction[18] of the Constitution suggests that it is unconstitutional for Congress to confer judicial authority on non-Article III bankruptcy judges because they do not comply with the structural safeguards of Article III.[19] On the other side, a broad construction[20] suggests that it is constitutional for Congress to confer judicial authority because, in light of the complex realities of bankruptcy law, the practical benefits considerably

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12 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. at 57.

13 *Id*.

14 *Separation of Powers – An Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx (last visited Jan. 15, 2016).

15 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. at 57.

16 Stern v. Marshall, 564 U.S. 462, 520–21 (2011) (Breyer, J., dissenting).

17 *Compare* Stern v. Marshall, 564 U.S. 462, *with* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

18 The term strict construction, or narrow construction, is defined as "interpreting the Constitution based on a literal and narrow definition of the language without reference to the differences in conditions when the Constitution was written and modern conditions, inventions and societal changes." *Strict Construction*, LAW.COM, http://dictionary.law.com/Default.aspx?selected=2028 (last visited Feb. 16, 2017).

19 Stern v. Marshall, 564 U.S. at 503.

20 Broad construction, in contrast to strict construction, "looks to what someone thinks was the 'intent' of the framers' language and expands and interprets the language extensively to meet current standards of human conduct and complexity of society." *Strict Construction*, LAW.COM, http://dictionary.law.com/Default.aspx?selected=2028 (last visited Feb. 16, 2017).

outweigh the minimal dangers.[21] Today, the exact scope of bankruptcy court authority still remains an important point of contention.[22]

The lack of clarity in the scope of bankruptcy court authority creates residual uncertainty for bankruptcy procedures.[23] This ambiguity is a significant problem because the fundamental purpose of bankruptcy proceedings is the quick and efficient facilitation of debtor relief and creditor repayment.[24] Focus on promptness and efficiency is increasingly diverted to ancillary jurisdictional arguments, which instead lead to "inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."[25]

In response to this developing concern, the United States Supreme Court provided some procedural clarity in 2015 through *Wellness International Network Limited v. Sharif*, which held that bankruptcy courts had the authority to render final judgments on related non-bankruptcy claims with the consent of the parties to the case.[26] The *Wellness* dissent, however, characterizes the Court's decision as an "impermissible [threat to] the institutional integrity of the Judicial Branch,"[27] cautioning that an "individual may not consent away the institutional interest protected by the separation of powers."[28] Thus, the constitutional boundaries of bankruptcy court authority remain blurred.

If history is any indication of the future, the outlook of bankruptcy court authority will be subject to perpetual fluctuation.[29] It was only a few years ago when bankruptcy court authority was thoroughly limited by strict, formalistic interpretation.[30] Subsequent narrow holdings have sidestepped certain procedural hurdles in bankruptcy proceedings, but the most important constitutional question regarding the scope of bankruptcy court authority still remains largely unanswered, or at least full of ambiguity. When dealing with a time-sensitive issue such as bankruptcy, procedural efficiency is paramount to those who are in financial distress and eagerly awaiting resolution.

This Comment explores the dynamic relationship between non-Article III bankruptcy courts and Article III judicial authority, and how this unstable

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21 Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932.
22 *See id.* at 1954.
23 Stern v. Marshall, 564 U.S. 462.
24 *Id*. at 520–21 (Breyer, J., dissenting).
25 *Id*.
26 Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932.
27 *Id.* at 1956 (Roberts, C.J., dissenting).
28 *Id*.
29 *Compare* Stern v. Marshall, 564 U.S. 462, *with* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932.
30 *See* Stern v. Marshall, 564 U.S. 462.

relationship affects the facilitation of bankruptcy law. First, this Comment examines the historical development of bankruptcy law and how the United States Supreme Court has shaped bankruptcy precedent through its shifting interpretations of Article III. Next, this Comment addresses the developing concerns resulting from both the strict and broad construction of Article III authority as it relates to bankruptcy courts. Finally, this Comment suggests that when the Court, again, inevitably addresses the constitutional concerns of bankruptcy court authority, the Court should lend sufficient weight to the following four factors: (1) the current threat of encroachment, and the amount of protection necessary to prevent it; (2) the practical effects on bankruptcy proceedings, and the benefits of preserving bankruptcy law; (3) the residual consequences to existing non-Article III tribunals; and (4) the current trend and disposition of bankruptcy authority. This balanced four-factor approach can increase the likelihood that bankruptcy procedures adapt to rapid societal growth within a constitutional framework, while providing more predictability in bankruptcy law development.

I. BACKGROUND

From colonial state law debtor-creditor proceedings, to federal bankruptcy laws, to recent amendments of the Federal Bankruptcy Rules of Procedure, the only consistency in the scope of bankruptcy authority has been its inconsistency. Examining the evolution of debtor-creditor relations throughout the history of the United States provides a basic foundation for understanding how strict and broad construction have shaped bankruptcy law.

A. The Establishment of Federal Bankruptcy Laws: Finding the Proper Balance between Debtors, Creditors, and Courts

Until almost the twentieth century, there was no reliable federal regulation of bankruptcy.[31] Before federal laws, the states were independently responsible for adjudicating bankruptcy claims but often suffered from problematic jurisdictional restrictions.[32] Instead of relief, imprisonment was a common state remedy.[33] Consequently, state law bankruptcy proceedings were tainted with volatility and regularly left debtors dwelling, or literally imprisoned, in financial turmoil.[34] In 1787, the Framers of the Constitution believed that federal

[31] DAVID A. SKEEL JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 23 (2001).

[32] *Id.*

[33] Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12 (1995).

[34] SKEEL, *supra* note 31, at 23–24.

legislation of bankruptcy laws was necessary to address the "problems that varying and discriminatory state laws caused for nonresident creditors and interstate commerce in general."[35] Through the Bankruptcy Clause, Congress was empowered to "pass uniform laws on the subject of bankruptcies."[36]

In response to repeated financial crises and commercial failures,[37] Congress attempted to pass a set of federal bankruptcy laws in 1800.[38] The Bankruptcy Act of 1800 was a system established for merchants which only provided for petitions from creditors.[39] Based on early English custom, the federal bankruptcy laws had a "distinctly pro-creditor orientation, and was noteworthy for its harsh treatment of defaulting debtors."[40] Because the laws essentially functioned as a commercial "creditors' remedy," private individuals, such as those in agriculture, were outraged.[41] Predictably, the 1800 Act was short-lived and eventually repealed in 1803, due to its ineffectiveness and disapproval among the general population.[42]

It took almost forty years for Congress to implement another federal bankruptcy system through the Bankruptcy Act of 1841.[43] Under the 1841 Act, voluntary bankruptcy proceedings, which were previously limited to merchants, became an available option for all financially troubled debtors.[44] This marked the first time that an insolvent debtor had the option to file for bankruptcy and receive a discharge.[45] A debtor was permitted to bring "all cases and controversies in bankruptcy arising between the bankrupt and any creditor" to the district courts for adjudication.[46] However, this new set of federal bankruptcy laws, viewed as somewhat overly sympathetic to debtors, caused a rapid influx of bankruptcy filings to the district court dockets.[47] Following criticism from

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35 Tabb, *supra* note 33, at 13.

36 U.S. CONST. art. I, § 8, cl. 4.

37 The Panic of 1792 and Panic of 1797 caused widespread ruin and financial turmoil. *See generally* Robert Sylla, et. al., *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Crisis of 1792*, 83 BUS. HIST. REV. 61. (2009); Richard S. Chu, *Certain Victims of an International Contagion: The Panic of 1797 and the Hard Times of the Late 1790s in Baltimore*, 25 J. EARLY REP., 565 (2005).

38 *Bankruptcy Jurisdiction in the Federal Courts*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/jurisdiction_bankruptcy.html (last visited Jan. 4, 2016).

39 *Id*.

40 Tabb, *supra* note 33, at 7.

41 *Id.* at 14–15.

42 *Bankruptcy Jurisdiction*, *supra* note 38.

43 *Id.*

44 *Id.*

45 Tabb, *supra* note 33, at 17.

46 *Bankruptcy Jurisdiction*, *supra* note 38.

47 *Id*.

creditors and overburdened district courts, the 1841 Act was also ultimately repealed.[48]

Having experienced the benefits of a discharge, there was overwhelming support for a system of federal bankruptcy laws because state laws could not discharge preexisting debts.[49] Congress responded in 1867 and passed a revised set of bankruptcy laws in which ordinary suits in law and equity related to the bankruptcy fell into an expanded jurisdiction for district and circuit courts.[50] With the 1867 Act, the federal courts were able to hear "plenary suits" involving the bankruptcy and any third parties with ancillary property disputes, even without a basis for federal court jurisdiction.[51] The United States Supreme Court held this grant of jurisdiction to be constitutional because it was considered to be a "legitimate part of a national system of bankruptcy."[52] District judges also appointed several "registers in bankruptcy, to assist the judge of the district court in the performance of his duties."[53] Still, due to the excessive costs and lengthy delays of bankruptcy proceedings, the 1867 Act was eventually repealed in 1874, proving yet again that the one constant in bankruptcy law was change.[54]

Though there were several endeavors to institute a permanent and reliable system, most of the nineteenth century was characterized by unsuccessful attempts at finding the proper balance between debtors, creditors, and bankruptcy adjudicators.[55] The 1800 Act limited bankruptcy relief to creditors in the commercial realm, and neglected a significant portion of private debtors in need of financial assistance.[56] The 1841 Act opened up voluntary proceedings to all insolvent debtors and discharged thousands of individual debts, but it outraged creditors and burdened district courts with overwhelming bankruptcy dockets.[57] The 1867 Act gave district courts original jurisdiction over bankruptcy and provided registers to lighten the docket, but high costs and delays ultimately proved fatal to effective proceedings.[58] Congress could not find an equitable balance between debtors and creditors or an efficient means to resolve their bankruptcy disputes.

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48 *Id*.
49 Tabb, *supra* note 33, at 19.
50 *Bankruptcy Jurisdiction*, *supra* note 38.
51 *Id.*
52 *Id.*
53 Tabb, *supra* note 33, at 19.
54 *Bankruptcy Jurisdiction*, *supra* note 38.
55 *Id.*
56 *See generally* Tabb, *supra* note 33.
57 *Id*.
58 *Id*. at 19.

Efforts to address the instabilities and inefficiencies of state bankruptcy law eventually resulted in the Bankruptcy Act of 1898, which established the modern concepts of debtor-creditor relations.[59] The 1898 Act finally instituted federal bankruptcy law as a permanent regulatory system, rather than a temporary remedy for crisis.[60] Not only did this system address debtor relief and equitable creditor distribution, but it focused on efficient facilitation and procedure.[61] Federal district courts were now empowered to sit as "courts of bankruptcy," and appoint "referees" to conduct most of the bankruptcy proceedings.[62] These referees handled "the bulk of the judicial and administrative work" and "exercised much of the jurisdiction given to the district courts."[63]

However, because state law concurrently governed many bankruptcy-related issues, the scope of federal court jurisdiction over bankruptcy became a source of controversy.[64] Federal courts maintained jurisdiction of summary bankruptcy proceedings, but ordinary disputes of law and equity relating to the bankruptcy estates were predominantly left to state courts for adjudication.[65] This resulted in immense confusion as to which cases were designated as summary proceedings and which cases required full and formal adjudication in state courts.[66] Ambiguous jurisdictional problems subsequently led to increased litigation of jurisdictional questions rather than efficient adjudication of bankruptcy proceedings.[67] Meanwhile, bankruptcy filings continued to increase.[68]

In response to the obscurity in bankruptcy jurisdiction, combined with rising numbers of bankruptcy filings over the years, Congress initiated a complete reform of bankruptcy laws.[69] The Bankruptcy Act of 1978 established Title 11 of the United States Code, commonly referred to as the Bankruptcy Code (the Code).[70] The Code ameliorated the "splintered jurisdictional scheme" of the 1898 Act by substantially expanding bankruptcy court jurisdiction.[71] Specifically, this statute empowered bankruptcy courts to hear and decide all

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59 *Bankruptcy Jurisdiction*, *supra* note 38.
60 Tabb, *supra* note 33, at 23–24.
61 *Id*, at 25.
62 *Id*.
63 *Id*.
64 *Bankruptcy Jurisdiction*, *supra* note 38.
65 *Id*.
66 *Id*.
67 *Id*.
68 *Id*.
69 28 U.S.C. § 1334 (2012).
70 *Id*.
71 Tabb, *supra* note 33, at 34.

civil proceedings "arising under" or "related to" Title 11.[72] In the new system, the bankruptcy courts functioned as units under the applicable United States district courts, and each district court had the option to refer bankruptcy matters to the bankruptcy court.[73]

The main objective of this extensive reform was to create a single tribunal to hear all bankruptcy related legal disputes and eliminate jurisdictional uncertainty between federal, state, and bankruptcy courts.[74] While it took almost two centuries, the Code seemed to finally provide a "unified jurisdictional system" of bankruptcy that struck a proper balance between debtor relief, creditor repayment, and efficient adjudication.[75] Instead, the Code became a source of constitutional controversy and increased uncertainty. Two centuries of modifications and adjustments culminated into a battleground for opposing approaches to constitutional construction and judicial interpretation.

B. Federal Bankruptcy Law Precedent: How the United States Supreme Court Shaped Bankruptcy Court Authority through Constitutional Construction

Since the establishment of the Code in 1978, Supreme Court precedent has mostly swayed between two opposing approaches to interpreting Article III of the Constitution: strict and broad construction.[76] Specifically, the Court has had conflicting approaches to section 1 of Article III, which states:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.[77]

A strict construction of constitutional text relies on the "literal and narrow definition," without consideration of modern conditions and societal changes.[78] Thus, a strict interpretation of Article III suggests that only judges with the

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[72] 28 U.S.C. § 1334(a) (2012).

[73] *Id*. § 157.

[74] *Bankruptcy Jurisdiction*, *supra* note 38.

[75] Tabb, *supra* note 33, at 34.

[76] *Compare* Stern v. Marshall, 564 U.S. 462 (2011), *with* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

[77] U.S. CONST. art. 3, § 1.

[78] *Strict Construction*, *supra* note 18.

proper safeguards of (1) life tenure and (2) protected salary can exercise Article III judicial authority.[79]

In contrast, a broad construction of constitutional text looks to the Framers' underlying intent, and then expands upon the text to adapt to the current needs of people in a rapidly changing society.[80] Thus, a broad interpretation of Article III looks to the fundamental purpose of Article III safeguards, and then determines whether limited Article III authority can be properly exercised in particular situations that substantially address societal needs, without realistically threatening the intended protections.[81] Starting from the institution of the Code to the present, Supreme Court precedent reveals that the inherent conflict between opposing constitutional constructions has inconsistently shaped bankruptcy law, and remains largely unresolved.

1. Northern Pipeline Construction Company v. Marathon Pipe Line Company*: Courts Lacking the Independence and Protection Provided in Article III Cannot Exercise Article III Judicial Authority*

In response to the Code's expansion of bankruptcy court authority, the Supreme Court significantly limited bankruptcy court jurisdiction in *Northern Pipeline Construction Company v. Marathon Pipe Line Company*. In *Northern Pipeline*, a plurality determined that the Bankruptcy Act of 1978 unconstitutionally authorized bankruptcy judges to exercise the "judicial power of the United States" under Article III of the Constitution.[82] The plaintiff, Northern Pipeline Construction Co. ("Northern"), filed a petition for reorganization under chapter 11 of the Code in a bankruptcy court.[83] In 1980, Northern brought suit in the same court against defendant Marathon Pipeline Co. ("Marathon") for alleged breaches of contracts.[84] Marathon immediately moved to dismiss this suit on the grounds that the Code unconstitutionally conferred Article III judicial authority on non-Article III judges.[85]

In his plurality opinion, Justice Brennan determined that Article III judicial powers could not be conferred on judges who lacked life tenure and protection from salary reduction.[86] He reasoned that when adjudicating cases, "tenure and

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79 Stern v. Marshall, 564 U.S. at 503.
80 *Strict Construction*, *supra* note 18.
81 Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932.
82 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. at 62.
83 *Id*. at 56.
84 *Id*.
85 *Id*.at 56–57.
86 *Id*.at 59.

protection from diminution" were necessary "safeguards" to secure political independence from the legislative or executive branches of government.[87] However, this decision did not explicitly address the constitutionality of non-Article III courts exercising Article III judicial authority.[88]

Rather, the Court distinguished bankruptcy courts from three categories of exceptions in which non-Article III courts could actually exercise traditional judicial authority.[89] First, territorial courts were exempt because Congress had the authority to exercise the general powers of the government in territories of the United States.[90] Second, courts-martial, or military courts, were exempt because the political branches had broad constitutional authority to control the military.[91] Third, cases involving "public rights" were exempt because these cases involved matters between an individual and the government, as opposed to private rights involving disputes between two private parties.[92]

Consequently, the Court determined Congress did not have the power to vest bankruptcy courts with broad authority to adjudicate state law matters not governed by federal rules.[93] Instead, Congress was only authorized to assign matters to non-Article III courts in situations involving federal statutes.[94] Even then, non-Article III courts could only wield limited powers narrower than those of Article III courts.[95] Because *Northern Pipeline* involved contractual rights subject to state law, the Court concluded that a bankruptcy court's exercise of Article III judicial authority encroached upon Article III territory.[96]

Writing for the dissent, Justice White emphasized that the plurality's strict construction of Article III oversimplified the separation of powers analysis.[97] He argued that examining Article III through pure textualism[98] was problematic for two reasons.[99] First, the Bankruptcy Act of 1978 was not invalid on its face, but

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87 *Id.* at 57.

88 *Id.* at 64–71.

89 *Id.*

90 *Id.* at 64–66.

91 *Id.* at 66.

92 *Id.* at 67.

93 *Id.* at 71–74.

94 *Id.*

95 *Id.*

96 *Id.* at 71–72.

97 *Id.* at 93 (White, J. dissenting).

98 Textualism is a method of statutory interpretation used to determine the meaning of legislation. Textualism focuses on the plain text of a statute and attempts to derive objective meaning of the legal text. *See Textualism*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/textualism. (last visited Apr. 6, 2018).

99 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. at 94–95 (White, J. dissenting).

only invalid when narrowly applied to the *Northern Pipeline* case.[100] Second, even though issues of bankruptcy, by nature, almost always involve both federal and state law issues, state law claims were heard too infrequently to render a bankruptcy court's ability to adjudicate such claims as an intrusion on the separation of powers.[101] Justice White's dissent argued that the Court disregarded the complex realities of bankruptcy law and its applications to society, in favor of a rigid theory on the separation of powers.[102]

The dissent further emphasized that there was no harm to the separation of powers because bankruptcy judges essentially assumed the role of the "referees" under the Bankruptcy Act of 1898.[103] In fact, it was noted that under the 1978 Act, there were even greater safeguards in place because district courts were given broader scope to judicially review any bankruptcy court decisions.[104] Rather than assenting to a bright line determination of matters that must appear before Article III courts, Justice White advocated a broad construction of Article III through a balancing test.[105] The balancing test proposed that legislative encroachment should be determined by weighing the benefits of legislative courts against the actual dangers or effects on judicial independence.[106]

Justice White ultimately asserted that the Bankruptcy Act of 1978 passed the balancing test for three reasons. First, bankruptcy courts were subject to appellate review by Article III courts.[107] Second, there were no attempts from Congress to seize power from the Judiciary.[108] Third, the Congressional goals of creating bankruptcy courts were worthy objectives.[109] However, despite the dissent's reasoning, the *Northern Pipeline* decision led Congress to amend the Bankruptcy Act in 1984.[110] This amendment authorized federal courts to refer all bankruptcy issues to bankruptcy courts, but limited bankruptcy courts to submitting proposed findings of fact and conclusions of law for any "non-core" issues to the district courts.[111]

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100 *Id*.
101 *Id*. at 96–100.
102 *Id*. at 98.
103 *Id*.
104 *Id*. at 100.
105 *Id*. at 113.
106 *Id*. at 113–15.
107 *Id*. at 116–18.
108 *Id*.
109 *Id*. at 118.
110 Bankruptcy Amendments and Federal Judgeship Act of 1983, H.R. 5174, 98th Cong. (1983).
111 *Id*. ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge

Despite the plurality holding in *Northern Pipeline*, the dissent's proposed balancing test would prove to be the foundation for future advocates of broad construction and an impediment to advocates of strict construction.[112]

2. Commodity Futures Trading Commission v. Schor*: Administrative Agencies May Exercise Jurisdiction over State Law Counterclaims in Certain Situations*

After the *Northern Pipeline* decision in 1982, bankruptcy courts no longer had jurisdiction over "non-core" claims in bankruptcy proceedings because these courts lacked Article III protection.[113] Any grant of broad jurisdictional powers to non-Article III courts was considered an encroachment on judicial authority.[114] However, in 1986, the Supreme Court was presented with another constitutional issue similar to that in *Northern Pipeline*, but this time involving a different congressional act regarding the futures contracts market.[115]

Specifically, the Commodity Exchange Act (CEA) prohibited fraudulent and manipulative conduct in connection with commodity futures transactions.[116] To facilitate the regulatory powers of the CEA, Congress established an independent federal agency in 1974, called the Commodity Futures Trading Commission (CFTC).[117] The CFTC was intended to facilitate an "'inexpensive and expeditious alternative to existing fora available to aggrieved customers, namely, the courts and arbitration."[118] To promote these goals, the CFTC issued a regulation allowing its administrative law judges to adjudicate counterclaims "arising out of the transaction . . . or series of transactions . . . set forth in the complaint."[119]

In *Commodity Futures Trading Commission v. Schor*, the Court held that an administrative agency's ruling on a state law counterclaim was constitutional.[120] Here, plaintiff Schor filed a claim with the CFTC against a brokerage firm for

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after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.").

112 *See* Stern v. Marshall, 564 U.S. 462 (2011).

113 Bankruptcy Amendments and Federal Judgeship Act of 1983, H.R. 5174, 98th Cong. (1983).

114 *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50.

115 *See* Commodity Futures Trading Com. v. Schor, 478 U.S. 833 (1986).

116 7 U.S.C. § 1 (2012).

117 *See* Commodity Futures Trading Com. v. Schor, 478 U.S. at 836–37.

118 S. REP. NO. 95-850, at 11 (1978).

119 Commodity Futures Trading Com. v. Schor, 478 U.S. at 837; *See generally* 17 C.F.R. § 12.23(b) (1983).

120 Commodity Futures Trading Com. v. Schor, 478 U.S. 833.

violating the CEA.[121] In response, the firm filed a state law counterclaim to recover a debit balance in Schor's account.[122] In a CFTC proceeding, an administrative law judge ruled in favor of the firm on both claims.[123] Schor subsequently challenged the CFTC's jurisdiction to hear state law counterclaims and appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals, in an attempt to avoid the same constitutional issue presented in *Northern Pipeline*, held that the CFTC only had jurisdiction over Schor's claim, but not the brokerage firm's counterclaim. After another appeal, the Supreme Court granted certiorari.[124]

Writing for the majority opinion, Justice O'Connor applied a broad construction of both the CEA and Article III.[125] With regards to the CEA, the Court held that the D.C. Circuit, in an attempt to avoid constitutional problems, "manufactured[d] a restriction on the CFTC's jurisdiction that was nowhere contemplated by Congress and reject[ed] plain evidence of congressional intent because that intent was not specifically embodied in a statutory mandate."[126] Justice O'Connor recognized that Congress created the CFTC with the purpose of providing "an inexpensive and expeditious alternative to existing fora available to aggrieved customers, namely, the courts and arbitration."[127] The Court acknowledged that agencies have superior knowledge to courts when deciding if a "particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of [an] Act the [agencies are] charged with enforcing" and are "therefore due substantial deference."[128]

Next, the Court applied a broad construction of Article III to determine whether the CFTC's exercise of jurisdiction over state law counterclaims was unconstitutional.[129] Justice O'Connor weighed three factors, with careful attention to the practical effects that such congressional action would have on the integrity of the Judiciary.[130]

First, the Court considered the scope of judicial power reserved to Article III courts, in relation to the extent that an administrative agency exercised judicial

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121 *Id*. at 837.
122 *Id.*
123 *Id*. at 838.
124 *Id*. at 838–41.
125 *See id*. at 833.
126 *Id*. at 847.
127 *Id*. at 836 (internal quotation marks omitted).
128 *Id*. at 845 (internal quotation marks omitted).
129 *Id*. at 847.
130 *Id*. at 851.

power.[131] Justice O'Connor reasoned that, notwithstanding common law counterclaims, the CFTC's adjudicatory powers were in line with the "traditional agency model."[132] Precedent indicated that, as a practical matter, it was not unconstitutional for a federal agency to initially adjudicate a state law claim when the claim was ancillary to federal law and subject to appellate review.[133] The Court emphasized that it was improper to declare such an exercise of authority as unconstitutional based on a fear of a "hypothetical slippery slope."[134]

Second, the Court considered the nature of the pending claim.[135] In *Schor*, the counterclaim was a "private right" governed by state law.[136] Although state law claims were historically reserved for and resolved by Article III courts, Justice O'Connor found that "there [was] no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries."[137] Instead, a broad construction, "beyond form to the substance of what Congress has done," suggested that the CFTC's limited jurisdiction over a narrow class of ancillary common law claims was not a genuine threat to the separation of powers.[138]

Third, the Court considered the motivations behind Congress's departure from Article III requirements.[139] Justice O'Connor recognized that Congress, when authorizing the CFTC to resolve counterclaims, did not intend to allocate or dilute jurisdiction among federal tribunals.[140] Rather, the purpose was to provide a specific and limited federal regulatory scheme as an "inexpensive and expeditious" alternative.[141] The Court determined that the reparations scheme in itself was certainly constitutional, and the ability to hear counterclaims was necessary to efficiently facilitate the process.[142] In promotion of the ultimate goal, this allocation of authority to the CFTC was deemed to be, at worst, a *de minimis* intrusion.[143]

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131 *Id*. at 851–52.
132 *Id*.
133 *Id*. at 852.
134 *Id*. at 851–52.
135 *Id*. at 853.
136 *Id*.
137 *Id*. (internal quotation marks omitted).
138 *Id*. at 854.
139 *Id*. at 851.
140 *Id*.
141 *Id*. at 855.
142 *Id*. at 856.
143 *Id*.

By considering these three factors, the Court applied a broad construction of Article III, with heavy emphasis on the unique aspects of each congressional plan, and the practical effects in light of Article III safeguards.[144] This time, the broad construction analysis in the *Northern Pipeline* dissent became the framework of the *Schor* majority opinion: "Bright line rules cannot effectively be employed to yield broad principles in all Article III inquires." Nonetheless, this broad construction analysis would not last.

3. Stern v. Marshall*: Although Statutorily Authorized, a Bankruptcy Court Lacks the Constitutional Authority to Enter Final Judgment on Unresolved State Law Counterclaims in a Bankruptcy Proceeding*

Although strict construction of Article III in *Northern Pipeline* initially tightened the scope of bankruptcy court authority, subsequent use of broad construction shaped later Supreme Court holdings.[145] The holdings in *Schor* and *Thomas v. Union Carbide Agricultural Products Company* seemed to indicate a trend towards greater consideration of pragmatic efficiency and legislative intent.[146]

In 2011, however, a 5-4 decision in *Stern v. Marshall* significantly limited bankruptcy court authority.[147] Here, the Supreme Court held that although the bankruptcy court had statutory authority under 28 U.S.C. § 157(b)(2)(C) to enter final judgment on core counterclaims unresolved in the process of ruling on a creditor's proof of claim, the court ultimately lacked the constitutional authority to do so under Article III of the Constitution.[148]

In *Stern*, celebrity Anna Nicole Smith (Smith), or legally Vickie Lynn Marshall, married J. Howard Marshall, an 89-year-old oil tycoon who died shortly after marriage.[149] Before J. Howard Marshall's death, his son, Pierce Marshall (Marshall), allegedly excluded Smith from her husband's estate through fraud, so she sued Marshall in Texas probate court for tortious

144 *Id*. at 857.

145 *Compare* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), *with* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 563 (1985), *and* Commodity Futures Trading Com. v. Schor, 478 U.S. 833.

146 *See generally* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 563; Commodity Futures Trading Com. v. Schor, 478 U.S. 833.

147 Stern v. Marshall, 564 U.S. 462 (2011).

148 *Id*. at 503.

149 *Id*. at 462.

interference.[150] In response, Marshall filed a counterclaim alleging defamation.[151] Before judgment in the Texas probate court, Smith filed for bankruptcy in a California bankruptcy court, and Marshall followed by filing a proof of claim for defamation damages to the bankruptcy court.[152]

Smith again filed for tortious interference, but this time as a counterclaim in the bankruptcy case.[153] The California bankruptcy court ultimately ruled in favor of Smith and awarded her damages.[154] Marshall then appealed to the federal district court, claiming that because the tortious interference counterclaim was "non-core" to the bankruptcy proceeding, the bankruptcy court lacked jurisdiction.[155] The Supreme Court subsequently granted certiorari.[156]

Writing for the majority opinion, Chief Justice Roberts determined that bankruptcy courts lacked the jurisdiction to enter final judgment on state law counterclaims that were non-core to the bankruptcy proceeding.[157] The Court reasoned that because they were not Article III courts, bankruptcy courts could not exercise "the judicial power of the United States" absent "limited circumstances."[158] Such "limited circumstances" consisted only of the three categories of exceptions laid out in *Northern Pipeline*: territorial courts, courts-marital, and public-rights disputes.[159] Chief Justice Roberts further indicated that while the bankruptcy courts' exercise of judicial authority may prove efficient, practical effects alone were insufficient to overcome unconstitutionality and the strict separation of powers.[160] The majority was not persuaded by any assertions that bankruptcy courts were mere adjuncts of the district courts.[161]

Although broad construction advocates stressed the importance of "a single tribunal [having] broad authority to restructure [debtor-creditor] relations," the

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150 Kenneth N. Klee, *Klee on Stern v. Marshall*, 2011 LEXIS EMERGING ISSUES ANALYSIS 5743, at 1–2 (June 2011).

151 Marshall v. Marshall (*In re* Marshall), 600 F.3d 1037, 1043 (9th Cir. 2010), *aff'd sub. nom. Stern,* 131 S. Ct. 2594.

152 *Id*. at 1043–44.

153 *Id*. at 1043–45.

154 Marshall v. Marshall (*In re* Marshall), 253 B.R. 550, 554 (Bankr. C.D. Cal. 2000), *adopted as modified*, 275 B.R. 5 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev'd and remanded sub nom.* Marshall v. Marshall, 547 U.S. 293 (2006), *rev'd*, 600 F.3d 1037 (9th Cir. 2010), *aff'd sub nom. Stern,* 131 S. Ct. 2594.

155 Stern v. Marshall, 564 U.S. 462.

156 *Id*.

157 *Id*.

158 *Id*. at 499.

159 *Id*. at 500.

160 *Id*. at 506.

161 *Id*. at 488–89.

Stern majority remained unconvinced.[162] Instead, Chief Justice Roberts minimized the importance of counterclaims being resolved in bankruptcy courts, maintaining that "the practical consequences of such limitations on the authority of bankruptcy courts to enter final judgments are [not] as significant . . . as the dissent suggest[s]."[163] He indicated that the Code "already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of bankruptcy courts."[164] Specifically, under 28 U.S.C. § 1334(c)(2), bankruptcy courts were required to abstain from hearing non-core, state law claims capable of timely adjudication in a state forum with jurisdiction.[165]

Accordingly, Chief Justice Roberts did not believe that the "removal of counterclaims . . . from core bankruptcy jurisdiction meaningfully change[d] the division of labor in the current statute."[166] He reasoned that as long as district courts rendered the final decisions, there would be no harmful consequences because bankruptcy judges could still hear counterclaims to propose findings of fact and conclusions of law.[167] The Court also qualified the question presented and answered in *Stern* as a "narrow" one, believing that this strict construction of Article III would not prove detrimental to the bankruptcy process.[168]

Writing for the dissent, Justice Breyer asserted that too much weight was placed on certain Article III precedent but not enough on others.[169] In particular, he argued that the Court should have looked to more recent Article III precedent, such as *Schor* and *Thomas*, rather than placing a disproportionate amount of emphasis on an earlier *Northern Pipeline* decision.[170] The dissent indicated that in both *Schor* and *Thomas*, there was a clear shift from "formalistic and unbending rules" to a more pragmatic and multifactor analysis.[171] This analysis centered on whether "a challenged delegation of adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize

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162 *Id*. at 502.

163 *Id*. at 501.

164 *Id*. at 502.

165 28 U.S.C. § 1334(c)(2) (2012) ("Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.").

166 Stern v. Marshall, 564 U.S. at 467.

167 *Id*. at 501–02.

168 *Id*. at, 503.

169 *Id*. at 506–07 (Breyer, J. dissenting).

170 *Id*.

171 *Id*. at 513.

its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch."[172]

Accordingly, Justice Breyer gave greater deference to the broad Article III construction exhibited in the more recent *Schor* and *Thomas* decisions. In *Schor*, the Court determined that "the purposes underlying the requirements of Article III" were more important than "conclusory reference to the language."[173] The *Schor* holding demonstrated an unwillingness to simply "adopt formalistic and unbending rules." [174] Further, in *Thomas*, the Court stated that "practical attention to substance rather than doctrinaire reliance on formal categories . . . inform[ed] application of Article III."[175] The *Thomas* holding demonstrated a reliance on "the nature of the right at issue and the concerns motivating the Legislature" when addressing the constitutional issues.[176] In light of these holdings, the *Stern* dissent "conclude[d] that the delegation of adjudicatory authority [in *Stern* was] constitutional."[177]

Specifically, Justice Breyer gave five reasons why a "grant of authority to a bankruptcy court to adjudicate compulsory counterclaims [did] not violate any constitutional separation-of-powers principle related to Article III."[178] First, Smith's tortious interference counterclaim "resemble[d] various common-law actions" often heard in bankruptcy courts.[179] Because bankruptcy courts already heard claims of a similar nature to state law tort claims, there was only a nominal difference in hearing a tortious interference counterclaim.[180]

Second, the exercise of judicial authority by bankruptcy courts favored constitutionality because these courts were "made up of judges who enjoy considerable protection from improper political influence."[181] These protections included: (1) federal court appointment of bankruptcy judges;[182] (2) removal of bankruptcy judges by a circuit judicial council;[183] (3) bankruptcy court salaries pegged to those of federal district court judges;[184] and (4) courthouse costs and

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172 *Id*. at 510.
173 Commodity Futures Trading Com. v. Schor, 478 U.S. at 847.
174 *Id*. at 850.
175 Thomas v. Union Carbide Agric. Prods. Co., 473 U.S., 563, 587 (1985).
176 *Id*. at 590.
177 Stern v. Marshall, 564 U.S. at 513 (Breyer, J. dissenting).
178 *Id*.
179 *Id*. at 514.
180 *Id*. at 513.
181 *Id*. at 514–15.
182 28 U.S.C. § 152(a)(1) (2012).
183 *Id*. § 152(e).
184 *Id*. § 152(a).

other work-related expenses paid by the Judiciary.[185] Essentially, these safeguards made bankruptcy judges similar to "magistrate judges, law clerks, and [the] Judiciary's administrative officials who lack Article III tenure and compensation protections but do not endanger the independence of the Judicial Branch."[186]

Third, because "Article III judges control and supervise the bankruptcy court's determinations," bankruptcy court authority to hear the counterclaim did not really endanger judicial independence.[187] After a ruling from a bankruptcy court, any party to the case had the option to "appeal those determinations to the federal district court, where the federal judge will review all determinations of fact for clear error and will review all determinations of law *de novo*."[188] Additionally, Article III judges essentially "maintain[ed] greater control of bankruptcy court proceedings at issue here than they did over the relevant proceedings in any of the previous cases in which this Court has upheld a delegation of adjudicatory power."[189]

Fourth, the court's judgment favored constitutionality because the parties consented to the bankruptcy court's jurisdiction.[190] Justice Breyer explained that "even when private rights are at issue, non-Article III adjudication may be appropriate when both parties consent."[191]

Fifth, the legislative purpose served by granting judicial authority to bankruptcy courts strongly favored constitutionality.[192] The purpose of establishing federal bankruptcy courts was "to create a single tribunal that could efficiently restructure debtor-creditor relations."[193] As such, effective bankruptcy proceedings required an investment of broad authority to "decid[e] all matters in dispute . . . and decree[] complete relief."[194] Considering all five of these reasons, the *Stern* dissent concluded that "the magnitude of any intrusion on the Judicial Branch [could] only be termed *de minimis*," and argued the statute was constitutional.[195]

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185 Stern v. Marshall, 564 U.S. at 514–15 (Breyer, J. dissenting).
186 *Id*.
187 *Id*.
188 FED. R. BANKR. P. 8013.
189 Stern v. Marshall, 564 U.S. at 514–15 (Breyer, J. dissenting).
190 *Id*.
191 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 n.31 (1982).
192 *Id*. at 71.
193 *Id*.
194 *Id*.; *see also* Katchen v. Landy, 382 U.S. 323, 335 (1966).
195 Stern v. Marshall, 564 U.S. at 517–19 (Breyer, J. dissenting).

Despite these five objections, the decision in *Stern* significantly narrowed the scope of bankruptcy court authority.[196] *Stern* halted the trend towards broad construction of Article III judicial authority and reinstituted a strict construction emphasizing formal boundaries over pragmatic consequences. However, it was not long before this formalistic approach to Article III once again took a backseat to procedural efficiency and bankruptcy goals.[197]

4. Wellness International Network, Limited v. Sharif*: Article III Authorizes Bankruptcy Courts to Adjudicate Noncore Claims in a Bankruptcy Proceeding with the Parties' Voluntary and Knowing Consent*

The decision in *Wellness International Network, Limited v. Sharif* is another example of how strict and broad construction of Article III continually molds the scope of bankruptcy court authority. Although unable to directly address the Article III constitutional question, the *Wellness* majority applied a broad construction to sidestep the strict construction holding in *Stern* and to provide broader procedural relief through consent.

In May 2015, less than four years after the *Stern* decision, broad construction of Article III again circumvented strict limitations to bankruptcy court jurisdiction.[198] In *Wellness*, the Supreme Court addressed clarity and efficiency in bankruptcy procedure by broadening the scope of bankruptcy court authority. The Court held that, with the intentional and voluntary consent of both parties in a bankruptcy proceeding, bankruptcy courts could constitutionally exercise Article III authority to enter final judgments on non-core claims.[199]

Here, respondent Richard Sharif filed for chapter 7 bankruptcy and listed petitioner Wellness International Network ("Wellness") as a creditor. However, Wellness filed an adversary proceeding against Sharif, alleging that Sharif fraudulently transferred over five million dollars in assets to a trust administered on his mother's behalf.[200] Because Sharif failed to provide discovery in the proceedings, the bankruptcy court entered default judgment in favor of Wellness and designated the trust funds as part of Sharif's property of the estate.[201] Sharif subsequently appealed to the district court, claiming that the bankruptcy court was limited to proposing findings of facts and recommendations of law to the

196 *See generally id*. at 517–19.
197 *See generally* Wellness Int'l Network, Ltd. v Sharif, 135 S. Ct. 1932 (2015).
198 *Id*.
199 *Id*.
200 *Id*. at 1940.
201 *Id*. at 1941.

district court.[202] Although the district court affirmed the bankruptcy court's order, the case ultimately made it onto the Supreme Court's docket.[203]

Writing the majority opinion, Justice Sotomayor began by reinforcing the conclusion that Article III served as a structural protection against congressional attempts to transfer judicial authority to non-Article III courts "for the purpose of emasculating constitutional courts."[204] She also reiterated that Article III functioned to "[prevent] the encroachment or aggrandizement of one branch at the expense of the other."[205] Even so, the Court affirmatively concluded that "allowing Article I adjudicators to decide claims submitted to them by consent [did] not offend the separation of powers so long as Article III courts [retained] supervisory authority over the process."[206] The question now became whether allowing bankruptcy courts to decide non-core claims by consent would "impermissibly threaten the institutional integrity of the Judicial Branch."[207]

As emphasized previously by advocates of broad construction, the Court determined that this question "must be decided not by formalistic and unbending rules but an eye to the practical effect that the practice will have on the constitutionally assigned role of the federal judiciary."[208] Consequently, Justice Sotomayor applied a familiar framework of analysis, previously used in *Schor* and recently advocated in the *Stern* dissent, to conclude that "allowing bankruptcy litigants to waive the right to Article III adjudication of [non-core] claims does not usurp the constitutional prerogatives of Article III courts."[209] Specifically, she considered that: (1) bankruptcy courts already often heard many related state law claims; (2) non-article III judges had sufficient safeguards from outside influence; (3) federal district courts had appellate review and supervisory roles in every bankruptcy proceeding; (4) party consent to bankruptcy court jurisdiction favored constitutionality; and (5) the nature of bankruptcy courts and legislative purpose for its authority also favored constitutionality.[210]

Following a more pragmatic approach, the Court entertained an alternative where "Congress could choose to rest the full share of the Judiciary's labor on

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202 *Id*.
203 *Id*.
204 *Id*. at 1944–45.
205 *Id*.
206 *Id*.
207 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).
208 Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. at 1944.
209 *Id*. at 1945.
210 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

the shoulders of Article III judges," but concluded that "doing so would require a substantial increase in the number of district judgeships."[211] Justice Sotomayor reasoned that "Congress [therefore] supplemented the capacity of district courts through the able assistance of bankruptcy judges."[212] Again, she reinforced that "[adjudication of non-core claims] poses no threat to the separation of powers" as long as bankruptcy judges were subject to Article III courts.[213]

The Court also distinguished *Wellness* from the recent *Stern* case, and the even earlier *Northern Pipeline* case, because those holdings were premised on "the fact that the litigant did not truly consent to resolution of the claim against it in a non-Article III forum."[214] Justice Sotomayor explained that "interpreting *Stern* to bar consensual adjudications by bankruptcy courts would meaningfully change the division of labor in [the] judicial system."[215] Moreover, "adjudication based on litigant consent has been a consistent feature of the federal court system since its inception," and therefore "[posed] no great threat to anyone's birthrights, constitutional or otherwise."[216]

Finally, the *Wellness* majority relied on an implied consent standard and adopted it to the bankruptcy context.[217] When applied to bankruptcy, this implied consent standard "possess[ed] the same pragmatic virtues—increasing judicial efficiency and checking gamesmanship—that [originally] motivated [the Court's] adoption of [this standard] for consent-based adjudications by magistrate judges."[218]

In opposition, Chief Justice Roberts's dissent applied a strict construction of Article III, asserting that "with narrow exceptions, Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the structural safeguards of Article III."[219] The dissent, which closely mirrored the *Stern* majority's rationale, opposed the *Wellness* majority's opportunistic use of a sufficiently narrow case to address a much broader Article III constitutional question.[220] In particular, while the immediate impact of the *Wellness* decision may have been limited, there was concern that such an

211 Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. at 1945.
212 *Id*. at 1946.
213 *Id*.
214 *Id*.
215 *Id*. at 1947.
216 *Id*.
217 *Id*. at 1948.
218 *Id*.
219 *Id*. at 1951 (Roberts, C.J. dissenting).
220 *Id*. at 1950.

authorization of encroachment onto the Judiciary would yield future "erosion of constitutional powers."[221]

Further, Chief Justice Roberts emphasized that preserving the separation of powers was one of the Court's heaviest responsibilities, and in performing this duty, the Court has not hesitated to enforce the Constitution's mandate "that one branch of Government may not intrude upon the central prerogatives of another."[222] He was also concerned about upholding the Framer's intentions when forming the Constitution.[223] The dissent relied on James Madison's statement that "if there is a principle in our Constitution . . . more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers."[224]

In addition, the *Wellness* dissent contended that bankruptcy court judges lacked the specific Article III protections of life tenure and secured salary that were required to render final judgments.[225] Thus, exercising such judicial authority compromised Article III safeguards and was beyond constitutional scope.[226] According to the dissent, Sharif did not have the authority to compromise the structural separation of powers, or agree to an exercise of judicial power outside Article III because separation of powers principles did not depend on whether the "encroached-upon branch approves the encroachment."[227] In particular, "the fact that Article III judges played a role in the Article III violation does not remedy the constitutional harm."[228]

As apparent in *Wellness*, while the societal need for bankruptcy law remains largely unchanged, the ever-changing composition of the Supreme Court continues to alter the Court's propensity for strict or broad construction, which, in turn, continues to alter the scope of bankruptcy court authority.

II. ANALYSIS

Having examined the inconsistent history of bankruptcy precedent and the concerns of opposing constructions of Article III, this Comment suggests a balanced approach which accounts for several significant interests. When

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221 *Id*. 1950 (Roberts, C.J. dissenting).
222 *Id*. at 1954 (Roberts, C.J. dissenting).
223 *Id*.
224 *Id*.
225 *Id*. at 1951.
226 *Id*.
227 *Id*. at 1954–55.
228 *Id*. at 1957.

inevitably redrawing the constitutional lines of bankruptcy court authority, the Court should extend sufficient consideration to the following four factors: (1) the current threat of encroachment, and the amount of protection necessary to prevent it; (2) the practical effects on bankruptcy proceedings, and the benefits of preserving bankruptcy law; (3) the residual consequences to existing non-Article III tribunals; and (4) the current trend and disposition of bankruptcy authority. Lending appropriate weight to each factor will allow bankruptcy procedures to adapt to rapid societal growth within a constitutional framework, while increasing the predictability of bankruptcy law development.

A. Factor One: The Current Potential for Encroachment Against the Current Preventive Safeguards

When addressing violations of Article III judicial independence, the Court should determine whether the current structural protections are sufficient to address the dangers of encroachment. If existing safeguards adequately protect against potential infringements, then concerns regarding constitutional violations would be mitigated and more focus should be paid to the remaining factors. If, however, impending violations outweigh current protections, then structural interests should be the highest priority. To make this determination, the Court should first measure the immediate potential for encroachment, then independently assess what specific safeguards would be necessary to prevent such violations. Only then can the Court properly determine whether current safeguards sufficiently protect against infringements.

1. Measuring the Immediate Potential for Encroachment

To measure the immediate potential for encroachment, the Court should first look to the relevant provisions of Article III.[229] In part, Section 1 states, "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."[230] Based on the language, there is no dispute in interpretation that judicial power is vested in Article III courts.[231] However, the text of Section 1 only articulates that judicial power is always vested in Article III courts—the text does not explicitly specify an unconditional limitation that judicial power must be exercised *solely* by Article III courts.[232] This discrepancy is significant

229 U.S. CONST. art. 3.
230 *Id*. § 1.
231 *Id*.
232 *Id*.

because the face of the text allows for a different, conceivable interpretation: non-Article III tribunals may constitutionally exercise judicial authority in certain situations, provided that Article III courts *always* retain permanent and predominant judicial authority.[233]

In fact, this interpretation directly correlates with one of the factors considered in the *Wellness* majority's balancing test: the nature of the non-Article III court.[234] In *Wellness*, the specific nature of a non-Article III court carried substantial weight in determining the potential threat of encroachment onto judicial authority.[235] In particular, the magnitude of probable danger was contingent on whether a non-Article III court *siphoned* judicial power *at the expense* of Article III courts.[236] This deeper analysis into a non-Article III court's exercise of judicial power inherently suggests that non-Article III exercise is not categorically unconstitutional, but that potential encroachment is instead measured on a spectrum governed by certain characteristics.

One significant characteristic in determining the threat of non-Article III exercise of judicial authority can be inferred from the *Wellness* decision: an intent to subvert the Judiciary. It seems clear that non-Article III exercise of judicial authority is unconstitutional when the purpose is to bypass federal courts (e.g., a congressional act authorizing the exercise of judicial power with the intent to circumvent federal court jurisdiction). However, making such a determination is not as simple or clear when non-article III tribunals exercising limited judicial power were created for the primary purpose of assisting Article III courts. Again, the Court's need for a deeper analysis into the unique circumstances of each case is evidence that the constitutionality of non-Article III exercise of judicial power is not always clear-cut.

Following suit, there may be additional characteristics that substantially move the needle when determining the dangers of non-Article III judicial authority. Such characteristics may include the absence of Article III supervision, the absence of benefit to the non-Article III tribunal, and the breadth of judicial authority conferred. For example, if non-Article III courts functioned with the noblest of intentions, but exercised judicial power without the possibility of appellate review by district courts, it would still indicate a clear threat. If non-Article III tribunals exercised Article III authority to the benefit of no one other than the tribunal or Congress itself, it would also signal danger. If

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233 *Id*.

234 Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. at 1946.

235 *See id*.

236 *See id*.

a non-Article III court maintained broader Article III jurisdiction than the federal judicial courts themselves, it would constitute encroachment. However, if a non-Article III court was subject to Article III appellate review, exercised judicial authority for the sole purpose of assisting Article III courts, and maintained very limited judicial authority, then this would suggest that there is no genuine, present threat to the Judicial Branch.

Further, when defining the dangers to Article III structural safeguards, it is particularly important to study the Framers' intentions. There is little doubt that the separation of powers must be handled with ample care; however, a far too narrow interpretation of the Framers' intentions can stifle the process of determining the actual dangers.[237] Aggrandizing the current dangers with theoretical risks undermines any practical solutions with an endless array of abstract hypotheticals. In fact, an interpretation that is too narrow can turn checks and balances into an impediment that deteriorates cooperation among each government branch and instead fosters complete isolation from one another.[238] Supreme Court precedent indicates that a governmental framework of isolation is contrary to the Framers' vision of the separation of powers.[239]

Among other precedent, the Court established in *Buckley v. Valeo* that the Framers recognized a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."[240] Moreover, the Court, in *Youngstown Sheet & Tube Company v. Sawyer*, believed the Framers understood that "while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[241] Such precedent indicates that the Framers envisioned a system of checks and balances designed to both protect liberties and facilitate interdependence within each designated area.[242] A far too narrow interpretation of the Framers' intent, in contrast, can lead to a disproportionate fear of hypothetical dangers, to a point where necessary cautions become debilitating impediments to both the government and society.[243]

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237 *See, e.g.*, *id*. at 1954 (Roberts, C.J. dissenting).

238 *See generally id.* at 1950.

239 *See generally* Buckley v. Valeo, 424 U.S. 1, 121 (1976); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 (1952).

240 Buckley v. Valeo, 424 U.S. at 121.

241 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 636.

242 *See generally* Buckley v. Valeo, 424 U.S. at 121; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 636.

243 *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. at 1954 (Roberts, C.J. dissenting).

Finally, it is important to define an "encroachment" or "intrusion" when measuring the dangers to Article III jurisdiction. The *Wellness* dissent emphasized that the Court has not hesitated to enforce the Constitution's mandate "that one branch of Government may not *intrude* upon the central prerogatives of another."[244] The key word here is "intrude."[245] The basic definition of "intrude" is "to thrust or bring in *without invitation, permission, or welcome*."[246] In the bankruptcy court context, it is misleading to say that Congress thrust itself into judicial authority without invitation, permission, or welcome. In fact, it was the district courts that initially referred bankruptcy cases to bankruptcy courts.[247] Actual intrusion upon the central prerogatives of another branch would more properly be illustrated by a scenario in which Congress provided unsolicited assistance to the Judiciary through unhelpful non-article III tribunals, in spite of the Judiciary's resistance. As such, necessary assistance should not be categorically equated with unsolicited intrusion, and this distinction alone may mitigate concerns regarding specific instances of "intrusion."

Similarly, the term "encroachment" has been used several times in Supreme Court precedent regarding bankruptcy authority.[248] For example, the *Wellness* dissent asserted that the approval of the "encroached-upon" does not alleviate unconstitutional "encroachment."[249] However, what would the Framers consider an "encroachment?" The Court has previously documented "the genius of the Framers' pragmatic vision . . . long recognized in cases that find constitutional room for necessary institutional innovation."[250] Referring to the Framers' original separation of powers as a "pragmatic vision" suggests that practical effects were indeed important considerations to the Framers.[251]

If pragmatic concerns were particularly significant, it seems probable that the Framers would not have considered a limited exercise of Article III authority by bankruptcy courts as an encroachment. If so, perhaps this Article III conflict is not truly about the potential dangers of encroachment or intrusion, but something else altogether.

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244 *Id*. (emphasis added).
245 *Id*.
246 *Intrude*, DICTIONARY.COM, http://www.dictionary.com/browse/intrude. (last visited Apr. 6, 2018).
247 *Bankruptcy Jurisdiction*, *supra* note 38.
248 Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. at 1934.
249 *Id*. at 1954 (Roberts, C.J. dissenting).
250 Clinton v. City of New York, 524 U.S. 417, 472 (1998).
251 *See generally id*.

2. Determining the Necessary Safeguards to Prevent Encroachment

To determine the safeguards necessary to preserve the function of Article III, it is important to look at the relevant provisions. In part, Article III Section 1 states, "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."[252] A strict construction of this provision suggests that the only adequate safeguards are life tenure and protection from salary reduction.[253] However, a strict interpretation of Article III safeguards may not always result in the greatest protection. Moreover, there is a sufficient amount of broad construction precedent which supports different forms of protections that sufficiently preserve Article III objectives.

Among others, the *Stern* majority and the *Wellness* dissent serve as examples. These two cases placed significant value in the protection provided to Article III judges: freedom from outside influence.[254] Life tenure and fixed salary, however, are not necessarily the sole safeguards that provide such freedom. In fact, diminishing the power and competence of Article I bankruptcy judges because they lack certain safeguards can actually prove to be counterproductive. Limiting bankruptcy court authority does not automatically guarantee that the parties to the bankruptcy proceedings will find themselves under the authority of judges with life tenure and secured salary. Rather, a loss of faith in the efficacy, and an increase in uncertainty about the finality, of bankruptcy courts may even encourage people to avoid bankruptcy courts altogether and decide cases in state court, where judges also lack these same Article III safeguards.

When following a strict construction of Article III protection, the plain reading logically suggests that state court judges lack even more safeguards from outside influence than bankruptcy court judges.[255] This is because state court judges are often elected judicial candidates who serve limited terms.[256] In the State of Georgia, superior and state court judges must be elected and re-elected on a nonpartisan basis for four-year terms.[257] Due to the nature of such elections, it has become necessary for such judicial contenders to solicit not only campaign

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252 U.S. CONST. art. 3, § 1.

253 *Id*.

254 Stern v. Marshall, 564 U.S. 462, 505 (2011).

255 U.S. CONST. art. 3, § 1.

256 G.A. CONST. art. 6, § 7 ("All superior court and state court judges shall be elected on a nonpartisan basis for a term of four years.").

257 *Id*.

contributions, but also public statements of support.[258] In fact, candidates are encouraged to form committees to manage funds and obtain support.[259]

It is contentious, to say the least, that elected state court judges, who at times must preside over the very electorate from whom they sought contribution or support, are incapable of rendering unbiased final adjudications with absolute integrity simply because they lacked a *specific* form of "freedom from outside influence." State court judges are certainly capable of honorably and impartially entering final judgments, even though state courts do not have the specific safeguards required of federal courts under Article III.

Consequently, the conclusion that bankruptcy court judges are not qualified to render final judgments, solely based on their lack of the specific safeguards listed in Article III, seems to be more of a theoretical, rather than realistic, assessment of the situation. Moreover, precedent indicates that there are fundamental conflicts between theoretical reasoning and practical reality. As indicated by the *Stern* dissent and *Wellness* majority, bankruptcy judges actually have numerous safeguards in place against "improper political influence."[260] Among others, federal bankruptcy judges are appointed by the federal court of appeals;[261] bankruptcy judges can be removed for cause by a circuit judicial council consisting of federal court of appeals and federal district court judges;[262] bankruptcy judges have salaries pegged to the salaries of federal district court judges;[263] bankruptcy judges have courthouses and work-related expenses paid by the Judiciary itself.[264] A formalistic interpretation of Article III overlooks all of the protections currently in place that insulate bankruptcy courts from external influence.

Relying solely on a strict construction of Article III to narrowly identify two exclusive forms of protection favors categorization over function. By this reasoning, a hypothetical federal tribunal with even greater protections than those listed in Article III would not pass constitutional muster if its judges did not have both life tenure and secured salaries. An interpretation prioritizing form

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[258] *Judicial Campaigns and Elections: Georgia*, NATIONAL CENTER FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_conduct.cfm?state=GA (last visited Jan. 19, 2016).

[259] *Id*.

[260] Stern v. Marshall, 564 U.S. 462, 514 (2011) (Breyer, J. dissenting).

[261] 28 U.S.C. § 152(a)(1) (2012).

[262] *Id*. § 152(e).

[263] *Id*. § 153(a).

[264] *Id*. § 156(e).

over substance, particularly in the bankruptcy court context, does not guarantee safer results.

3. Weighing Current Dangers against Current Safeguards

After making the determinations in steps 1 and 2 above, the Court should weigh the potential dangers against the current protections. Presently, there seem to be sufficient safeguards surrounding bankruptcy court authority to overcome potential dangers.[265] Bankruptcy courts seem to pose minimal threat because they are subject to appellate review, exercise limited Article III authority, and do so to efficiently provide relief, not to "emasculat[e] constitutional courts."[266] Further, the current safeguards seem to sufficiently ensure freedom from outside influence because the federal judiciary maintains complete supervisory authority of bankruptcy procedures.[267] The only true threat seems to be based on a "potential" derived from a formalistic reading of Article III. Consequently, the current balance seems to weigh in favor of constitutionality.

B. Factor Two: Practical Effects on Bankruptcy Proceedings and the Benefits of Preserving Bankruptcy Law

In today's society, the changing scope of bankruptcy court authority can result in many practical consequences.[268] A strict construction of Article III, however, adheres to formalistic textual interpretation with minimal consideration of practical effects. As evident in *Stern*, the Court was "not convinced that the practical consequences of such limitations on the authority of bankruptcy courts to enter final judgments are as significant as . . . the dissent suggests."[269] In the midst of conflicting views, the Court should make an objective assessment of the costs of limiting bankruptcy court authority by identifying the practical effects of bankruptcy proceedings and the benefits of preserving bankruptcy law.

When determining the practical effects of bankruptcy proceedings, a natural starting point is to look at the court docket. The dissent in *Stern* drew attention to the sizable difference between the bankruptcy and federal dockets.[270] It recognized a large discrepancy between the "staggering [volume]" of

265 *See generally* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932.
266 *Id*. at 1944–45.
267 *See generally id.* at 1932.
268 *Id.* at 517–19 (Breyer, J. dissenting).
269 Stern v. Marshall, 564 U.S. at 501.
270 *Id*. at 520.

bankruptcy cases of "almost 1.6 million" compared to the volume of federal district cases of "around 280,000 civil cases and 78,000 criminal cases."[271] It is important to remember that the bankruptcy court's authority to decide all matters in bankruptcy proceedings is fundamental to procedural efficiency because state law claims and counterclaims frequently arise in bankruptcy.[272] In reality, many compulsory counterclaims in bankruptcy cases "involve the same factual disputes as the claims that may be finally adjudicated by the bankruptcy courts."[273] If a bankruptcy court must regularly submit recommendations and wait for district court rulings before entering its own final judgments, it undoubtedly leads to "inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."[274]

An empirical analysis of recent bankruptcy filings may prove helpful in ascertaining practical effects. According to statistical data, in 2015, there were 349 authorized bankruptcy judgeships with only 330 active judges presiding over bankruptcy cases.[275] However, there were 860,182 bankruptcy filings in 2015, and 805,580 bankruptcy filings in 2016.[276] This means there was an average annual caseload of about 2,441 to 2,600 cases per active bankruptcy judge.[277] While some bankruptcy cases are likely to produce minimal adjudicatory work, there are other cases that contain over hundreds of adversary proceedings and contested issues.[278]

In comparison, there were 1,015 active and senior district court judges[279] handling 387,687 filings in 2015.[280] This means the average caseload for each district judge consists of about 381 cases.[281] If bankruptcy cases were additionally distributed to each district judge in 2015, the caseload of each judge

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271 *Id*.

272 *See, e.g.*, *In re* CBI Holding Co., 529 F.3d 432 (CA2 2008); *In re* Winstar Communications, Inc., 348 B.R. 234 (Bankr. D. Del. 2005).

273 Stern v. Marshall, 564 U.S. at 520 (Breyer, J. dissenting).

274 *Id*.

275 *Total Judicial Officers – U.S. Court of Appeals, District Courts, and Bankruptcy Courts,* UNITED STATES COURTS, http://www.uscourts.gov/sites/default/files/data_tables/Table1.01.pdf (last visited Jan. 18, 2016).

276 *Caseload Statistics Data Tables,* UNITED STATES COURTS, http://www.uscourts.gov/sites/default/files/data_tables/bf_f_0930.2016.pdf (last visited Jan. 18, 2016).

277 *Id*.

278 Susan DeSantis, *Southern District Judges Preside Over Record High Bankruptcy Cases*, N.Y.L.J., https://www.law.com/newyorklawjournal/almID/1202800542226/.

279 *Total Judicial Officers*, *supra* note 275.

280 *United States District Courts – National Judicial Caseload Profile*, UNITED STATES COURTS, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2016.pdf (last visited Jan. 18, 2016).

281 *Id*.

would have increased from 381 cases to approximately 1229 cases—more than triple the caseload.[282] Although this is an extrapolated statistical example of harmful practical consequences, it nevertheless shows that procedural concerns are significant factors when determining the effects on the efficiency of both bankruptcy and district court proceedings. Because bankruptcy precedent has consistently proven that bankruptcy law is subject to change, it is particularly important to focus on practical consequences when attempting to adjust to the large number of annual bankruptcy filings and pending cases.[283]

Even without a tripled docket, increased delay will naturally follow a limiting of bankruptcy court authority. Bankruptcy courts were established for the very purpose of efficiently handling cases from the moment they are filed.[284] As such, a system and rules of procedure are in place to help facilitate the process. For example, a chapter 7 proceeding in a bankruptcy court will typically take about four to six months from the date the debtor files the petition to the granting of a discharge or going to trial.[285] However, in 2015, it took a median of 27 months for civil cases in a district court to go to trial.[286]

If a chapter 7 case involving non-core issues was presented to a bankruptcy court, it is not a stretch to deduce that it may take more than four times longer for debtors and creditors to receive final judgment because they must wait for pending resolution of ancillary issues. Civil trial scheduling may also be postponed in district courts where criminal cases are assigned higher priority than civil cases.[287] In a bankruptcy court with no authority to adjudicate disputed state law claims, debtors will be stuck waiting for a separate federal district court proceeding before the resolution of their bankruptcy petition.

As the *Stern* dissent warned, "to be effective, a [bankruptcy court] must have broad authority to restructure [debtor-creditor] relations."[288] Typical bankruptcy cases involve far more than a single debtor and single creditor. When there are a large number of creditors, delays become further exacerbated if a bankruptcy court cannot allocate resources before determining the legitimacy of each

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282 *See generally id.*; *Caseload Statistics*, *supra* note 276.

283 *Bankruptcy Jurisdiction*, *supra* note 38.

284 *Id.*

285 *Discharge in Bankruptcy – Bankruptcy Basics,* UNITED STATES COURTS, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics (last visited Jan. 14, 2016).

286 *United States District Courts*, *supra* note 279.

287 18 U.S.C. §§ 3161–74.

288 Stern v. Marshall, 564 U.S. 462, 501 (2011).

claim.[289] In a case involving a debtor and potentially thousands of creditors, everyone else gets less if one gets too much.

While the current reality of bankruptcy proceedings may not warrant substantial reform, it seems undeniable that narrowing bankruptcy court authority will have significant practical consequences. In particular, when dealing with a debtor in severe financial distress, it is unfair to marginalize a debtor's pragmatic concerns.

C. Factor Three: The Residual Consequences to Existing Non-Article III Tribunals

To accurately assess the impact of strict Article III interpretation to non-Article III tribunals, the Court should analyze how precedent has dealt with similar non-Article III disputes. A pertinent example is the Court's treatment of federal administrative agencies. In *Schor*, the Court dealt with the question of whether a congressional act authorized a specialized administrative agency to adjudicate state law counterclaims.[290]

It is important to note that the Court's reasoning behind the majority opinion in *Schor* essentially became the reasoning for the dissent in *Stern*.[291] A comparative analysis of the *Schor* majority and the *Stern* dissent can help explain how the Court produced different holdings in these two cases. First, in both cases, the non-Article III tribunals were created by Congress.[292] Here, the apparent distinction is that the bankruptcy court is a non-Article III court, while the CFTC is a non-Article III federal administrative agency. In *Stern,* a bankruptcy judge exercised judicial authority to determine related state law counterclaims.[293] In *Schor*, an administrative law judge of the CFTC exercised judicial authority to determine ancillary state law counterclaims.[294]

An initial, factual comparison of *Stern* and *Schor* highlights the similarities of both non-Article III tribunals. In fact, one might reasonably assume both tribunals would be subject to the same treatment. However, the holdings indicate that it is constitutional for Congress to authorize a federal administrative agency to exercise Article III judicial authority, but it is unconstitutional for Congress

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289 *Bankruptcy Jurisdiction*, *supra* note 38.

290 Commodity Futures Trading Com. v. Schor, 478 U.S. 833 (1986).

291 Stern v. Marshall, 564 U.S. at 506 (Breyer, J. dissenting).

292 Commodities Futures Trading Act of 1974. Pub. L. No. 93-463, 88 Stat. 1389 (1974); The Bankruptcy Reform Act of 1978. Pub. L. No. 95–598, 92 Stat. 2549 (1978).

293 Stern v. Marshall, 564 U.S. at 462.

294 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833.

to authorize the bankruptcy court to exercise the same. At first glance, the conflicting results which favor Article III constitutionality for federal agencies over Article I tribunals suggest that there must be some very fundamental differences between federal agencies and bankruptcy courts. A deeper look may prove enlightening.

First, both the CFTC and bankruptcy courts are non-Article III tribunals.[295] For the CFTC, an administrative law judge is hired by the federal agency's Office of Personnel Management through a merit selection process.[296] Administrative judges have career tenure and are subject to removal and salary reduction by the CFTC.[297] In contrast, for bankruptcy courts, a bankruptcy judge is appointed by the federal court of appeals. [298] Bankruptcy judges serve for fourteen-year terms, are subject to removal by a circuit judicial council of federal court of appeals and district judges,[299] and have salaries fixed to those of federal district court judges.[300]

The results from these comparisons are somewhat confounding. It seems reasonable to conclude that a bankruptcy judge appointed by the federal district court has more Article III oversight than an administrative law judge appointed by a federal agency. However, the Court determined it was constitutional for the CFTC administrative law judge to exercise judicial authority, but held it was unconstitutional for a bankruptcy judge to exercise the same authority.[301] If Article III oversight does not account for these different results, then perhaps the distinction is rooted in the Congressional motivations behind the allocation of authority. Again, a deeper analysis is necessary.

The CFTC was created to prevent fraudulent futures and options transactions, and judicial authority was necessary to hear related state law counterclaims for efficient regulation of the futures contract market.[302] In contrast, the bankruptcy courts were created to provide the insolvent debtor with a fresh start and unpaid creditors with equal repayment.[303] Judicial authority to hear related state law counterclaims was necessary for the efficient facilitation

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295 *Compare* Stern v. Marshall, 564 U.S. 462, *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833.

296 5 U.S.C. § 1302 (2012); 5 U.S.C. § 3301 (2012).

297 5 C.F.R. § 930.204 (2012).

298 28 U.S.C. § 152(a)(1) (2012).

299 *Id*. § 152(a).

300 *Id*. § 153(a).

301 *Compare* Stern v. Marshall, 564 U.S. 462, *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833.

302 7 U.S.C. § 1 (2012).

303 Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

of such relief and repayment.[304] Still, precedent reveals that the CFTC can exercise Article III authority, but the bankruptcy court cannot.[305] This conclusion is disconcerting because it indicates that the efficient and cost-effective regulation of a commodity in the futures contract market is more important than the efficient and cost-effective facilitation of bankruptcy relief to debtors and creditors. While both functions may benefit substantially from efficient adjudication, it seems at least equally important to address a debtor in overwhelming debt as a consumer in the commodity futures contract market.

In fact, this inconsistency raises additional questions. Did Congress unconstitutionally authorized non-Article III federal administrative agencies with judicial authority to hear related state law claims? Or rather, did Congress constitutionally confer non-Article III bankruptcy courts with judicial authority in 1978—despite how the Court has interpreted it? In the larger scheme, if federal administrative agencies were unconstitutionally authorized to exercise judicial power, are the three narrow exceptions—territorial courts, courts-martial, and public rights disputes—just examples of more "hypothetical slippery slope[s]"[306] that will threaten Article III separation of powers in the future? If constitutionality is truly determined through a strict interpretation of Article III, then there should be no room for inconsistent allocations or exceptions.

In an attempt to answer these questions, it is helpful to examine the arguments regarding Congress's authority to confer judicial authority on non-Article III tribunals. In particular, the *Wellness* dissent, which stressed the grave implications of allowing parties to consent to constitutional violations, seems subject to two opposing interpretations.[307] In one interpretation, the dissent implies that Congress may authorize non-Article III judges to decide federal cases as long as they are officially categorized as an accepted federal agency or one of the three *Northern Pipeline* exceptions.[308] In the other interpretation, the dissent implies that Congress may never authorize non-Article III judges to enter final judgment in federal cases. Either way, both interpretations yield implications that are inconsistent with precedent or the currently accepted practices of society.[309] If the constitutional separation of powers requires a bright

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304 28 U.S.C. § 151 (1984).

305 *Compare* Stern v. Marshall, 564 U.S. 462, *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833.

306 Commodity Futures Trading Com. v. Schor, 478 U.S. at 851–52.

307 Wellness Int'l Network, Ltd. v Sharif, 135 S. Ct. at 1955 (Roberts, C.J. dissenting).

308 *See generally id*.

309 *See generally id*.

line boundary, then what accounts for the different treatment of federal agencies and bankruptcy courts in exercising Article III authority?

One possible answer is that the distinction is not actually rooted in a substantive threat to the separation of powers. Rather, it is a distinction born of an earlier Court favoring broad construction of Article III and a later Court favoring strict construction. This seems particularly evident when strict interpretation concerns about Article III structural safeguards are mostly dependent on classification and categorization, rather than function or intention. If so, the constitutional inquiry of Article III authority is far too contingent on technical wording and not dependent enough on function.

The other potential answer is that Congress *never* had authority to confer Article III authority on any non-Article III judge. This would indicate, however, that it is unconstitutional for any administrative agencies, including the CFTC, to exercise judicial authority. In fact, even the three narrow exceptions could be considered violations because, regardless of classification, Congress never had the authority to confer judicial power on any non-Article III tribunal. The *Wellness* dissent expressed that "the fact that Article III judges played a role in the Article III violation does not remedy the constitutional harm."[310] Following this logic, does this consequently mean that the Supreme Court also played a role in Article III violations when it allowed any non-Article III tribunal to exercise judicial authority? According to the *Wellness* dissent, the answer may be yes, if the power to enter final judgment is reserved solely for the Judiciary, regardless of tradition or practicality of use.[311]

The inconsistent treatment of Article III authority, especially when comparing *Schor* and *Stern*, is problematic. The Court may one day have to address these discrepancies, but it must then be prepared to account for the residual implications of its decision. If the Court adheres to the strict construction of Article III, then is the Court acknowledging that it plays a continual role in Article III violations through allocating authority to administrative agencies and excepted tribunals, or is the Court recognizing the unconstitutionality of institutional practices that have lasted for decades?

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310 *Id*. at 1957.

311 *See generally id*, at 1932.

D. Factor Four: Current Trend and Future Outlook of Bankruptcy Law: The Stern Amendments

Since the ruling of *Stern*, and in response to shifting precedent from *Stern* to *Wellness*, the Judicial Conference of the United States proposed amendments to the Federal Rules of Bankruptcy Procedures on April 28, 2016.[312] When determining the future scope of bankruptcy court authority, the Court should lend greater deference to the recent trend of bankruptcy law, rather than selecting precedent that most resonates with their canon of constitutional construction. By respecting the current movement of bankruptcy law over a predisposition to a particular interpretation, there will be more clarity to the future outlook of bankruptcy law, and consequently, more predictability and greater ability to prepare for future adjustments. The *Stern* amendments are an illustration of one of the most recent developments in bankruptcy law.

The *Stern* amendments addressed Rules 7008, 7012, 7016, 9027, and 9033 of the Rules of Bankruptcy Procedures, which finally went into effect on December 1, 2016.[313] These amendments, proposed in response to *Stern*, focused on three key changes: "(1) to eliminate the distinction between "core" and "non-core" proceedings in the Bankruptcy Rules; (2) to require parties to explicitly state from the beginning whether they consented to entry of final judgment by a bankruptcy judge in all adversary proceedings; and (3) to direct the bankruptcy courts to determine the proper treatment of all proceedings."[314] When determining the trend of bankruptcy court authority, it is important to understand the reasoning and purpose behind these amendments.

In 2011, the Advisory Committee on Bankruptcy Rules had already considered amendments to the Bankruptcy Rules in response to the *Stern* ruling.[315] One substantial post-*Stern* issue was that the terms 'core' and 'non-core' were full of ambiguity.[316] To make matters worse, even if a proceeding was designated as statutorily core, there was a possibility that the bankruptcy judge was not constitutionally authorized to determine the case, rendering the proceeding constitutionally non-core.[317] Without a definitive answer from the Court, this continued to be a problem. For example, the existing Rules 7008[318]

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312 H.R. DOC. NO. 114-130, at 34 (2016).
313 *Id.*
314 *Id*. at 54–55.
315 *Id*. at 52.
316 *Id*. at 52.
317 *Id*.
318 FED. R. BANKR. P. 7008(a).

and 7012[319] required that parties to adversary bankruptcy proceedings state in the complaint and pleading whether the proceeding was core or non-core.[320] For non-core proceedings, a determination had to be made whether the pleader consented to entry of final judgment by a bankruptcy judge.[321] Under Rule 7012(b), final judgements could not be entered "except with the consent of the parties."[322]

When the constitutional validity of consent was finally upheld in the Court's subsequent *Wellness* decision, the Committee "voted unanimously to proceed with the *Stern* amendments as originally drafted and approved, rather than propose a set of amendments that would take a different approach to expressing party consent to the bankruptcy court adjudication."[323] These amendments provided for express consent from all parties to a bankruptcy court proceeding so that, absent consent, it would not be necessary for another court to determine whether bankruptcy courts had the authority to hear and determine disputes.[324]

Further, the Committee decided to go beyond the minimum implied consent standard in *Wellness*, even though it recognized a small possibility that "an express consent approach could result in more non-core and *Stern* claims being adjudicated in the district court."[325] The reasoning was because an "express consent approach [had] the advantage . . . of clarity."[326] Express consent would eliminate any uncertainty regarding party consent because a court could simply look to the pleadings and clearly determine whether parties explicitly consented.[327] Today, these amendments reflect an adherence to the development of procedural efficiency by adding clarity to bankruptcy procedure.

The Committee also determined that it became unnecessary to determine whether a pleading was core or non-core because even a statutorily core issue did not necessarily establish constitutional authority of non-article III bankruptcy courts to adjudicate the issue. Thus, the *Stern* amendments to Rules 7008 and 7012 were designed to require parties in every proceeding to explicitly state their consent or non-consent to a bankruptcy judge's entry of final

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319 *Id.* 7012(b).
320 H.R. DOC. NO. 114-130, at 52 (2016).
321 *Id*.
322 *Id*.
323 *Id*. at 54.
324 *Id*.
325 *Id*.
326 *Id*.
327 *Id*.

judgment, without distinction of core versus non-core.[328] Similar amendments were proposed to Rule 9027(a) and (e) involving removal.[329] Removal actions were amended to no longer distinguish between core or non-core, and instead require a clear statement that the parties either consent or do not consent to final judgment by a bankruptcy judge.[330] By removing the distinction between core or non-core, there should be less uncertainty about whether bankruptcy judgments are truly final and the assurance that, regardless of the issues, final judgment can be entered with party consent.

Finally, the Committee "believe[d] it [was] important to provide needed clarity to the bankruptcy community as soon as possible regarding how bankruptcy courts can proceed on a consent basis to adjudicate *Stern* claims."[331] As such, important amendments were also proposed to Rule 7016 involving pre-trial procedures.[332] These changes were designed to provide the bankruptcy court with three options on how to exercise its authority in proceedings: (1) to hear and determine the dispute, (2) to hear the dispute and issue findings of fact and conclusions of law for the district court, or (3) to take some other action, allowing for variation based on different scenarios the court might encounter.[333] The final amendment was to Rule 9033, which governs subsequent procedures once a bankruptcy court issues proposed findings of fact and conclusions of law.[334] Once strictly limited to non-core proceedings, this change expanded jurisdiction to any proceeding in which the bankruptcy court has issued proposed findings of fact and conclusions of law.

The *Stern* Amendments are signs of a current trend shifting from a strict construction of formalistic and textual interpretations, to a broad construction of the pragmatic effects to bankruptcy law efficiency. These amendments alleviate some pragmatic concerns because they allow bankruptcy courts to definitively adjudicate non-core proceedings with the parties' consent and provide procedural guidelines on how best to handle proceedings when lacking consent.

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328 *Id.*at 52.

329 *Id*. at 54.

330 The Committee Notes on Rules—2016 Amendment provide in part: "Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court." *Id.* at 46.

331 *Id*. at 56.

332 *Id*. at 52.

333 The Committee Notes on Rules—2016 Amendment provides in part: "This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding." *Id.* at 42.

334 FED. R. BANKR. P. 9033.

However, while these amendments have mitigated several procedural uncertainties in bankruptcy proceedings, history shows that the Court can drastically alter the scope of bankruptcy court authority through strict or broad construction at any time. The Court has yet to provide a sufficiently clear or indisputable answer to the deeper constitutional question of Article III authority.

CONCLUSION

Presently, the current outlook for bankruptcy procedure seems to be trending towards appropriating weight to the pragmatic need for bankruptcy courts to wield judicial authority. However, this current trend is the result of a *Wellness* Court that favored broad construction, as opposed to the previous *Stern* Court which adhered to strict construction. Thus, it is likely that facilitation of bankruptcy goals will continue to be contingent on whether the Court implements a strict or broad construction to future cases and controversies. For the sake of consistency and predictability, the Court should lend greater deference to the current trend of bankruptcy law when determining bankruptcy court authority. If not, it is only a matter of time before bankruptcy law will again be unpredictably altered by the opposing constructions of Article III text, and the outcome will be unclear.

This Comment is not an imposition, but an attempt to reconcile the drastically shifting landscape of bankruptcy court authority. The lack of clarity resulting from the unstable scope of bankruptcy court authority erodes the fundamental purpose of bankruptcy to provide quick and efficient debtor relief and creditor repayment. Instead, too much time and resources are spent addressing ancillary jurisdictional issues which lead to increased cost, delay, and inefficiency. A balanced methodology, which weighs both the positive and negative realities of bankruptcy law and governmental framework, serves as a suggestion to provide more consistency and predictability in bankruptcy law development.

A priority in the future development of bankruptcy law should be to take incremental steps from the unstable to the stable. All those involved in bankruptcy—courts, judges, litigants, and society—stand to benefit from a little more stability.

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