



EMORY
LAW

Emory Bankruptcy Developments Journal

Volume 28
Issue 2 *The Ninth Annual Emory Bankruptcy Developments Journal Symposium*

2012

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Recommended Citation

Kent L. Richland, *Stern v. Marshall: A Dead-End Marathon?*, 28 EMORY BANKR. DEV. J. 393 (2012).
Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol28/iss2/7>

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STERN V. MARSHALL: A DEAD-END MARATHON?

*Kent L. Richland**

INTRODUCTION

If ten years ago a poll had been taken of lawyers asking them to predict the individuals who would have the most significant impact on federal jurisdiction law in the first decade of the 21st century, it's a safe bet that Anna Nicole Smith's name would not have shown up on many ballots. But counterintuitive as it may then have seemed, as it turned out, the late Ms. Smith left a substantial imprint on the jurisprudence of federal jurisdiction: in that uniquely American way pop culture has of filling every nook and cranny of our society, litigation brought by Ms. Smith generated two of the most important United States Supreme Court decisions on federal jurisdiction in the last ten years.

First, in 2006, the high court handed down *Marshall v. Marshall*, in which Ms. Smith (whose married name was Vickie Lynn Marshall) successfully sought review of the 9th Circuit's reversal of an \$89 million judgment in her favor based on her claim that her stepson had interfered with an intended *inter vivos* gift from her deceased billionaire husband. In reversing the 9th Circuit, the Court clarified an issue of federal jurisdiction that had bedeviled the lower federal courts for forty years: Resolving a four-way split among the circuits, Justice Ginsburg's unanimous opinion explained that the judge-made "probate exception" to federal jurisdiction was to be applied narrowly, only foreclosed a federal court from directly interfering with a state court's probate of a will or administration of an estate, and could not be used as an "end-around" federal jurisdiction simply because a case was related to a state probate action.

Then, in 2011, the Court issued its opinion in *Stern v. Marshall*, in which the late Ms. Smith's estate had sought review of the 9th Circuit's second reversal of the same judgment.¹ In a 5-4 ruling, the Court held that a non-Article III bankruptcy court could not constitutionally render a final decision on a bankruptcy estate's state-law-based compulsory counterclaim to a proof

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¹ See *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

of claim filed by a creditor of the estate.² Although characterized by the majority as a “narrow” decision, the rationale adopted by the majority—as well as the very nature of Article III and the jurisprudence that has developed around it—could result in a significant shift of adjudicatory authority, not just in the bankruptcy system, but potentially far more broadly.³

This article will focus on the *Stern* holding and its potentially serious implications both inside and outside of bankruptcy. First, it will discuss the problem presented by Article III and the relevant (but inconsistent) Supreme Court cases before *Stern*. Then it will recount both the facts and legal analysis of the *Stern* decision itself. Finally, it will consider perhaps the most troubling question inherent in the *Stern* holding: what are its implications in light of the established principle that, because of Article III’s structural, separation-of-powers aspect, its application cannot be waived by the parties? Within the answer to that question may lie the future effectiveness of not just the bankruptcy courts, but of federal magistrates, federal arbitration, and other non-Article III adjudicative bodies.

I. ARTICLE III ANALYSIS: FORMALISM VERSUS ALL-FACTORS BALANCING

A. *Early Cases: The Development of Article III Formalism*

By its terms, Article III is seemingly absolute. It vests the “judicial Power of the United States” in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” and it provides that the judges of those courts “shall hold their Offices during good Behaviour [sic], and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”⁴ By its terms, then, Article III directs that only the federal courts can wield federal judicial

² *Id.* at 2620.

³ *Id.* As of the date of this writing, bankruptcy and district courts across the country are considering a wide variety of issues regarding the scope of the *Stern* holding and its effect on the jurisdiction of bankruptcy courts to issue final decisions in a number of situations. But the potential for even broader impact has not gone unnoticed. On September 9, 2011, the Fifth Circuit Court of Appeals issued a *sua sponte* order in a pending appeal, requesting supplemental briefing from the parties “addressing whether the reasoning of *Stern* applies to magistrate judges, which, like bankruptcy judges, are not Article III judges, and whether, under *Stern*, a magistrate judge can enter final judgment in a case tried to a magistrate judge by consent under 28 U.S.C. § 636(c) where jurisdiction is based on diversity of citizenship and state law provides the rule of decision.” Order at 2, *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, No. 10-20640, 2012 WL 688520 (5th Cir. Mar. 5, 2012), available at <http://stevesathersbankruptcynews.blogspot.com/2011/09/fifth-circuit-to-consider-impact-of.html> (last visited February 19, 2012).

⁴ U.S. CONST. art. III, § 1.

power, and that those courts must be staffed by judges with life tenure whose salaries may not be reduced during that tenure.

The problem is that, pursuant to its Article I powers, Congress—for good, pragmatic reasons—has created a multiplicity of tribunals other than the federal courts—for example, territorial courts, military courts, agency tribunals, and bankruptcy courts. Do these so-called “legislative courts” violate Article III?

From early on, the Supreme Court held that in many instances they did not—at least, not if they fell within certain specific categories. For example, in *The American Insurance Company v. Canter*, Chief Justice Marshall wrote on behalf of a unanimous court that a territorial court created by Congress in the territory of Florida, whose judges served for terms of four years, did not violate Article III when it exercised admiralty jurisdiction.⁵ Although section 2 of Article III provides that “[t]he judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction,”⁶ Chief Justice Marshall explained that the territorial courts

are not constitutional courts, in which the judicial power conferred by the [C]onstitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that [Article I] clause which enables [C]ongress to make all needful rules and regulations respecting the territory belonging to the United States.⁷

A more nuanced—and ultimately more influential—approach to Article III was articulated in *Murray’s Lessee v. Hoboken Land & Improvement Co.*⁸ In that case, the Court changed its focus from the nature of the decision maker to the nature of the matter under consideration.⁹

In *Murray’s Lessee*, the Treasury Department had summarily sold property belonging to a customs collector who had failed to transfer to the government

⁵ *Am. Ins. Co. v. Canter*, 26 U.S. 511, 546 (1828). For Congress to create federal courts in the territories, it would have presented a real practical problem: when and if the territory became a state and established its own local court system, there would have been a surfeit of life-tenured federal judges left over from the territorial courts.

⁶ U.S. CONST. art. III, § 2.

⁷ *Am. Ins. Co.*, 26 U.S. at 546.

⁸ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855).

⁹ *See id.* at 283–85.

customs funds he had collected.¹⁰ The plaintiff argued that the sale was void, asserting that calculating the deficiency and selling the property were judicial acts that could not be done by the executive branch under Article III.¹¹

The Supreme Court upheld the Treasury Department sale, stating that while Article III would prohibit Congress from

withdraw[ing] from judicial cognizance any matter which . . . is the subject of a suit at the common law, or in equity, or admiralty . . . there are matters, involving public rights . . . which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.¹²

The Court explained that the case before it was a “public rights” matter because it could only be brought against the federal government; since the federal government could be sued only if it chose to waive sovereign immunity, it followed that the federal government could dictate the method by which it could be held liable.¹³ Thus, the *Murray’s Lessee* court drew what appeared to be a strict distinction between “public rights,” which could be adjudicated by a non-Article III entity, and “private rights,” which could not.

But when the Court expressly considered whether a non-Article III federal agency tribunal could decide a “private rights” dispute in *Crowell v. Benson*, it came up with a surprising answer.¹⁴ Congress had set up a federal workers’ compensation scheme under which employers would pay compensation to maritime workers injured on the job.¹⁵ Any factual dispute between employer and employee—such as the nature and scope of the employee’s injury—was decided by a non-Article III deputy commissioner of the United States Employees’ Compensation Commission, whose decision was final subject only to very deferential judicial review by an Article III court.¹⁶

The Court acknowledged *Murray’s Lessee’s* Article III dichotomy of public rights versus private rights, and it concluded that the case before it involved a determination of private rights.¹⁷ Nevertheless, the Court held that (except in one respect irrelevant here), delegation of final fact-finding to the

¹⁰ *Id.* at 275.

¹¹ *Id.*

¹² *Id.* at 284.

¹³ *Id.* at 283–84.

¹⁴ *See Crowell v. Benson*, 285 U.S. 22 (1932).

¹⁵ *Id.* at 37–38.

¹⁶ *Id.* at 43–44.

¹⁷ *Id.* at 50–51.

deputy commissioner did not violate Article III.¹⁸ The Court likened the deputy commissioner’s function to that of a jury or special master, as to whom, the Court noted, “[I]t has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law.”¹⁹

B. Northern Pipeline v. Marathon Pipe Line: Formalism Over Balancing

As the above discussion suggests, the Court’s early Article III cases lacked a coherent, unifying principle. Indeed, when the Court first considered the impact of Article III on bankruptcy court adjudications in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, one Justice archly observed that the Court’s previous Article III cases “do not admit of easy synthesis.”²⁰ In *Marathon*, a splintered Court disagreed on the appropriate approach to Article III analysis; nevertheless, a majority of the Justices concluded that the Bankruptcy Act of 1978 (the 1978 Act) violated Article III.²¹

The 1978 Act created bankruptcy courts as so-called “adjuncts” to the federal district court in each district.²² The bankruptcy court judges were appointed to fourteen-year terms by the President, with the advice and consent of the Senate; their salaries were set by statute and could be adjusted by Congress.²³ The jurisdiction of the bankruptcy courts was very broad, extending to “all ‘civil proceedings arising under title 11 or arising in or related to cases under title 11.’”²⁴

Northern Pipeline had filed a petition for reorganization in the bankruptcy court.²⁵ Northern then filed suit in the bankruptcy court against Marathon Pipe Line—an entity that was not otherwise a party in the bankruptcy case—alleging breach of contract and other claims.²⁶ The bankruptcy court denied Marathon’s motion to dismiss that argued that the Bankruptcy Act unconstitutionally conferred Article III judicial power on non-Article III

¹⁸ *Id.* at 95.

¹⁹ *Id.* at 51–52.

²⁰ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

²¹ *Id.* at 87 (plurality opinion).

²² *Id.* at 53.

²³ *Id.*

²⁴ *Id.* at 54 (quoting 28 U.S.C. § 1471(b) (1976 ed., Supp. IV)) (emphasis omitted).

²⁵ *Id.* at 56.

²⁶ *Id.*

judges, but the district court reversed.²⁷ Northern appealed to the Supreme Court.²⁸

Justice Brennan's four-justice plurality opinion began by emphasizing that Article III served important structural interests as "[a]n inseparable element of the constitutional system of checks and balances;" thus, the guarantees of life tenure and an undiminished salary for federal judges "were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government."²⁹ Because bankruptcy judges enjoyed neither of these guarantees, they clearly were not Article III judges.³⁰

The plurality then attempted to synthesize the previous case law. It asserted that there were only "three narrow situations" that had been recognized as exceptions to the Article III rule that the judicial power of the United States must be vested in Article III courts: territorial courts (per *Canter*), military courts (as the Court had recognized in other early cases), and "public rights" cases (per *Murray's Lessee*).³¹ The plurality defined "public rights" cases as those where the government was a party.³² Concluding that Northern's contract action against Marathon fell within none of those categories—and particularly noting that it involved not a "public right," but rather a "state-created private right[]"³³—the plurality held that the Bankruptcy Act's broad delegation to non-Article III bankruptcy courts of the power to decide any civil proceeding simply "related to" bankruptcy violated Article III.³⁴

Concurring in the result for himself and Justice O'Connor, Justice Rehnquist trenchantly noted that the Court's previous Article III jurisprudence was characterized by "frequently arcane distinctions and confusing precedents," and he expressed skepticism that Article III had "three tidy exceptions, as the plurality believes."³⁵ Nevertheless, the concurring justices

²⁷ *Id.* at 56–57.

²⁸ *Id.* at 57.

²⁹ *Id.* at 58, 59.

³⁰ *Id.* at 60–61.

³¹ *Id.* at 64–67.

³² *Id.* at 67–68.

³³ *Id.* at 71. The plurality thus distinguished *Crowell v. Benson* on the ground that that case dealt with a federally-created right as to which Congress "possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges." *Id.* at 80.

³⁴ *Id.* at 87.

³⁵ *Id.* at 90–91 (Rehnquist, J., concurring).

were “satisfied” that Northern’s lawsuit against Marathon—described by Chief Justice Burger in dissent as “a ‘traditional’ state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law”—could not be sustained under the Court’s previous Article III cases.³⁶

Justice White’s three-justice dissent described the Court’s previous “confusing and controversial” Article III jurisprudence and took the plurality opinion to task for its “gross oversimplification” of the law.³⁷ Eschewing the plurality’s and the Court’s own previous “unsuccessful attempt[s] to articulate a principled” approach to Article III issues,³⁸ the dissent employed a balancing test that considered the strength of the legislative interest in assigning a determination to a non-Article III tribunal, the relative strength of Article III values in the particular circumstances, and “whether and to what extent the legislative scheme accommodates [those values] or, conversely, substantially undermines them.”³⁹ Applying that balancing test, the dissent concluded that the bankruptcy court system embodied in the 1978 Act did not violate Article III because of (1) the availability of appellate review of bankruptcy court determinations by Article III courts; (2) the absence of any indication the 1978 Act was an attempt by the political branches to take power from the judiciary; and (3) the importance of the congressional goal that motivated the creation of the bankruptcy courts—to efficiently deal with the “tremendous increase” in bankruptcy filings that threatened otherwise to overwhelm the federal judiciary.⁴⁰

The *Marathon* case thus presented two very different recipes for Article III analysis. The plurality pursued a formalistic approach, examining the nature of the matter being adjudicated and determining whether it could be decided by a non-Article III tribunal according to whether it fell within certain narrowly-defined categories. The dissent urged a more subjective analysis, weighing and balancing the importance of congressional goals against Article III values and the extent to which the latter might be compromised by the legislative scheme in question.⁴¹

³⁶ *Id.* at 91–92 (Rehnquist, J., concurring, & Burger, C.J., dissenting).

³⁷ *Id.* at 93 (White, J., dissenting).

³⁸ *Id.* at 105.

³⁹ *Id.* at 115.

⁴⁰ *Id.* at 116–17.

⁴¹ *Id.* To illustrate the formalistic nature of the plurality’s approach, the dissent pointed to *Katchen v. Landy*, 382 U.S. 323 (1966), in which the Court had “recognized that [a bankruptcy] referee could adjudicate counterclaims against a creditor who files his claim against the estate,” and reasoned that therefore “if

C. *Post-Marathon Cases: Balancing Ascendant*

Although the *Marathon* decision was a victory for the Justices advocating the formalistic approach to Article III analysis, it was to be short-lived. In the Court's next few Article III cases, it seemed as if Justice White's balancing approach in his *Marathon* dissent clearly had triumphed.

Thus, in *Thomas v. Union Carbide Agricultural Products Co.*, the Court considered an Article III attack on a federal statute that required binding arbitration, with limited appellate review, of disputes among pesticide manufacturers (clearly a "private rights" dispute) who were subject to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁴² Writing for the majority, Justice O'Connor expressly rejected the formalistic approach, stating that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."⁴³ The majority examined the substance of FIFRA and noted that under the Act the "danger of Congress or the Executive encroaching on the Article III judicial powers" was minimal, and it further observed that FIFRA "does provide for limited Article III review, including whatever review is independently required by due process considerations."⁴⁴ Weighing these factors, the majority found no Article III violation.⁴⁵

One year later, the Court reaffirmed its adherence to the balancing approach. In *Commodity Futures Trading Commission v. Schor*, the Court considered the constitutionality of a federal statute that created the Commodity Futures Trading Commission (CFTC) to help regulate commodity futures transactions.⁴⁶ Among its statutory duties, the CFTC was to adjudicate claims of the customers of professional commodity brokers that the brokers had violated the statute or CFTC regulations.⁴⁷ The CFTC route was not exclusive,

Marathon had filed a claim against the bankrupt in this case, the trustee could have filed and the bankruptcy judge could have adjudicated a counterclaim seeking the relief that is involved in these cases." *Marathon Pipe Line*, 458 U.S. at 99–100 (White, J., dissenting). The plurality responded in a footnote that the earlier case had "no discussion of the Art[icle] III issue." *Id.* at 79 n.31 (plurality opinion). This question—whether a non-Article III bankruptcy judge could constitutionally adjudicate a counterclaim—would become the central issue in *Stern*. See *Stern v. Marshall*, 131 S. Ct. 2594, 2600 (2011).

⁴² *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 571–73 (1985).

⁴³ *Id.* at 587.

⁴⁴ *Id.* at 591, 593.

⁴⁵ *Id.* at 593–94.

⁴⁶ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 835–36 (1986).

⁴⁷ *Id.* at 836.

but rather was intended to be an “inexpensive and expeditious” alternative to traditional judicial relief.⁴⁸

An important feature of the CFTC system was a provision that permitted the broker to bring any counterclaim against the customer that arose out of the transactions about which the customer was complaining.⁴⁹ In the case before the Court, the customer had filed a CFTC complaint against the broker alleging that the broker’s violations had caused losses and expenses to exceed funds deposited, thus resulting in a debit balance in the customer’s account.⁵⁰ The broker counterclaimed, alleging the debit balance was the result of the customer’s poor trading decisions and was therefore a simple debt owed to the broker under state common law.⁵¹

When the court of appeals held that the counterclaim provision violated Article III under *Marathon*,⁵² the Supreme Court granted the broker’s petition for certiorari.⁵³ Justice O’Connor wrote the opinion for the majority and once again eschewed formalistic analysis. Her opinion noted initially that the Court’s earlier cases—which had emphasized the structural, separation-of-powers aspect of Article III—had “little occasion” to discuss the “personal” interests protected by Article III.⁵⁴ The opinion identified those personal interests as a litigant’s “right to have claims decided before judges who are free from potential domination by other branches of government.”⁵⁵ Holding that such personal interests can be waived—and finding that the customer did waive them when he initially brought his claim against the broker before the CFTC rather than in court—the Court concluded that the “personal” aspect of Article III was no barrier to determination of the counterclaim by the CFTC.⁵⁶

The Court then turned to the structural aspect of Article III, the separation-of-powers guarantee that serves as “an inseparable element of the constitutional system of checks and balances.”⁵⁷ As to this element of Article III, consent could not provide a way out: “When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the

⁴⁸ *Id.* (quoting S. REP. NO. 95-850, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2087, 2099).

⁴⁹ *Id.* at 837.

⁵⁰ *Id.* at 837–38.

⁵¹ *Id.* at 838.

⁵² *Id.* at 839.

⁵³ *Id.* at 841.

⁵⁴ *Id.* at 848.

⁵⁵ *Id.* (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)).

⁵⁶ *Id.* at 848–50.

⁵⁷ *Id.* at 850 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982)).

limitations serve institutional interests that the parties cannot be expected to protect.”⁵⁸

Declining to “adopt formalistic and unbending rules,” the opinion went on to weigh “a number of factors,” including the extent to which the non-Article III tribunal possessed the “essential attributes of judicial power” as well as the “concerns that drove Congress to depart from the requirements of Article III.”⁵⁹ The opinion concluded that the intrusion on Article III was *de minimis*, while the congressional goal of furnishing a “prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact” was a worthy one.⁶⁰ Summing up, the opinion stated that because “due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III,” the majority concluded the CFTC’s counterclaim authority passed muster under Article III.⁶¹

Justice Brennan’s two-justice dissent reiterated the formalistic approach of his plurality opinion in *Marathon* and harkened back to the language in *Murray’s Lessee* that Congress could not “withdraw from [Article III] judicial cognizance any matter which, from its nature, is the subject of a suit at the common law.”⁶²

With the *Schor* decision, it appeared that an all-factors balancing test along the lines urged by Justice White in his *Marathon* dissent had displaced formalism as the Court’s prescribed method for analyzing Article III issues. Indeed, one prominent academic critic of the *Marathon* plurality opinion, Professor Erwin Chemerinsky, concluded that *Thomas* and *Schor* had effectively overruled *Marathon*.⁶³ And this was the state of the Court’s Article III jurisprudence when it considered the authority of bankruptcy courts to decide state-law counterclaims in *Stern*.

⁵⁸ *Id.* at 851.

⁵⁹ *Id.*

⁶⁰ *Id.* at 856.

⁶¹ *Id.* at 857.

⁶² *Id.* at 861–62 (Brennan, J., dissenting) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)).

⁶³ Erwin Chemerinsky, *Ending the Marathon: It Is Time To Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 320 (1991).

II. *STERN V. MARSHALL: MARATHON REDUX*

A. *Overview of Facts*

The archetypal story of Anna Nicole Smith's marriage to octogenarian billionaire J. Howard Marshall and the subsequent estate battle with her stepson Pierce Marshall has become a staple of pop culture: how they met in 1991 when he was an 86-year-old oil tycoon and she was a 24-year-old dancer at a bar; how soon thereafter she became a Playboy centerfold model, Playmate of the Year, and international model for Guess jeans; how they married in 1994, against the wishes of J. Howard's son Pierce and the rest of his family; how, when J. Howard died in 1995, she was not mentioned in his will; and how she and Pierce spent the next decade-and-a-half litigating against each other—two times in the United States Supreme Court—and how their estates continued the fight when both met untimely deaths.⁶⁴

Less well known is the intricate procedural history of the litigation. Although a comprehensive review of that history is unnecessary for purposes of this article, the somewhat abbreviated summary below provides both the flavor of what occurred and essential background to the case as decided by the Supreme Court.⁶⁵

Shortly after J. Howard died in August 1995, Pierce initiated a Texas proceeding to probate the will.⁶⁶ In early 1996, Vickie Lynn Marshall filed for bankruptcy in California.⁶⁷ Pierce filed an adversary complaint and creditor's claim in the bankruptcy proceeding alleging that Vickie, through her lawyers, had defamed him by publicly accusing him of forgery, fraud, and overreaching to gain control of J. Howard's assets before his death.⁶⁸

Vickie objected to the creditor's claim, pleaded truth as an affirmative defense and asserted a compulsory counterclaim against Pierce for tortious

⁶⁴ Marshall v. Marshall (*In re Marshall*), 275 B.R. 5, 11–25 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev'd and remanded sub nom.* Marshall v. Marshall, 547 U.S. 293 (2006), *rev'd*, 600 F.3d 1037 (9th Cir. 2010), *aff'd sub nom.* Stern v. Marshall, 131 S. Ct. 2594 (2011).

⁶⁵ Although there have been a substantial number of published opinions in this matter, none includes a complete explanation of the procedural history of the case. In its opinion, the Supreme Court relied on the Court of Appeals Excerpts of Record and Supplemental Excerpts of Record, both publicly available documents. *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2607 (2011).

⁶⁶ 5 Excerpts of Record at 836–45, Marshall v. Marshall, 600 F.3d 1037 (9th Cir. 2010) (Nos. 02-56002, 02-56067).

⁶⁷ *In re Marshall*, 275 B.R. at 8.

⁶⁸ *Id.* at 8–9.

interference with her expectancy of an *inter vivos* gift from J. Howard.⁶⁹ In March 1999, the bankruptcy court confirmed Vickie's reorganization plan, which provided that her creditors would be paid out of the proceeds, if any, of her counterclaim against Pierce.⁷⁰

The bankruptcy court resolved Pierce's claim against him on summary judgment.⁷¹ Pierce asserted that Vickie's counterclaim was barred by the "probate exception" to federal jurisdiction and that Vickie's tortious interference claim against him could only be heard in a Texas probate court.⁷² The bankruptcy court ruled against Pierce on the jurisdictional issue,⁷³ tried Vickie's counterclaim, and held in her favor; it found that J. Howard had instructed his lawyers to create an *inter vivos* trust for Vickie consisting of half the appreciation in his assets from the time of their marriage, but that Pierce had tortiously prevented it.⁷⁴ The court awarded Vickie's bankruptcy estate \$449 million in compensatory damages and \$25 million in punitive damages, entering final judgment in December 2000.⁷⁵

When the bankruptcy court entered final judgment, the Texas probate trial was in progress.⁷⁶ Vickie immediately dismissed all her claims in the Texas court.⁷⁷ However, the probate court permitted Pierce to assert a new claim for declarative relief against Vickie, asking for a declaration that Vickie never had a "contract" with J. Howard for one-half his property.⁷⁸ After a jury trial, the

⁶⁹ *Id.* at 9.

⁷⁰ 29 Supplemental Excerpts of Record at 6065–91, *Marshall v. Marshall*, 600 F.3d 1037 (9th Cir. 2010) (Nos. 02-56002, 02-56067).

⁷¹ *In re Marshall*, 275 B.R. at 9.

⁷² *Marshall v. Marshall (In re Marshall)*, 257 B.R. 35, 37 (Bankr. C.D. Cal. 2000), *aff'd in part, vacated in part, rev'd in part*, 264 B.R. 609 (C.D. Cal. 2001).

⁷³ Nevertheless, in an excess of caution, Vickie then filed a tortious interference claim against Pierce in the Texas probate proceedings. 14 Excerpts of Record, *supra* note 66, at 2863; 38 Supplemental Excerpts of Record, *supra* note 70, at 8426–27; 45 *id.* at 10306–09; 53 *id.* at 12453.

⁷⁴ *Marshall v. Marshall (In re Marshall)*, 253 B.R. 550, 560 (Bankr. C.D. Cal. 2000), *adopted as modified*, 275 B.R. 5, 11–25 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev'd and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006), *rev'd*, 600 F.3d 1037 (9th Cir. 2010), *aff'd sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

⁷⁵ *In re Marshall*, 275 B.R. at 9–10.

⁷⁶ *In re Marshall*, 253 B.R. at 561.

⁷⁷ *Marshall v. Marshall (In re Marshall)*, 392 F.3d 1118, 1128 (9th Cir. 2004), *rev'd and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006), *rev'd*, 600 F.3d 1037 (9th Cir. 2010), *aff'd sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

⁷⁸ 13 Excerpts of Record, *supra* note 66, at 2683; 19 *id.* at 3994–95; 38 Supplemental Excerpts of Record, *supra* note 70, at 8609–16, 8638–39; 53 *id.* at 12260–61, 12453.

probate court issued a judgment in December 2001 upholding J. Howard's will and finding in favor of Pierce's declaratory relief claim against Vickie.⁷⁹

Meanwhile in California, Pierce had appealed the bankruptcy court judgment to the federal district court.⁸⁰ The district court held that the "probate exception" to federal jurisdiction did not apply; it also denied Pierce's motion to dismiss on the ground that the Texas probate judgment collaterally estopped the counterclaim; however, relying on *Marathon*, it agreed with Pierce that the bankruptcy court could not finally determine Vickie's tortious interference counterclaim consistent with Article III.⁸¹ Consequently, it concluded, it would treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law and conduct a trial *de novo* of Vickie's counterclaim.⁸²

During the *de novo* trial, the district court examined all the evidence before the bankruptcy court and substantial documentary evidence Pierce had previously refused to produce; it also heard live testimony from key witnesses.⁸³ In March 2002, the district court entered judgment for Vickie.⁸⁴ It found that J. Howard had directed his lawyers to prepare an *inter vivos* trust for Vickie consisting of one-half the appreciation of his assets during their marriage, but Pierce had conspired to suppress or destroy the trust instrument and to strip J. Howard of his assets by backdating and altering documents, arranging for surveillance of J. Howard and Vickie, and presenting documents to J. Howard under false pretenses.⁸⁵ Based on these findings, the court awarded Vickie \$44.3 million in compensatory damages and, finding "overwhelming" evidence of Pierce's "willfulness, maliciousness and fraud," it awarded her another \$44.3 million in punitive damages.⁸⁶

⁷⁹ 18 Excerpts of Record, *supra* note 66, at 3782; 23 *id.* at 4706, 4736; 31 Supplemental Excerpts of Record, *supra* note 70, at 6623–24; 53 *id.* at 12261, 12453–54.

⁸⁰ *Marshall v. Marshall (In re Marshall)*, 264 B.R. 609, 618 (C.D. Cal. 2001).

⁸¹ *Id.* at 625, 629, 633.

⁸² *Marshall v. Marshall (In re Marshall)*, 275 B.R. 5, 10 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev'd and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006), *rev'd*, 600 F.3d 1037 (9th Cir. 2010), *aff'd sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

⁸³ *Id.* at 10.

⁸⁴ *Id.* at 58.

⁸⁵ *Id.* at 39–40, 45, 52.

⁸⁶ *Id.* at 57–58.

Pierce appealed to the Ninth Circuit, which reversed the judgment on the jurisdictional “probate exception” ground.⁸⁷ Vickie’s certiorari petition to the Supreme Court was granted, and the high court unanimously reversed the Ninth Circuit and remanded for consideration of the remaining appellate issues.⁸⁸ On remand,⁸⁹ the Ninth Circuit again reversed the district court’s judgment, this time on the ground that the judgment was collaterally estopped by the Texas probate judgment that had been entered before it.⁹⁰ In response to Vickie’s argument that the bankruptcy court judgment, which preceded that of the probate court, should be considered the first final judgment and therefore preclusive of the probate court judgment, the Ninth Circuit held that the bankruptcy court did not have authority consistent with Article III to issue a final judgment on Vickie’s tort counterclaim.⁹¹ Vickie sought, and was again granted, certiorari review in the Supreme Court on the question of whether the bankruptcy court had the power, under Article III, to issue a final judgment on her tortious interference counterclaim.⁹²

B. *Stern v. Marshall and The Return Of Formalism Over Balancing*

When the Supreme Court considered the Article III issue in *Stern*, it confronted a different bankruptcy scheme than was before it in *Marathon*. In response to the *Marathon* ruling, Congress had held extensive hearings and enacted a new bankruptcy act, the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Act), intended to address the Article III problems identified by the Court.⁹³

Under the new 1984 Act, the district courts were given “original and exclusive jurisdiction” over all bankruptcy cases.⁹⁴ The district courts were

⁸⁷ *Marshall v. Marshall (In re Marshall)*, 392 F.3d 1118, 1137 (9th Cir. 2004), *rev’d and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006), *rev’d*, 600 F.3d 1037 (9th Cir. 2010), *aff’d sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

⁸⁸ *Marshall v. Marshall*, 547 U.S. 293, 315 (2006), *rev’d*, 600 F.3d 1037 (9th Cir. 2010), *aff’d sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

⁸⁹ Both Pierce and Vickie died before the Ninth Circuit ruled again; the case was pursued by their respective estates. *Marshall v. Marshall (In re Marshall)*, 600 F.3d 1037, 1040 n.1 (9th Cir. 2010), *aff’d sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

⁹⁰ *Id.* at 1061.

⁹¹ *Id.* at 1068–69.

⁹² *See Stern v. Marshall*, 131 S. Ct. 2594 (2011).

⁹³ *See* President Ronald Reagan, Statement on Signing the Bankruptcy Amendments and Federal Judgeship Act of 1984 (July 10, 1984), *available at* <http://www.reagan.utexas.edu/archives/speeches/1984/71084d.htm> (last visited Feb. 9, 2012).

⁹⁴ 28 U.S.C. § 1334(a) (2006).

authorized to refer such cases to the bankruptcy courts in their districts, but could withdraw a case from a bankruptcy court “for cause shown.”⁹⁵ Bankruptcy judges for each district were appointed to fourteen-year terms by the court of appeals for that district (in contrast to appointment by the President with the advice and consent of Congress in the 1978 Act that was held unconstitutional in *Marathon*).⁹⁶

Congress also sought to address the Article III issue by making the scope of a bankruptcy court’s authority dependent on the type of proceeding before it. Thus, proceedings “arising under title 11, or arising in a case under title 11” were designated “core” proceedings and the bankruptcy court could issue a final judgment in such proceedings, subject to ordinary appellate review by the district court.⁹⁷ Proceedings that were not “core” but were “otherwise related to a case under title 11” (like the proceeding against the third party in *Marathon*) could be heard by the bankruptcy court, but in such matters the court could only issue proposed findings of fact and conclusions of law to the district court, which had the sole authority to enter a final judgment in such matters after *de novo* review.⁹⁸ Section 157 of title 28 lists sixteen different types of “core” matters, including “counterclaims by the [debtor’s] estate against persons filing claims against the estate.”⁹⁹ The latter provision provided the statutory basis for the bankruptcy court’s entry of final judgment on Vickie’s counterclaim.¹⁰⁰

Chief Justice Roberts’s opinion for the five-justice majority begins by disposing of two preliminary issues. First, the majority rejected Pierce’s argument that the designation of 28 U.S.C. § 157(b)(2)(C) “counterclaims” as “core” was not a sufficient statutory basis for the bankruptcy court to enter final judgment on the counterclaim.¹⁰¹ The majority concluded (and the dissent agreed) that Congress intended “core” proceedings to be equivalent to proceedings that arise under title 11 or in a title 11 case—and therefore were

⁹⁵ *Id.* § 157(a), (d).

⁹⁶ *Id.* § 152(a)(1).

⁹⁷ *Id.* § 157(b)(1); *see id.* § 158(a).

⁹⁸ *Id.* § 157(c)(1).

⁹⁹ *Id.* § 157(b)(2)(C).

¹⁰⁰ *See* *Marshall v. Marshall (In re Marshall)*, 275 B.R. 5, 10 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev’d and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006), *rev’d*, 600 F.3d 1037 (9th Cir. 2010), *aff’d sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

¹⁰¹ *Stern v. Marshall*, 131 S. Ct. 2594, 2604 (2011).

proceedings in which bankruptcy courts were statutorily authorized to enter final judgment.¹⁰²

The majority also rejected Pierce's argument that the bankruptcy court lacked statutory authority to enter final judgment on his defamation claim (and therefore on Vickie's counterclaim) because the former was a "personal injury tort" under 28 U.S.C. § 157(b)(5).¹⁰³ That statute provides that "[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose."¹⁰⁴ Without deciding whether Pierce's defamation claim was or was not a "personal injury tort" within the meaning of the statute, the majority held that (1) the statute was not jurisdictional, and hence was waivable; and (2) Pierce consented to the bankruptcy court finally deciding his claim by expressly agreeing to it on several occasions and failing to invoke § 157(b)(5) until two years after he filed his claim in the bankruptcy court.¹⁰⁵

Turning to the Article III issue, the majority relied heavily upon *Murray's Lessee* and *Marathon* to conclude that "in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'"¹⁰⁶ Further, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts."¹⁰⁷ The majority concluded that it was "clear that the [b]ankruptcy [c]ourt in this case exercised the 'judicial Power of the United States' in purporting to resolve and enter final judgment on a state common[-]law claim, just as the court did in [*Marathon*]."¹⁰⁸

The majority then distinguished the previous Supreme Court cases that had recognized "exceptions" to Article III. First, it held that the "public rights" exception did not apply because the Court had "limit[ed] the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in

¹⁰² *Id.* at 2604–05.

¹⁰³ *Id.* at 2606–07.

¹⁰⁴ *Id.* at 2606 (quoting 28 U.S.C. § 157(b)(5)).

¹⁰⁵ *Id.* at 2606–08.

¹⁰⁶ *Id.* at 2597 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)).

¹⁰⁷ *Id.* at 2609 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)).

¹⁰⁸ *Id.* at 2611.

which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority.”¹⁰⁹ Next, it held that the fact that Pierce had filed a claim in Vickie’s bankruptcy case, and thus was not a new party to the action as in *Marathon*, made no difference because Vickie’s counterclaim would not be resolved by determination of Pierce’s claim, and the counterclaim was not a right of recovery created by federal bankruptcy law.¹¹⁰ Finally, the majority concluded that bankruptcy courts could not be considered “adjuncts” to Article III courts—even though bankruptcy judges were appointed by the federal courts of appeals and any bankruptcy matter could be removed to a district court for good cause.¹¹¹ The majority explained that bankruptcy courts could not be mere “adjuncts,” because the bankruptcy courts “do not ‘ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law’ or engage in ‘statutorily channeled factfinding functions.’”¹¹²

The majority opinion ends with the observation that its “narrow” decision “does not change all that much,” but that a “statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.”¹¹³

Justice Scalia’s concurring opinion lamented that the “sheer surfeit” of distinctions the majority opinion was forced to draw was an indication “that something is seriously amiss with our jurisprudence in this area.”¹¹⁴ He pointed out, for example, that there is no reason to conclude from Article III that “state-law claims [as opposed to federal claims] have preferential entitlement to an Article III judge.”¹¹⁵ Finally, he queried whether “historical practice permits non-Article III judges to process claims against the bankruptcy estate,” although he stated no position on the unbriefed issue.¹¹⁶

Justice Breyer’s four-justice dissent criticized the majority for its reliance on formalistic decisions such as *Murray’s Lessee* and *Marathon*, and for its understatement of the significance of more recent decisions such as *Thomas*

¹⁰⁹ *Id.* at 2613.

¹¹⁰ *Id.* at 2617–18.

¹¹¹ *Id.* at 2618–19.

¹¹² *Id.* at 2618–19 (quoting *Marathon Pipe Line*, 458 U.S. at 85).

¹¹³ *Id.* at 2620.

¹¹⁴ *Id.* at 2621 (Scalia, J., concurring).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

and *Schor* that employed a balancing test.¹¹⁷ The dissent then adopted the more “pragmatic” approach of those later cases to determine “the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.”¹¹⁸ Weighing five factors, the dissent concluded: (1) although the nature of Vickie’s bankruptcy counterclaim—which “resemble[d]” a common-law tort action—weighed against non-Article III determination, that factor was mitigated by the fact that bankruptcy courts frequently decide similar state common-law-type claims by creditors; (2) the nature of the non-Article III tribunal weighed in favor of constitutionality because bankruptcy judges are appointed by and removable only by the federal courts of appeal and their salaries are pegged to that of federal district court judges, and hence they “enjoy considerable protection from improper political influence;” (3) the fact that Article III judges exercise control over bankruptcy proceedings, including by way of the right to withdraw and through appellate review, weighed in favor of constitutionality; (4) the fact that Pierce had voluntarily appeared in the bankruptcy proceedings to prosecute his claim against Vickie’s bankruptcy estate, thus subjecting himself to the bankruptcy court’s equitable power to restructure debtor-creditor relations, weighed in favor of constitutionality; and finally (5) the nature and importance of the legislative purpose argued in favor of constitutionality, since bankruptcy court authority to finally decide counterclaims was necessary “to create an efficient, effective federal bankruptcy system.”¹¹⁹

The dissent ends by expressing some skepticism at the majority’s assertion that its decision “does not change all that much.”¹²⁰ It pointed out that bankruptcy filings dwarf all other filings in the district courts (1.6 million bankruptcy cases versus 280,000 civil and 78,000 criminal) and that disputes involving state-law claims and counterclaims arise frequently in the bankruptcy courts.¹²¹ Thus, the dissent predicted “a constitutionally required game of jurisdictional ping-pong between courts” that will cause “inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.”¹²²

¹¹⁷ *Id.* at 2622–26 (Breyer, Ginsburg, Sotomayor, & Kagan, JJ., dissenting).

¹¹⁸ *Id.* at 2625 (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)).

¹¹⁹ *Id.* at 2626–29.

¹²⁰ *Id.* at 2629.

¹²¹ *Id.* at 2630.

¹²² *Id.*

The *Stern* majority opinion represents a resurgence of the formalistic approach to Article III analysis and a defeat for the more pragmatic balancing approach the Court seemed to have adopted in the cases immediately following the *Marathon* plurality decision. Whether that change in approach will have significant practical consequences remains to be seen—although, as noted at the outset of this article, in its immediate aftermath, the opinion is being invoked in courts across the country as a “game changer.”¹²³ What is certain is that the opinion has the *potential* to have dramatic impact on the scope of authority of non-Article III tribunals, as explained below.

III. ANALYSIS OF *STERN V. MARSHALL* AND THE ARTICLE III CONSENT PROBLEM

Chief Justice Roberts’s majority opinion in *Stern* begins with a quote from Dickens’s *Bleak House*, comparing the novel’s endless case of *Jarndyce v. Jarndyce* to the lengthy proceedings that preceded the most recent Supreme Court opinion in the *Marshall* litigation.¹²⁴ But the sad irony is that one of the principal reasons the *Marshall* lawsuit dragged on for so long was that the district court determined that it was required to conduct a *de novo* trial because *the bankruptcy court lacked authority to enter a final judgment under Article III!*¹²⁵ In other words, the *Stern* majority’s holding institutionalizes a rule that played a substantial part in causing the very delays in litigation that the majority laments.

But the *Stern* opinion’s return to a formalistic approach to Article III could have much more serious consequences than simply delaying some bankruptcies. The reason for that stems from the fact that Article III serves two prophylactic functions—a personal one (it protects individual litigants by safeguarding their “right to have claims decided by judges who are free from potential domination by other branches of government”)¹²⁶ and a structural one (it is “an inseparable element of the constitutional system of checks and balances”).¹²⁷

¹²³ See Order, *supra* note 3; see also Adam Lewis et al., *Stern v. Marshall: A Jurisdictional Game Changer?*, 2011 PRATT’S J. BANKR. L. 483.

¹²⁴ *Stern*, 131 S. Ct. at 2600.

¹²⁵ See *Marshall v. Marshall* (*In re Marshall*), 275 B.R. 5, 10 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev’d and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006), *rev’d*, 600 F.3d 1037 (9th Cir. 2010), *aff’d sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

¹²⁶ *United States v. Will*, 449 U.S. 200, 218 (1980).

¹²⁷ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 50, 58 (1982).

The Supreme Court explained the significance of the dual nature of Article III in *Schor*. There the Court held that “as 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.”¹²⁸ By contrast, with respect to the structural function of Article III,

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.¹²⁹

The potential consequences of the non-waivability of the structural aspect of Article III are profound. On the most immediate level, claims against a bankruptcy estate will frequently have the very characteristics that led the *Stern* majority to conclude that Vickie’s counterclaim had to be heard by an Article III tribunal. Like that counterclaim, claims against a bankruptcy estate are often state-based, common-law claims that fail to fit within any of the exceptions discussed in the *Stern* opinion.¹³⁰ Does that mean that one of the most fundamental, “core” functions of a bankruptcy court—the final determination of a claim against the bankruptcy estate—could be unconstitutional under the reasoning of *Stern*? If consent or waiver cannot wholly cure an Article III violation, it would certainly seem so. Indeed, Justice Scalia raised that very specter in his concurring opinion, stating that because the issue had not been briefed, he “state[d] no position on” whether “non-Article III judges [could] process claims against the bankruptcy estate.”¹³¹

But the potential implications of *Stern* are far broader. Under 28 U.S.C. § 157(c)(2), a bankruptcy judge is permitted to finally determine any “related

¹²⁸ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986).

¹²⁹ *Id.* at 851.

¹³⁰ *See Stern v. Marshall*, 131 S. Ct. 2594, 2603–04 (2011).

¹³¹ *Id.* at 2621 (Scalia, J., concurring). Significantly, Justice Scalia is not the only member of the Court to have had this problem in mind. The first question at the *Stern* oral argument, asked by Justice Sotomayor, was, “What’s the authority at all for a bankruptcy court to adjudicate proof of claims, without violating Article III?” Transcript of Oral Argument at 4, *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (No. 10-179). And at the end of the argument, Justice Breyer asked, “Structurally, it does injure the—the prestige or something or the structure or the integrity of the [f]ederal [g]overnment—judiciary, [f]ederal judiciary—to allow the bankruptcy judge to adjudicate a direct claim; why is a counterclaim different?” *Id.* at 52–53.

to” proceeding “with the consent of all of the parties.”¹³² This provision permits the parties to agree to have most or all of the contested proceedings in a bankruptcy heard solely in the bankruptcy court, thus allowing them to take advantage of the relative efficiency of bankruptcy courts rather than competing for time on crowded district court dockets. Particularly where the bankruptcy estate is relatively small, keeping the entire matter in the bankruptcy court may be the only way to preserve the estate against excessive costs. Yet it is difficult to see how this statute, at least on its face, could survive an Article III attack with respect to state-law proceedings, in light of the *Stern* holding and the non-waivability of Article III structural protections.

And the implications are even broader. Under 28 U.S.C. § 636(c)(1), non-Article III United States magistrate judges may, “[u]pon the consent of the parties, . . . conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case.”¹³³ The breadth of the statute surely encompasses state-law-based common-law proceedings like Vickie’s counterclaim that may be in federal court under diversity or pendent jurisdiction. In fact, in a pending case, the Fifth Circuit has requested briefing on “whether, under *Stern*, a magistrate judge can enter final judgment in a case tried to a magistrate judge by consent . . . where jurisdiction is based on diversity of citizenship and state law provides the rule of decision.”¹³⁴

Moreover, these same principles would seem to threaten the tenability of much of the arbitration conducted under the Federal Arbitration Act, which permits parties to agree to determination of legal disputes by private, non-Article III adjudicators subject only to very limited judicial review by Article III courts—far more limited review than the ordinary appellate review by Article III district courts available in the bankruptcy setting.¹³⁵ Because the Federal Arbitration Act applies to all contracts involving interstate commerce,¹³⁶ the scope of the civil disputes that it encompasses is enormously broad and unquestionably includes state-law matters. Indeed, there had been suggestions that arbitration presented troubling Article III problems even before *Stern*.¹³⁷

¹³² 28 U.S.C. § 157(c)(2) (2006).

¹³³ *Id.* § 636 (c)(1).

¹³⁴ Order, *supra* note 3, at 2.

¹³⁵ See 9 U.S.C. § 10 (2006).

¹³⁶ *Id.* § 2; see *id.* § 1 (defining “commerce” broadly as “commerce among the several States or with foreign nations”); see also *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

¹³⁷ See, e.g., Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1191 (2008).

In each of the above instances, the non-Article III tribunal frequently, even typically, adjudicates state common-law claims—“the stuff of the traditional actions at common law tried by the courts at Westminster in 1789” that the *Stern* majority held could not be withdrawn from the federal judiciary consistent with Article III.¹³⁸ The tribunals in question are neither territorial courts nor military courts, the tribunals that are historical exceptions to Article III.¹³⁹ Nor can the purely private disputes being resolved in those tribunals be considered “public rights” as that term was construed by the *Stern* majority; rather, like the counterclaim in *Stern*, a typical claim in those tribunals “does not ‘depend[] on the will of [C]ongress;’ Congress has nothing to do with it.”¹⁴⁰ Finally, as in *Stern*, in each instance cited above the non-Article III tribunal is not “an agency but . . . a court, with substantive jurisdiction reaching any area of the *corpus juris*.”¹⁴¹ In short, none of the circumstances cited above falls within any of the *Stern* majority’s formalistic, categorical exceptions to Article III.

Of course, it is unlikely that the Supreme Court is actively searching for opportunities to invalidate large chunks of the law that provide alternative, more efficient—and often less costly—means of dispute resolution than traditional Article III courts. But as the *Stern* majority reminds us, “‘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.’”¹⁴² The *Stern* Court’s resurrection of Article III formalism, coupled with the principle of non-waivability of the structural aspects of Article III, are therefore not a trivial threat to the viability of all of the above forms of non-Article III adjudication.

But perhaps the *Stern* Court is not serious about the non-waivability of Article III’s structural guarantees. After all, the *Stern* majority did hold that Pierce had waived his right to district court determination of his purported “personal injury tort” claim under 28 U.S.C. § 157(b)(5).¹⁴³ The difficulty with taking much solace from that holding is that it involved purely an issue of statutory interpretation, and thus provides no insight into how the Court would

¹³⁸ *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982)).

¹³⁹ See *Marathon Pipe Line*, 458 U.S. at 64–67.

¹⁴⁰ *Stern*, 131 S. Ct. at 2614 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)) (citation omitted).

¹⁴¹ *Id.* at 2615.

¹⁴² *Id.* at 2619 (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

¹⁴³ *Id.* at 2607–08.

view the issue through a constitutional, Article III lens. And in any event, even if the Court's willingness to recognize the viability of consent in statutory circumstances generally analogous to Article III indicated a sympathy for the concept in a constitutional setting, that does not answer the crucial question: If the only exceptions to Article III are the formal categories identified in *Stern*, and if the structural guarantees of Article III may not be waived by the parties (a proposition the Court has never questioned), what is the way out? How can a bankruptcy court, federal magistrate, or arbitrator constitutionally decide a state-law claim that does not fall within the Article III exceptions identified in *Stern*—whether the parties consent or not?

Justice Scalia's concurrence suggests one possible way out. He indicates that he would be willing to uphold bankruptcy court authority to finally adjudicate claims against the bankruptcy estate if "historical practice" permitted it.¹⁴⁴ Perhaps "historical practice" would also establish that at the time Article III was drafted there were non-Article III institutions similar to federal magistrates and arbitrators, who could make binding legal decisions when the parties agreed to it.

Professor Ralph Brubaker has also suggested that one potential escape route is the argument that "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 (particularly since reappointment decisions reside in the Article III judiciary itself)."¹⁴⁵ Of course, that argument did not hold sway in *Stern*, in which the Court concluded that "it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings."¹⁴⁶ Nevertheless, Professor Brubaker's point remains a cogent one, applicable as well to adjudication by federal magistrates and arbitrators. The fact is that none of these institutions represents any attempt by the legislative or executive branch to seize power from the judiciary, and in none do the political branches exercise power that would affect the impartiality of the tribunals. The problem is that this sort of pragmatic analysis has no place in the *Stern* majority's formalistic approach to Article III.

¹⁴⁴ *Id.* at 2621 (Scalia, J., concurring).

¹⁴⁵ Ralph Brubaker, *Article III's Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges' Core Jurisdiction*, 31 BANKR. L. LETTER, Sept. 2011, at 1, 19.

¹⁴⁶ *Stern*, 131 S. Ct. at 2619.

Taken to its logical conclusion, the formalistic approach of the *Stern* majority threatens a significant number of non-Article III institutions. Thus far, only Justice Scalia has indicated he is prepared to take it to its logical conclusion—although he has also suggested a way out, at least with respect to claims against a bankruptcy estate. It will be interesting to see over the next few years if the other justices in the majority are willing to go that far.

CONCLUSION

The issue in *Stern v. Marshall* was seemingly narrow—whether a non-Article III bankruptcy court could finally decide a state-law-based counterclaim against a party who had filed a claim against the bankruptcy estate. The majority opinion resurrected the formalistic approach to Article III jurisprudence that the Court seemed to have abandoned in the early 1980's, immediately following the *Marathon* decision. Employing that approach, the *Stern* majority looked at the nature of the proceeding and the nature of the non-Article III tribunal and determined that neither fit within any of the categorical exceptions to Article III. The dissent would have followed the balancing approach of the post-*Marathon* cases and weighed a number of factors, including the extent of the intrusion on Article III and the importance of the legislative objective in assigning the matter to a non-Article III tribunal.

The problem with the majority's formalistic approach is its inflexibility. Article III courts are swamped with cases, and requiring non-Article III tribunals to fit into a limited number of historical exceptions will stymie Congress's efforts to establish alternative methods of dispute resolution that present no serious threat to Article III values. The problem is particularly acute because it is established that Article III's structural aspect cannot be waived by the parties. What this appears to mean is that parties who are perfectly satisfied litigating outside the Article III courts are, by the logic of the *Stern* holding, foreclosed from doing so.

Something's got to give. The majority's formalistic approach, coupled with non-waivability, would seem to threaten practices such as bankruptcy court determination of claims and binding arbitration. It seems far-fetched, if not impossible, that the Court will strike down these long-accepted non-Article III alternatives to federal court litigation. But in order to uphold them, the Court must either find a way to fit them into an historical pigeonhole, adopt an approach more akin to the dissent's balancing test, or modify or abandon the

doctrine of non-waivability. It may be years before we know how the conundrum is solved.