



2016

Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Litigant Consent

Ralph Brubaker

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Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Litigant Consent*, 33 Emory Bankr. Dev. J. 11 (2016).

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**NON-ARTICLE III ADJUDICATION: BANKRUPTCY AND
NONBANKRUPTCY, WITH AND WITHOUT
LITIGANT CONSENT**

*Ralph Brubaker**

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This article is based upon an earlier version published as *The Constitutionality of Non-Article III Bankruptcy Adjudications, With and Without Litigant Consent (Part I)*, 35 BANKR. L. LETTER No. 9, Sept. 2015, at 1, *The Constitutionality of Non-Article III Bankruptcy Adjudications, With and Without Litigant Consent (Part II)*, 35 BANKR. L. LETTER No. 12, Dec. 2015, at 1, and *The Constitutionality of Non-Article III Bankruptcy Adjudications, With and Without Litigant Consent (Part III)*, 36 BANKR. L. LETTER No. 1, Jan. 2016, at 1.

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INTRODUCTION

The Supreme Court’s 2011 decision in *Stern v. Marshall*¹—declaring a portion of bankruptcy judges’ statutory “core” jurisdiction to be unconstitutionally over-broad under Article III—was akin to a jurisprudential earthquake that is still throwing off aftershocks.² With its more recent decisions in *Executive Benefits Insurance Agency v. Arkison*³ and *Wellness International Network, Ltd. v. Sharif*,⁴ though, the Supreme Court has now “fixed” the two most pressing and troubling potential problems raised by *Stern*: (1) the supposed “statutory gap” for so-called *Stern* claims—statutory core matters in which it would be unconstitutional for a non-Article III bankruptcy judge to enter final judgment as authorized in § 157(b)(1) of the Judicial Code,⁵ and in which, therefore, bankruptcy judges (according to a few courts) were given no statutory authorization to do anything at all (not even hear the matter for purposes of entering proposed findings and conclusions);⁶ and (2) whether it is constitutional for a non-Article III bankruptcy judge to enter final judgment with the consent of the litigants on non-core (and *Stern*) claims as authorized by Judicial Code § 157(c)(2).⁷

¹ 564 U.S. 462 (2011).

² *Stern* was also like an earthquake in that the fault lines that ultimately produced its holding had been evident (but largely ignored) ever since the 1989 decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). See generally Ralph Brubaker, A “Summary” Statutory and Constitutional Theory of Bankruptcy Judges’ Core Jurisdiction After *Stern v. Marshall*, 86 AM. BANKR. L.J. 121, 150–57 (2012) [hereinafter Brubaker, A “Summary” Theory]; Ralph Brubaker, *Article III’s Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges’ Core Jurisdiction*, 31 BANKR. L. LETTER No. 9, Sept. 2011, at 1, 3–6 [hereinafter Brubaker, *Bleak House (Part II)*].

³ 134 S. Ct. 2165 (2014).

⁴ 135 S. Ct. 1932 (2015).

⁵ 28 U.S.C. § 157(b)(1) (2012).

⁶ See generally Brubaker, A “Summary” Theory, *supra* note 2, at 142–43; Ralph Brubaker, *Article III’s Bleak House (Part I): The Statutory Limits of Bankruptcy Judges’ Core Jurisdiction*, 31 BANKR. L. LETTER No. 8, Aug. 2011, at 1, 12 [hereinafter Brubaker, *Bleak House (Part I)*].

⁷ 28 U.S.C. § 157(c)(2). See generally Brubaker, A “Summary” Theory, *supra* note 2, at 144–45, 160–64, 185–88; Ralph Brubaker, *The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications*, 32 BANKR. L. LETTER No. 12, Dec. 2012, at 1, 5–12 [hereinafter Brubaker, *Litigant Consent*].

In *Arkison*, the Court plugged the purported statutory gap for *Stern* claims, unanimously holding that the “statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c).”⁸ In *Wellness*, a more divided 6-3 Court confirmed the constitutional validity of § 157(c)(2), holding “that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.”⁹

Wellness is highly instructive both as to issues which it did and which it did not expressly decide, and this article begins with an analysis of the larger constitutional significance of the *Wellness* decision. For example, *Wellness* clearly has implications beyond the context of non-Article III bankruptcy adjudications with consent of the litigants; it speaks directly to the validity of other non-Article III adjudications with litigant consent (e.g., by magistrate judges). Part I of this article, therefore, situates the *Wellness* decision within the Supreme Court’s larger jurisprudence of non-Article III adjudications. In particular, Part I extracts from the *Wellness* decision helpful clues as to the Court’s preferred methodological approach/es to determining the constitutionality of non-Article III adjudications. *Wellness* fits a distinctive pattern in the Supreme Court’s case law regarding non-Article III adjudications, in which the Court uses formal categorical rules to determine the

⁸ *Arkison*, 134 S. Ct. at 2173. “Thus, § 157(c) may be applied naturally to *Stern* claims.” *Id.* “If the [*Stern*] claim satisfies the criteria of § 157(c)(1)” because it is “related to” the debtor’s bankruptcy case, then “the bankruptcy court simply treats the claim[] as non-core: The bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment.” *Id.* Moreover, as the Court noted in *Wellness*, even “when the bankruptcy court improperly enters final judgment” on a *Stern* claim, on appeal district court judges “are not required to restart proceedings entirely.” *Wellness*, 135 S. Ct. at 1942 n.6. Rather, “the district courts may [also] treat *Stern* claims like non-core claims,” regarding the bankruptcy court’s judgment as the equivalent of proposed findings and conclusions that are subjected to *de novo* review before entry of final judgment. *Id.*; see *Arkison*, 134 S. Ct. at 2175 (holding that “even if EBIA is correct that the Bankruptcy Court’s entry of judgment was invalid, the District Court’s *de novo* review and entry of its own valid final judgment cured any error”).

The *Arkison* Court specifically noted that the statutory process for a non-core claim—heard by a non-Article III bankruptcy judge who submits proposed findings and conclusions for *de novo* review by an Article III district court judge before entry of final judgment in the district court—“does not implicate the constitutional defect identified by *Stern*.” 134 S. Ct. at 2170. Presumably, the bankruptcy court’s limited involvement in the adjudication of such a non-core claim is constitutionally valid under the non-Article III “adjunct” theory originating in the Court’s seminal decision of *Crowell v. Benson*, 285 U.S. 22 (1932). See Brubaker, A “Summary” Theory, *supra* note 2, at 158–60; Brubaker, *Bleak House (Part II)*, *supra* note 2, at 6–7.

⁹ *Wellness*, 135 S. Ct. at 1939. The *Wellness* decision also held that neither the Constitution nor § 157(c)(2) require that such consent must be express; rather, the requisite consent can be implied if “the litigant or counsel were made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case” before the non-Article III bankruptcy judge. *Id.* at 1948 (quoting *Roell v. Withrow*, 538 U.S. 580, 590 (2003)).

constitutionality of non-Article III adjudications without consent (e.g., over the objection of one) of the litigants. Thus, formalism appears to be the Court's favored methodology for defining the scope of litigants' constitutional right to final judgment from an Article III judge in "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."¹⁰ When the litigants have consented to the non-Article III adjudication at issue, however, the Court uses a functional mode of analysis that assesses whether the consent adjudication system at issue, as a practical matter, actually threatens the structural integrity of the Article III judicial branch. These dual modes of analysis, while seeming incoherent to many, are actually a logical corollary of the dual interests protected by Article III, § 1—both the waivable individual rights of litigants to an Article III adjudication, as well as non-waivable structural separation-of-powers values.

While Part I analyzes the significance of *Wellness* in the Supreme Court's general jurisprudence of non-Article III adjudications, Parts II and III assess *Wellness*'s larger implications for the constitutionality of non-Article III *bankruptcy* adjudications. In particular, one of the most persistent puzzles left unresolved by *Stern* is determining the constitutional basis (if any) for bankruptcy judges to render final judgment *without* litigant consent, e.g., in those statutory core matters that have traditionally been finally adjudicated by non-Article III arbiters.¹¹ Justice Sotomayor's majority opinion in *Wellness* ducked the broader issue of articulating the constitutional theory that validates non-Article III bankruptcy adjudications without litigant consent. The three "dissenting" justices, though, expressly addressed that question,¹² and it now seems clear that a majority of the Court believes that the bulk of bankruptcy judges' core jurisdiction is indeed constitutionally valid. Moreover, the views of the *Wellness* dissenters, as well as the *Wellness* decision itself, are fully consistent with the Court's cumulative jurisprudence of non-Article III bankruptcy adjudications, which seems to have constitutionalized the longstanding historical distinction between "summary" matters of estate and

¹⁰ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

¹¹ See generally Brubaker, A "Summary" Theory, *supra* note 2, at 164–67, 180–85; Brubaker, *Bleak House* (Part II), *supra* note 2, at 9–10, 16–18.

¹² It is a bit curious that Chief Justice Roberts and Justice Thomas designated their separate opinions as "dissenting" opinions, since they *agreed* with the majority (although for different reasons) that the judgment of the Seventh Circuit should be reversed and remanded. See *Wellness*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting); *id.* at 1960 (Thomas, J., dissenting). Perhaps they chose the "dissenting" designation, as opposed to concurring in part in the Court's judgment, principally as a rhetorical device designed to register the depth of their disagreement with the majority's methodological approach to deciding the consent issue. See *infra* Part I.B.

case administration, as distinguished from “plenary” suits against “adverse claimants.”

Part II traces the Supreme Court’s longstanding role in preserving and defining the historical distinction between summary and plenary matters and, most significantly, in superintending that traditional distinction (taken from English bankruptcy practice) to *limit* the adjudicatory powers of non-Article III bankruptcy referees.¹³ Moreover, within the Supreme Court’s extensive summary-plenary jurisprudence, limiting the adjudicatory powers of non-Article III referees, is a clear precursor to the Court’s *Wellness* decision that highlighted both the individual rights and structural separation-of-powers values at stake.¹⁴ Recognizing the summary-plenary line as the operative constitutional boundary, therefore, is fully consistent with established historical practice (i) that would have informed the Founders’ understanding of the Article III, § 1 “judicial Power” in the context of bankruptcy adjudications, and (ii) that the Supreme Court itself used to limit the adjudicatory powers of non-Article III bankruptcy arbiters. Recognizing the summary-plenary line as the operative constitutional boundary is also fully consistent with, and provides a coherent and theoretically compelling explanation for, *all* of the Supreme Court’s modern constitutional decisions.

Recognizing the summary-plenary line as the operative constitutional boundary also provides lower courts with helpful guidance (from the Court’s extensive summary-plenary jurisprudence) in making core-noncore determinations under the current jurisdictional statute. Part III uses the *Wellness* litigation to illustrate several vectors along which the Supreme Court has differentiated between summary matters (appropriate for final adjudication by a non-Article III bankruptcy tribunal) and plenary suits (in which the parties have a constitutional right to final judgment from an Article III judge). Part III demonstrates how that existing and extensive summary-plenary jurisprudence provides a highly developed analytical framework for resolving even the most nuanced and difficult core-noncore determinations.

¹³ See *Weidhorn v. Levy*, 253 U.S. 268 (1920), discussed *infra* Part II.A.2.

¹⁴ See *MacDonald v. Plymouth Cty. Tr. Co.*, 286 U.S. 263 (1932), discussed *infra* Part II.B.1.

I. THE CONSTITUTIONALITY OF NON-ARTICLE III CONSENT ADJUDICATIONS—BANKRUPTCY AND NONBANKRUPTCY

Some of the Supreme Court’s modern case law regarding non-Article III adjudications, like *Stern*, uses formal, categorical rules to determine the permissibility of a particular non-Article III adjudication. Other cases, though, like *Wellness*, employ a functional analysis that assesses whether the non-Article III adjudication at issue, as a practical matter, threatens the structural separation-of-powers values embodied in Article III, § 1. One might be tempted to chalk up such seeming inconsistency to the vagaries of shifting majorities navigating a difficult, controversial area of constitutional law. A more generous explanation, though, explored and explained in this Part I, is that the Court’s shifting majorities reflect a collective judgment that the appropriate constitutional analysis is a bifurcated one that reconciles the dual interests protected by Article III, § 1.¹⁵

In the absence of litigant consent to the non-Article III adjudication at issue, formalism preserves inviolate the litigants’ absolute right to final judgment from an Article III judge in “any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”¹⁶ When the litigants have effectively consented to the non-Article III adjudication at issue, though, the only constitutional values at stake are structural separation-of-powers concerns to which the Court’s functional analysis is directly responsive. And the pattern of the Court’s decisions, through and including *Wellness*, confirms that in cases in which one of the litigants has objected to the non-Article III adjudication at issue, the Court uses formalism to decide the scope of a litigant’s constitutional right to an Article III adjudication, but the Court uses a functional mode of analysis to determine the permissibility of non-Article III adjudications done with consent of the litigants.¹⁷ In *Wellness*, that functional analysis was used to uphold the constitutionality of Judicial Code § 157(c)(2),¹⁸ authorizing non-Article III bankruptcy judges to finally adjudicate *Stern*-like non-core claims with consent of the litigants.¹⁹

¹⁵ See *infra* Part I.A.

¹⁶ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

¹⁷ See *infra* Part I.B.

¹⁸ 28 U.S.C. § 157(c)(2) (2012).

¹⁹ See *infra* Part I.C.

A. *Article III, § 1's Protection of Both Individual Rights and Structural Values*

The constitutional question confronting the Supreme Court in *Wellness* was a deceptively difficult one: Can a non-Article III bankruptcy judge enter final judgment in a *Stern*-like, traditional, private-rights suit (that would otherwise require final judgment from an Article III district court judge) because the parties to that suit have consented to final judgment from the bankruptcy judge or have otherwise waived or forfeited their constitutional right to final judgment from an Article III judge?²⁰ Resolving that question as a matter of first principles of constitutional law is perplexing because of the complex nature of Article III, § 1, which “serves *both* to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government,’ *and* to safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’”²¹

1. *A Non-Waivable Structural Protection*

The Court has emphasized repeatedly in its jurisprudence of non-Article III adjudications that Congress generally cannot “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty”²² because of structural separation-of-powers principles. As the Court stated in *Stern*, “Article III could neither serve

²⁰ The Fifth, Sixth, and Seventh Circuits had held that the litigants cannot waive an Article III, § 1 objection to entry of final judgment by a non-Article III bankruptcy judge and, indeed, could even assert such an objection for the first time on appeal from such a final judgment. See *In re BP RE, L.P.*, 735 F.3d 279, 286–91 (5th Cir. 2013); *Wellness Int’l Network, Ltd. v. Sharif*, 727 F.3d 751, 767–73 (7th Cir. 2013), *rev’d*, 135 S. Ct. 1932 (2015); *Waldman v. Stone*, 698 F.3d 910, 917–18 (6th Cir. 2012). Those courts’ holdings, though, conflicted with a contrary decision of the Ninth Circuit. See *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 566–67 (9th Cir. 2012). Those decisions also called into question the constitutionality of Judicial Code § 157(c)(2), which authorizes bankruptcy judges to enter final judgment in a non-core proceeding “with the consent of all the parties to the proceeding.” 28 U.S.C. § 157(c)(2); see Brubaker, *Litigant Consent*, *supra* note 7, at 1, 10. The Supreme Court, therefore, granted certiorari in the *Wellness* case to resolve the constitutionality of consent adjudications by non-Article III bankruptcy courts.

The Seventh Circuit’s *Wellness* holding was actually limited to *Stern* claims in the supposed “statutory gap” for which there was purportedly no statutory authorization in § 157(c)(2) for bankruptcy courts to enter final judgment with consent of the litigants. See 727 F.3d at 772 (stating that “[i]n this case we need not, and do not, express an opinion on the constitutionality of § 157(c)(2)”). See generally Brubaker, A “Summary” *Theory*, *supra* note 2, at 145. The *Arkison* holding, though, that there is no statutory gap—because “[t]he statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c)—presumably means that the § 157(c)(2) consent provision is also applicable to *Stern* claims. *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2173 (2014).

²¹ CFTC v. Schor, 478 U.S. 833, 848 (1986) (citations omitted and emphasis added).

²² *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."²³

The structural dimension of Article III, § 1, therefore, would suggest that litigant consent *cannot* validate final adjudication of a traditional private-rights suit by a non-Article III bankruptcy judge. As the Supreme Court noted in *CFTC v. Schor*:

[O]ur precedents establish that Article III, § 1 . . . serves as "an inseparable element of the constitutional system of checks and balances." Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts, and thereby preventing "the encroachment or aggrandizement of one branch at the expense of the other." To the extent that this structural principle is implicated in any given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.²⁴

Given the *Stern* Court's heavy emphasis upon the structural protections embodied in Article III, § 1, it is not at all surprising that *Stern* prompted a serious re-examination of the constitutionality of non-Article III consent adjudications and Judicial Code § 157(c)(2).

2. A Waivable Individual Right

The *Stern* decision, though, also acknowledged that "the dynamic between and among the branches is not the only object of the Constitution's concern," and in addition, "Article III protects [individual] liberty . . . by specifying the defining characteristics of Article III judges" that ensure their independence and impartiality.²⁵ Indeed, in *Schor* the Court went so far as to state that "our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the

²³ *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

²⁴ *Schor*, 478 U.S. at 850–51 (1986) (citations omitted).

²⁵ *Stern*, 564 U.S. at 483 (citation omitted).

United States intimated that this guarantee serves to protect *primarily personal*, rather than structural, interests.”²⁶

Of course, such an individual personal right of litigants to an independent, impartial arbiter for their dispute is a right that can be freely waived by the litigants: “[A]s a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.”²⁷

Determining the proper role of consent in the context of non-Article III adjudications is conceptually difficult, then, because Article III, § 1 simultaneously protects non-waivable structural values, as well as waivable individual rights. Thus, litigant consent or waiver clearly cannot be dispositive in validating any and all non-Article III adjudication schemes. Consent, however, certainly should not be entirely irrelevant if indeed Article III, § 1 is *primarily* for the protection of individual litigants. In fact, as Justice Thomas pointed out in his *Wellness* opinion, there are compelling indications that the constitutional jury trial guaranties protect both litigants’ individual rights and systemic structural interests,²⁸ yet the Seventh Amendment right to a jury trial is unquestionably one that can be waived by the litigants.²⁹

The challenge is thus sorting out the proper interaction between the waivable personal and the non-waivable structural facets of Article III, § 1. Indeed, the Seventh Circuit in *Wellness* nicely captured the nature of the conundrum:

The dual nature of Article III, § 1, renders notions of waiver and consent more nuanced than they are in other areas. The practical problem, of course, is the difficulty of separating out the waivable personal safeguard from the nonwaivable structural safeguard, for in every case an argument that a party waived the personal protection can be met with the argument that the court must still consider the objection because the structural aspect cannot be waived. The net

²⁶ *Schor*, 478 U.S. at 848 (emphasis added).

²⁷ *Id.* at 848–49.

²⁸ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1962 & n.1 (2015) (Thomas, J., dissenting). For an excellent account of the same thesis, see SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 11–24, 55–106 (2016).

²⁹ *See Kearney v. Case*, 79 U.S. (12 Wall.) 275, 281 & n.6 (1870) (“Numerous decisions, however, settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid.”).

result would be that an Article III, § 1, argument can never be waived and that parties can never consent to adjudication by a non-Article III tribunal, which would render *Schor*'s discussion of the waivability of the personal protections meaningless.³⁰

Moreover, (and as the Supreme Court pointed out in *Wellness*) that result would also fly in the face of a long history of cases in which the Supreme Court itself has approved non-Article III adjudications with litigant consent,³¹ including two decisions specifically in the context of non-Article III bankruptcy adjudications.³² As I have asserted before,³³ though, a perfectly logical means for reconciling the non-waivable structural and waivable personal aspects of Article III, § 1 (and which the Court apparently employed in *Wellness*) emerges from the seeming incongruity of the Court's methodological approaches in its decisions regarding the constitutionality of non-Article III adjudications.

B. Formalism or Functionalism?

Many observers of the Supreme Court's jurisprudence of non-Article III adjudications have been frustratingly nonplused by the seeming schizophrenia in the analytical approach of the Court's modern decisions, beginning with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* in 1982.³⁴ The shifting mode of analysis, however, is the means by which the Court has accommodated the two incommensurate (one waivable, one non-waivable) constitutional interests protected by Article III, § 1.

³⁰ *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 769 (7th Cir. 2013), *rev'd*, 135 S. Ct. 1932.

³¹ The Court quoted my survey of that history, which revealed that "[d]uring the early years of the Republic, federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report." *Wellness*, 135 S. Ct. at 1942 (quoting Brubaker, *Litigant Consent*, *supra* note 7, at 6).

³² See *MacDonald v. Plymouth Cty. Tr. Co.*, 286 U.S. 263, 266–67 (1932); *Newcomb v. Wood*, 97 U.S. 581, 581–83 (1878); see also Brubaker, *Litigant Consent*, *supra* note 7, at 7 (discussing the significance of those decisions).

³³ See Brubaker, A "Summary" Theory, *supra* note 2, at 186–88; Brubaker, *Litigant Consent*, *supra* note 7, at 9–10. I was also co-counsel for the American College of Bankruptcy as an amicus curiae in the *Arkison* case, in which the Court granted certiorari on, but then did not decide, the consent issue resolved in *Wellness*. The proper interaction between the waivable individual and non-waivable structural features of Article III, § 1 was a prominent component of the College's amicus brief in *Arkison*. See Brief of Amicus Curiae the American College of Bankruptcy in Support of Respondent at 19–22, *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014) (No. 12-1200), 2013 WL 6091503, at *19–22, available at: <http://www.americancollegeofbankruptcy.com/file.cfm/15/docs/No.-12-1200-bsac-American-College-of-Bankruptcy.pdf>.

³⁴ 458 U.S. 50 (1982).

1. *Marathon: Formalism*

The *Marathon* plurality and concurring opinions used a very formal, categorical, rule-based approach to determining the unconstitutionality of the jurisdictional scheme of the Bankruptcy Reform Act of 1978 with respect to the lawsuit at issue—a traditional plenary suit at law against an adverse claimant.³⁵ In his dissent, though, Justice White advocated abandoning formal limits on Congress’s power to create non-Article III tribunals and proposed instead a more pragmatic, functional approach to ascertaining the constitutionality of any given system of non-Article III adjudications—one that balances “the strength of the legislative interest” in employing a non-Article III tribunal against “the values furthered by Art. III”:

I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.³⁶

And Justice White’s functional approach soon gained seeming ascendance.

2. *Schor, Thomas, and Peretz: Functionalism*

In a series of subsequent decisions regarding non-Article III adjudications—*Thomas v. Union Carbide Agricultural Products*,³⁷ *CFTC v. Schor*,³⁸ and *Peretz v. United States*³⁹—the Court not only upheld the particular non-Article III adjudication at issue in each case, but the Court also appeared to adopt precisely the kind of functional balancing approach Justice White had proposed in his *Marathon* dissent.⁴⁰ *Stern*, though, brought an abrupt and (for

³⁵ “[T]he lawsuit in which *Marathon* was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.” *Marathon*, 458 U.S. at 90 (Rehnquist, J., concurring).

³⁶ *Id.* at 115 (White, J., dissenting).

³⁷ 473 U.S. 568 (1985).

³⁸ 478 U.S. 833 (1986).

³⁹ 501 U.S. 923 (1991).

⁴⁰ Indeed, this prompted Dean Chemerinsky to opine that the *Marathon* decision itself was perhaps ripe for an outright overruling, stating that although “[t]here is . . . an unpredictability to the Court’s balancing approach, since it is not clear what weight the Court will give to what factors in the balancing,” nonetheless, “if *Northern Pipeline* were decided today, there is every reason to believe that it would be resolved differently.

many) surprising resurrection of formalism in the jurisprudence of non-Article III adjudications.⁴¹

3. Stern: *Formalism*

The *Stern v. Marshall* dissenters would have upheld the constitutionality of Judicial Code § 157(b)(2)(C)⁴² using a “more pragmatic approach to the constitutional question” that considers a number of relevant factors “to determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III.”⁴³ That approach, of course, is consistent with Justice White’s *Marathon* dissent and the Court’s opinions in *Thomas*, *Schor*, and *Peretz*.

The *Stern* majority, however, would have none of that. Indeed, Justice Scalia not only joined the majority opinion’s formal constitutional limit on bankruptcy judges’ core jurisdiction, but also separately concurred to, inter alia, deride the dissent’s “intuitive balancing of benefits and harms” as an inappropriate method of constitutional adjudication.⁴⁴ With the *Wellness* decision, though, we see the (mysterious?) reappearance of functionalism.

4. Wellness: *Functionalism*

The resurgence of formalism in *Stern*, more than anything else, likely explains the rash of lower-court decisions holding consent adjudications by bankruptcy judges to be unconstitutional.⁴⁵ The kind of pragmatic functional analysis necessary to accommodate consent adjudications (and that the

The approach endorsed in *Schor* indicates a strong likelihood that Justice White’s opinion might attract a majority of the Court.” Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 320 (1991).

⁴¹ Dean Chemerinsky was particularly critical of the *Stern* majority’s reliance on formalism. See Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 S. CT. REV. 183.

The Court’s *Granfinanciera* decision also used formal categorical rules in explicating the scope of the constitutional right to final judgment from an Article III judge. See *Granfinanciera*, S.A. v. Nordberg, 492 U.S. 33 (1989); *infra* notes 117–123 and accompanying text. Until *Stern*, though, most observers discounted the relevance of *Granfinanciera* to Article III jurisprudence. See generally Brubaker, A “Summary” Theory, *supra* note 2, at 150–51.

⁴² At least as applied to a non-Article III bankruptcy judge’s final adjudication of *compulsory* “counterclaims by [a debtor’s bankruptcy] estate against persons filing claims against the estate.” 28 U.S.C. § 157(b)(2)(C) (2012).

⁴³ *Stern v. Marshall*, 564 U.S. 462, 512–13 (2011) (Breyer, J., dissenting).

⁴⁴ *Id.* at 505 (Scalia, J., concurring).

⁴⁵ See *supra* note 20.

majority utilized in *Wellness*) “has no place in the *Stern* majority’s formalistic approach to Article III.”⁴⁶ Indeed, Chief Justice Roberts and Justice Scalia dissented in *Wellness* because they “would not yield so fully to functionalism. The Framers adopted the formal protections of Article III for good reasons, and ‘the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.’”⁴⁷ For Roberts and Scalia, then, the formal analysis was straightforward and simple: “Sharif has no authority to compromise the structural separation of powers or agree to an exercise of judicial power outside Article III. His consent therefore cannot cure a constitutional violation.”⁴⁸

Why the “flip flop” on methodology, then, for those Justices (Alito and Kennedy) who joined the majority opinions in *both Stern* (formalism) *and Wellness* (functionalism)? I would suggest that the explanation is rooted in the dual nature of Article III, § 1 in safeguarding both non-waivable structural interests and waivable personal liberty interests.

5. Formalism as a Protection of Individual Liberty Interests

As the *Wellness* majority emphasized, in each of the prominent modern-era decisions using a formal categorical analysis (*Marathon* and *Stern*), the Court struck down a non-Article III adjudication to which one of the litigants objected.⁴⁹ And in each case, the Court’s decision expressly relied upon the *absence* of litigant consent in finding the non-Article III adjudication to be unconstitutional.⁵⁰ Indeed, in the *Marathon* case, *all* of the opinions (plurality, concurrence, and two dissents) made a point of emphasizing that the holding of the Court applied *only* in the *absence* of litigant consent to final judgment from a non-Article III bankruptcy judge.⁵¹

⁴⁶ Kent L. Richland, *Stern v. Marshall: A Dead-End Marathon?*, 28 EMORY BANKR. DEV. J. 393, 415 (2012); *see also* Chemerinsky, *supra* note 41, at 209–12.

⁴⁷ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1950 (2015) (Roberts, C.J., dissenting) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

⁴⁸ *Wellness*, 135 S. Ct. at 1954 (Roberts, C.J., dissenting).

⁴⁹ “[T]he cases in which this Court has found a violation of a litigant’s right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily before a non-Article III court.” *Id.* at 1947 (Sotomayor, J., for the Court).

⁵⁰ *See* Brubaker, *A “Summary” Theory*, *supra* note 2, at 160–64.

⁵¹ *See* Brubaker, *Litigant Consent*, *supra* note 7, at 7–8.

In the absence of consent, the Court’s formal, categorical approach to the Article III, § 1 protection serves as a strong-form bulwark to preserve inviolate individual litigants’ personal right to final adjudication from an independent Article III court in “any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”⁵² Indeed, “the litigants’ personal interests in an arbiter who is (actually and, as importantly, widely perceived to be) independent and impartial . . . is not a concern to which functional balancing (in the absence of litigant consent) is particularly (if at all) sensitive.”⁵³ The personal liberty interest at stake when a litigant *objects* to a particular non-Article III adjudication, therefore, helps explain why a majority of the Court would consistently favor formalism as the appropriate means of explicating the constitutional right in that circumstance.

6. *Functionalism as a Structural Evaluation of Non-Article III Consent Adjudications*

By contrast, where the parties to a particular controversy *have* effectively consented to a non-Article III adjudication, that consent removes any concern for the litigants’ personal right to an Article III adjudication. Thus, it is *only* Article III, § 1’s *structural protections* that are at stake in non-Article III *consent* adjudications, and it is precisely those structural concerns to which “functional balancing seems most attuned and responsive.”⁵⁴ Indeed, in non-Article III adjudication cases in which the Court has used a more pragmatic, functional analysis (in each case, to uphold the non-Article III adjudication at issue), the litigants *had* consented in some fashion to the non-Article III adjudication at issue.⁵⁵ As Justice Alito pointed out in his separate *Wellness* concurrence, those decisions are “still the law of this Court.”⁵⁶

⁵² Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

⁵³ Brubaker, A “Summary” Theory, *supra* note 2, at 188.

⁵⁴ *Id.*

⁵⁵ “The Court has *never* done what Sharif and the principal dissent would have us do—hold that a litigant who has the right to an Article III court may not waive that right through his consent.” *Wellness*, 135 S. Ct. at 1947 (emphasis added). For example, in *Peretz* the defendant’s consent “was dispositive” in validating the non-Article III practice at issue. *Id.* at 1943. Compare *Peretz v. U.S.*, 501 U.S. 923, 935–36 (1991) (holding that non-Article III magistrate judge could supervise voir dire in a felony trial with defendant’s consent), with *Gomez v. U.S.*, 490 U.S. 858, 872 (1989) (holding that non-Article III magistrate judges have no such power without consent because of, *inter alia*, constitutional concerns). See also *CFTC v. Schor*, 478 U.S. 833, 849 (1986) (emphasizing that “Schor indisputably waived any right he may have possessed to full trial” of the claim at issue “before an Article III court”); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589–92 (1985) (emphasizing that the agency adjudication at issue governed only “voluntary participants” in “a complex regulatory scheme to allocate costs and benefits” of the program amongst those “voluntary participants,” that “no unwilling defendant is subjected to judicial enforcement as a result of the agency

7. *Consent Does Not Cure a Constitutional Violation, Consent Changes the Constitutional Analysis*

But what about Chief Justice Roberts' contention that neither the litigants nor the Article III courts themselves can "agree to an exercise of judicial power outside Article III," and "consent therefore cannot cure a constitutional violation"?⁵⁷ Indeed, on the surface, that very result seems to be the upshot of the *Wellness* holding. If the suit at issue is a traditional plenary private-rights suit against an adverse claimant, both *Marathon* and *Stern* hold that a final-judgment adjudication of that suit by a non-Article III bankruptcy court violates Article III. *Wellness*, however, "holds that Article III *permits* bankruptcy courts to decide [such suits] submitted to them by consent" of the litigants;⁵⁸ i.e., consent seemingly "cures" the constitutional violation. Bifurcating Article III, § 1's protections in the manner outlined above, though,⁵⁹ reveals that Chief Justice Roberts' invocation of the "consent cannot cure a constitutional violation" maxim is based upon contested assumptions that the *Wellness* majority apparently did not accept.

If the formal categorical prohibition set forth in *Marathon* and *Stern* serves to protect individual litigants' personal right to final judgment from an Article III judge, then absence of a waiver of that right (i.e., absence of litigant consent to a non-Article III adjudication) is essential to the constitutional violation identified in *Marathon* and *Stern*. As the Court stated in *Thomas*, "[t]he Court's holding in [*Marathon*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review."⁶⁰ Indeed, after quoting that same passage in his *Stern* opinion, Chief Justice Roberts said, "Just so: Substitute 'tort' for 'contract,' and that statement directly covers this case."⁶¹

'adjudication,'" and that "the only potential object of judicial enforcement power is the" participant "who explicitly consents to have his rights determined by arbitration").

⁵⁶ *Wellness*, 135 S. Ct. at 1949 (Alito, J., concurring). "If, as the principal dissent suggests, consent is irrelevant to the Article III analysis, it is difficult to see how *Schor* and *Peretz* were not wrongly decided. But those decisions obviously remain good law." *Id.* at 1947 (Sotomayor, J., for the Court); see Brubaker, *Litigant Consent*, *supra* note 7, at 9.

⁵⁷ *Wellness*, 135 S. Ct. at 1954 (Roberts, C.J., dissenting).

⁵⁸ *Id.* at 1949 (Sotomayor, J., for the Court) (emphasis added).

⁵⁹ See *supra* Part I.B.5–6.

⁶⁰ *Thomas*, 473 U.S. at 584 (emphasis added).

⁶¹ *Stern v. Marshall*, 564 U.S. 462, 494 (2011).

Justice Thomas made this very point in his separate dissent in *Wellness* in order to explain his view that appropriate historical evidence could reveal that “parties may consent to bankruptcy court adjudication of” *Marathon-* and *Stern*-like plenary suits⁶²:

[B]ecause the only authorities capable of granting power are the Constitution itself, and the people acting through the amendment process, individual consent cannot authorize the Government to exceed constitutional boundaries.

This does not mean, however, that consent is invariably irrelevant to the constitutional inquiry. Although it may not authorize a constitutional violation, consent may prevent one from occurring in the first place. This concept is perhaps best understood with the example on which the majority and THE CHIEF JUSTICE both rely: the right to a jury trial.¹ [Footnote 1: There is some dispute whether the guarantee of a jury trial protects an individual right, a structural right, or both, raising serious questions about how it should be treated under *Commodity Futures Trading Comm’n v. Schor*. My view, which does not turn on such taxonomies, leaves no doubt: It is a “fundamental reservation of power in our constitutional structure,” meaning its violation may not be authorized by the consent of the individual.] Although the Government incurably contravenes the Constitution when it acts in violation of the jury trial right, our precedents permit the Government to convict a criminal defendant without a jury trial when he waives that right. The defendant’s waiver is thus a form of consent that lifts a limitation on government action by satisfying its terms—that is, the right is exercised and honored, not disregarded. Provided the Government otherwise acts within its powers, there is no constitutional violation.⁶³

With respect to non-Article III adjudications with litigant consent, then, consent lifts the *Marathon/Stern* formal categorical prohibition designed to protect individual litigants’ personal right to final judgment from an Article III judge in a traditional private-rights suit. Hence, whether that consent

⁶² *Wellness*, 135 S. Ct. at 1970 (Thomas, J., dissenting) (opining that “[w]hether parties may consent to bankruptcy court adjudication of *Stern* claims is a difficult constitutional question” that “turns on issues that are not adequately considered by the Court or briefed by the parties”). See *infra* note 67 and note 248 and accompanying text for my analysis of (and response to) Justice Thomas’s insistence upon additional historical evidence.

⁶³ *Wellness*, 135 S. Ct. at 1961–62 & n.1 (Thomas, J., dissenting) (citations omitted).

adjudication “otherwise” violates the Constitution depends upon whether it contravenes Article III structural separation-of-powers values.⁶⁴

a. Divisibility of the Personal and Structural Interests

Of course, Chief Justice Roberts and Justice Scalia also favored formalism as the appropriate means of operationalizing Article III, § 1’s structural protections, using the same categorical rules that define the content of individuals’ personal right to final judgment from an Article III judge. For Roberts and Scalia, then, Article III, § 1’s individual and structural dimensions are inseparable,⁶⁵ and thus, litigant consent can have no effect.⁶⁶ According to Chief Justice Roberts, because *Stern* establishes the content of the constitutional guaranty for purposes of both individual and structural interests, “*Stern* held that ‘it does not matter who’ authorizes a bankruptcy judge to render final judgment on *Stern* claims, because the ‘constitutional bar remains.’”⁶⁷

The biggest embarrassment for that position, though, is a long series of decisions in which the Supreme Court specifically approved non-Article III adjudications with litigant consent:

During the early years of the Republic, federal courts, with consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee’s report. The Supreme Court, in reviewing challenges to such judgments, implicitly approved these non-Article III adjudications, consulting prior practices of English courts and the contemporaneous practice in the state courts. As Mr. Justice Campbell stated for the Court, in affirming such a judgment pursuant to the “practice [that] prevails in

⁶⁴ See Jaime Dodge, *Reconceptualizing Non-Article III Tribunals*, 99 MINN. L. REV. 905, 947 (2015) (“If the individual is merely waiving his own right, then the court retains the jurisdiction to assess any structural challenge to the non-Article III tribunal.”).

⁶⁵ See *Wellness*, 135 S. Ct. at 1956–57 (Roberts, C.J., dissenting); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 70 (1989) (Scalia, J., concurring in part and concurring in judgment).

⁶⁶ As Justice Brennan stated in dissent in *Schor*, “[b]ecause the individual and structural interests served by Article III are coextensive, I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required. In other words, consent is irrelevant to Article III analysis.” *CFTC v. Schor*, 478 U.S. 833, 867 (1986) (Brennan, J., dissenting).

⁶⁷ *Wellness*, 135 S. Ct. at 1957 (Roberts, C.J., dissenting) (citation omitted). Justice Thomas, while allowing for bifurcation of the individual and structural analysis, would also analyze the structural values at stake using formalism, grounded in an extremely specific inquiry into historical practice—one that virtually ensures an absence of relevant historical evidence, at least in the context of bankruptcy adjudications. See *supra* note 62 and accompanying text; *infra* note 248 and accompanying text.

the courts, where rules of reference are in use,” “upon principle we see no objection to the introduction of the same practice in the courts of the United States.” Moreover, when eventually the practice was directly challenged as improper, the Supreme Court upheld it as fully consistent with the judicial function of the federal courts.⁶⁸

Chief Justice Roberts would have accommodated/distinguished these decisions on the basis that “[i]n those cases, . . . it was the Article III court that ultimately entered final judgment.”⁶⁹ “The problem is that Congress has . . . given bankruptcy courts authority to enter final judgments subject only to deferential appellate review, and Article III precludes those judgments when they involve *Stern* claims.”⁷⁰ “[U]nder the Constitution, the ‘ultimate responsibility for deciding’ the case must remain with the Article III court.”⁷¹

Chief Justice Roberts fails to mention, however, that non-Article III bankruptcy referees under the 1898 Act system *did* enter final orders and judgments with consent of the litigants,⁷² and the Supreme Court upheld that practice (with specific reference to principles of constitutional structure) in *MacDonald v. Plymouth County Trust Co.*⁷³ Moreover, even in the 19th century cases Roberts was distinguishing, the referees’ reports were binding on the Article III court, with the same effect as a final judgment—only reversible under a deferential standard similar to appellate review.⁷⁴

All that was at stake, therefore, with the formal line Chief Justice Roberts was proposing was *who* performs the entirely formal act of entering the judgment in non-Article III consent adjudications—either a non-Article III bankruptcy court (with deferential appellate review thereof by an Article III district court) or an Article III district court (based upon a deferential

⁶⁸ Brubaker, *Litigant Consent*, *supra* note 7, at 6 (footnotes omitted) (quoting *York & Cumberland R.R. Co. v. Myers*, 59 U.S. (18 How.) 246, 252 (1855)).

⁶⁹ *Wellness*, 135 S. Ct. at 1958 (Roberts, C.J., dissenting).

⁷⁰ *Id.* at 1957 (Roberts, C.J., dissenting).

⁷¹ *Id.* at 1958 (Roberts, C.J., dissenting) (citation omitted).

⁷² See 2A COLLIER ON BANKRUPTCY ¶¶ 39.01[5], 39.16, 39.28 (James Wm. Moore et al. eds., 14th ed. 1978) [hereinafter COLLIER (14th ed.)].

⁷³ 286 U.S. 263, 267 (1932); see *infra* Part II.B.1.b.

⁷⁴ See, e.g., *Kimberly v. Arms*, 129 U.S. 512, 524 (1889) (holding that the master’s “findings, like those of an independent tribunal, are to be taken as presumptively correct,” subject to revision only “when there has been a manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise”); *Newcomb v. Wood*, 97 U.S. 581, 583 (1878) (holding that the defendant was not entitled to de novo review of the referees’ report in the district court because the parties’ “agreement to submit the controversy to referees” indicated “clearly that they intended the [referees’] award should be final and conclusive”).

appellate-like review of the non-Article III bankruptcy court's report). Indeed, in the latter case (on which Roberts would insist with his view that the former is unconstitutional), the Article III judge need not have any involvement at all prior to entry of judgment, as the Court in *Heckers v. Fowler* approved a judgment entered under an order of reference that expressly provided "that on filing the report of the said referee with the clerk of the court, judgment be entered in conformity therewith the same as if said cause had been heard before the court."⁷⁵

Drawing such an extremely fine line, supposedly for the sake of protecting the institutional integrity of the Article III courts, seems a bit silly and, indeed, might well permit *greater* encroachments than a practical functional evaluation of the consent adjudication system at issue. A majority of the Court in *Wellness*, therefore, was unwilling to extend *Stern*'s formal prohibition to consent adjudications. Justice Alito, in particular (who joined the *Stern* majority opinion—a case where the defendant *objected* to final judgment from the non-Article III bankruptcy judge) specifically mentioned this particular implication of extending formalism to consent adjudications in his *Wellness* concurrence, using the non-Article III consent-adjudication example of arbitral awards:

No one believes that an arbitrator exercises "[t]he judicial Power of the United States," Art. III, § 1, in an ordinary, run-of-the mill arbitration. And whatever differences there may be between an arbitrator's "decision" and a bankruptcy court's "judgment," those differences would seem to fall within the Court's previous rejection [in *Schor*] of "formalistic and unbending rules."⁷⁶

The majority's response to Chief Justice Roberts' proposed formalism, therefore, was that formalism is *not* the appropriate mode of constitutional analysis when litigants have consented to the non-Article III adjudication at issue: "[W]e do not rely on [defendant] Sharif's consent to 'cur[e]' a violation of Article III. His consent shows, in part, why no such violation has occurred."⁷⁷

⁷⁵ 69 U.S. (2 Wall.) 123, 127 (1864).

⁷⁶ *Wellness*, 135 S. Ct. at 1949 (Alito, J., concurring in part and concurring in the judgment).

⁷⁷ *Id.* at 1945 n.10 (Sotomayor, J., for the Court).

b. Consent Changes the Constitutional Analysis

Consent, then, seems to be the determinative circumstance justifying (for a majority of the Court) a functional analysis of the propriety of the non-Article III consent adjudication scheme at issue. As the Court stated in *Peretz*, “consent significantly changes the constitutional analysis”⁷⁸ and effectively functions as a “switching device” that “channels the rest of the analysis.”⁷⁹ Thus, the *Wellness* Court concluded that if the parties *have* effectively consented to the non-Article III adjudication at issue, then the constitutionality of that particular kind of consent adjudication is determined using a functional analysis of whether it does, as a practical matter, pose a realistic threat to the structural values embedded in Article III, § 1:

The question here, then, is whether allowing bankruptcy courts to decide *Stern* claims by consent would “impermissibly threate[n] the institutional integrity of the Judicial Branch.” And that question must be decided not by “formalistic and unbending rules,” but “with an eye to the practical effect that the” practice “will have on the constitutionally assigned role of the federal judiciary.” “[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”⁸⁰

And the Court’s practical, functional assessment of Judicial Code § 157(c)(2) led it to conclude that consent adjudications by non-Article III bankruptcy judges do *not* pose any realistic threat to the structural soundness of the Article III judiciary.

C. Consent Adjudications by Bankruptcy Courts Do Not Impermissibly Threaten the Institutional Integrity of the Judicial Branch

Unsurprisingly, the *Wellness* Court upheld the constitutionality of Judicial Code § 157(c)(2). Two overarching structural considerations point to that result. First, “as a practical matter, structural separation-of-powers concerns . . . do not pose any significant threat to the independence and impartiality of non-Article III bankruptcy judges, as the system is currently structured.”⁸¹ Second, “there is no indication that Congress gave bankruptcy

⁷⁸ *Peretz v. U.S.*, 501 U.S. 923, 932 (1991), quoted in *Wellness*, 135 S. Ct. at 1943.

⁷⁹ LARRY YACKLE, *FEDERAL COURTS: THE CURRENT QUESTIONS* (forthcoming Dec. 2016) (noting that “[b]y this account, personal consent should function as a switching device” and citing the American College of Bankruptcy amicus brief in *Arkison* discussed *supra* note 33).

⁸⁰ *Wellness*, 135 S. Ct. at 1944 (citations omitted).

⁸¹ Brubaker, *A “Summary” Theory*, *supra* note 2, at 187.

courts the ability to decide *Stern*[-like non-core] claims [with litigant consent] in an effort to aggrandize itself or humble the Judiciary.”⁸²

1. *The Article III Courts’ Control of Bankruptcy Judges’ Consent Adjudications*

In its functional analysis of the constitutionality of Judicial Code § 157(c)(2), the *Wellness* Court indicated that the principal consideration is the level of control the Article III judiciary exercises over the consent adjudications at issue. Such a system of non-Article III consent adjudications “does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.”⁸³

Bankruptcy judges’ adjudicatory role in non-core proceedings was modeled after that of the non-Article III magistrate judges in civil suits in the federal district courts. Accordingly, the consent provision of § 157(c)(2) was also modeled after the consent provision of the Federal Magistrate Act of 1979.⁸⁴ And the *Wellness* Court concluded that Article III judges’ control over consent adjudications by bankruptcy judges is sufficiently robust “that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern*[-like non-core] claims does not usurp the constitutional prerogatives of Article III courts.”⁸⁵

Bankruptcy judges, like magistrate judges, “are appointed and subject to removal by Article III judges,” *Peretz*, 501 U.S., at 937; see 28 U.S.C. §§ 152(a)(1), (e). They “serve as judicial officers of the United States district court,” § 151, and collectively “constitute a unit of the district court” for that district, § 152(a)(1). Just as “[t]he ‘ultimate decision’ whether to invoke [a] magistrate [judge]’s assistance is made by the district court,” *Peretz*, 501 U.S., at 937, bankruptcy courts hear matters solely on a district court’s reference, § 157(a), which the district court may withdraw *sua sponte* or at the request of a party, § 157(d). . . . As in *Peretz*, “[b]ecause ‘the entire process takes place under the district court’s total control and jurisdiction,’ there is no danger that use of the [bankruptcy court]

⁸² *Wellness*, 135 S. Ct. at 1945.

⁸³ *Id.* at 1944; see also *id.* at 1946 (“So long as those [non-Article III] judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.”).

⁸⁴ That statute provides that a non-Article III magistrate judge, “[u]pon consent of the parties . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case,” subject to appeal “in the same manner as an appeal from any other judgment of a district court.” 28 U.S.C. § 636(c)(1) & (3) (2012).

⁸⁵ *Wellness*, 135 S. Ct. at 1944–45.

involves a ‘congressional attempt[t] “to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating” constitutional courts.’” 501 U.S., at 937 (citation omitted).⁸⁶

The holding of *Wellness*, therefore, not only upholds the constitutionality of Judicial Code § 157(c)(2), its rationale leaves little to no doubt that the consent provision of the Federal Magistrate Act, Judicial Code § 636(c), is also constitutional. Indeed, the Court specifically noted that “the Courts of Appeals have unanimously upheld the constitutionality of § 636(c)” and that those decisions are “[c]onsistent with [the Court’s] precedents.”⁸⁷

2. Bankruptcy Judges’ Authority to Render Final and Proposed Judgments Without Litigant Consent

Also material to the Court’s functional analysis of Judicial Code § 157(c)(2) was the apparent agreement by a majority of the Court (explored in Part II of this article) that, with the exception of *Stern* claims, bankruptcy judges’ authority to render final judgment in “core” bankruptcy proceedings⁸⁸ is indeed constitutionally valid, even *without* litigant consent. Given that, it was *only* with respect to *Stern*-like non-core “related to” claims⁸⁹ that the validity of litigant consent to final judgment from a bankruptcy judge was even at issue in *Wellness*.

Whatever “potential prejudicial influences on bankruptcy judges’ decisions” may exist, “those potential prejudices (and even speculative hypothetical incursions from other political branches) seem to be just as (if not more) potent in proceedings in which bankruptcy judges can . . . unquestionably render final judgment (such as adjudicating creditors’ claims),

⁸⁶ *Id.* at 1945; accord Brubaker, *Litigant Consent*, *supra* note 7, at 10. Although not expressly mentioned by the Court, it also seems likely that the right to appeal any final judgment entered by a non-Article III bankruptcy or magistrate judge, to an Article III appellate court, is an essential aspect of Article III courts’ control over these non-Article III consent adjudications and thus the constitutionality thereof. See Ralph Brubaker, *Bankruptcy Appeals: Finality and the Appellate Litigation Unit*, 35 BANKR. L. LETTER No. 6, June 2015, at 1, 3 & n.13. In the absence of litigant consent to final judgment by a non-Article III bankruptcy or magistrate judge, sufficient control of these non-Article III judicial officers (under the “adjunct” theory of *Crowell v. Benson*, 285 U.S. 22 (1932)) may well require de novo review in an Article III court. See *supra* note 8. But “to the extent ‘de novo review is required to satisfy Article III concerns, it need not be exercised unless requested by the parties.’” *Peretz v. U.S.*, 501 U.S. 923, 939 (1991) (citation omitted).

⁸⁷ *Wellness*, 135 S. Ct. at 1948 n.12; see also *id.* at 1944 n.9 (noting that *Peretz* expressly opined that § 636(c) is constitutional).

⁸⁸ See 28 U.S.C. § 157(b)(1) (2012).

⁸⁹ See *id.* § 157(c); *supra* notes 7–8 and accompanying text.

as they are in non-core ‘related to’ proceedings.”⁹⁰ As I previously maintained, then, as a practical matter, “litigant consent to final judgment from bankruptcy judges in non-core proceedings, in and of itself, poses a truly inconsequential marginal threat to the structural integrity of the bankruptcy system.”⁹¹ The *Wellness* Court reached a similar conclusion:

[B]ankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts [with consent of the litigants]. Their ability to resolve such matters [with litigant consent] is limited to “a narrow class of [non-core] common law claims as an incident to the [bankruptcy courts’] primary, and unchallenged, adjudicative function [in core proceedings].” “In such circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*.”⁹²

Moreover, the bankruptcy courts’ “primary and unchallenged adjudicative function” (to which their non-core consent adjudications are incident) is not limited to their final-judgment jurisdiction in *core* matters; it also includes their significant role in *non-core* “related to” proceedings, even *without* consent of the litigants, that the Court upheld in *Arkison*.⁹³ Bankruptcy judges can, and routinely do, fully hear (including by bench trial) *Stern*-like non-core “related to” claims and submit proposed judgments thereon (in the form of proposed findings of fact and conclusions of law) to their Article III district courts.⁹⁴ The unanimous *Arkison* Court specifically noted that this statutory process for non-core claims—with *de novo* review by an Article III district court judge before entry of final judgment in the district court—“does not implicate the constitutional defect identified by *Stern*.”⁹⁵ “The option for parties to submit their” non-core “related to” claims for final (rather than merely a proposed) judgment by a bankruptcy judge is also “at most a ‘*de minimis*’ infringement on the prerogative of the federal courts,”⁹⁶ given the Article III courts’ extensive control over such consent adjudications:

Congress could choose to rest the full share of the Judiciary’s labor on the shoulders of Article III judges. But doing so would require a substantial increase in the number of district judgeships.

⁹⁰ Brubaker, *Litigant Consent*, *supra* note 7, at 10.

⁹¹ Brubaker, A “Summary” Theory, *supra* note 2, at 188.

⁹² *Wellness*, 135 S. Ct. at 1945 (citations omitted).

⁹³ *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014).

⁹⁴ *See* 28 U.S.C. § 157(c)(1); *supra* note 8.

⁹⁵ *Arkison*, 134 S. Ct. at 2170.

⁹⁶ *Wellness*, 135 S. Ct. at 1943 (citation omitted).

Instead, Congress has supplemented the capacity of district courts through the able assistance of bankruptcy judges. So long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.⁹⁷

Indeed, even the *Wellness* dissenters acknowledged that, as the system is currently structured, consent adjudications by bankruptcy judges “seem benign enough,” and “litigants can be trusted to protect their own interests when deciding whether to consent.”⁹⁸ Moreover, if Congress were to change the structure of the bankruptcy court system in deleterious ways, as the dissenters fear is (if not at all probable) at least possible,⁹⁹ that alternative system of non-Article III consent adjudications would not necessarily pass constitutional muster. One would hope that the chief virtue in a flexible functional assessment of consent adjudication structures would be that it is directly responsive to genuine congressional “effort[s] to aggrandize itself or humble the Judiciary.”¹⁰⁰

For example, systematic efforts to “coerce” litigant “consent”¹⁰¹ could both undermine litigants’ personal liberty interests protected by Article III, § 1 and indicate a serious (to the extent of even wholesale) compromise of Article III judges’ institutional role in non-core suits. Final judgment from a non-Article III bankruptcy judge in a non-core suit, in the absence of the litigants’ knowing and voluntary consent to that adjudication, runs afoul of the *Marathon/Stern* formal, categorical rule preserving inviolate litigants’ individual right to final judgment from an Article III judge and, thus, removes the entire premise for a functional structural assessment of the validity of the consent adjudication system. Credible indications of systemic “coercion” of litigant “consent,” therefore, should be subjected to particularly searching scrutiny and might even run afoul of the doctrine of unconstitutional conditions (placed on the litigants’ right to final judgment from an Article III judge).¹⁰²

⁹⁷ *Id.* at 1946. In the absence of litigant consent, that control is even more extensive and is essential to ensuring that the bankruptcy judge is a true “adjunct” to the Article III district court, under the theory of *Crowell v. Benson*, 285 U.S. 22 (1932). *See supra* notes 8 and 86.

⁹⁸ *Wellness*, 135 S. Ct. at 1959 (Roberts, C.J., dissenting).

⁹⁹ *See id.* at 1959–60 (Roberts, C.J., dissenting).

¹⁰⁰ *Id.* at 1945 (Sotomayor, J., for the Court).

¹⁰¹ *See generally* Dodge, *supra* note 64, at 936–48.

¹⁰² The particular example Chief Justice Roberts gave in his parade of horrors potentially following on the heels of *Wellness*—“Congress can find ways to ‘encourage’ consent, say by requiring it as a condition of federal benefits”—would seem to be extremely suspect on this basis. *Wellness*, 135 S. Ct. at 1960 (Roberts, C.J., dissenting); *cf.* Brubaker, *A “Summary” Theory*, *supra* note 2, at 163.

II. THE CONSTITUTIONALITY OF NON-ARTICLE III BANKRUPTCY ADJUDICATIONS—WITH AND WITHOUT LITIGANT CONSENT

While Part I of this article situates the *Wellness* decision within the Supreme Court’s larger jurisprudence of non-Article III adjudications, this Part II reconciles *Wellness* with the Court’s decisions in the particular context of non-Article III bankruptcy adjudications, both with and without litigant consent. The precise holding of *Wellness* only addressed the constitutionality of *consent* adjudications by non-Article III bankruptcy judges. *Wellness*, though, is also instructive with respect to an important issue left unresolved by *Stern*: determining the constitutional basis (if any) for bankruptcy judges to render final judgment *without* litigant consent in those statutory “core” matters that traditionally have been finally adjudicated by non-Article III arbiters.¹⁰³ This Part II, therefore, explores what *Wellness* adds to the search for the constitutional line between (1) those matters in which bankruptcy judges can render final judgment, even without litigant consent, and (2) those matters in which litigants have a constitutional right to final judgment from an Article III judge.

The petitioners in *Wellness* argued forcefully that the suit at issue was *not* one in which the litigants had a constitutional right to final judgment from an Article III judge. Because the *Wellness* consent holding was potentially dispositive, though,¹⁰⁴ Justice Sotomayor’s majority opinion did not address whether the suit at issue was indeed one in which the litigants had a constitutional right to final judgment from an Article III judge. Sotomayor’s majority opinion thus ducked the broader issue of articulating the constitutional theory that validates non-Article III bankruptcy adjudications without litigant consent.¹⁰⁵ The three dissenting justices, though, explicitly addressed that question and concluded that “Article III likely poses no barrier to the Bankruptcy Court’s resolution of *Wellness*’s claim,” even without the

¹⁰³ See generally Brubaker, A “Summary” Theory, *supra* note 2, at 164–67, 180–85; Brubaker, *Bleak House (Part II)*, *supra* note 2, at 9–10, 16–18.

¹⁰⁴ And on remand, the *Wellness* consent holding was dispositive. See *Wellness Int’l Network, Ltd. v. Sharif*, 617 Fed. Appx. 589, 590–91 (7th Cir. 2015) (holding that appellant had forfeited his claim to a constitutional right to final judgment from an Article III judge by failure to timely raise that argument in his appeal).

¹⁰⁵ “Because the Court concludes that the Bankruptcy Court could validly enter judgment on *Wellness*’ claim with the parties’ consent, this opinion does not address, and expresses no view on, *Wellness*’ alternative contention that the Seventh Circuit erred in concluding the claim [at issue] was a *Stern*[-like non-core] claim.” *Wellness*, 135 S. Ct. at 1942 n.7.

litigants' consent, because it "falls within the narrow historical exception that permits a non-Article III adjudicator in certain bankruptcy proceedings."¹⁰⁶

Consequently, it now seems clear that a majority of the Court believes that the bulk of bankruptcy judges' core jurisdiction—authorizing bankruptcy judges to enter final judgment without litigant consent¹⁰⁷—is indeed constitutionally valid. Moreover, the views of the *Wellness* dissenters, as well as the *Wellness* decision itself (regarding consent adjudications), are fully consistent with the Court's cumulative jurisprudence of non-Article III bankruptcy adjudications, which seems to have constitutionalized the historical distinction (imported from English bankruptcy practice prevailing at the time of the Founding) between summary bankruptcy matters and plenary suits at law or in equity.

As regards the constitutionality of non-Article III bankruptcy adjudications without litigant consent, the Court has been cryptic and cagey—purposefully avoiding any clear, definitive statement confirming the constitutional validity of (and basis for) non-Article III bankruptcy adjudications.¹⁰⁸ Nonetheless, there is considerable evidence that the entire series of constitutional decisions from *Marathon*¹⁰⁹ to *Granfinanciera*¹¹⁰ to *Stern*¹¹¹ to *Wellness* has simply confirmed the constitutional significance of the longstanding, fundamental, historical distinction between (i) summary matters of estate and case administration, appropriate for final adjudication by a non-Article III arbiter, as distinguished from (ii) plenary suits by the bankruptcy estate's representative to recover money or property from an adverse claimant, in which individual litigants have a constitutional right to final judgment from an Article III judge. And with good reason. The backdrop against which the Supreme Court decided all of those modern constitutional decisions was an extensive jurisprudence, that the Court itself expressly constructed within the framework of the historical summary-plenary distinction, precisely for the purpose of strictly limiting the adjudicatory powers of non-Article III bankruptcy arbiters to traditional summary matters.¹¹² Indeed, even in the face of evident congressional authorization for non-Article III bankruptcy referees to finally

¹⁰⁶ *Id.* at 1952, 1954 (Roberts, C.J., dissenting).

¹⁰⁷ *See* 28 U.S.C. § 157(b)(1) (2012).

¹⁰⁸ *See infra* Part II.A.1.

¹⁰⁹ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

¹¹⁰ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

¹¹¹ *Stern v. Marshall*, 546 U.S. 462 (2011).

¹¹² *See infra* Part II.A.2–B.

adjudicate plenary suits under the Bankruptcy Act of 1898, the Supreme Court held in *Weidhorn v. Levy*¹¹³ that it nonetheless would be inappropriate for a non-Article III judicial officer to entertain a plenary suit.

Thus, it was the Supreme Court (and *not* Congress) that strictly limited “the authority and jurisdiction of the [non-Article III] referee [to] the ordinary [summary] administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof.”¹¹⁴ The Court itself fully acknowledged that “to what extent jurisdiction conferred . . . shall be exercised by summary proceedings” before a non-Article III referee, “and to what extent by plenary suit” in an Article III court, was “(subject to the constitutional guaranties)” “determined by decisions of this court.”¹¹⁵ And that summary-plenary jurisprudence contains a striking counterpart and precursor¹¹⁶ to even the Court’s most recent constitutional decision in *Wellness*.

A. *In Search of the Constitutional Validity of Non-Article III Bankruptcy Adjudications Without Litigant Consent*

On two occasions (in *Marathon*¹¹⁷ and *Stern*¹¹⁸), the Supreme Court has squarely held that litigants have a constitutional right to final judgment from an Article III judge in particular bankruptcy proceedings. On a third occasion (in *Granfinanciera*¹¹⁹), reasoning critical to the Court’s holding indicated that the same is true in a trustee’s fraudulent conveyance suit, and the Court has since (particularly in *Stern*) treated that case as, at least in part, an Article III decision.¹²⁰ In each case, the Court concluded that the claim at issue fell within the oft-repeated prohibition (from *Murray’s Lessee*¹²¹) that Congress cannot “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”¹²² Thus, the statutes giving non-Article III bankruptcy judges jurisdiction to finally

¹¹³ 253 U.S. 268 (1920), discussed *infra* Part II.A.2.

¹¹⁴ *Id.* at 273.

¹¹⁵ *Taubel-Scott-Kitzmilller Co. v. Fox*, 264 U.S. 426, 431 & n.8 (1924).

¹¹⁶ *See MacDonald v. Plymouth Cty. Tr. Co.*, 286 U.S. 263 (1932), discussed *infra* Part II.B.1.

¹¹⁷ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

¹¹⁸ *Stern v. Marshall*, 564 U.S. 462 (2011).

¹¹⁹ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

¹²⁰ *See generally* Brubaker, A “Summary” Theory, *supra* note 2, at 150–51.

¹²¹ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

¹²² *Id.* at 284; *see Stern*, 564 U.S. at 484; *Granfinanciera*, 492 U.S. at 52–54; *Marathon*, 458 U.S. at 68–71 (Brennan, J., plurality opinion); *id.* at 90–91 (Rehnquist, J., concurring). That quotation from *Murray’s Lessee* is a prominent hallmark of the formal, categorical approach to defining the right to final judgment from an Article III judge. *See supra* Part I.B.

adjudicate the claims at issue were declared unconstitutional in both *Marathon* and *Stern*, and the clear implication of *Granfinanciera* was that “Congress could not constitutionally assign resolution of the fraudulent conveyance action [at issue] to a non-Article III court.”¹²³

There is a conspicuous asymmetry, though, in the Court’s decisions regarding the constitutionality of non-Article III bankruptcy adjudications without litigant consent. While the Court has now struck down as unconstitutional certain non-Article III bankruptcy adjudications without consent of the litigants, the Court has *never upheld* as constitutionally valid, in the face of a clear constitutional challenge thereto, a final-judgment non-Article III bankruptcy adjudication without consent of the litigants.¹²⁴ Moreover, a majority of the Court has *never* agreed on a constitutional theory that would validate final-judgment adjudications by non-Article III bankruptcy judges without consent of the litigants. Indeed, the coy opinion structure in the *Stern v. Marshall* decision raised the possibility that a majority of the Court might ultimately conclude that the entirety of bankruptcy judges’ statutory “core” jurisdiction—to render final judgment without litigant consent¹²⁵—is unconstitutional.¹²⁶

With the *Wellness* decision, a majority of the Justices—the *Stern* dissenters (Breyer, Ginsburg, Sotomayor, and Kagan) and the *Wellness* dissenters (Roberts, Scalia, and Thomas)—have now indicated their belief that the bulk of bankruptcy judges’ core jurisdiction is indeed constitutionally valid. However, no single constitutional explanation therefor has clearly garnered the explicit approval of a majority of the Court.

¹²³ *Stern*, 564 U.S. at 492 n.7; see also *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2169 n.3 (2014) (stating “*Granfinanciera* held that a fraudulent conveyance claim under Title 11 is not a matter of ‘public right’ for purposes of Article III and that the defendant to such a claim is entitled to a jury trial under the Seventh Amendment” (emphasis added and citations omitted)); *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1953 (2015) (Roberts, C.J., dissenting) (noting that “this Court has implied” in *Granfinanciera* that a trustee’s fraudulent conveyance suit “must be adjudicated by an Article III court”). See generally Brubaker, A “Summary” Theory, *supra* note 2, at 182–83.

¹²⁴ Of course, *Wellness* held that it is constitutionally permissible for bankruptcy judges to finally adjudicate even a *Marathon*- or *Stern*-like non-core claim *with consent of the litigants*. Moreover, in *Arkison* the Court specifically noted that bankruptcy judges’ more limited involvement in non-core claims even *without consent of the litigants*—heard by a non-Article III bankruptcy judge who submits proposed findings and conclusions for de novo review by an Article III district court judge before entry of final judgment in the district court—“does not implicate the constitutional defect identified by *Stern*.” *Arkison*, 134 S. Ct. at 2170; see 28 U.S.C. § 157(c)(1) (2012); *supra* note 8.

¹²⁵ See 28 U.S.C. § 157(b)(1).

¹²⁶ See generally Brubaker, A “Summary” Theory, *supra* note 2, at 174–76.

That constitutional uncertainty is more than a mere academic curiosity because the core-jurisdiction statute was overtly designed to give non-Article III bankruptcy judges as much final-judgment jurisdiction as is constitutionally permissible (but no more).¹²⁷ And after the Supreme Court’s decisions in *Stern* and *Arkison*, it is now clear that the determinative inquiry in deciding whether a particular proceeding is core or non-core is (with only one exception) entirely a constitutional one.¹²⁸ Hence, a federal bankruptcy proceeding¹²⁹ is a “core” proceeding, in which a bankruptcy judge can enter final judgment without litigant consent, if (and only if) that is *constitutionally* permissible under Article III (even if that proceeding is *not* one that the statute itself explicitly designates as “core”).¹³⁰ Conversely, if the proceeding is one in which the parties have a *constitutional* right to final judgment from an Article III judge (even if that proceeding is one that the statute itself expressly denominates as “core”), then the bankruptcy court should “simply treat the claims as non-core.”¹³¹

Given that the core-jurisdiction statute codifies constitutional limits, then, the lingering constitutional ambiguity will continue to confound attempts to discern the line between (1) those matters in which bankruptcy judges can enter final judgment without litigant consent, and (2) those matters in which they cannot because the litigants have a constitutional right to final judgment from an Article III judge. *Both* of the leading theories for why non-Article III bankruptcy adjudications are constitutionally permissible, though, are grounded in the historical distinction between (i) summary matters of estate and case administration, and (ii) plenary suits against adverse claimants. Moreover, the Supreme Court itself invoked the historical summary-plenary

¹²⁷ See generally *id.* at 135–37; Brubaker, *Bleak House (Part I)*, *supra* note 6, at 9–10.

¹²⁸ See *supra* notes 5 & 8 and accompanying text. The only claims for which constitutional principles are *not* determinative are otherwise-core “personal injury tort and wrongful death claims against the estate,” which the statute explicitly provides are *not* core proceedings. 28 U.S.C. § 157(b)(2)(B); see also *id.* § 157(b)(5) (mandating trial of “personal injury tort and wrongful death claims” in a federal district court); *id.* § 1411(a) (preserving “any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim”).

¹²⁹ I.e., one within federal subject-matter jurisdiction under 28 U.S.C. § 1334(b).

¹³⁰ The non-exclusive nature of the list of statutorily specified “core” proceedings in § 157(b)(2), in conjunction with the so-called catch-all categories in § 157(b)(2)(A) & (O) and the extremely vague statutory specification in § 157(b)(1) of core proceedings as including all those that “arise in” a bankruptcy case, are all sufficiently capacious to give bankruptcy judges as much core jurisdiction as is constitutionally permissible. See 28 U.S.C. § 157(b)(1)–(2); *id.* § 157(b)(2)(A) & (O). See generally Brubaker, A “Summary” Theory, *supra* note 2, at 136–41, 145–46; Brubaker, *Bleak House (Part I)*, *supra* note 6, at 9–12, 13–14.

¹³¹ Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014); see 28 U.S.C. § 157(c); *supra* notes 5 & 8 and accompanying text.

divide in framing its extensive jurisprudence limiting (to summary matters) the adjudicative authority of non-Article III bankruptcy referees,¹³² authorized by and appointed under the longstanding Bankruptcy Act of 1898¹³³ (which remained in effect until superseded by the current Bankruptcy Code, enacted in 1978). Unsurprisingly, therefore, that summary-plenary jurisprudence has served as a presumptive guidepost for determining the constitutionality of non-Article III bankruptcy adjudications,¹³⁴ and *all* of the Court's decisions regarding the constitutionality of non-Article III bankruptcy adjudications (including *Wellness*) are consistent with the proposition that the Court is simply constitutionalizing its summary-plenary jurisprudence.

1. The “Public Rights” Theory

Supreme Court jurisprudence regarding non-Article III adjudications recognizes a category of so-called “public rights” disputes that may be finally adjudicated by non-Article III tribunals, sometimes referred to as a “public rights” *exception* to Article III. As Justice Thomas pointed out in his *Wellness* dissent, though, “[t]he distinction between disputes involving ‘public rights’ and those involving ‘private rights’ is longstanding, but the contours of the ‘public rights’ doctrine have been the source of much confusion and controversy,” and “[o]ver time, the line between public and private rights has blurred.”¹³⁵ Likewise, the validity and scope of a “public rights” theory in the context of bankruptcy adjudications is also subject to considerable uncertainty.¹³⁶

Justice Brennan's opinion for a four-Justice plurality in *Marathon*, while noting “that a matter of public rights must at a minimum arise ‘between the government and others,’” nonetheless also suggested that “the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . may well be a ‘public right.’”¹³⁷ In *Granfinanciera*, however, Justice

¹³² See Brubaker, A “Summary” Theory, *supra* note 2, at 129–30; Brubaker, *Litigant Consent*, *supra* note 7, at 7; Brubaker, *Bleak House (Part I)*, *supra* note 6, at 7.

¹³³ Pub. L. No. 55-171, ch. 541, 30 Stat. 544 (amended variously 1903–1976 & repealed 1978) [hereinafter 1898 Act], reprinted in COLLIER ON BANKRUPTCY app. A, pt. 3(a) (Alan N. Resnick & Henry J. Sommers eds., 16th ed. 2016) [hereinafter COLLIER (16th ed.)].

¹³⁴ See Brubaker, A “Summary” Theory, *supra* note 2, at 150–57.

¹³⁵ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1964–65, 1966 (2015) (Thomas, J., dissenting).

¹³⁶ See generally Brubaker, A “Summary” Theory, *supra* note 2, at 164–67, 180–85.

¹³⁷ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69, 71 (1982) (Brennan, J., plurality opinion) (citation omitted); see also *id.* at 91 (Rehnquist, J., concurring) (acknowledging the plurality's

Brennan walked back that earlier flirtation with a “public rights” explanation for bankruptcy adjudications. Writing for a five-Justice majority, Brennan completely disavowed his earlier suggestion with the turnabout that “[w]e *do not suggest* that the restructuring of debtor-creditor relations is in fact a public right.”¹³⁸ A sixth Justice went even further. Justice Scalia’s concurrence flatly rejected the applicability of the “public rights” doctrine to bankruptcy adjudications because of his “view [that] a matter of ‘public rights’ . . . must at a minimum arise ‘between the government and others.’”¹³⁹

In *Stern v. Marshall*,¹⁴⁰ a majority of the Court continued to expressly refuse to adopt any version of a “public rights” justification for non-Article III bankruptcy adjudications. Justice Scalia reiterated his view that “public rights” matters are limited to disputes between private citizens and the Government and, thus, cannot have any applicability to bankruptcy adjudications.¹⁴¹ And Chief Justice Roberts’ majority opinion repeated the *Granfinanciera* disclaimer of a “public rights” account.¹⁴² The *Stern* majority, thus, chose to “follow the same approach” as the *Granfinanciera* Court (as well as that of Justice Rehnquist in his two-Justice *Marathon* concurrence¹⁴³), in that “even if one accepts this thesis” that the restructuring of debtor-creditor relations is a public right, the chapter 11 debtor’s state-law tortious interference claim at issue “does not fall within any of the varied formulations of the public rights exception in this Court’s cases” “any more than” did the chapter 11 debtor’s damages claim “under state common law between two private parties” in *Marathon*.¹⁴⁴

A majority of the Court, therefore, has *never* embraced the proposition that non-Article III bankruptcy adjudications are “public rights” adjudications. A majority of the Court, however, *has* expressly and repeatedly *questioned* whether the “public rights” doctrine has any purchase at all in the bankruptcy

suggestion that some “powers granted under th[e] 1978 Bankruptcy Reform] Act might be sustained under the ‘public rights’ doctrine”).

¹³⁸ *Granfinanciera*, S.A. v. Nordberg, 492 U.S. 33, 56 n.11 (1989) (emphasis added).

¹³⁹ *Id.* at 65 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

¹⁴⁰ 564 U.S. 462 (2011).

¹⁴¹ *Id.* at 503 (Scalia, J., concurring).

¹⁴² “We noted that we did not mean to ‘suggest that the restructuring of debtor-creditor relations is in fact a public right.’” *Id.* at 492 n.7 (Roberts, C.J., for the Court) (quoting *Granfinanciera*, 492 U.S. at 56 n.11).

¹⁴³ “To whatever extent different powers granted under th[e] 1978 Bankruptcy Reform] Act might be sustained under the ‘public rights’ doctrine . . . I am satisfied that the adjudication of [chapter 11 debtor] Northern’s [breach of contract] lawsuit cannot be so sustained.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

¹⁴⁴ *Stern*, 564 U.S. at 487, 492 n.7, 493.

context. Moreover, any potential public-rights explanation for non-Article III bankruptcy adjudications must take into account two important considerations, extrapolated from the analysis set forth in Part I.B: (1) the apparent commitment of a majority of the Court over a long run of decisions (*Marathon*, *Granfinanciera*, and *Stern*) to formalism as the appropriate means for explicating the scope of individual litigants' constitutional right to final judgment from an Article III judge "in any matter which, from its nature, is the subject of a suit at the common law, or in equity,"¹⁴⁵ and thus, correlatively, (2) that specification of the matters in which non-Article III bankruptcy judges can render final judgment *without litigant consent* likewise must be defined in terms of formal, categorical rules.

To the extent, then, that a more capacious conception of the "public rights" doctrine (i.e., in disputes *not* involving the Government) is linked to a pragmatic, functional balancing methodology for evaluating the constitutionality of non-Article III adjudications *without litigant consent* (as did the four dissenters in *Stern*),¹⁴⁶ any such rendering of the "public rights" doctrine is inconsistent with the Court's *Marathon*, *Granfinanciera*, and *Stern* decisions.¹⁴⁷ And regardless of who ultimately succeeds the late Justice Scalia on the Court, it seems exceedingly unlikely that the Court would overturn, en masse, *Marathon*, *Granfinanciera*, and *Stern*.

a. A "Public Rights" Exception or Established Historical Practice?

It is extremely difficult to discern, from the Court's decisions, just what it is that makes a matter a "public rights" dispute appropriate for final adjudication by a non-Article III tribunal. The Court first articulated a "public

¹⁴⁵ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); see *supra* Part I.B.

¹⁴⁶ See *Stern*, 564 U.S. at 510–13 (Breyer, J., dissenting). The Court's decisions in *Thomas* and *Schor* (per Brennan's suggestion in *Marathon*) appear to have abandoned the limitation that "public rights" matters must involve the Government as a party. Although both *Thomas* and *Schor* involved litigant consent to the non-Article III adjudications at issue (see *supra* note 55 and accompanying text), those decisions (unlike the majority opinion in *Wellness*) also linked their more expansive version of the "public rights" doctrine to a functional balancing methodology: "In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (citations omitted); see also *CFTC v. Schor*, 478 U.S. 833, 853–54 (1986).

¹⁴⁷ Significantly, the *Wellness* majority opinion (and unlike the decisions in *Thomas* and *Schor* and the *Stern* dissent) made no mention of the "public rights" doctrine in its functional assessment of the validity of non-Article III bankruptcy adjudications *with litigant consent*. See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938–47 (2015); *supra* note 146.

rights” exception to Article III adjudications in the 1855 case of *Murray’s Lessee*, as follows:

[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.¹⁴⁸

One way to understand this famous passage is as acknowledging a certain grey area between those matters inherently judicial in their nature and those of an executive nature. Indeed, as Professor Jaffe pointed out, “an important development in modern legal thinking,” widely accepted by the time of the Founding and that would have informed the Framing generation’s ideas regarding separation of powers, was that “the courts became identified with the enforcement of private right, and administrative agencies with the execution of public policy,” and “[m]uch of the later development of administrative law attempted to reconcile the conflicts developed by this dichotomy and to harmonize them within the frame of a constitutional system built on the rule of law.”¹⁴⁹ Justice Thomas, in his *Wellness* dissent, elaborated as follows:

The Founders carried this idea forward into the Vesting Clauses of our Constitution. Those Clauses were understood to play a role in ensuring that the federal courts alone could act to deprive individuals of private rights because the power to act conclusively against those rights was the core of the judicial power. As one early treatise explained, the judiciary is “that department of the government to whom the protection of the rights of the individual is by the constitution especially confided.” 1 St. George Tucker, *Blackstone’s Commentaries*, App. 357 (1803). If “public rights” were not thought to fall within the core of the judicial power, then that could explain why Congress would be able to perform or authorize non-Article III adjudications of public rights without transgressing Article III’s Vesting Clause.¹⁵⁰

¹⁴⁸ *Murray’s Lessee*, 59 U.S. (18 How.) at 284.

¹⁴⁹ Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 413 (1958).

¹⁵⁰ *Wellness*, 135 S. Ct. at 1965 (Thomas, J., dissenting).

Likewise, Professor Pfander posits that the Framers understood that certain matters “fell outside the judicial power due to the traditional limits on the scope of the powers of the English superior courts of law, equity, and admiralty.”¹⁵¹ With respect to bankruptcy adjudications, the Founding generation’s understanding of the “judicial Power” was obviously shaped by the English “system of adjudication that took place in part outside the superior courts of law, equity, and admiralty,”¹⁵² through what Blackstone characterized as an “extrajudicial method of proceeding” before commissioners appointed by the Lord Chancellor in Equity.¹⁵³ Moreover, the work of these bankruptcy commissioners did, indeed, seem to occupy a grey area between the judicial and the executive.¹⁵⁴

“Bankruptcy commissioners were not judges,” and “parliaments did not endow bankruptcy commissions with the attributes of a court.”¹⁵⁵ Nonetheless, English “bankruptcy acts gave broad powers to bankruptcy commissioners to adjudicate issues that arose in the bankruptcy” administration.¹⁵⁶ Indeed, bankruptcy commissioners “determined almost all of the issues arising in . . . the administration of the [bankrupt’s] estate and the case.”¹⁵⁷ And Professor Pfander is undoubtedly correct that “the dual function of the commissioners in administering the estate and adjudicating certain claims may provide an important key to understanding” the constitutional validity of non-Article III bankruptcy adjudications.¹⁵⁸

As Professor McCoid noted, the characteristic function of English bankruptcy commissioners was both executive and judicial in nature:

¹⁵¹ James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 715 (2004).

¹⁵² *Id.* at 719.

¹⁵³ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *477 (1765).

¹⁵⁴ The Lord Chancellor, who appointed bankruptcy commissioners and exercised supervisory powers over their work, was himself an embodiment of commingled executive and judicial functions. See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 59–63 (2d ed. 1993); GARY L. McDOWELL, EQUITY AND THE CONSTITUTION 24–29, 35 (1982); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 44, at 46–48 (1836); Lynn S. Branham, *Keeping the “Wolf Out of the Fold”: Separation of Powers and Congressional Termination of Equitable Relief*, 26 J. LEGIS. 185, 211 (2000); William Lindsay Carne, *A Sketch of the History of the High Court of Chancery from its Origin to the Chancellorship of Wolsey*, 15 GEO. L.J. 426, 426–27, 434–37, 460–61 (1927).

¹⁵⁵ W.J. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period*, 69 TRANSACTIONS AM. PHIL. SOC’Y. No. 3, at 1, 10 (1979).

¹⁵⁶ Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 590 (1998).

¹⁵⁷ *Id.* at 576.

¹⁵⁸ Pfander, *supra* note 151, at 720.

Necessarily making determinations of law and fact as they carried out these duties, the commissioners clearly functioned in a judicial fashion, and colloquially, at least, they could be labeled a court. In many respects, however, their work perhaps more nearly resembled the activities of our present-day administrative agencies.¹⁵⁹

Indeed, under English law, colonial statutes, and the first federal bankruptcy statute (the Bankruptcy Act of 1800), commissioners had wide-ranging powers to administer a debtor's estate, including even the power to directly seize the body and effects of the debtor and break into any premises for that purpose.¹⁶⁰

As Professor Pfander points out, then, “the early refusal of Congress to place the administration of bankruptcy estates entirely in the hands of Article III judges may reflect a recognition . . . that the administrative work of commissioners did not fit comfortably within the definition of the judicial power of the United States”¹⁶¹ because, in the words of Mr. Justice Curtis in *Murray's Lessee*, Congress cannot “bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.”¹⁶² Correlatively, Professor Plank correctly notes that the 1800 Act's “grant of original [adjudicatory] jurisdiction to bankruptcy commissioners and *not* to Article III judges suggests that the early Congresses did not consider such original bankruptcy jurisdiction to fall within the ‘judicial Power.’”¹⁶³ In other words, and per Justice Curtis in *Murray's Lessee*, the traditional adjudicatory powers of bankruptcy commissioners fall into the grey area between executive and judicial functions and, thus, “are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”¹⁶⁴

¹⁵⁹ John C. McCoid, II, *Right to Jury Trial in Bankruptcy*: *Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 15, 30 (1991).

¹⁶⁰ See generally *id.* at 28–37; Plank, *supra* note 156, at 578–80, 584–87, 599, 603–06, 608–09.

¹⁶¹ Pfander, *supra* note 151, at 720.

¹⁶² *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

¹⁶³ Plank, *supra* note 156, at 609 (emphasis added).

¹⁶⁴ *Murray's Lessee*, 59 U.S. (18 How.) at 284. Indeed, in the first federal bankruptcy statute, the 1800 Act, Congress chose *not* to bring the traditional work of bankruptcy commissioners within the original jurisdiction of the federal courts. In the second federal bankruptcy statute, however, the Bankruptcy Act of 1841, Congress chose to give original bankruptcy jurisdiction to the federal district courts, rather than commissioners, “in all matters and proceedings in bankruptcy . . . said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity.” Ch. 9, § 6, 5 Stat. 440, 445 (1841) (repealed 1843), *reprinted in* 10 COLLIER (14th ed.), *supra* note 72, at 1738, 1742 [hereinafter 1841 Act]. See generally Brubaker, A “Summary” Theory, *supra* note 2, at 126 & n.25.

This account, of course, would place the traditional adjudicatory powers of bankruptcy commissioners squarely within Justice Thomas’s conception of a “public rights” exception to Article III.¹⁶⁵ Such a depiction of the “public rights” doctrine, moreover, is very similar to (and, indeed, likely indistinguishable from) Justice Scalia’s conviction that exceptions to Article III must be grounded in established historical practice. As he stated in his *Stern v. Marshall* concurrence:

Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, 285 U.S. 22 (1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason—and not because of some intuitive balancing of benefits and harms—I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true “public rights” cases. Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate; the subject has not been briefed so I state no position on the matter. But [Anna Nicole Smith] points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.¹⁶⁶

In *Wellness*, Chief Justice Roberts and Justices Scalia and Thomas all embraced just such a historical-practice justification for the validity of final adjudications by non-Article III bankruptcy judges, even without litigant consent. Roberts’ dissenting opinion, in a Part joined by both Scalia and Thomas, set forth a “narrow historical exception that permits a non-Article III adjudicator in certain bankruptcy proceedings”¹⁶⁷ as follows:

Our precedents have also recognized an exception to the requirements of Article III for certain bankruptcy proceedings. When the Framers gathered to draft the Constitution, English statutes had long empowered nonjudicial bankruptcy “commissioners” to collect a debtor’s property, resolve claims by creditors, order the distribution of assets in the estate, and ultimately discharge the debts. See 2 W. Blackstone, Commentaries *471–488. This historical practice, combined with Congress’s constitutional authority to enact bankruptcy laws, confirms that Congress may assign to non-Article

¹⁶⁵ Though Justice Thomas himself was hesitant to draw that conclusion, opining instead that “[b]ankruptcy courts . . . are not an easy fit in the ‘public rights’ category.” *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1967 (2015) (Thomas, J., dissenting).

¹⁶⁶ 564 U.S. 462, 504 (2011) (Scalia, J., concurring) (citations omitted).

¹⁶⁷ *Wellness*, 135 S. Ct. at 1954 (Roberts, C.J., dissenting).

III courts adjudications involving “the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power.” *Northern Pipeline*, 458 U.S., at 71 (plurality opinion).¹⁶⁸

Indeed, as I have argued at length before, the best reading of the Court’s cumulative jurisprudence of non-Article III bankruptcy adjudications is that the Court has constitutionalized the traditional distinction between “summary” matters of estate and case administration, as distinguished from “plenary” suits at law or in equity by the estate’s representative to recover money or property from a so-called “adverse claimant.”¹⁶⁹ Adjudication of historically summary matters by non-Article III officials has a long, established historical pedigree, rooted in the commissioner adjudications of English bankruptcy practice, which were also employed by Congress in the very first federal bankruptcy statute in 1800. Likewise, the Supreme Court itself approved of, but strictly limited, non-Article III bankruptcy referees (authorized and appointed under the longstanding Bankruptcy Act of 1898) to adjudication of summary matters.¹⁷⁰

That a “public rights” account of non-Article III bankruptcy adjudications would ultimately be grounded in established historical practice should not be terribly surprising. In fact, as astutely noted by Justice White in his *Marathon* dissent, historically summary matters seem to be exactly what Justice Brennan had in mind with his “public rights” characterization of “the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power.”¹⁷¹ As Justice White put it:

¹⁶⁸ *Id.* at 1951 (Roberts, C.J., dissenting). Justice Thomas, in his separate dissent, described the “bankruptcy exception” to Article III in similar terms:

Article I’s Bankruptcy Clause serves to carve cases and controversies traditionally subject to resolution by bankruptcy commissioners out of Article III, giving Congress the discretion, within those historical boundaries, to provide for resolution outside of Article III courts.

Id. at 1967–68 (Thomas, J., dissenting).

¹⁶⁹ See generally Brubaker, A “Summary” Theory, *supra* note 2, at 150–57; Brubaker, *Bleak House (Part II)*, *supra* note 2, at 3–6; Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 776–77 & n.111 (2000) [hereinafter Brubaker, *A General Theory*].

¹⁷⁰ See Brubaker, A “Summary” Theory, *supra* note 2, at 122–30; *infra* Part II.A.2–B.

¹⁷¹ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (Brennan, J., plurality opinion). That was even clearer in Brennan’s majority opinion in *Granfinanciera*, in which he directly relied upon the historical summary-plenary divide in concluding that fraudulent conveyance suits by a bankruptcy estate—“quintessentially [plenary] suits at common law”—are *not* “integral to the restructuring of debtor-creditor relations.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56, 58 (1989); see also *id.* at 76–77 (White, J., dissenting) (astutely observing that “the Court determine[d] that an action to recover fraudulently conveyed property is not ‘integrally related’ to the essence of bankruptcy proceedings” because “under federal

I take it that the Court does not condemn as inconsistent with Art. III the assignment of these functions—*i.e.*, those within the summary jurisdiction of the old [non-Art. III referees]—to a non-Art. III judge, since, as the plurality says, they lie at the core of the federal bankruptcy power. They also happen to be functions that have been performed by referees . . . for a very long time and without constitutional objection.¹⁷²

Justice Thomas’s opinion for the unanimous *Arkison* Court likewise opined that Justice Brennan’s “public rights” characterization of the “core of the federal bankruptcy power” was simply “a description of those claims that fell within the scope of the historical” summary bankruptcy jurisdiction.¹⁷³ And Chief Justice Roberts’ depiction of a “bankruptcy exception” to Article III in his *Wellness* dissent, quoted above, also equates Brennan’s “public rights” description of “the core of the federal bankruptcy power” with historically summary matters.¹⁷⁴

Moreover, the outside limit of that historical practice was undoubtedly the basis for the holding in *Marathon*—that it was unconstitutional for Congress to give non-Article III bankruptcy judges final-judgment adjudicatory authority in a traditional plenary suit against an adverse claimant. Indeed, as Justice Rehnquist pointed out in his *Marathon* concurrence, such quintessential plenary suits “are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,”¹⁷⁵ which Congress cannot “withdraw from judicial cognizance.”¹⁷⁶ Justice Brennan’s plurality opinion, likewise, leaned

bankruptcy statutes predating the 1978 Code,” “actions such as this one were solely heard in plenary proceedings in Article III courts”); *id.* at 93 (Blackmun, J., dissenting) (agreeing with Justice White that the Court was employing “a century-old conception of what is and is not central to the bankruptcy process”). See generally Brubaker, “A Summary” Theory, *supra* note 2, at 152–54.

¹⁷² *Marathon*, 458 U.S. at 99 (White, J., dissenting) (internal citation omitted).

¹⁷³ *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2171 & n.7 (2014).

¹⁷⁴ See *supra* note 168 and accompanying text.

¹⁷⁵ *Marathon*, 458 U.S. at 90 (Rehnquist, J., concurring).

¹⁷⁶ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). And the same, of course, was true in both *Granfinanciera* (see *supra* note 171) and in *Stern*: “Like the contract claim in *Northern Pipeline*, the tort claim in *Stern* involved ‘the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,’” and thus, “Congress had no power under the Constitution to assign resolution of such a claim to a judge who lacked the structural protections of Article III.” *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1952 (2015) (Roberts, C.J., dissenting); see also *Stern v. Marshall*, 564 U.S. 462, 513 (2011) (Breyer, J., dissenting) (conceding “that the nature of the claim to be adjudicated argues against” the constitutionality of final adjudicatory power in a non-Article III tribunal, because the claim at issue—“a kind of tort suit—resembles ‘a suit at the common law.’” (quoting *Murray’s Lessee*, 59 U.S. (18 How.) at 284)).

upon “historical consensus” for a “limiting principle”¹⁷⁷ that Congress had contravened with respect to the suit at issue in *Marathon*:

[T]he Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.¹⁷⁸

The *Marathon* plurality, like Justice Rehnquist, however, could “discern no such exceptional grant of power applicable in the [action] before” the Court,¹⁷⁹—an action that had consistently been recognized as requiring a plenary suit in a superior court since well before, at the time of, and for nearly two centuries after the Founding.¹⁸⁰

b. Just What Is a “Public Right,” Really?

Others have proffered “public rights” accounts of a “bankruptcy exception” to Article III that are untethered from the category of traditionally summary matters.¹⁸¹ If one is committed, however, to drawing a formal, categorical line that cordons off “any matter which, from its nature, is the subject of a suit at the common law, or in equity,”¹⁸² in order to ensure that litigants retain a constitutional right to final judgment from an Article III judge in such a matter (and, as discussed in Part I.B of this article, the Court has insisted on drawing such a line), established historical practice has much to commend it.

In the abstract (i.e., untethered from historical context), just what a “public right” is remains a mystery and, thus, has no discernible (much less generalizable) meaning. Even more troubling, though, wherever one might

¹⁷⁷ *Marathon*, 458 U.S. at 73 (Brennan, J., plurality opinion).

¹⁷⁸ *Id.* at 70 (Brennan, J., plurality opinion).

¹⁷⁹ *Id.* at 71 (Brennan, J., plurality opinion).

¹⁸⁰ See generally Brubaker, A “Summary” Theory, *supra* note 2, at 122–32.

¹⁸¹ See, e.g., Brook Gotberg, *Preferences Are Public Rights*, 2013 WIS. L. REV. 1355 (arguing that preference suits should be considered “public rights” adjudications); Jonathan C. Lipson & Jennifer L. Vandermeuse, Stern, *Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161 (arguing that fraudulent conveyance suits should be considered “public rights” adjudications). Historically, however, both preference and fraudulent conveyance actions by the estate’s representative required a plenary suit at law or in equity. See McCoid, *supra* note 159, at 20–27, 30–31. Indeed, the plenary nature of a typical preference or fraudulent conveyance suit received express statutory recognition in the text of the Bankruptcy Act of 1898. See 1898 Act, *supra* note 133, §§ 60b, 67e, 70e(3). See generally 2 COLLIER (14th ed.), *supra* note 72, ¶ 23.15; 3, pt. 2 *id.* ¶ 60.60[1.1]; 4 *id.* ¶ 67.44[1]; 4B *id.* ¶ 70.91[1].

¹⁸² *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

draw such a line in the bankruptcy context (in a way that remains faithful to the Court's existing precedent) is also completely untethered from Article III values of judicial independence and structural separation of powers.

Thus, consider the opposite-extreme examples of matters that virtually all observers acknowledge are and, conversely, are not constitutionally within the final adjudicatory powers of non-Article III bankruptcy judges without consent of the litigants. The paradigmatic examples of the latter are *Marathon*- and *Stern*-like claims by the debtor's bankruptcy estate to recover money or property from a third party, such as a damages action for a *defendant's* alleged prebankruptcy tort or breach of contract. The paradigmatic example of the former is adjudication of an unsecured creditor's claim against a debtor's bankruptcy estate, such as a damages claim for a *debtor's* alleged prebankruptcy tort or breach of contract.¹⁸³ Are structural separation of powers concerns *less* pertinent in the former as compared to the latter? Are judicial independence concerns *less* pertinent in the former as compared to the latter? There is no good reason to think that they are. Indeed, as I have argued before:

The most salient potential prejudicial influences on bankruptcy judges' decisions likely come from the bankruptcy bar. However, those potential prejudices (and even speculative hypothetical incursions from the other political branches) seem to be just as (if not more) potent in proceedings in which bankruptcy judges can . . . unquestionably render final judgment, as they are in [*Marathon*- and *Stern*-like] noncore "related to" proceedings.¹⁸⁴

More nuanced attempts to directly incorporate Article III values into the inquiry,¹⁸⁵ therefore, will not necessarily produce results consistent with the Court's existing precedent. Moreover, they inevitably move away from formal, categorical line-drawing and toward functional balancing, which (as discussed in Part I.B of this article) the Court has rejected in cases not involving litigant consent to the non-Article III adjudication at issue.

The only principled way to draw a formal, categorical line between the latter and the former (and the Supreme Court has been committed to doing so) is using established historical practice. Moreover, the Supreme Court itself has already developed an extensive jurisprudence, explicitly constructed within the

¹⁸³ See *Katchen v. Landy*, 382 U.S. 323, 329–30 (1966). The *Stern* majority treated the *Katchen* case as an Article III decision. See Brubaker, A "Summary" Theory, *supra* note 2, at 155–57, 173.

¹⁸⁴ Brubaker, A "Summary" Theory, *supra* note 2, at 188 (footnote omitted).

¹⁸⁵ See, e.g., Troy McKenzie, *Getting to the Core of Stern v. Marshall: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L.J. 23 (2012).

framework of the historical summary-plenary distinction, precisely for the purpose of strictly limiting the adjudicatory powers of non-Article III bankruptcy arbiters to traditionally summary matters.

2. *The Supreme Court's Summary-Plenary Jurisprudence*

In allocating jurisdictional authority under the earliest federal bankruptcy statutes, both Congress and the Supreme Court invoked the traditional summary-plenary divide,¹⁸⁶ and pursuant thereto:

The procedural divide established under the early American bankruptcy statutes . . . simply adopted the English practice requiring a formal plenary suit in assignee [now trustee or debtor-in-possession] actions to recover money or property from an adverse claimant. As in England, American assignees had to pursue adverse claimants through formal plenary suits commenced in either a federal district or circuit court. All other “bankruptcy proceedings,” however, were conducted by summary processes in the federal district court, and as in England, early Congresses also authorized (non-Article III) bankruptcy commissioners to act as first-instance adjudicators in summary bankruptcy proceedings. For example, in the very first federal bankruptcy statute, the Bankruptcy Act of 1800, bankruptcy commissioners were given powers very similar to those of English bankruptcy commissioners, and similar to the relationship between English commissioners and the Lord Chancellor, decisions by the 1800 Act commissioners were subject to revision only through a petition for review of the commissioners’ determinations filed with the federal district court.¹⁸⁷

In the Bankruptcy Act of 1898, Congress authorized the appointment of bankruptcy referees,¹⁸⁸ who were non-Article III judicial officers analogous to English and 1800 Act bankruptcy commissioners. The 1898 Act authorized the district courts to refer any and all bankruptcy matters to referees,¹⁸⁹ and in matters so referred authorized referees, in an extremely broad and open-ended fashion, to exercise the same “jurisdiction to . . . perform such of the duties as are by this Act conferred on courts of bankruptcy.”¹⁹⁰ Moreover, the Act

¹⁸⁶ See generally Brubaker, A “Summary” Theory, *supra* note 2, at 124–26.

¹⁸⁷ *Id.* at 126 (footnotes omitted).

¹⁸⁸ 1898 Act, *supra* note 133, §§ 33–34.

¹⁸⁹ *Id.* § 22a. After 1938, most bankruptcy cases were automatically referred to referees, as a matter of course. See 2 COLLIER (14th ed.), *supra* note 72, ¶¶ 22.01–22.03.

¹⁹⁰ With only those limited exceptions “herein otherwise provided.” 1898 Act, *supra* note 133, § 38(6). As originally enacted in § 38(4), this provision had slightly different wording, but was to the same effect. See Pub.

defined the term “court” to include both the district court and the referee,¹⁹¹ and required referees to “take the same oath of office as that prescribed for judges of United States courts.”¹⁹² Indeed, in summary proceedings, the Supreme Court treated the referee as the equal of the judge, allowing him to enter final orders reviewable only by appeal and having the same preclusive effects as a district court decision.¹⁹³

By the express terms of the 1898 Act, therefore, Congress authorized a referee—although he was not an Article III judge—to act as the court in a referred case, with “all jurisdiction given the courts of bankruptcy.”¹⁹⁴ In fact, on its face, the 1898 Act authorized non-Article III bankruptcy referees to hear and finally adjudicate even a plenary suit against an adverse claimant that could only be brought in a superior court of law or equity in England in 1789—the epitome of a “matter which, from its nature, is the subject of a suit at the common law, or in equity.”¹⁹⁵ Indeed, several lower courts, including the First Circuit in the case of *In re Weidhorn*, so held.¹⁹⁶ In *Weidhorn v. Levy*,¹⁹⁷ though, the Supreme Court reversed the First Circuit. That decision, therefore, is extremely significant in understanding the nature of the limitation the Court thereby imposed on non-Article III referees’ adjudicatory powers.

a. *The Weidhorn v. Levy Decision*

In *Weidhorn v. Levy*, after the debtor’s bankruptcy case had been referred generally (i.e., without limitation¹⁹⁸) to the bankruptcy referee, the bankruptcy trustee filed a plenary suit before the referee “to avoid two conveyances by the bankrupt to his brother, on the alleged ground that they had been made with

L. No. 55-171, ch. 541, 30 Stat. 544, 555 (1898) (granting referees “jurisdiction to . . . perform such part of the duties . . . as are by this Act conferred on courts of bankruptcy”), reprinted in 2A COLLIER (14th ed.), *supra* note 72, ¶ 38.01, at 1395 n.2.

¹⁹¹ See 1898 Act, *supra* note 133, §§ 1(10), 1(20), 1(26) (defining “court,” “judge,” and “referee”).

¹⁹² *Id.* § 36. The 1898 Act also required that records of proceedings before referees be kept and provided that the records so kept constituted “records of the court.” *Id.* § 42.

¹⁹³ See *Weidhorn v. Levy*, 253 U.S. 268, 271–72 (1920); *Katchen v. Landy*, 382 U.S. 323, 334 (1966); *Page v. Ark. Natural Gas Corp.*, 286 U.S. 269, 270–72 (1932). See generally 2A COLLIER (14th ed.), *supra* note 72, ¶¶ 38.02, 39.01[5], 39.16, 39.28, 39.29.

¹⁹⁴ 2A COLLIER (14th ed.), *supra* note 72, ¶ 38.08[2], at 1415.

¹⁹⁵ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

¹⁹⁶ 253 F. 28, 29–32 (1st Cir. 1917) (summarizing the case law and concluding that there is nothing in the Act to exclude plenary suits from the operation of 1898 Act § 38 giving referees adjudicatory jurisdiction that is co-extensive with that of district court judges).

¹⁹⁷ 253 U.S. 268 (1920).

¹⁹⁸ See generally 2 COLLIER (14th ed.), *supra* note 72, ¶ 22.05.

intent to hinder, delay, or defraud his creditors.”¹⁹⁹ The Supreme Court, employing the classic, well-settled summary-plenary distinction, easily concluded that the matter at issue, from its nature, was the subject of a plenary suit:

[I]f the property [at issue] were in the custody of the bankruptcy court or its officer, any controversy raised . . . setting up a title to or lien upon it might be determined on summary proceedings in the bankruptcy court, and would fall within the jurisdiction of the referee. *White v. Schloerb*, 178 U.S. 542, 546 [1900]; *Mueller v. Nugent*, 184 U.S. 1, 13 [1902].

But in the present instance the controversy related to property not in possession or control of the court or of the bankrupt or any one representing him at the time [the bankruptcy] petition [was] filed, and not in the court’s custody at the time of the controversy, but in the actual possession of the bankrupt’s brother under an adverse claim of ownership based upon conveyances made more than four months before the institution of the proceedings in bankruptcy. In order to set aside these conveyances and subject the property to the administration of the court of bankruptcy a plenary suit was necessary, and such was the nature of the one that was instituted.²⁰⁰

The debtor’s brother, though, “promptly objected to the jurisdiction of the referee” to hear and adjudicate such a plenary suit, but the referee overruled the brother’s “jurisdictional objection, proceeded to hear the merits, and entered a final decree in favor of the trustee.”²⁰¹ The Supreme Court, however, held that a “general reference” of an entire bankruptcy case simply could not authorize the referee to handle a plenary matter.

The *Weidhorn v. Levy* Court could point to no specific provisions in the 1898 Act (because there were none) that precluded reference of a plenary suit to a referee nor that excluded plenary suits from the statutory grant to referees of general adjudicatory jurisdiction co-extensive with that of district court judges. Indeed, precisely the opposite was true; the terms of the 1898 Act itself, on their face, clearly and expressly authorized a referee to adjudicate

¹⁹⁹ *In re Weidhorn*, 253 F. at 29.

²⁰⁰ *Weidhorn v. Levy*, 253 U.S. at 271–72. Historically, the summary-plenary divide not only determined the scope of a non-Article III bankruptcy tribunal’s adjudicatory powers, it also determined the appropriate process to be used (regardless of the forum) in litigating the proceeding at issue. See Brubaker, A “Summary” Theory, *supra* note 2, at 128–29; Ralph Brubaker, *Justice Story, Bankruptcy Injunctions, and the Anti-Injunction Act of 1793*, 92 TEX. L. REV. *SEE ALSO* 67, 76 (2014) [hereinafter Brubaker, *Justice Story and Bankruptcy Injunctions*].

²⁰¹ *Weidhorn v. Levy*, 253 U.S. at 269.

plenary suits in referred cases.²⁰² Nonetheless, the Court concluded that it would be inappropriate for a bankruptcy referee to adjudicate a plenary suit, simply relying upon the familiar, traditional summary-plenary distinction, in and of itself (and invoking no other credible reasoning or authority):

We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration.²⁰³

b. The Supreme Court’s Superintendence of the Common-Law Summary-Plenary Divide

Note, then, that it was *not* the statute, by its terms, that limited referees to adjudication of summary matters; rather, it was the Supreme Court that independently imposed that limitation, in apparent contravention of the express terms of the statute. Indeed, a fair inference is that *Weidhorn v. Levy* is an

²⁰² See *supra* notes 188–196 and accompanying text. Thus, when the *Weidhorn v. Levy* Court stated, in general terms (and without reference to any specific statutory provisions) that “[t]he provisions of the act, as well as the title of his office, indicate that the referee is to exercise powers *not* equal to or co-ordinate with those of the court or judge,” 253 U.S. at 273 (emphasis added), that statement was manifestly (and transparently) untrue; the provisions of the act clearly stated just the opposite.

²⁰³ *Weidhorn v. Levy*, 253 U.S. at 273. The Court’s intimation that use of the term “proceedings” in the Supreme Court’s general order of reference limited the matters that could be referred to a referee—in a manner that excluded plenary suits—is not a sound basis for the holding. See *id.*; General Orders and Forms in Bankruptcy, Gen. Order XII(1), 172 U.S. 653, 657 (1898) (providing that upon general reference of an entire bankruptcy case, “thereafter all the proceedings . . . shall be had before the referee”); 1898 Act, *supra* note 133, § 30 (“All necessary rules, forms, and orders as to the procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.”). As Justice Story had held under the 1841 Act and as the Court would later reaffirm under the 1898 Act, general jurisdictional references to bankruptcy “proceedings” have always subsumed and included plenary suits. See *Ex parte Christy*, 44 U.S. (3 How.) 292, 313 (1845); *Babbitt v. Dutcher*, 216 U.S. 102, 106–08 (1910) (tracing 1841 Act § 6 to 1867 Act § 1 to 1898 Act § 2); *Williams v. Austrian*, 331 U.S. 642, 646–62 (1947). See generally Brubaker, *A General Theory*, *supra* note 169, at 759–77; Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Federal Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261, 264–69 (1999). Indeed, the same remains true to this day. See 28 U.S.C. §§ 1334(b), 157(a) (2012) (pervasively employing the “proceedings” terminology in the bankruptcy jurisdiction grants of both the district courts and the bankruptcy courts). And in the subsequent case of *MacDonald v. Plymouth County Trust Co.*, 236 U.S. 263, 268 (1932), the Court made clear that plenary suits were indeed “proceedings” within the meaning and scope of General Order XII. See *infra* notes 252–256 and accompanying text.

example of implicit constitutional avoidance in action.²⁰⁴ And the Court developed an extensive jurisprudence (with dozens of decisions over the course of multiple generations) fleshing out the category of summary matters appropriate for final adjudication by non-Article III referees.²⁰⁵ Indeed, the last edition of the leading practice treatise under the 1898 Act, in a section dated 1974, states that the Court’s “general principles regarding the summary jurisdiction of the bankruptcy court have been affirmed and reaffirmed in a chain of decisions beginning with *White v. Schloerb* [in 1900] and extending down to the present date.”²⁰⁶

Thus, while the Court would sometimes loosely describe its summary jurisdiction decisions as addressing a “statutory question,”²⁰⁷ that characterization is misleadingly inexact. Indeed, as Justice Brandeis frankly acknowledged in *Taubel-Scott-Kitzmiller Co. v. Fox*,²⁰⁸ in the course of addressing an objection to the summary jurisdiction of a bankruptcy referee:

Congress has, also (subject to the constitutional guaranties), power to determine to what extent jurisdiction conferred . . . shall be exercised by summary proceedings and to what extent by plenary suit. It has not done so in terms. In the absence of congressional definition of the scope of summary proceedings, it has been determined by decisions of this court²⁰⁹

In other words, Congress did have the power (within constitutional limits) to determine what matters were appropriate for adjudication by referees (in summary proceedings) and what matters had to be tried in a federal district

²⁰⁴ A common criticism of constitutional avoidance is that it inevitably “distorts” the meaning of statutes. See, e.g., Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112, 2115–16, 2118–22 (2015); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1577–78 (2000). As Justice Holmes candidly acknowledged, “[w]ords have been strained” in order to avoid declaring a statute unconstitutional, as “I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called upon to perform.” *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1928) (Holmes, J., concurring).

²⁰⁵ See generally 2A COLLIER (14th ed.), *supra* note 72, ¶ 38.09[2]; 2 *id.* ¶¶ 23.02–23.11 (collecting voluminous case law); KENNETH N. KLEE & WHITMAN L. HOLT, *BANKRUPTCY AND THE SUPREME COURT: 1801–2014*, at 148–56 (2015).

²⁰⁶ 2 COLLIER (14th ed.), *supra* note 72, ¶ 23.04[2], at 455–56.

²⁰⁷ See, e.g., *Katchen v. Landy*, 382 U.S. 323, 328 (1966). And I hereby confess that I am guilty of the same offense. See, e.g., Brubaker, *A “Summary” Theory*, *supra* note 2, at 155–57, 186.

²⁰⁸ 264 U.S. 426 (1924).

²⁰⁹ *Id.* at 431 & n.8 (1924); see also *Katchen v. Landy*, 382 U.S. at 328 (“Congress has often left the exact scope of summary proceedings in bankruptcy undefined, and . . . in the absence of congressional definition this is a matter to be determined by decisions of this Court.”).

court (by plenary suit). Congress did *not* do so; therefore, the Supreme Court (within constitutional limits) determined what matters were appropriate for adjudication by referees (in summary proceedings) and what matters had to be tried in a federal district court (by plenary suit).

The Supreme Court, therefore, (and *not* Congress) strictly limited non-Article III referees to adjudication of traditionally summary matters because it obviously considered plenary suits at law or in equity to be beyond the appropriate competence of referees. Moreover, as the Court fully acknowledged, its summary-plenary jurisprudence was necessarily administered with constitutional considerations in mind, and that entire jurisprudence originated in the distinction between a summary bankruptcy matter and a plenary suit at law or in equity as those concepts had developed in England.²¹⁰ Sharply delineating “any matter which, from its nature, is the subject of a suit at the common law, or in equity,” which cannot be “withdraw[n] from judicial cognizance,”²¹¹ pervaded the entire jurisdictional structure under every federal bankruptcy system before 1978.²¹² Indeed, the 1841, 1867, and 1898 Acts all contained a separate jurisdictional grant giving jurisdiction to the old trial-level circuit courts in plenary “suits at law or in equity.”²¹³ And as the Supreme Court itself readily recognized, that “jurisdiction . . . of all suits at law or in equity . . . is the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the Constitution,”²¹⁴ and such an action “could only be enforced by a plenary suit, at law or in equity,” in an Article III court.²¹⁵

“[T]he dichotomy between plenary assignee/trustee suits at law or in equity via an original complaint or bill, as distinguished from so-called summary

²¹⁰ See *Marshall v. Knox*, 83 U.S. (16 Wall.) 551, 554–57 (1872); *Smith v. Mason*, 81 U.S. (14 Wall.) 419, 429–33, 432 n.† (1871) (citing *Ex parte Bacon*, 2 Molloy 441 (Ir. Ch. 1810)); see also GEORGE TAYLOR, *THE BANKRUPT LAW, ACT OF MARCH 2, 1867, WITH NOTES AND REFERENCES TO ENGLISH DECISIONS 61–62* (1867) (citing *Ex parte Bacon*, 2 Molloy 441 (Ir. Ch. 1810)).

²¹¹ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

²¹² See Brubaker, *A “Summary” Theory*, *supra* note 2, at 122–30; Brubaker, *A General Theory*, *supra* note 169, at 755–77; Plank, *supra* note 156, at 606–10.

²¹³ See 1841 Act, *supra* note 164, § 8; Bankruptcy Act of 1867, ch. 176, § 2, 14 Stat. 517, 518 (amended 1874 and repealed 1878), *reprinted in* 10 COLLIER (14th ed.), *supra* note 72, at 1746, 1747; Bankruptcy Act of 1898, Pub. L. No. 55-171, ch. 541, § 23a, 30 Stat. 544, 552 (amended 1926 & 1938 and repealed 1978), *reprinted in* 10 Collier (14th ed.), *supra* note 72, at 1783, 1799 & n.7. For a discussion of these provisions, see Brubaker, *A “Summary” Theory*, *supra* note 2, at 125–26, 127 & n.29; Brubaker, *A General Theory*, *supra* note 169, at 761 & n.54, 763–64 & n.60, 768–72.

²¹⁴ *Morgan v. Thornhill*, 78 U.S. (11 Wall.) 65, 80 (1870).

²¹⁵ *Bardes v. Hawarden Bank*, 178 U.S. 524, 532 (1900).

bankruptcy proceedings in equity on motion or petition” is “one of the most prominent, fundamental, and longstanding jurisdictional and procedural divides with respect to bankruptcy proceedings” in our Anglo-American legal tradition.²¹⁶ Little wonder, then, that the Supreme Court’s summary-plenary jurisprudence—determining when a matter, from its nature, is the subject of a plenary suit at law or in equity that, therefore, requires trial in an Article III court—has been considered to presumptively, if not dispositively, control Article III questions in and ever since the *Marathon* decision. The three *Wellness* dissenters, likewise, relied upon that jurisprudence to determine “whether the claim Wellness submitted to the bankruptcy court . . . requires final adjudication by an Article III court.”²¹⁷ Moreover, the holding of the *Wellness* majority regarding consent adjudications is also fully consistent with the Court’s summary-plenary jurisprudence and the proposition that the Court, in the entire series of constitutional decisions—from *Marathon* to *Granfinanciera* to *Stern* to *Wellness*—is simply constitutionalizing its summary-plenary jurisprudence.

B. The Constitutional Significance of the Supreme Court’s Summary-Plenary Jurisprudence

Whether cast as a “public rights” exception to Article III or simply established historical practice that would have informed the Founders’ understanding of the Article III “judicial Power” in the context of bankruptcy adjudications, the upshot is the same: Traditional summary matters “may be presented in such form that the judicial power is capable of acting on them, and [they] are susceptible of judicial determination, but . . . congress may or may not bring [them] within the cognizance of the [Article III] courts of the United States, as it may deem proper.”²¹⁸ By contrast, traditional plenary suits are the “suits at law or in equity . . . described in . . . the third article of the Constitution,”²¹⁹ and thus, such a plenary “matter which, from its nature, is the subject of a suit at the common law, or in equity” cannot be “withdraw[n] from

²¹⁶ Brubaker, *Justice Story and Bankruptcy Injunctions*, *supra* note 200, Abstract, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469339.

²¹⁷ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1952 (2015) (Roberts, C.J., dissenting); *see id.* at 1952–54.

²¹⁸ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

²¹⁹ *Morgan v. Thornhill*, 78 U.S. (11 Wall.) at 80.

judicial cognizance”²²⁰ and can “only be enforced by a plenary suit, at law or in equity,” in an Article III court.²²¹

Indeed, in *Morgan v. Thornhill*, the Court described Congress’s characteristic use of the phrase “suits at law or in equity” to refer to traditional plenary suits as “showing conclusively that the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in . . . the third article of the Constitution.”²²² Yet, it was the Supreme Court (and *not* Congress) that strictly limited “the authority and jurisdiction of the [non-Article III] referee [to] the ordinary [summary] administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof.”²²³ As the Court itself acknowledged, “to what extent jurisdiction conferred . . . shall be exercised by summary proceedings” before a non-Article III referee, “and to what extent by plenary suit” in an Article III court, was “(subject to the constitutional guaranties)” “determined by decisions of this court.”²²⁴ And the Court’s most recent decision in *Wellness* is also consistent with the thesis of this Part II that the Court is simply constitutionalizing its extensive summary-plenary jurisprudence as the operative limitation on the adjudicatory powers of non-Article III bankruptcy judges.

1. Non-Article III Bankruptcy Adjudications With Litigant Consent

In upholding the constitutionality of Judicial Code § 157(c)(2)²²⁵—authorizing a non-Article III bankruptcy judge to finally adjudicate even a *Marathon*- or *Stern*-like non-core “related to” proceeding with consent of the litigants—the *Wellness* majority noted the analogous practice under the Bankruptcy Act of 1898: Non-Article III referees “could preside over . . . matters implicating the [district] court’s ‘plenary jurisdiction’ by consent” of the litigants,²²⁶ citing the Court’s 1932 decision of *MacDonald v. Plymouth County Trust Co.*²²⁷

²²⁰ *Murray’s Lessee*, 59 U.S. (18 How.) at 284.

²²¹ *Bardes v. Hawarden Bank*, 178 U.S. 524, 532 (1900).

²²² *Morgan v. Thornhill*, 78 U.S. (11 Wall.) at 80.

²²³ *Weidhorn v. Levy*, 253 U.S. 268, 273 (1920); see Brubaker, A “Summary” Theory, *supra* note 2, at 129–30; *supra* Part II.A.2.

²²⁴ *Taubel-Scott-Kitzmilller Co. v. Fox*, 264 U.S. 426, 431 & n.8 (1924).

²²⁵ 28 U.S.C. § 157(c)(2) (2012).

²²⁶ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015).

²²⁷ 286 U.S. 263 (1932).

The *Wellness* majority did not specifically rely upon *MacDonald* as having any particular precedential force in upholding the constitutionality of § 157(c)(2). Careful analysis of *MacDonald* is nonetheless highly instructive, though, because *MacDonald* was a pivotal decision in the Court’s general jurisprudence charting the outermost limits of the adjudicative powers of non-Article III referees. Significantly, *MacDonald* clearly exposed the “summary” limit on referees’ adjudicatory powers to be a constraint independently imposed by the Supreme Court (and *not* Congress). Moreover, that decision addressed both the structural and individual-rights aspects of referee adjudications that were determinative in the *Wellness* Court’s constitutional analysis (discussed in Part I.B of this article). *MacDonald* and *Wellness*, therefore, provide further evidence that the Court is simply constitutionalizing (even if *sub silentio*) its existing summary-plenary jurisprudence.

a. *The MacDonald v. Plymouth County Trust Co. Decision*

In *MacDonald*, after a Massachusetts corporation “was duly adjudicated a bankrupt . . . the case under the usual order authorized by [the Supreme Court’s] General Order XII was referred [generally, i.e., without limitation²²⁸] by the District Court to a referee in bankruptcy.”²²⁹ The trustee then “filed a petition with the referee to set aside certain alleged transfers of property by the bankrupt . . . as voidable preferences,”²³⁰ which raised “matters properly determinable only in a plenary suit.”²³¹ The defendant, though, “consented in open court that the trial of the issues proceed before the referee.”²³² After trial, the “referee made an order, based on findings, granting in part the relief prayed,”²³³ and the District Court upheld the referee’s authority to hear and determine the matter with consent of the litigants.²³⁴ The First Circuit, however, “reversed the order of the District Court, holding that as the issues before the referee were determinable only in a plenary suit, the referee, notwithstanding the consent of the parties, was without jurisdiction to decide

²²⁸ See *supra* note 198 and accompanying text.

²²⁹ *Plymouth Cty. Tr. Co. v. MacDonald*, 53 F.2d 827, 828 (1st Cir. 1931), *rev’d*, 286 U.S. 263 (1932).

²³⁰ 286 U.S. at 264–65.

²³¹ 53 F.2d at 829.

²³² 286 U.S. at 265.

²³³ *Id.*

²³⁴ *In re Craig, Reed & Emerson, Inc.*, 46 F.2d 811, 811 (D. Mass. 1931), *rev’d sub nom.*, *Plymouth Cty. Tr. Co. v. MacDonald*, 53 F.2d 827 (1st Cir.), *rev’d*, 286 U.S. 263 (1932).

them.”²³⁵ The Supreme Court, though, upheld the validity of the referee’s consent adjudication.

The First Circuit proceeded on the assumption that the Supreme Court’s prior decision in *Weidhorn v. Levy* was an interpretation of the terms of the 1898 Act and the Supreme Court’s General Order XII (authorizing general orders of reference) that construed those provisions as affirmatively excluding plenary suits from a general order of reference. So read, *Weidhorn v. Levy* would indeed seem to implicate a structural limitation on the adjudicatory powers of referees akin to the Article III structural limitations on federal courts’ subject-matter jurisdiction: not only must the matter at issue be a case or controversy of the kind that Article III, § 2 of the Constitution authorizes the federal courts to entertain (a structural federalism principle), Congress must *also* have invested the federal courts with such subject-matter jurisdiction via a duly enacted jurisdictional statute (a structural separation-of-powers principle).²³⁶

As the First Circuit reasoned, then (citing *Weidhorn v. Levy*), if Congress has affirmatively precluded referees from entertaining plenary matters under a general reference, then that restriction is in the nature of a non-waivable structural separation-of-powers limit on the “subject-matter jurisdiction” of referees:

[A] referee under a general order of reference, having no jurisdiction over the subject-matter, cannot acquire jurisdiction by consent of the parties. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 420 [1911].

The objection to the jurisdiction of the referee before the District Court after the appellant had consented to the referee hearing the matter may have been ‘unsportsmanlike,’ as it was characterized by the District Judge; but lack of jurisdiction may be raised on review, and at any stage of the proceedings. A litigant is not bound by the findings of any tribunal having no jurisdiction over the subject-matter, even if found with his consent. The proceedings before the referee were *coram non iudice*.²³⁷

As the Court’s modern Article III, § 1 jurisprudence also recognizes, requiring that matters within the “judicial Power” must be adjudicated by an

²³⁵ 286 U.S. at 265.

²³⁶ See U.S. CONST. art. III, § 1 (providing that “[t]he judicial Power of the United States shall be vested in . . . such inferior Courts as the Congress may from time to time ordain and establish”).

²³⁷ 53 F.2d at 830 (citations omitted).

Article III judge does indeed serve structural separation-of-powers values “as ‘an inseparable element of the constitutional system of checks and balances,’” and thus, “[t]o the extent this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction.”²³⁸ And, of course, that was precisely the reasoning of Chief Justice Roberts and Justice Scalia, dissenting in *Wellness*: “[A]n individual may not consent away the institutional interest protected by the separation of powers.”²³⁹ The unanimous *MacDonald* Court’s response to that structural argument, therefore, is every bit as instructive as the majority’s response in *Wellness*.

b. Limitation of Non-Article III Referees to Adjudication of Summary Matters Primarily Protected Personal Rather Than Structural Interests

While Article III, § 1—like Article III, § 2 and subject-matter jurisdiction limitations—does indeed serve non-waivable structural values, the Court’s modern jurisprudence also acknowledges that the Article III, § 1 guarantee (*unlike* subject-matter jurisdiction limitations) “serves to protect primarily personal, rather than structural, interests.”²⁴⁰ Thus, both the *Schor* and *Wellness* decisions reasoned:

“[A]s a personal right, Article III[, § 1]’s guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights”—such as the right to a jury—“that dictate the procedures by which civil and criminal matters must be tried.”²⁴¹

In strikingly similar terms that prefigure both *Schor* and *Wellness*, the *MacDonald* Court also opined (citing to the Seventh Amendment jury-trial decision of *Patton v. United States*²⁴²) that bankruptcy litigants’ right to insist upon trial of a plenary suit in an Article III court is “like the right to trial by jury,” which may “be waived”:

²³⁸ *CFTC v. Schor*, 478 U.S. 833, 850–51 (1986) (citation omitted).

²³⁹ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1955 (2015) (Roberts, C.J., dissenting); *see id.* at 1955–57 (also quoting the same passage from *Schor* quoted *supra* in the text accompanying note 238); *supra* Part I.B.7 (discussing the dissenting opinion of Chief Justice Roberts, joined by Justice Scalia, in *Wellness*).

²⁴⁰ *Schor*, 478 U.S. at 848; *see also Wellness*, 135 S. Ct. at 1944 (“The entitlement to an Article III adjudicator is a ‘personal right’ and thus ordinarily ‘subject to waiver.’” (quoting *Schor*, 478 U.S. at 848)).

²⁴¹ *Wellness*, 135 S. Ct. at 1943 (quoting *Schor*, 478 U.S. at 848–49).

²⁴² 281 U.S. 276 (1930).

[W]e can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit [in an Article III court] may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure [before a bankruptcy referee] substituted. Cf. *Chicago, B. & Q. R. Co. v. Willard*, 220 U.S. 413, 419–421 [1911].²⁴³

Significantly, then, with the “Cf.” citation to the *Willard* case and its extensive discussion of the non-waivable structural limitations on federal courts’ subject-matter jurisdiction (and on which the First Circuit had relied for its contrary decision), the *MacDonald* Court expressly dismissed such structural concerns.²⁴⁴ Of course, *Schor* and *Wellness* make clear the Court’s role in scrutinizing any particular system of non-Article III consent adjudications to determine whether it “impermissibly threatens the institutional integrity of the Judicial Branch.”²⁴⁵ And while the written opinion of the *Wellness* majority more explicitly reviewed the structural implications of consent adjudications by non-Article III bankruptcy judges, that opinion ultimately reached the same conclusion as did the *MacDonald* Court (with respect to a very similar system of consent adjudications by non-Article III bankruptcy referees): Non-Article III “[a]djudication based on litigant consent” is “unremarkable” and “poses no great threat to anyone’s birthrights, constitutional or otherwise.”²⁴⁶ Even Chief Justice Roberts acknowledged that as a practical matter such consent adjudications do, in fact, “seem benign.”²⁴⁷

As both *Schor* and *Wellness* confirm, the constitutional validity of non-Article III consent adjudications transcends the bankruptcy context: “Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception.”²⁴⁸ That the *MacDonald* Court, like the

²⁴³ *MacDonald v. Plymouth Cty. Tr. Co.*, 286 U.S. 263, 267 (1932).

²⁴⁴ The *Stern* majority likewise expressly distinguished the structural limitations of subject-matter jurisdiction, “stating that *nothing* in the allocation of federal bankruptcy jurisdiction as between Article III district courts and non-Article III bankruptcy courts is ‘jurisdictional’ in the sense that would invoke subject matter jurisdiction doctrines, such as the one holding that issues of subject matter jurisdiction are nonwaivable and can be raised at any time (including for the first time on appeal or sua sponte by the court).” Brubaker, *A “Summary” Theory*, *supra* note 2, at 144–45; *see id.* at 187; *Stern v. Marshall*, 564 U.S. 462, 480 (2011).

²⁴⁵ *Schor*, 478 U.S. at 851, quoted in *Wellness*, 135 S. Ct. at 1944.

²⁴⁶ *Wellness*, 135 S. Ct. at 1947.

²⁴⁷ *Id.* at 1959 (Roberts, C.J., dissenting).

²⁴⁸ *Id.* at 1947 (Sotomayor, J., for the Court). And that is the response to Justice Thomas’s concern, in his separate *Wellness* dissent, that there is no Founding-era evidence of “a historical practice of allowing broader adjudication by [English] bankruptcy commissioners [of plenary suits] acting with the consent of the parties.” *Id.* at 1970 (Thomas, J., dissenting); *see supra* note 62 and accompanying text and note 67. The validity of consent adjudications, however, is *not* premised upon a unique “bankruptcy exception” to Article III, but

Wellness majority, expressly considered both the structural and individual-rights dimensions of referee consent adjudications is even more significant, then, given what the *MacDonald* decision confirms regarding the nature of the Supreme Court’s summary-plenary jurisprudence in the bankruptcy context.

c. *Limitation of Non-Article III Referees to Adjudication of Summary Matters Was Independently Imposed by the Supreme Court (Not Congress)*

In *Wellness*, the Seventh Circuit dismissed *MacDonald* as irrelevant, with the mistaken claim that “*MacDonald* was decided on statutory grounds—the question was whether the referee had statutory jurisdiction.”²⁴⁹ That assumption, however, misapprehends the *non*-statutory nature of the Court’s summary-plenary jurisprudence²⁵⁰ strictly limiting non-Article III referees to adjudication of summary matters.²⁵¹ Indeed, to the extent that was unclear from the *Weidhorn v. Levy* opinion, *MacDonald* confirms that it was the Supreme Court that independently imposed that limitation (and *not* Congress). *MacDonald*, therefore, was simply another in the long line of Supreme Court decisions independently crafting prudential limitations on the adjudicatory powers of non-Article III referees.

Nowhere did the 1898 Act or the Supreme Court’s General Orders in Bankruptcy provide even the vaguest indication that referees could adjudicate plenary suits with consent of the litigants. The *MacDonald* Court’s “statutory” analysis, therefore, simply pointed out that the statute explicitly “contemplates that referees within their districts may be invested with the powers of courts of bankruptcy,”²⁵² citing 1898 Act § 38 (entitled “Jurisdiction of Referees”) providing that “[r]eferees . . . are hereby invested . . . with jurisdiction to . . . perform such . . . of the duties . . . as are by this Act conferred on courts of

rather rests on more general constitutional principles regarding non-Article III adjudications, of which non-Article III *bankruptcy* consent adjudications are simply a longstanding, consistent, illustrative instance, which the Supreme Court approved as early as 1878. See *Newcomb v. Wood*, 97 U.S. 581, 582–83 (1878); *supra* notes 31–32 and accompanying text.

²⁴⁹ *Wellness Int’l Network, Ltd. v. Sharif*, 727 F.3d 751, 772 (7th Cir. 2013), *rev’d*, 135 S. Ct. 1932 (2015).

²⁵⁰ It is a common misunderstanding, though, that the Supreme Court itself has fostered through its loose and misleadingly imprecise characterizations of its summary-plenary jurisprudence as “statutory.” See *supra* note 207 and accompanying text and *infra* Part II.B.2.

²⁵¹ See *supra* Part II.A.2.

²⁵² *MacDonald v. Plymouth Cty. Tr. Co.*, 286 U.S. 263, 268 (1932).

bankruptcy.”²⁵³ And, the Court went on, “General Order XII [regarding general orders of reference] directs that after the appointment of the referee *all proceedings* shall be had before him.”²⁵⁴ It was “[t]hese provisions,” then, according to the Court, that “vest[ed] in [the referee] the power possessed by courts of bankruptcy . . . to decide the issues in a [plenary] suit brought under section 60b [to avoid and recover preferential transfers] where the parties join in presenting them to him for determination.”²⁵⁵

Because those provisions made no mention whatsoever of litigant consent, though, that same “statutory” analysis (as discussed in Part II.A.2 of this article) would lead to the conclusion that a referee could adjudicate a plenary suit even *without* consent of the litigants.²⁵⁶ *MacDonald*, therefore, confirmed that the *only* reason referees could *not* adjudicate a plenary suit *without* litigant consent was because the Court itself had independently concluded that it would be beyond the appropriate competence of a referee to do so:

In cases where the defendant made timely objection to a determination by the referee, *it has been said* that the referee is without power to hear the issues involved in a plenary suit, and that such a suit, if brought before him, must be dismissed for want of jurisdiction. See *Weidhorn v. Levy*, *supra*.²⁵⁷

Hence, the further conclusion in *MacDonald* that referees *could* hear and adjudicate a plenary suit *with* litigant consent was *also* simply another independent determination by the Court (*not* Congress) that such a consent adjudication *was* within the appropriate competence of a non-Article III referee:

While under the provisions of the Bankruptcy Act the exercise of his jurisdiction by the referee is ordinarily restricted to those matters which may be dealt with summarily by the method of procedure available to referees in bankruptcy [see *Weidhorn v. Levy*, *supra*], the restriction may be removed, as it was here, by the consent of the

²⁵³ See 2A COLLIER (14th ed.), *supra* note 72, ¶ 38.01, at 1395 n.2 (quoting the language of 1898 Act § 38 in effect when *MacDonald* was decided in 1932).

²⁵⁴ *MacDonald*, 286 U.S. at 268 (emphasis added).

²⁵⁵ *Id.*

²⁵⁶ Moreover, by concluding that a plenary suit was within the scope of the “proceedings” referred to in General Order XII, *MacDonald* also flatly repudiated the suggestion in *Weidhorn v. Levy*, 253 U.S. 268, 273 (1920), that use of the term “proceedings” in General Order XII somehow excluded plenary suits from the scope of a general order of reference or precluded reference of plenary suits to a referee. See *supra* note 203.

²⁵⁷ *MacDonald*, 286 U.S. at 266 (emphasis added).

parties to a summary trial of the issue presented. The referee therefore had power to decide the issues²⁵⁸

By the terms of the 1898 Act itself, Congress authorized non-Article III referees to hear and adjudicate plenary suits; the decision that it would be inappropriate for a non-Article III referee to do so, therefore, was made entirely by the Supreme Court (*not* Congress). The terms of the 1898 Act itself said *nothing* about the ability of non-Article III referees to hear and adjudicate an otherwise-plenary suit with consent of the litigants; the decision that it would be *appropriate* for a non-Article III referee to do so, therefore, was also made solely by the Supreme Court (*not* Congress).²⁵⁹

2. *Non-Article III Bankruptcy Adjudications Without Litigant Consent*

The entirety of the Supreme Court’s extensive jurisprudence regarding the adjudicatory powers of non-Article III referees consisted of independent determinations by the Court as to those matters appropriate for adjudication by a non-Article III referee. Moreover, as was the case in both *Weidhorn v. Levy*²⁶⁰ and *MacDonald*,²⁶¹ the Court’s propensity to enshroud those decisions

²⁵⁸ *Id.* at 268.

²⁵⁹ The *MacDonald* Court’s discussion of the consent provision of 1898 Act § 23b (286 U.S. at 267–68) was not only virtually incomprehensible and utterly incoherent, it was also an elaborate red herring. That provision spoke *solely* to federal subject-matter jurisdiction, generally *denying* the federal courts any bankruptcy jurisdiction whatsoever over most plenary suits “unless by consent of the proposed defendant.” And as the Court made clear in *Williams v. Austrian*, 331 U.S. 642, 646–62 (1947), § 23b was *not* a grant of jurisdiction to anyone—neither district judges nor referees—but rather was an affirmative *restriction* on the broad all-inclusive grant in 1898 Act § 2 of federal jurisdiction over all bankruptcy “proceedings.” See generally Brubaker, *A General Theory*, *supra* note 169, at 767–77.

Moreover, federal subject-matter jurisdiction in *MacDonald* was *not* dependent upon “consent of the defendant” at all, as that case involved a preference suit under § 60b, which was expressly excepted from § 23b’s withdrawal of federal bankruptcy jurisdiction (granted by § 2) over plenary suits. Thus, the federal district courts had jurisdiction over plenary preference suits under § 60b (as well as plenary fraudulent conveyance suits under §§ 67e and 70e) even without “consent of the defendant.” See generally 2 COLLIER (14th ed.), *supra* note 72, ¶¶ 23.01[3], 23.15. The First Circuit in *MacDonald*, therefore, was absolutely correct that the consent provision of § 23b was wholly inapplicable to the *MacDonald* case because § 23b simply “has no application to suits by the trustee to recover a preference, or property conveyed in fraud of creditors.” 53 F.2d at 830. The *MacDonald* Court’s addled discussion of the consent provision of § 23b, therefore, was gratuitous, irrelevant “window dressing.”

Indeed, the lower courts readily recognized that § 23b was completely immaterial to the *MacDonald* holding, because they concluded that its holding also permitted a referee to finally adjudicate a plenary suit with litigant consent in corporate reorganization cases under Chapter X, which by its express terms provided that § 23 was entirely inapplicable in a Chapter X case. See, e.g., *Morrison v. Rocco Ferrera & Co.*, 554 F.2d 290, 296–97 (6th Cir. 1977); see 1898 Act, *supra* note 133, § 102, discussed in Brubaker, *A General Theory*, *supra* note 169, at 774–75.

²⁶⁰ 253 U.S. 268 (1920), discussed *supra* Part II.A.2.

in feigns of “due consideration of the structure and purpose of the Bankruptcy Act as a whole, as well as the particular provisions of the Act brought in question,”²⁶² was (if not subterfuge) empty and meaningless rhetorical flourish.

For example, the congressional purpose that purportedly guided the *Katchen* Court’s decision—a desire “to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period”²⁶³—would *always* counsel in favor of giving non-Article III referees *full* adjudicatory jurisdiction over *all* traditional plenary suits.²⁶⁴ Indeed, the decision *Katchen* quoted for that proposition, *Ex parte Christy*, actually involved a traditional *plenary* matter and the Court (via a Justice Story opinion) ultimately concluded that such a plenary suit *could* be handled by a district court through “summary proceedings in equity” rather than a plenary “suit at law or in equity.”²⁶⁵ Note also, because *Christy* merely authorized summary adjudication of a traditional plenary matter by an *Article III* district court,²⁶⁶ *Christy* ultimately says *nothing* about the appropriate scope of non-Article III bankruptcy adjudications. Likewise, the congressional purposes and provisions the Court purported to rely on when determining the limits on the adjudicatory powers of non-Article III referees (as in *Weidhorn v. Levy*, *MacDonald*, and *Katchen*) were invariably makeweights that also said *nothing* at *all* about limiting referees’ adjudicatory powers.

Thus, the Court itself, with *no* guidance from Congress, was independently determining the appropriate limits on non-Article III referees’ adjudicatory powers, and in doing so, the Court relied upon the longstanding traditional summary-plenary distinction that undoubtedly would have informed the Framers’ understanding of the Article III “judicial Power” in the bankruptcy context. Indeed, because the summary-plenary divide long preceded and existed independently of the Bankruptcy Act of 1898 (and every prior American bankruptcy statute), that is no doubt why Congress did not generally

²⁶¹ See *supra* Part II.B.1.c.

²⁶² *Katchen v. Landy*, 382 U.S. 323, 328 (1966).

²⁶³ *Id.* (quoting *Ex parte Christy*, 44 U.S. (3 How.) 292, 312 (1845)).

²⁶⁴ Cf. Brubaker, A “Summary” Theory, *supra* note 2, at 136–37 (making a similar point regarding interpretation of the scope of the catch-all categories of statutory “core” proceedings in 28 U.S.C. § 157(b)(2)(A) & (O) (2012)).

²⁶⁵ See Brubaker, *Justice Story and Bankruptcy Injunctions*, *supra* note 200, at 77 & n.38, 86–88.

²⁶⁶ Because the Bankruptcy Act of 1841 at issue made no provision whatsoever for final adjudications by non-Article III arbiters without litigant consent. See Brubaker, A “Summary” Theory, *supra* note 2, at 126–27 n.25.

define the distinction between summary and plenary matters.²⁶⁷ From the earliest years of the Republic, it was the courts (and ultimately the Supreme Court) that preserved and policed the distinction between summary bankruptcy matters of estate and case administration, in contradistinction to plenary trustee suits against adverse claimants.²⁶⁸ The Supreme Court itself, without any guidance from Congress, charted the limits of non-Article III referees' adjudicatory powers, drawing its guidance from the traditional summary-plenary distinction.

III. USING THE SUPREME COURT'S SUMMARY-PLENARY JURISPRUDENCE TO RESOLVE CORE-NONCORE DETERMINATIONS

The current bankruptcy jurisdiction statute, like predecessor statutory references to summary or plenary matters, does *not* definitively specify how to determine whether a given matter is, on the one hand, a "core" proceeding in which the bankruptcy judge can enter final judgment without litigant consent or, on the other, a non-core "related to" proceeding in which the parties have a right to final judgment from the district court.²⁶⁹ That statutory distinction, therefore, simply codifies the constitutional line, particularly given the *Arkison* decision, that if a statutory "core" matter is one in which litigants have a *constitutional* right to final judgment from an Article III judge (a so-called

²⁶⁷ Rather, Congress generally would simply refer, e.g., to plenary suits as "suits at law or in equity," which language the Supreme Court characterized as "showing conclusively that the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in . . . the third article of the Constitution." *Morgan v. Thornhill*, 78 U.S. (11 Wall.) 65, 80 (1870); *see also* *Lathrop v. Drake*, 91 U.S. 516, 517 (1876) (describing 1867 Act jurisdictional grant over plenary "suits at law or in equity" as "[jurisdiction] as an ordinary court"). It was left to the courts, therefore, to specify those matters which, by their nature, required a plenary suit. *See, e.g.*, *Marshall v. Knox*, 83 U.S. (16 Wall.) 551, 556 (1872) ("The bankrupt law does not distinguish in what cases the District Court may proceed summarily, and in what cases by plenary suit; and we are left to decide the question on the general principles that affect the case."); *see also* *Smith v. Mason*, 81 U.S. (14 Wall.) 419, 430–33 (1871) (applying the 1867 Act); *Ex parte Christy*, 44 U.S. (3 How.) at 314–15, 316–17 (applying the 1841 Act). In doing so, the Court relied upon the contours of the summary-plenary divide as it had developed in English bankruptcy practice. *See supra* note 210 and accompanying text.

²⁶⁸ In *Lathrop v. Drake*, the Court described these "two distinct classes" of bankruptcy jurisdiction as follows:

[F]irst, jurisdiction as a court of bankruptcy over the [summary] proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of [plenary] suits at law or in equity

91 U.S. at 517.

²⁶⁹ *See* 28 U.S.C. § 157(b)–(c). *See generally* Brubaker, A "Summary" Theory, *supra* note 2, at 135–37; Brubaker, *Bleak House (Part I)*, *supra* note 6, at 9–10.

Stern claim), then the “statute permits [such a] *Stern* claim[] to proceed as non-core within the meaning of” the statute.²⁷⁰ Moreover, in many cases, the statute itself does not clearly categorize a particular proceeding as core or non-core, in which case that categorization must be made, in the first instance and last, based solely upon the parties’ constitutional rights, “consistent with Congress’s obvious objective of giving bankruptcy courts as much core jurisdiction as is constitutionally permissible (but no more than is constitutionally permissible).”²⁷¹ This Part III, therefore, demonstrates the continuing relevance of the Supreme Court’s summary-plenary jurisprudence to the core-noncore distinction drawn by the current jurisdictional provisions.

As the Tenth Circuit noted shortly after *Wellness* was decided, “[r]ecognizing the summary-plenary line as the operative constitutional boundary” not only has “the virtue of consistency with historical practice” that would have informed the Founding generation’s understanding of the nature of the Article III “judicial Power” in the context of bankruptcy adjudications, it can also “afford lower courts (some of) the guidance they’ve long wanted.”²⁷² Indeed, the *Wellness* litigation itself nicely demonstrates how the Court’s extensive summary-plenary jurisprudence can help resolve even the most difficult (and inevitable) “hard cases.”²⁷³ This Part III uses the *Wellness* litigation to illustrate several dimensions by which the Supreme Court has differentiated between (1) summary matters appropriate for final adjudication

²⁷⁰ Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014); see *supra* notes 127–131 and accompanying text.

²⁷¹ Brubaker, A “Summary” Theory, *supra* note 2, at 146.

²⁷² Loveridge v. Hall (*In re Renewable Energy Dev. Corp.*), 792 F.3d 1274, 1282 (10th Cir. 2015).

²⁷³ It is easy criticize a historical approach to the constitutional issue on the grounds that there are indeed “hard cases” (like *Wellness*) that are not resolved in an entirely self-evident and effortless manner using the summary-plenary distinction. See, e.g., McKenzie, *supra* note 185, at 35–41. The most that critique establishes, though, is that perhaps it would be better do away with such uncertain line-drawing exercises, as Congress did in the context (and via an expansion) of subject-matter jurisdiction in 1978. See Brubaker, A General Theory, *supra* note 169, at 792–95. Of course, Congress sought to do the same in 1978 with respect to the adjudicatory powers of the new bankruptcy courts, but Congress’s decision to *not* give bankruptcy judges Article III status, the *Marathon* decision, “the subsequent codification of a core/non-core distinction (analogous to the summary/plenary distinction),” as well as *Stern*’s emphatic reaffirmation of the *Marathon* holding, all conspire to “make such uncertain line-drawing exercises inevitable.” Brubaker, A “Summary” Theory, *supra* note 2, at 174 n.231. Moreover, those who believe *Marathon*, *Granfinanciera*, and *Stern* were wrongly decided and dream of a world in which *Schor* functional balancing was the controlling constitutional check (even in the absence of litigant consent to a non-Article III adjudication) are pining for a regime that is likely much *less* determinate than the established, longstanding summary-plenary divide, especially if (as is certainly the most likely course of events) the *Marathon*, *Granfinanciera*, and *Stern* holdings are *not* overturned. See Chemerinsky, *supra* note 40, at 317–22; *supra* notes 35–41 and accompanying text, notes 117–123 and accompanying text, notes 145–147 and accompanying text, and Part II.A.1.b.

by a non-Article III bankruptcy tribunal, even without litigant consent, and (2) plenary suits at law or in equity in which the parties have a right to final judgment from an Article III judge. And the *Wellness* dissenters relied upon that jurisprudence (and the analytical structure supplied thereby) to conclude that “Article III likely pose[d] no barrier to the Bankruptcy Court’s resolution of Wellness’s claim,” even without consent of the litigants.²⁷⁴

In disputes involving money or other property (including damages claims), the initial inquiry regarding summary/core jurisdiction must focus upon possession of the property at issue. Property within the actual or constructive possession of the estate’s representative or the debtor is considered within the possession and control of the bankruptcy court, giving the bankruptcy court summary/core jurisdiction to adjudicate any and all claims to that property, including those of a so-called “adverse claimant.”²⁷⁵ If the property at issue is in the possession of some other, third party, that property is beyond the summary/core jurisdiction of the bankruptcy court (thus, requiring a plenary/non-core suit to recover) only if that third party raises a substantial adverse claim entitling that party to keep the property.²⁷⁶ Even with respect to property held under a substantial claim of right by a third party, however, the bankruptcy court has supplemental summary/core jurisdiction to adjudicate conflicting claims to that property to the extent the bankruptcy court addresses particular issues of fact or law bearing on those adverse claims in order to resolve some other summary/core matter properly before the court.²⁷⁷

A. *The Wellness Litigation as an Illustrative Example*

In order to understand how the Supreme Court’s existing summary-plenary jurisprudence can be used to resolve difficult cases like *Wellness*, it is worth recounting, in some detail, the litigation in that case that required resolution in the bankruptcy court.²⁷⁸

1. *The Pre-Bankruptcy Federal Court Litigation*

The protracted litigation that produced the *Wellness* decision spanned more than a decade and ultimately involved numerous federal courts in two different

²⁷⁴ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1952 (2015) (Roberts, C.J., dissenting).

²⁷⁵ See *infra* Part III.B.1.

²⁷⁶ See *infra* Part III.B.2.

²⁷⁷ See *infra* Part III.B.3.

²⁷⁸ The description of the *Wellness* litigation that follows is taken from the various published judicial opinions cited herein.

circuits, as well as an Illinois state court. Wellness International Network, Ltd. was a manufacturer of health and wellness products, and Wellness had a distributorship agreement with Richard Sharif. That relationship soured, though, and in 2003 Sharif and others sued Wellness and its founders (collectively, “Wellness”) in federal district court in the Northern District of Illinois claiming that Wellness was running a pyramid scheme and seeking damages of nearly \$1 million. Wellness successfully moved to compel arbitration of some of the claims asserted in that suit,²⁷⁹ and the court dismissed the remaining claims without prejudice pursuant to forum-selection clauses in the parties’ contracts.²⁸⁰ Sharif and his co-plaintiffs then refiled their remaining claims in federal district court in the Northern District of Texas.

Sharif and his co-plaintiffs initiated no discovery in their Texas suit and repeatedly ignored Wellness’s discovery requests, for which they were ultimately sanctioned by a default judgment being entered against them. The Fifth Circuit affirmed that default judgment with the following observation:

After this appeal was dismissed for Appellants’ failure to order a transcript timely and make financial arrangements with the court reporter, it was [subsequently] reinstated A review of the record on appeal demonstrates that Appellants’ untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of non-performance or insubstantial performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants’ feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees’ motion for attorney’s fees.²⁸¹

On remand, the district court sanctioned Sharif and his co-plaintiffs by awarding Wellness over \$650,000 in attorney’s fees. Wellness’s attempts to collect that judgment are what led to Sharif’s bankruptcy filing and the bankruptcy litigation that wound its way into the Supreme Court.

Wellness served Sharif with post-judgment discovery requests in the Texas litigation, which Sharif ignored. On Wellness’s motion, the Texas district court

²⁷⁹ See *Sharif v. Wellness Int’l Network, Ltd.*, 376 F.3d 720 (7th Cir. 2004).

²⁸⁰ See *Muzumdar v. Wellness Int’l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006).

²⁸¹ *Sharif v. Wellness Int’l Network, Ltd.*, 273 Fed. Appx. 316, 317 (5th Cir. 2008).

ordered Sharif to respond to that discovery and to appear for a judgment debtor's examination. Sharif failed to do either and was ultimately arrested and held for contempt. Upon Sharif's promise to comply with Wellness's discovery requests and to pay Wellness's additional costs and attorney's fees (embodied in an order to do so), Sharif was released on his own recognizance. Sharif, however, also ignored that order and, rather than comply, filed chapter 7 two weeks later, on February 24, 2009, in the Northern District of Illinois.²⁸²

2. *The Bankruptcy Litigation*

Sharif's bankruptcy schedules listed as his creditors several members of Sharif's family (to whom he allegedly owed a total of \$271,000 on undocumented loans) and Wellness. The only creditor to file a proof of claim was Wellness.

The initial § 341 official meeting of creditors²⁸³ was held on March 25, 2009. At that meeting, Wellness and the chapter 7 trustee asked Sharif about a 2002 loan application they had obtained, pursuant to which Sharif had procured a bank loan based upon Sharif's representations in the application that he owned various assets worth in the aggregate nearly \$5.4 million (the "Loan Assets"). The chapter 7 trustee continued the § 341 meeting until April 21 to give Sharif time to provide documents regarding the Loan Assets.

At the continued § 341 meeting in April 2009, though, Sharif did not provide the requested documents. Rather, Sharif maintained that he never owned the Loan Assets, that he lied on the 2002 loan application, that the Loan Assets were owned by a trust (the "Soad Wattar Trust") for which he was merely the trustee, and that the beneficiaries of that trust were his mother (Soad Wattar) and his sister (Ragda Sharifeh). Wellness and the chapter 7 trustee, therefore, requested documents regarding the Soad Wattar Trust, and the chapter 7 trustee continued the § 341 meeting until June 3 to allow Sharif time to provide the requested documents.²⁸⁴

At the continued § 341 meeting in June, though, Sharif did not provide any documents regarding the Soad Wattar Trust. Sharif then requested a protective order for documents relating to the Loan Assets and the Soad Wattar Trust,

²⁸² See generally *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 755–56 (7th Cir. 2013) (discussing factual and procedural background), *rev'd*, 135 S. Ct. 1932 (2015).

²⁸³ See 11 U.S.C. § 341 (2012).

²⁸⁴ See generally *Wellness*, 727 F.3d at 756–57 (discussing factual and procedural background).

which the bankruptcy court denied. On the chapter 7 trustee's motion, the court also ordered Sharif to turn over to the chapter 7 trustee documentation regarding the Loan Assets and the Soad Wattar Trust, but Sharif did not comply.²⁸⁵

a. The Wellness Adversary Proceeding

On August 24, 2009, Wellness filed an adversary proceeding against Sharif objecting to Sharif's discharge under Bankruptcy Code § 727(a)(2)–(5).²⁸⁶ One count of Wellness's complaint sought a declaratory judgment that the Soad Wattar Trust was the alter ego of Sharif and, thus, was property of Sharif's bankruptcy estate. Another count of the complaint sought to deny Sharif a discharge on the basis that he had concealed that property of the estate (the Soad Wattar Trust assets) with intent to hinder, delay, and defraud his creditors and the chapter 7 trustee.²⁸⁷

In that adversary proceeding, a by-then “familiar pattern of discovery evasion [by Sharif] ensued.”²⁸⁸ On Wellness's motion, the bankruptcy court ordered Sharif to fully comply with all outstanding discovery requests, expressly stating that if he did not do so by April 28, 2010, a default judgment would be entered against him. Sharif produced some documents and sat for a deposition, but he did not fully comply with his obligation to produce all documents relating to the Loan Assets and the Soad Wattar Trust.²⁸⁹

After an evidentiary hearing, the bankruptcy court found that Sharif had violated the court's discovery order and entered a default judgment against him on all counts. Accordingly, the bankruptcy court (1) denied Sharif a discharge pursuant to Code § 727(a)(2)–(5), and (2) declared that “(i) the Soad Wattar Trust no longer existed and (ii) that the trust's assets became property of [Sharif's] bankruptcy estate as of the commencement of [Sharif's] bankruptcy case.”²⁹⁰

²⁸⁵ See generally *Sharifeh v. Fox (In re Sharif)*, 457 B.R. 702, 710–12 (Bankr. N.D. Ill. 2011) (discussing factual and procedural background).

²⁸⁶ 11 U.S.C. § 727(a)(2)–(5).

²⁸⁷ See generally *Sharif*, 457 B.R. at 708–09 (discussing counts of the complaint).

²⁸⁸ *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1941 (2015).

²⁸⁹ See generally *Wellness*, 727 F.3d at 757–58 (discussing factual and procedural background).

²⁹⁰ *Sharif*, 457 B.R. at 731 (discussing July 6, 2010 default judgment).

b. Ragda Sharifeh's Request to Intervene

Sharif's sister, Ragda Sharifeh, by separate motions (1) sought to intervene in Wellness's adversary proceeding to protect her interests as purported beneficiary of the Soad Wattar Trust,²⁹¹ and (2) also sought to vacate the default judgment insofar as it declared "that the Soad Wattar Trust is the Debtor's *alter ego*."²⁹² Both motions alleged (1) that Sharifeh became the successor beneficiary of the Soad Wattar Trust upon the death of her and Sharif's mother in 2010, and (2) that she became the successor trustee of the Soad Wattar Trust after Sharif's 2010 resignation as trustee. The court, however, denied both motions and specifically found against Sharifeh with respect to both of her allegations.

In particular, with respect to Sharifeh's allegation that she was the successor beneficiary of the Soad Wattar Trust, the bankruptcy court found, as a factual matter, that "[h]er unsupported allegation will be given no weight . . . as she has presented neither testimony nor documents in support of this assertion."²⁹³ Moreover, the court concluded, as a matter of law, that even if she were the successor beneficiary, that would provide her no standing to participate in the adversary proceeding because under Illinois law "[b]eneficiaries can not [sic] act on behalf of a trust. . . . The trust has to be represented by its trustee, not its beneficiary,"²⁹⁴ and thus, "a trust beneficiary cannot sue or be sued regarding the trust."²⁹⁵

Likewise, with respect to Sharifeh's allegation that she was the successor trustee of the Soad Wattar Trust, the bankruptcy court found as a factual matter that "Sharifeh failed to produce any evidence that she is the successor trustee of the Soad Wattar Trust."²⁹⁶ Moreover, the court also concluded "that her assertion lacks any legal basis,"²⁹⁷ given her acknowledgment that Sharif was the trustee *both* on the date of the filing of his bankruptcy petition, February 24, 2009, *and* on the date that the bankruptcy court issued its default judgment declaring the Soad Wattar Trust to be Sharif's alter ego, July 6, 2010. Thus, in its July 6 default judgment ruling, the bankruptcy court not only held that "[t]he trust's assets became property of the Debtor's estate as of the

²⁹¹ See *In re Sharif*, 447 B.R. 853, 854 (Bankr. N.D. Ill. 2011).

²⁹² *In re Sharif*, 446 B.R. 870, 884 (Bankr. N.D. Ill. 2011).

²⁹³ 446 B.R. at 882.

²⁹⁴ 447 B.R. at 866.

²⁹⁵ 446 B.R. at 882.

²⁹⁶ 447 B.R. at 867.

²⁹⁷ 446 B.R. at 882.

commencement of the bankruptcy case,” the court also decided that “[a]s of July 6, 2010, . . . the trust no longer existed.”²⁹⁸ Sharif’s alleged *subsequent* resignation would, therefore, be a futile gesture with no legal significance whatsoever and could not provide Sharifeh any kind of retroactive standing to try to undo the court’s ruling, after the fact.²⁹⁹ Even if she was the successor beneficiary of the trust, she was fully bound by the court’s final judgment in litigation to which her trustee was a party.

Sharif appealed the July 6, 2010 default judgment entered against him in Wellness’s adversary proceeding, and it was that appeal that ultimately made its way to the Supreme Court.³⁰⁰ And as the *Wellness* Supreme Court dissenters recognized, the Court’s existing and extensive summary-plenary jurisprudence already contains a highly developed structure for analyzing whether it was constitutionally permissible (as a traditionally summary “core” matter) for the non-Article III bankruptcy court to enter that default judgment.

B. *The Summary-Plenary Divide*

The summary-plenary distinction was constructed through *in rem* conceptions of the property in the rightful possession or control of the bankrupt’s estate created upon commencement of a bankruptcy case regarding that debtor.³⁰¹ Consistent with the historical purposes of the “bankruptcy” proceedings,³⁰² “summary” jurisdiction extended to all proceedings necessary to administer that property in the rightful possession or control of the estate for the benefit of the bankrupt’s creditors—what the *Weidhorn v. Levy* Court referred to as “the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof.”³⁰³

²⁹⁸ 447 B.R. at 867.

²⁹⁹ In the absence of a sufficient showing of proper grounds to vacate that judgment under FED. R. BANKR. P. 7062 (incorporating FED. R. CIV. P. 60(b)), which the bankruptcy court found Sharifeh had neither alleged nor established. See 446 B.R. at 884.

³⁰⁰ See *Sharifeh v. Fox*, Nos. 11 C 8811, et al., 2012 WL 469980 (N.D. Ill. Feb. 10, 2012), *aff’d in part, vacated in part sub nom.*, *Wellness Int’l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013), *rev’d*, 135 S. Ct. 1932 (2015).

³⁰¹ See generally Brubaker, A “Summary” Theory, *supra* note 2, at 122–30.

³⁰² “Since the Roman law of cession (*cessio bonorum*), bankruptcy law has concerned itself with transfer of a debtor’s property to the debtor’s creditors. The mechanism for such transfer in Anglo-American law has been the construct of a bankrupt’s ‘estate,’ vested in trust to a representative of the creditor collective.” Brubaker, *A General Theory*, *supra* note 169, at 817 (footnotes omitted).

³⁰³ 253 U.S. 268, 273 (1920).

If the estate’s representative “were required to sue someone to recover money or property *for* the estate, however, . . . such an action required an ordinary formal suit in the appropriate superior court.”³⁰⁴ For example:

[A] debtor’s property [included in the estate] often included things not within the possession of the court, such as a disputed cause of action [for money damages] against a third party or tangible property held under a substantial claim of right by a third party, a so-called adverse claimant. A court of bankruptcy had no summary jurisdiction to adjudicate [such] disputes with adverse claimants. Such a dispute could be resolved only by an ordinary civil action (a plenary suit)³⁰⁵

For most bankruptcy proceedings, it is very easy to determine on which side of the summary-plenary divide the proceeding sits. The alter-ego cause of action in *Wellness*, though, requires a more nuanced consideration of summary-plenary doctrine. Moreover, because no one asserted a right to final judgment from an Article III court while that action was before the bankruptcy court, the bankruptcy judge considered *none* of the issues and findings necessary to determine whether the *Wellness* alter-ego action was or was not a traditional summary “core” matter. As the *Wellness* dissenters noted, then, such a determination would have to be “an inquiry for the Bankruptcy Court on remand,”³⁰⁶ which was, of course, mooted by the majority’s alternative resolution of the case.³⁰⁷ The reported opinions in *Wellness*, though, suggest several fruitful lines of inquiry for such a case and demonstrate how the analytical structure for resolving even more difficult core-noncore cases like *Wellness* already exists in the Supreme Court’s summary-plenary jurisprudence.

In *Wellness*, the proceeding at issue was an alter-ego action to have the Soad Wattar Trust, for which the debtor Sharif served as the trustee when he filed bankruptcy, declared to be a sham—the alter ego of Sharif himself—thereby making all of the assets nominally owned by the Soad Wattar Trust

³⁰⁴ Brubaker, A “Summary” Theory, *supra* note 2, at 124.

³⁰⁵ Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L.J. 1, 23–24 (1998).

³⁰⁶ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1953 (2015) (Roberts, C.J., dissenting); see *Harris v. Brundage Co.*, 305 U.S. 160, 163 (1938) (“In every case the bankruptcy court has power, in the first instance, to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed.”); *Taubel-Scott-Kitzmilller Co. v. Fox*, 264 U.S. 426, 433 (1924) (noting that “every court must have power to determine, in the first instance, whether it has jurisdiction to proceed”).

³⁰⁷ See *supra* note 104.

property of Sharif's bankruptcy estate available for distribution to Sharif's creditors, such as Wellness. To the extent that such an action would require adjudication of the interests of third parties in such property (such as the named beneficiaries of the trust, Sharif's mother and sister), one might be tempted to think that this action was a prototypical traditional plenary suit. There are several reasons to suspect, though, that a non-core plenary suit may *not* have been required in *Wellness*, and thus, that the bankruptcy court may well have *had* constitutional authority to finally adjudicate that alter-ego claim (as a traditionally summary, now-core matter), even without litigant consent.

1. Actual or Constructive Possession by the Debtor

It is axiomatic that upon commencement of a bankruptcy case, the bankruptcy estate automatically and by operation of law succeeds to all of the debtor's interests in property, under the supervision and control of the bankruptcy court. Thus, the filing of the petition in bankruptcy causes all property of the debtor to pass into the rightful custody of the bankruptcy court, under the control of the estate's representative (the bankruptcy trustee), an officer of the court.³⁰⁸ As Justice Fuller famously stated in *Mueller v. Nugent*, "the filing of the petition is a caveat to all the world, and in effect an attachment and injunction" pursuant to which "title to the bankrupt's property bec[omes] vested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court."³⁰⁹ Summary jurisdiction was conceived as a species of in rem jurisdiction over all that "property in the actual or constructive possession of the court and proceedings to administer that property for the benefit of creditors."³¹⁰

Moreover, if the debtor resisted turnover of property to the bankruptcy trustee, the trustee was not required to initiate a plenary suit against the debtor to gain actual physical possession of that property. A debtor's mere possession of property is, in itself, an "interest in property" to which a debtor's bankruptcy

³⁰⁸ See Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 1043 n.314 [hereinafter Brubaker, *Bankruptcy Injunctions*].

³⁰⁹ 184 U.S. 1, 14 (1902); see also *Bank v. Sherman*, 101 U.S. 403, 406 (1879) ("The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction.").

³¹⁰ Brubaker, *Bankruptcy Injunctions*, *supra* note 308, at 1043 n.314; see *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 737–38 (1931) (upon commencement of a bankruptcy case, "title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court," which "is competent to hear and determine all questions respecting title, possession, and control of the property").

estate succeeds upon commencement of a bankruptcy case.³¹¹ Thus, in applying their general equitable powers, “courts of bankruptcy . . . fashioned the *summary* turnover procedure as one necessary to accomplish their function of administration.”³¹² Injunctive turnover proceedings are the means by which the bankruptcy court enforces its right of “possession, custody,” and “control” of property of the estate.³¹³

As nicely explained by a World War II-era commentator:

The trustee in bankruptcy is vested, upon his qualification, with title to all the non-exempt property which belonged to the bankrupt on the date the petition was filed.^[314] But whereas this title placidly comes to rest with him by operation of law, strenuous effort on the part of the trustee may be required to gather together all the assets of the estate, wherever they may be found. His search for missing property may lead him to the bankrupt or to third parties, often the

³¹¹ See generally Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power*, 33 BANKR. L. LETTER No. 8, Aug. 2013, at 1, 5–6 [hereinafter Brubaker, *Turnover (Part I)*]; Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who Is “Exercising Control” Over What?*, 33 BANKR. L. LETTER No. 9, Sept. 2013, at 1, 4–6 [hereinafter Brubaker, *Turnover (Part II)*].

³¹² *Maggio v. Zeitz*, 333 U.S. 56, 62–63 (1948) (emphasis added).

³¹³ 11 U.S.C. § 542(a) (2012); see *id.* § 521(a)(4) (setting forth debtor’s obligation to “surrender to the trustee all property of the estate”); *id.* § 105(a) (“The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”). When an entity (including the debtor) refuses to surrender property of the estate to the trustee, an injunctive order compelling turnover “has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act.” *Maggio v. Zeitz*, 333 U.S. at 63. Justice Brandeis stated the controlling principle as follows:

To protect its jurisdiction from interference, th[e] court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that, where a court of competent jurisdiction has, through its officers, taken property into its possession, . . . the court may . . . issue all writs necessary to protect its possession from physical interference.

Ex parte Baldwin, 291 U.S. 610, 615 (1934). The injunctive nature of a turnover order is made clear by the fact that failure to comply with a turnover order is punishable as a civil contempt. See *Oriel v. Russell*, 278 U.S. 358, 363–67 (1929) (stating that there is “no doubt that a motion to commit the bankrupt for failure to obey an order of the court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt,” and “this sort of an order of ‘turnover’ finds its analogy in the inquiry in contempt proceedings for violating an injunction issued by a court of general jurisdiction”); *Mueller v. Nugent*, 184 U.S. at 13 (stating that “if the [turnover] order . . . was in itself a lawful order, the power of the district court to commit” the person in possession of the bankrupt’s money “until he surrendered the money to the trustee, or otherwise satisfied the trustee with respect thereto, was unquestionable under . . . the general jurisdiction of the court to enforce its orders in the collection of assets”).

³¹⁴ The current statute provides that a debtor’s bankruptcy estate, of which the trustee is representative, includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1).

bankrupt's friends or relatives or officers of a bankrupt corporation, who are found to be concealing or withholding money or goods which are part of the estate in bankruptcy. In such circumstances the trustee, as the chosen representative of the creditors,³¹⁵ has the right and duty to vindicate his title and right of possession. To that end, he may effectively institute a *summary* proceeding to compel those who have the property to surrender it to him. This form of proceeding is commonly known as the "turnover proceeding."³¹⁶

As emphasized in the above quotations, the Supreme Court conceived of the turnover process as a quintessential summary proceeding "heard and determined by the [non-Article III] referee in bankruptcy."³¹⁷ And that summary turnover procedure is undoubtedly what Congress was referring to in the current grant of "core" jurisdiction for non-Article III bankruptcy judges to enter "orders to turn over property of the estate."³¹⁸ Indeed, because the entire turnover procedure and the limits thereon are themselves products of, and defined by the limitations on, the traditional summary bankruptcy process, turnover proceedings have always stood at the boundary between summary and plenary matters. Thus, the appropriate scope of turnover proceedings ultimately helps to define the full expanse of traditionally summary matters.³¹⁹

³¹⁵ The current statute provides that the trustee "is the representative of the estate." 11 U.S.C. § 323(a).

³¹⁶ Joseph W. McGovern, *Aspects of the Turnover Proceeding in Bankruptcy*, 9 *FORDHAM L. REV.* 313, 313 (1940) (emphasis added and footnotes omitted). The turnover procedure "is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity." *Maggio v. Zeitz*, 333 U.S. at 61. "[A] vast body of judicial authority has grown up which not only sanctions this type of proceeding but has defined the basis and the consequences of it." Max Schwartz, *Turnover and Contempt Proceedings in the Light of the History of Maggio v. Zeitz*, 5 *UCLA L. REV.* 75, 75 (1958). And use of the turnover process by federal courts dates from the earliest days of the Republic. See Brubaker, *Justice Story and Bankruptcy Injunctions*, *supra* note 200, at 93–94 & n.96.

³¹⁷ McGovern, *supra* note 316, at 313.

³¹⁸ 28 U.S.C. § 157(b)(2)(E) (2012); see *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2171 n.7 (2014) (stating that "[i]n using the term 'core,' Congress tracked the [*Marathon*] plurality's use of the same term as a description of those claims that fell within the scope of the historical" summary bankruptcy jurisdiction); *Reed v. Nathan*, 558 B.R. 800, 816–17 (E.D. Mich. 2016) ("Simply put, 'the principles applicable to determine jurisdiction over turnover actions under the 1898 [Act] remain 'perfectly appropriate to distinguish between a 'core' turnover proceeding and a 'non-core'' state-law action (quoting *In re Prosser*, Civ. No. 2011-113, 2013 WL 996367, at *4 (D. V.I. Mar. 14, 2013) (quoting *Beard v. Braunstein*, 914 F.2d 434, 444 (3d Cir. 1990))); *Jones v. Anderson (In re Jones)*, Nos. CC-06-1105-MoBK, et al., 2006 WL 6810992, at *4 (B.A.P. 9th Cir. Dec. 6, 2006) (holding that a turnover proceeding is core under § 157(b)(2)(E) because "the action for turnover . . . has always been considered within the 'summary' or 'core' jurisdiction of a bankruptcy court" (quoting *Global Int'l Airways Corp. v. Azima (In re Global Int'l Airways Corp.)*, 76 B.R. 700, 705 (Bankr. W.D. Mo. 1987)).

³¹⁹ See 4 *NORTON BANKRUPTCY LAW & PRACTICE* § 62:2, at 62–5 to –6 (3d ed. 2015); Brubaker, *Turnover (Part I)*, *supra* note 311, at 3 (noting that "this injunctive turnover power directly implicated the historical summary-plenary distinction that pervaded multiple dimensions of federal bankruptcy jurisdiction and procedure"). Thus, the only section of the pre-Code edition of the Collier treatise devoted to "Turnover

A turnover proceeding was properly considered a summary matter, because “[t]he possession . . . essential to [summary] jurisdiction[] need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee.”³²⁰ Constructive possession is also the operative principle with respect to property that cannot be physically possessed. “Where the character of the property is such that it is not capable of tangible or actual physical custody, constructive possession will suffice to confer summary jurisdiction upon the bankruptcy court regarding such property.”³²¹ In such cases, *control* of the property at issue is often a more useful inquiry than possession, which is why the Supreme Court often phrased the determinative inquiry in terms of whether the property at issue was “in the possession or control of the court or of the bankrupt . . . at the time of petition filed.”³²² As Judge Learned Hand cogently opined, the “nature of the doctrine” of constructive possession “depends merely upon possession in the natural sense” of being “in control of the property *de facto*,” with the ability to “exclude all others.”³²³

These basic principles would likely go a long way toward determining whether the bankruptcy court in *Wellness* had core jurisdiction over the property at issue in Wellness’s alter-ego action against the debtor, Sharif. Sharif’s admission that he served as trustee of the Soad Wattar Trust on the date of his bankruptcy petition suggests that he may have had actual possession or control of trust assets on the petition date, which would establish constructive possession in the court of those trust assets.³²⁴ Indeed, if the only

Orders” was set forth within the topic entitled “Jurisdiction of Bankruptcy Court in Summary Proceedings.” 2 COLLIER (14th ed.), *supra* note 72, ¶ 23.10.

³²⁰ Taubel-Scott-Kitzmillier Co. v. Fox, 264 U.S. 426, 432 (1924). See generally Brubaker, *Turnover (Part I)*, *supra* note 311, at 3–4. “Since in the turnover proceeding the trustee is seeking the surrender of property alleged to be in the actual physical possession of [the debtor or] a third party, it is apparent that it is *constructive* possession of the bankrupt’s property which there forms the foundation for the exercise of the court’s summary jurisdiction.” McGovern, *supra* note 316, at 314–15.

³²¹ 2 COLLIER (14th ed.), *supra* note 72, ¶ 23.05[4], at 486.

³²² Weidhorn v. Levy, 253 U.S. 268, 272 (1920). Indeed, the currently codified statutory automatic stay (in Code § 362(a)(3)) protects both “possession” and “control” of property of the estate from any outside interference. 11 U.S.C. § 362(a)(3) (2012); see Brubaker, *Turnover (Part II)*, *supra* note 311, at 1–4.

³²³ Palmer v. Warren, 108 F.2d 164, 166 (2d Cir. 1939), *aff’d*, 310 U.S. 132 (1940).

³²⁴ While a debtor’s bankruptcy estate obviously does not succeed to fee simple ownership of property the debtor merely holds in trust for another, the estate does succeed to whatever rights and interests the debtor (as trustee) has in the trust property (e.g., legal title, right of possession and control, etc.). See 4A COLLIER (14th ed.), *supra* note 72, ¶ 70.25, at 339–40 (noting that “[t]he rule is elementary that a trustee in bankruptcy (or reorganization) succeeds . . . to the title and rights in the property that the debtor possessed,” including cases “[t]herefore, where the bankrupt or debtor was in the possession of property impressed with a trust”).

way for the chapter 7 trustee to obtain possession and control of those trust assets was to divest possession and control from the trustee (debtor Sharif), then the bankruptcy court had constructive possession of those trust assets, with core jurisdiction to adjudicate anyone and everyone's rights in those assets.

As Judge Hand insightfully observed, “[t]he reason lying back of the whole doctrine” of possession and constructive possession “is practical rather than conceptual.”³²⁵ In gathering up all of the debtor's property for liquidation and distribution to creditors, from whom must the trustee obtain that property? As the Supreme Court noted in *May v. Henderson*, “[i]f the bankrupt . . . is not shown to possess or control the specific property which is the subject of [a] summary order,” a summary order for the debtor to turn over such property is not only improper, but also does the trustee no good whatsoever, and “[a] court of bankruptcy should not make useless orders.”³²⁶ Thus, if the property the trustee seeks is in the possession or control of a third party, who asserts a substantial claim of right to keep that property as his or her own, then “a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim . . . can be tried and adjudicated.”³²⁷

If the property the trustee seeks *is* in the possession or control of the debtor, however, no such plenary suit is necessary; that property is already in the constructive possession of the bankruptcy court, with full power not only to compel the debtor to relinquish possession or control to the trustee, but also to finally adjudicate third parties' adverse claims to that property. “[I]f the property were in the custody of the bankruptcy court or its officer, any controversy raised by an adverse claimant . . . might be determined on summary proceedings in the bankruptcy court, and would fall within the jurisdiction of the referee.”³²⁸ As Justice Brandeis noted: “This is but an application of the well-recognized rule that, when a court of competent jurisdiction takes possession of property through its officers, . . . the court . . . is competent to hear and determine *all questions* respecting title, possession,

³²⁵ *Palmer v. Warren*, 108 F.2d at 166.

³²⁶ 268 U.S. 111, 120 (1925).

³²⁷ *Babbitt v. Dutcher*, 216 U.S. 102, 113 (1910); *see also Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 433–34 (1924).

³²⁸ *Weidhorn v. Levy*, 253 U.S. 268, 271–72 (1920); *see also Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. at 433.

and control of the property.”³²⁹ Indeed, modern courts uniformly recognize that determining whether the property at issue is, in fact, property of the estate is an integral part of a core turnover action.³³⁰

That the alter-ego action at issue in *Wellness* would adjudicate substantial adverse claims of third-party beneficiaries (Sharif’s mother and sister) to equitable ownership of the trust assets, then, is *not* necessarily determinative as to whether the bankruptcy court had core jurisdiction to adjudicate that action. Moreover, that the debtor may have had nothing more than bare legal title to those trust assets (as trustee) is immaterial. The determinative inquiry is not who actually “owns” the property at issue; that may well be what the underlying action itself must determine (as in *Wellness*). Rather, the initial, potentially determinative inquiry is whether the debtor (and thus the court itself) had possession or control of the property at issue. As the Supreme Court stated in *Thompson v. Magnolia Petroleum Co.*³³¹—another case in which the action at issue would determine who “owned” the property at issue:

Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in [nor ownership of] but possession by the bankrupt at the time of the filing of the petition in bankruptcy.^[332] Here, the trustee succeeded to the physical possession, custody and control of the [property at issue] which the [debtor] had enjoyed at the time of bankruptcy. . . . [T]he jurisdiction thus acquired by the bankruptcy court “extends * * * to the adjudication of questions respecting the title [or ownership].”³³³

³²⁹ *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 737–38 (1931) (emphasis added); *accord Ex parte Baldwin*, 291 U.S. 610, 615 (1934) (“Having possession, the court may . . . determine *all questions* respecting the same.” (emphasis added)).

³³⁰ See 5 COLLIER (16th ed.), *supra* note 133, ¶ 542.03, at 542–9 to –10.

³³¹ 309 U.S. 478 (1940).

³³² While turnover jurisdiction under pre-Code law turned on possession as of the petition date, the Bankruptcy Code seems to have expanded the bankruptcy estate’s possessory rights, by imposing a turnover obligation on any “entity” (including the debtor) “in possession, custody, or control, *during the case*, of property” of the estate. 11 U.S.C. § 542(a) (2012) (emphasis added); see *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 207 (1983) (noting that the explicit “reach of § 542(a)” does not “require[] that the debtor hold a possessory interest in the property at the commencement of the [bankruptcy] proceedings. . . . In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings.”); cf. 5 COLLIER (16th ed.), *supra* note 133, ¶ 542.03[1], at 542–11 to –12 (discussing disagreement in the courts as to whether the “during the case” language overturns pre-Code Supreme Court case law holding “that possession or control of the property by a defendant at the time of a turnover proceeding is required to compel turnover”).

³³³ *Thompson*, 309 U.S. at 481–82 (quoting *Ex parte Baldwin*, 291 U.S. at 616).

Merely concluding that the debtor Sharif, as trustee of the Soad Wattar Trust, had possession or control of trust assets would *not*, of course, make those trust assets property of the debtor's bankruptcy estate; whether they were or not is what the underlying alter-ego action itself would determine, on the merits. The debtor Sharif's possession or control of trust assets as trustee of the Soad Wattar Trust, though, would give the bankruptcy court core jurisdiction to finally adjudicate ownership of those trust assets through that alter-ego action. And that is true even if that alter-ego action would adjudicate substantial adverse claims of third-party beneficiaries (Sharif's mother and sister) to equitable ownership of those assets.

Note, then, how the Supreme Court's summary-plenary jurisprudence remained faithful to the English origins of that distinction prevailing at the time of the Founding.³³⁴ The bankruptcy court has summary (now-core) jurisdiction to adjudicate all proceedings to administer property within the rightful possession and control of the estate's representative, including adjudication of all claims regarding that property. Plenary/non-core suits are necessary only when the estate representative seeks to recover money or property from an adverse claimant. "Recognizing the summary-plenary line as the operative constitutional boundary in bankruptcy" does, therefore, "have the virtue of consistency with historical practice" and does "afford lower courts (some of) the guidance they've long wanted."³³⁵

2. A Substantial Adverse Claim by a Third Party

In determining whether the bankruptcy court would have core jurisdiction to finally adjudicate the alter-ego action at issue in *Wellness*, therefore, the initial inquiry would be who had possession or control of the trust property. If the trust property included financial assets, for example, those assets might well be in the possession or control of third parties (such as banks or other financial institutions). If, however, those financial assets were held for the account of the debtor Sharif (as trustee for the Soad Wattar Trust), they would still seem to come within the summary/core jurisdiction of the bankruptcy court.

It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a bankruptcy court. But property held or

³³⁴ See Brubaker, A "Summary" Theory, *supra* note 2, at 122–26.

³³⁵ *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1282 (10th Cir. 2015).

acquired by others for [the] account of the bankrupt is subject to a summary order of the court which may direct an accounting and a payment over to the trustee or receiver appointed by the bankruptcy court.³³⁶

If any of the property at issue was *not* in the possession, custody, or control of the debtor, constructive possession of that property (essential to core/summary turnover jurisdiction regarding that property) is determined by whether the third party with possession, custody, or control raises a so-called “adverse claim” superior to that of the debtor or the estate,³³⁷ entitling that third party to keep the property. “To the extent a debtor’s property [i]s in the possession of a third party raising *no* adverse claim to retain possession, . . . a federal bankruptcy court c[an] summarily issue an injunctive turnover order against that party.”³³⁸

In *Wellness*, after the death (during the bankruptcy case) of debtor Sharif’s mother, apparently the only party purporting to claim trust assets adversely to the debtor was Sharif’s sister, who eventually sought to intervene in the alter-ego action.³³⁹ Of course, an adverse claim to those trust assets by Sharif’s sister would deprive the bankruptcy court of summary/core jurisdiction only if Sharif’s sister or someone holding for her account (and not Sharif or someone holding for Sharif’s account) were in possession or control of trust assets.³⁴⁰

³³⁶ May v. Henderson, 268 U.S. 111, 115 (1925) (citations omitted).

³³⁷ In the *Whiting Pools* decision, the Supreme Court interpreted Code § 542(a) as expanding the estate’s possessory rights in reorganization proceedings with respect to property held by a secured creditor by virtue of a pre-bankruptcy repossession, even though such a secured creditor would be considered an “adverse claimant” to the property at issue, with rights superior to those of the debtor, under pre-Code law. See 11 U.S.C. § 542(a); *Whiting Pools*, 462 U.S. at 207; Brubaker, *Turnover (Part I)*, *supra* note 311, at 4–7. Because Code § 542(a) changed the relative possessory rights as between such a secured creditor and the bankruptcy estate, such a secured creditor could no longer be considered an “adverse claimant” to the property at issue, the property at issue would now have to be considered within the “constructive possession” of the bankruptcy court, and the bankruptcy court would have core jurisdiction in a turnover proceeding against the secured creditor.

³³⁸ Brubaker, *Turnover (Part I)*, *supra* note 311, at 3 (emphasis added); see *Mueller v. Nugent*, 184 U.S. 1, 14–15 (1902) (holding that the referee had summary jurisdiction to enter turnover order against bankrupt’s agent because “[t]here was no pretense that . . . this money of the bankrupt . . . was held subject to any adverse claim, or that the right or title thereto had been passed over to another”).

³³⁹ See *supra* Part III.A.2.b.

³⁴⁰ See *Weidhorn v. Levy*, 253 U.S. 268, 272 (1920) (noting that “a plenary suit was necessary” because “the controversy related to property not in possession or control of the court or of the bankrupt or any one representing him at the time of the petition filed, . . . but in the actual possession of the [defendant] under an adverse claim of ownership”).

Even assuming that were the case,³⁴¹ it is still unclear whether a “substantial” adverse claim to the trust assets—necessary to deprive the bankruptcy court of constructive possession and corresponding summary/core turnover jurisdiction—was ever raised in *Wellness*.

In that regard, the Supreme Court in *Harrison v. Chamberlain*³⁴² nicely summarized the controlling principles as to whether a third party in possession or control of property has adequately raised an adverse claim that deprives the bankruptcy court of summary/core turnover jurisdiction:

It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit. However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and *substantial* or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding.³⁴³

And “as to the test to be applied in determining whether an adverse claim is substantial or merely colorable,” the *Harrison v. Chamberlain* Court went on to state:

[I]t is to be deemed of a substantial character when the claimant’s contention “discloses a contested matter of right, involving some fair doubt and reasonable room for controversy,” in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient,

³⁴¹ Sharif, of course, would claim that *he* was holding for the account of his sister (who *did* claim adversely). Since Sharif was the debtor, though, *his* possession or control (to which his estate rightfully succeeds) should be sufficient to give the bankruptcy court constructive possession. See 2 COLLIER (14th ed.), *supra* note 72, ¶ 23.05[2], at 474.3 (opining that summary jurisdiction exists even with respect to property “the bankrupt holds merely as an *agent*” for another); 4A *id.* ¶ 70.07[1], at 85–86 (“[A]s between the bankrupt and his trustee[,] the bankrupt cannot set up a third person’s title or right to justify a failure to turn over property or to account for it. . . . The rule applies even to property which the bankrupt had held in trust.”).

³⁴² 271 U.S. 191 (1926).

³⁴³ *Id.* at 193–94 (citations omitted and emphasis added); see also *May v. Henderson*, 268 U.S. 111, 115–16, 120 (1925); *Mueller v. Nugent*, 184 U.S. at 15.

either in fact or law, as to be plainly without color of merit, and a mere pretense.³⁴⁴

The Court also opined that “a claim is merely colorable if ‘on its face made in bad faith and without any legal justification.’”³⁴⁵

Using these same principles, then, if a defendant in even a *Marathon-* or *Stern*-like suit fails to answer the complaint, for example, the complete failure to assert any substantial defense on the merits would seem to give the bankruptcy court core jurisdiction to enter a default judgment against the defendant.³⁴⁶ These principles also suggest a possible justification for core jurisdiction over the bankruptcy court’s default judgment against Sharif on the alter-ego claim in the *Wellness* case.

The putative adverse claimant in *Wellness* was debtor Sharif’s sister, as purported beneficiary of the Soad Wattar Trust, whose alleged interest in the property at issue was raised both by debtor Sharif and by Sharif’s sister herself, through her request to intervene in the alter-ego action.³⁴⁷ The bankruptcy court, though, (1) entered a default judgment against Sharif on the alter-ego claim for failure to fully comply with the court’s discovery order, and (2) denied the requests of Sharif’s sister to intervene and to set aside the default judgment because, inter alia, with respect to her allegation that she succeeded to an interest in the trust assets upon her mother’s death, “[h]er unsupported allegation will be given no weight . . . as she has presented neither testimony nor documents in support of this assertion.”³⁴⁸

³⁴⁴ *Harrison v. Chamberlain*, 271 U.S. at 194–95 (citation omitted).

³⁴⁵ *Id.* at 194 (quoting *May v. Henderson*, 268 U.S. at 119). The Supreme Court (via a Justice Douglas opinion) applied these principles to an alter-ego action in *Sampsel v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941), concluding that a referee’s findings “that the [pre-petition] transfer of the [debtor’s] property to the [newly-formed family] corporation was not in good faith but was made for the purpose of placing the property beyond the reach of [the debtor’s] creditors” made it “clear that [the] family corporation’s adverse claim is merely colorable.” *Id.* at 216, 218.

³⁴⁶ *Cf. Geron v. Peebler (In re Pali Holdings, Inc.)*, 488 B.R. 841, 851–53 (Bankr. S.D.N.Y. 2013) (holding that the bankruptcy court had constitutional power to order turnover of amounts owing on promissory note when defendant raised no substantial defenses).

³⁴⁷ Whether it was necessary to join Sharif’s sister as a defendant in the alter-ego action is a standing issue determined by otherwise applicable state trust law. The bankruptcy court concluded that it was not necessary to join Sharif’s sister because under Illinois law “beneficiaries can not [sic] act on behalf of a trust. . . . The trust has to be represented by its trustee, not its beneficiary.” *In re Sharif*, 447 B.R. 853, 866 (Bankr. N.D. Ill. 2011). Thus, according to the bankruptcy court, “a trust beneficiary cannot sue or be sued regarding the trust.” *In re Sharif*, 446 B.R. 870, 882 (Bankr. N.D. Ill. 2011).

³⁴⁸ *Sharif*, 446 B.R. at 882; see *supra* Part III.A.2.

Again, because no jurisdictional objection was raised before the bankruptcy court, the bankruptcy judge made none of the inquiries or findings that would be necessary to conclude whether the putative adverse claim to the property at issue was “real and substantial” or “merely colorable.” The course of the proceedings before the bankruptcy court, though, suggest that this could have been a live issue had the jurisdictional objection been raised before the bankruptcy court.³⁴⁹

3. *General Supplemental Summary/Core Jurisdiction*

Another potential basis for core jurisdiction over the alter-ego claim in *Wellness* can be found in the Supreme Court’s *Katchen v. Landy*³⁵⁰ decision (determining the appropriate scope of a referee’s summary jurisdiction), which the *Stern v. Marshall*³⁵¹ majority relied on in its constitutional analysis and treated as an Article III decision.³⁵² As I have explained at length before, the reasoning of the *Katchen v. Landy* opinion contained a rationale for a general and very broad doctrine of supplemental non-Article III adjudications.³⁵³ While *Stern v. Marshall* implicitly rejected the most expansive version of supplemental non-Article III adjudications, the *Stern* decision was *not* a wholesale “rejection of supplemental jurisdiction in the context of non-Article III adjudications.”³⁵⁴ Indeed, the counterclaim jurisdiction approved in both *Katchen* and *Stern* indisputably *is* a species of supplemental jurisdiction: there is no independent core jurisdiction over the counterclaim at issue as a stand-alone claim, yet core jurisdiction over that counterclaim nonetheless can exist when it is joined and litigated with a core creditor claim. That *is* an application of supplemental jurisdiction principles in the context of (and that *expands* the permissible reach of) non-Article III bankruptcy-court adjudications.

Stern v. Marshall, then, did *not* reject (and indeed implicitly approved) the application of supplemental jurisdiction to non-Article III adjudications. *Stern* did, however, “circumscribe the necessary supplemental relationship” between

³⁴⁹ For a particularly thoughtful application of these principles of summary/core jurisdiction to a complex turnover action, involving questions of both possession of the property at issue and the substantiality of putative adverse claims thereto, see *Reed v. Nathan*, 558 B.R. 800, 814–20 (E.D. Mich. 2016).

³⁵⁰ 382 U.S. 323 (1966).

³⁵¹ 564 U.S. 462 (2011).

³⁵² See Brubaker, A “Summary” Theory, *supra* note 2, at 150–57, 167–72; Brubaker, *Bleak House (Part II)*, *supra* note 2, at 3–6, 10–12.

³⁵³ See Brubaker, A “Summary” Theory, *supra* note 2, at 167–72, 176–80.

³⁵⁴ *Id.* at 170–71.

the claims at issue.³⁵⁵ In that regard, “the most that *Stern v. Marshall* implicitly admits is the possibility of supplemental core jurisdiction over common factual and legal issues that are ‘necessary’ to adjudicate those matters historically considered ‘summary’”³⁵⁶—those that are “resolved in the process of ruling on”³⁵⁷ or “disposed of in passing on”³⁵⁸ a traditionally summary, core matter. And, of course, if supplemental jurisdiction principles are “properly applicable to expand the jurisdiction of non-Article III tribunals,” as both *Katchen* and *Stern* seem to necessarily imply, “those principles would obviously have application in many bankruptcy contexts other than simply ‘counterclaims by the estate against persons filing claims against the estate.’”³⁵⁹—the context at issue in both *Katchen* and *Stern*.

The applicability of such a doctrine of supplemental core jurisdiction was raised in *Wellness*, but the Seventh Circuit rejected it by concluding that it only has applicability to the particular core, traditionally summary matter at issue in both *Katchen* and *Stern*: allowance or disallowance of a creditor’s claim against a bankruptcy estate.³⁶⁰ That is an incredibly cramped reading of *Katchen* and *Stern* that is not necessarily warranted. The undue stinginess of that approach is highlighted by courts’ widespread *acceptance* of supplemental core jurisdiction, in the context of nondischargeability determinations, to enter money judgment against the debtor personally on a debt declared nondischargeable,³⁶¹ which is *not* a matter that is typically resolved through allowance or disallowance of the creditor’s claim against the estate.³⁶² If *Stern*’s “necessity” version of supplemental core jurisdiction applies to

³⁵⁵ *Id.* at 171.

³⁵⁶ *Id.* at 179.

³⁵⁷ *Stern v. Marshall*, 564 U.S. 462, 503 (2011).

³⁵⁸ *Katchen v. Landy*, 382 U.S. 323, 333 n.9 (1966).

³⁵⁹ Brubaker, A “Summary” Theory, *supra* note 2, at 178 (citation omitted).

³⁶⁰ See *Wellness Int’l Network, Ltd. v. Sharif*, 727 F.3d 751, 775 (7th Cir. 2013), *rev’d on other grounds*, 135 S. Ct. 1932 (2015).

³⁶¹ See generally *Deitz v. Ford (In re Deitz)*, 469 B.R. 11, 26–30 (B.A.P. 9th Cir. 2012) (Markell, B.J., concurring), *aff’d*, 760 F.3d 1038 (9th Cir. 2014); Brubaker, A “Summary” Theory, *supra* note 2, at 178–180; Brubaker, A General Theory, *supra* note 169, at 911–21; Ralph Brubaker, *Bankruptcy Court Jurisdiction to Enter a Money Judgment on a Nondischargeable Debt: Exposing Pacor’s Deficiencies and the True Supplemental Nature of Third-Party “Related To” Bankruptcy Jurisdiction*, 29 BANKR. L. LETTER No. 4, Apr. 2009, at 1, 8.

³⁶² See Brubaker, A “Summary” Theory, *supra* note 2, at 180 n.264; Brubaker, A General Theory, *supra* note 169, at 915–16 n.600. Thus, the Ninth Circuit was simply incorrect when it asserted that “dischargeability actions . . . are ‘necessarily resolved during the process of allowing or disallowing claims against the estate.’” *Deitz*, 760 F.3d at 1039. Indeed, in most chapter 7 cases, including the *Deitz* case itself, creditors do not even file claims against the estate (because it has no assets), so there are *no* creditor claims against the estate to allow or disallow! See *Deitz*, 469 B.R. at 27–28 (Markell, B.J., concurring).

proceedings other than claims allowance proceedings (and there is no apparent cogent reason why it should not), the *Wellness* litigation provides a nice example of how it could give the bankruptcy court core jurisdiction over the alter-ego claim at issue in that case.

The adversary proceeding at issue in *Wellness* objected to Sharif's discharge under Bankruptcy Code § 727(a)(2)–(5).³⁶³ One count of the complaint sought a declaratory judgment that the Soad Wattar Trust was the alter-ego of Sharif and, thus, was property of Sharif's bankruptcy estate. Another count of the complaint sought to deny Sharif a discharge under Code § 727(a)(2) on the basis that he had concealed that “property of the debtor” or “property of the estate” (the Soad Wattar Trust assets) with intent to hinder, delay, and defraud his creditors and the chapter 7 trustee.³⁶⁴

No one questioned the constitutionality of the bankruptcy court's core jurisdiction over those counts seeking to deny Sharif a discharge, including the count concerning concealment of the Soad Wattar Trust assets (as property of the debtor or property of the estate) under Code § 727(a)(2). Indeed, in the Seventh Circuit, Sharif conceded and the court agreed “that the bankruptcy court had authority to enter final judgment” on the discharge-denial counts,³⁶⁵ and thus, the Seventh Circuit “affirm[ed] the bankruptcy court's entry of default judgment denying discharge of Sharif's debts.”³⁶⁶ Of course, Sharif's alleged concealment of the Soad Wattar Trust assets would be grounds for denial of discharge under Code § 727(a)(2) only if those assets were, in fact, “property of the debtor” or “property of the estate.”³⁶⁷

Again, because the jurisdictional objection was not raised before the bankruptcy court, the bankruptcy judge did not make the requisite findings. It

³⁶³ 11 U.S.C. § 727(a)(2)–(5) (2012).

³⁶⁴ *Id.* § 727(a)(2)(A)–(B); see *supra* Part III.A.2.a.

³⁶⁵ *Wellness*, 727 F.3d at 773.

³⁶⁶ *Id.* at 782. As Chief Justice Roberts correctly noted in *Wellness*, “[w]hen the Framers gathered to draft the Constitution, English statutes had long empowered nonjudicial bankruptcy ‘commissioners’ to,” *inter alia*, “discharge the debts” of the bankrupt. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting); see also 2 BLACKSTONE, *supra* note 153, at *482–83; Plank, *supra* note 156, at 576, 589–90, 612; Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 333–34, 340 & n.96, 342 (1991). As Professor Plank's research reveals, commissioners “determined almost all of the issues arising in the bankruptcy proceeding,” including “discharge of the bankrupt's debts.” Plank, *supra* note 156, at 576. And as Professor Tabb has observed, “[w]hether or not to issue the certificate [of conformity, which was later called the certificate of discharge] was considered a judicial act within the discretion of the commissioners.” Tabb, *supra*, at 334.

³⁶⁷ 11 U.S.C. § 727(a)(2)(A)–(B).

is certainly plausible, though, that had the jurisdictional objection been raised before the bankruptcy court, the bankruptcy judge would have concluded that she was resolving the alter-ego claim in order to finally adjudicate a core § 727(a)(2) discharge objection premised upon the Soad Wattar Trust assets being property of the debtor or property of the estate and, thus, that she also had supplemental core jurisdiction to finally adjudicate the alter-ego claim.³⁶⁸ As I have argued before,³⁶⁹ even in the absence of any other basis for core jurisdiction, such an exercise of supplemental core jurisdiction is fully consistent with the *Katchen* and *Stern* decisions.

CONCLUSION

The Supreme Court's *Wellness* decision has important implications for the constitutionality of non-Article III adjudications in the context of both bankruptcy and nonbankruptcy adjudicatory systems, whether those non-Article III adjudications are conducted with or without consent of the litigants. In the nonbankruptcy context, *Wellness* reveals a Supreme Court jurisprudence with a bifurcated analytical methodology that facilitates a complex interaction between the waivable personal and non-waivable structural interests protected by Article III, § 1. In the bankruptcy context, *Wellness* provides further evidence that the Court is, over a long run of decisions, simply confirming the constitutional significance of its extensive summary-pleenary jurisprudence as the operative constitutional constraint on the adjudicatory powers of non-Article III bankruptcy judges.

³⁶⁸ The *Stern* Court's own statement of the holding of the case, as applied to a general principle of supplemental core jurisdiction, is that a bankruptcy judge "lack[s] the constitutional authority to enter a final judgment on" a supplemental claim, such as the counterclaim at issue in *Stern*, only to the extent that a particular issue of fact or law "is *not* resolved in the process of ruling on" a constitutionally core claim, such as a creditor's claim against the estate. *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (emphasis added); *see also Katchen v. Landy*, 382 U.S. 323, 333 n.9 (1966) (reserving judgment as to whether a referee had jurisdiction to determine (by final order) factual or legal issues regarding an otherwise-pleenary claim "which have *not* been disposed of in passing on" a summary matter (emphasis added)).

³⁶⁹ *See* Brubaker, A "Summary" Theory, *supra* note 2, at 167–72, 176–80.