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No More Ping-Pong: The Need for Article III Status in Bankruptcy After *Stern v. Marshall*

Latoya C. Brown*

*“Unfortunately, Stern v. Marshall has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court.”*¹

I. INTRODUCTION

Quite aptly, the United States Supreme Court borrowed the words of Charles Dickens to describe the life of the case that ultimately resulted in *Stern v. Marshall*:² “This suit has, in the curse of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises.”³ Ironically, even after the Court’s decision, the “curse”⁴ has continued and many, especially those of the bankruptcy bar, are in disagreement as to the ultimate outcome and unforeseen consequences of *Stern*.⁵

The “big fuss”⁶ arose out of the Court’s holding that bankruptcy courts do not have constitutional authority to enter final judgment on

* J.D., 2013. I thank Professor Jerry Markham for serving as my faculty advisor on this paper and for his invaluable insight.

¹ *In re Ambac Fin. Grp., Inc.*, 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011).

² *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (5-4 decision).

³ *Id.* at 2600 (quoting 1 CHARLES DICKENS, *Bleak House*, in THE WORKS OF CHARLES DICKENS 4, 4-5 (illustrated ed. 1891)).

⁴ *Id.*

⁵ See *infra* note 18 and accompanying text.

⁶ *Stern*, 131 S. Ct. at 2620 (“If our decision today does not change all that much, then why the fuss?”). As bankruptcy courts begin to deal with the many issues left unresolved by *Stern*, and as litigants, justifiably or unjustifiably, continue to challenge the authority of bankruptcy courts citing *Stern*, Justice Roberts’s assertion that *Stern* ‘does not change much’ has become quite inexplicable. As Professor Kuney neatly puts it, “Justice Breyer may not have been able to command a majority of the court and thus be ‘constitutionally correct,’ but he has definitely been right about one thing: Justice Roberts’s statement that as a ‘practical matter’ the *Stern v. Marshall* decision ‘does not change all that much’ was either tongue-in-cheek or decidedly incorrect.” George W. Kuney, *Stern v. Marshall: A Likely Return to the Bankruptcy Act’s Summary/Plenary Distinction in Article III Terms*, 21 J. BANKR. L. & PRAC. 1, art. 1, 9 (2012) (citing *Stern*, 131 S. Ct. at 2620).

a state law counterclaim “that is not resolved in the process of ruling on a creditor’s proof of claim.”⁷ The Court stated that common law claims, as well as suits in equity and admiralty, fall within the province of Article III courts, and Congress cannot “chip away at the authority of the judicial branch”⁸ by enacting statutes delegating such power to non-Article III judges.⁹ The Constitution grants judicial power to courts whose judges enjoy tenure during good behavior and salary protections.¹⁰

Article III provisions are safeguards against intrusion by other branches of government and they ensure that judicial decisions are being made with “[c]lear heads . . . and honest hearts.”¹¹ A different outcome would have been likely if the case involved a ‘public right’ because the Court has recognized that Congress has the authority to adjudicate in suits involving that exception.¹² The public rights exception applies in cases where a “right is integrally related to particular federal government action.”¹³

Other than the obvious limiting effect that *Stern* will have on bankruptcy courts with regards to adjudicating common law claims, the decision raises other concerns; specifically, the decision suggests that the Court may entertain other constitutional challenges to Congress’s grant of authority to bankruptcy judges.¹⁴ Such scrutiny of bankruptcy courts is not novel, however, given that Article III judges started questioning the legitimacy of bankruptcy judges as early as the 1970s.¹⁵ Some scholars have theorized that the “denial of Article III power and prestige to the bankruptcy court”¹⁶ is the result of an arbitrary hierarchy of power in the judicial system of the United States and a stigma that attached to bankruptcy early on in the practice.¹⁷

⁷ *Stern*, 131 S. Ct. at 2620.

⁸ *Id.*

⁹ *See id.* at 2594.

¹⁰ U.S. CONST. art. III, § 1.

¹¹ *Stern*, 131 S. Ct. at 2609 (quoting 1 WORKS OF JAMES WILSON 363 (James DeWitt Andrews ed., 1896)).

¹² *See Den (ex dem. Murray) v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

¹³ *Stern*, 131 S. Ct. at 2613.

¹⁴ *See In re Safety Harbor Resort & Spa*, 456 B.R. 703, 709 (Bankr. M.D. Fla. 2011) (“But the Supreme Court, foreshadowing its ultimate holding, then observes: ‘We agree with Pierce that designating all counterclaims as ‘core’ proceedings raises serious constitutional concerns.’”) (quoting *Stern*, 131 S. Ct. at 2605).

¹⁵ *See Linda Coco, Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge’s Non-Article III Status*, 16 MICH. J. RACE & L. 181, 194-95 (2011); *see also* Kenneth N. Klee, *Legislative History of the Bankruptcy Reform Act of 1978*, 1979 ANN. SURV. BANKR. L. 2 (1979) (providing an in depth look at the making of the fifth bankruptcy law of the United States and the reaction of certain members of the Judiciary).

¹⁶ Coco, *supra* note 15, at 184-88.

¹⁷ *Id.* at 186-91.

Stern has created a buzz in the media, academic settings and at bar,¹⁸ leading Chief Justice Roberts to ask, “Why all the fuss?”¹⁹ There are a number of responses to the Chief Justice’s question. Among the criticisms and concerns, some believe *Stern* will result in: (1) a less efficient process in bankruptcy courts and increase in case overload in federal district courts;²⁰ (2) forum shopping;²¹ (3) a prolongation of the tension between Article III judges and bankruptcy judges;²² (4) separation of powers issues;²³ and (5) misunderstanding as to the role consent plays in bankruptcy proceedings.²⁴

This article takes a closer look at *Stern* in Part I, and highlights the key rationale for the Court’s holding. Part I also briefly examines applicable legislative history, as well as prior cases that led the majority to take the position it did in *Stern*. In Part II, the article addresses the concerns that are being voiced by judges and scholars regarding *Stern*’s outcome. This article explores these criticisms and ultimately concludes that these issues stem from the current structure of the American bifurcated, hybrid bankruptcy system,²⁵ and are not unique by-products of the *Stern* decision.

¹⁸ See, e.g., *In re CD Liquidation Co.*, 462 B.R. 124, 136 (Bankr. D. Del. 2011) (“During the pendency of the briefing on the Injunction Motion, the United States Supreme Court decided *Stern v. Marshall* . . . a ruling which created great uncertainty within the bankruptcy bench and bar.”); Michael Moody & Arthur Spector, *Anna Nicole Smith Decision Affects Court’s Authority*, DAILY BUS. REV., Aug. 23, 2011, at A8; John Pacenti, *Justice Watch: Anna Nicole Twist Put Into Rothstein Case*, DAILY BUS. REV., Aug. 8, 2011, at A3 (quoting United States Bankruptcy Judge A. Jay Cristol that the Justices “don’t always understand fully what we are doing in bankruptcy . . . [Stern] is going to complicate a number of cases”); Stephen J. Lubben, *Messing With the Bankruptcy System*, N.Y. TIMES (Aug. 26, 2011, 2:58 PM), <http://dealbook.nytimes.com/2011/08/26/messing-with-the-bankruptcy-system/>.

¹⁹ *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (“If our decision today does not change all that much, then why the fuss?”).

²⁰ See *infra* note 170.

²¹ See *infra* note 188.

²² See *Coco*, *supra* note 15, at 186-91.

²³ See *infra* note 223.

²⁴ See, e.g., Richard Lieb, *The Supreme Court, in Stern v. Marshall, by Applying Article III of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders*, 20 J. BANKR. L. & PRAC. 4, art. 1, 2 (2011) (“Although not directly addressed by the majority, it is unclear whether express consent by the parties is, by itself, a sufficient basis upon which a bankruptcy judge may adjudicate a common law claim.”).

²⁵ See G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 515 (2010) (explaining that American bankruptcy laws constructed a hybrid system comprised of federal and state laws); Melodie Freeman-Burney, *Jurisdiction Under the Bankruptcy Amendments of 1984: Summing Up the Factors*, 22 TULSA L.J. 167, 179-83 (1986) (describing the bifurcated structure of the bankruptcy system, where district courts retain judicial power of the United States and bankruptcy courts are units of the district court, thereby making bankruptcy judges judicial officers of the district court).

Under the current system, Congress has granted jurisdiction over bankruptcy to the district courts.²⁶ The district courts may refer cases to bankruptcy courts, which function as units of the district courts.²⁷ Bankruptcy proceedings involve substantive entitlements and rules based on state laws.²⁸ A bankruptcy judge must then decide whether the proceeding is a core or non-core proceeding.²⁹ The practical effect of such a distinction is that a bankruptcy judge may enter final orders in core proceedings, but may only submit proposed findings of fact and conclusions of law in non-core proceedings.³⁰ A lot of uncertainty revolves around the designation of core versus non-core proceedings.³¹ This hybrid system and the vagaries of the Bankruptcy Code (“the Code”), therefore, give rise to efficiency concerns, forum shopping problems, constitutional questions, and other issues.

Further, as one court stated, *Stern* may not be that big of a surprise, since the Supreme Court “had already expressed its constitutional concerns in *Northern Pipeline*.”³² *Stern*, therefore, only echoes the Supreme Court’s prior statement that the constitutional separation of powers must be revered.³³ The decision only conjures up, and, to some extent, exacerbates the many unresolved problems plaguing the American bankruptcy system.³⁴

Finally, in Part III, this article proposes a solution to the longstanding issue of bankruptcy courts’ authority in the United States. This section concludes that Congress should bestow the Bankruptcy Court with Article III status. Such a grant will cure further jurisdictional issues and also resolve many of the concerns being voiced in light of *Stern* – as well as those voiced decades before.³⁵

²⁶ Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DEPAUL BUS. & COM. L.J. 383, 387 (2005).

²⁷ *Id.*

²⁸ Cole & Zywicki, *supra* note 25.

²⁹ Daley & Shuster, *supra* note 26, at 391.

³⁰ *Id.*

³¹ Cole & Zywicki, *supra* note 25, at 519-20. See, e.g., *In re Teleservices Grp., Inc.*, 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011) (“My frustration with *Stern* is that it offers virtually no insight as to how to recalibrate the core/non-core dichotomy . . .”).

³² *In re Teleservices Grp.*, 456 B.R. at 322 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

³³ *Id.*

³⁴ See *supra* notes 18 and 25.

³⁵ See *infra* notes 184-223.

II. EVOLUTION OF THE BANKRUPTCY COURT'S JURISDICTION

A. In the Beginning

The concept of providing relief for the economically burdened is as old as civilization itself.³⁶ The first known law in recorded history that provided for the relief of debtors from their debts is found in the book of Deuteronomy, chapter 15.³⁷ Prior to the enactment of *Cessio Bonorum* under Cesar, which abolished capital punishment, slavery and imprisonment for insolvent debtors, the *Roman Law of the Twelve Tablets* (451-450 B.C.) allowed creditors to carve up the bodies of their insolvent debtors and share the pieces proportionately.³⁸ To the extent that *Cessio Bonorum* permitted financially distressed debtors, who had acted in good faith, to turn over remaining assets to their creditors and gain immunity from imprisonment or physical punishment, this body of law can be said to be a prototype of modern bankruptcy law.³⁹

During the Middle Ages, the Hanseatic League, the most successful league of merchant associations, would banish debtors who could not meet their obligations.⁴⁰ Another approach in some communities was to put the debtor to public shame by writing the debtor's name in a crowded commercial district and ringing the 'shame bell'.⁴¹ In Lombardy, Italy, where traders and bankers conducted their business from benches or stalls in an open market, these traders would break the business bench of a debtor as a symbol of failure.⁴²

In England, bankruptcy laws were quasi-criminal in nature and were creatures of statute.⁴³ Debt was considered immoral and fraudulent: the first English Bankruptcy Act of 1542 referred to the debtor as

³⁶ David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis Of Insolvency Laws And Their Impact On The Role, Power, And Jurisdiction Of Today's United States Bankruptcy Court And Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 166 (2000).

³⁷ *Id.* (citing *Deuteronomy* 15:1-4 ("At the end of every seven years thou shalt make a release. And this is the manner of the release: Every creditor that lendeth ought unto his neighbor shall release it; he shall not exact it of his neighbor, or his brother; because it is called the Lord's release. Of a foreigner thou mayest exact it again; but that which is thine with thy brother thine hand shall release; save when there shall be no poor among you.")).

³⁸ *Id.* at 167.

³⁹ *Id.*

⁴⁰ *Id.* at 168.

⁴¹ *Id.*

⁴² Kennedy & Clift, *supra* note 36, at 168 (explaining that these Italian traders and bankers soon discovered the rich business opportunities in England and started to migrate there, bringing their customs with them, including the practice of breaking the bench). The word 'bankrupt' is the Anglicized version of 'broken bench.' *Id.*

⁴³ *Id.* at 168-69.

“the offender,” and an act in 1570 treated debtors as criminals.⁴⁴ The statute of Queen Anne, passed in 1705, decriminalized bankruptcy law and allowed for the discharge of debts.⁴⁵ This Statute was in effect at the time the forefathers suspended their relationship with England and established the United States of America.⁴⁶ Though the Industrial Revolution brought more favorable perceptions of bankruptcy,⁴⁷ the stigma attached to debt and debtors was transferred nonetheless to American society.⁴⁸

B. Development in American Jurisprudence

Under the Bankruptcy Act of 1898, bankruptcy proceedings were conducted by referees — later called bankruptcy judges — who were officers of the district court and appointed and removed by the districts courts.⁴⁹ The limited jurisdiction of the referees under the Act became a major obstacle to the efficient administration of bankruptcy cases.⁵⁰ The Bankruptcy Reform Act of 1978 (“Reform Act”) was therefore enacted to address this concern; the purpose of the Reform Act was to expand the jurisdiction of bankruptcy courts and provide a single forum for the adjudication of all issues related to the administration of a bankruptcy case.⁵¹

The Reform Act granted United States bankruptcy judges “original and exclusive jurisdiction over bankruptcy cases and original, non-exclusive jurisdiction over civil proceedings ‘arising under,’ ‘arising in,’ or ‘related to’ cases under the Bankruptcy Reform Act”⁵² The bankruptcy court was to be a separate entity from the district court.⁵³ In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁵⁴ the Court found this attempt to broaden the jurisdiction of bankruptcy courts unconstitutional on the basis that Congress cannot imbue Article I courts with authority to make final rulings on common law claims

⁴⁴ An Acte Againste Suche Persones as Doo Make Bankrupte, 34 & 35 Hen. 8, c. 4 (1542) (Eng.); An Acte Touchyng Orders for Banckruptes, 13 Eliz., c. 7 (1570) (Eng.); Kennedy & Clift, *supra* note 36, at 168-69.

⁴⁵ Queen Anne’s Act, 4 Anne, c. 17 (1705) (Eng.); Kennedy & Clift, *supra* note 36, at 169-70.

⁴⁶ Kennedy & Clift, *supra* note 36, at 170.

⁴⁷ *Id.*

⁴⁸ See Coco, *supra* note 15, at 187-209.

⁴⁹ Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1979); Daley & Shuster, *supra* note 26, at 384-85.

⁵⁰ See Daley & Shuster, *supra* note 26, at 385.

⁵¹ *Id.*

⁵² *Id.* at 386.

⁵³ *Id.*

⁵⁴ 458 U.S. 50 (1982).

in the absence of Article III protections.⁵⁵ To remedy the Reform Act's jurisdictional problems, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984.⁵⁶ Under the Federal Judgeship Act of 1984, following referral from the federal district court, a bankruptcy court must determine if the matter involves a core proceeding or a non-core proceeding.⁵⁷

In non-core proceedings, or those "related to" title 11 cases, the bankruptcy court may hear the matter and propose findings of facts and conclusions of law to the district court.⁵⁸ An action is "related to" bankruptcy if the "outcome might have a conceivable effect on the estate."⁵⁹ In core proceedings, which "arise in" a case under title 11 or "arise under" title 11, a bankruptcy judge may enter final judgment.⁶⁰ "A core proceeding is a proceeding that 'invokes a substantive right provided by title 11' or one that, 'by its nature, could arise only in the context of a bankruptcy case.'"⁶¹ In other words, claims that have no existence outside of bankruptcy, or which would not exist but for bankruptcy, are said to "arise in" bankruptcy.⁶² Under 28 U.S.C. § 157(b)(2)(C),⁶³ "counterclaims by [a debtor's] estate against persons

⁵⁵ Daley & Shuster, *supra* note 26, at 387.

⁵⁶ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); see Daley & Shuster, *supra* note 26, at 387.

⁵⁷ 28 U.S.C. § 157(a)-(c) (2008) (found unconstitutional as applied by *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011)); see Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, And Policy Analysis*, 62 *FORDHAM L. REV.* 721, 795-96 (1994).

⁵⁸ 28 U.S.C. § 157(c) (2008); see Block-Lieb, *supra* note 57, at 796.

⁵⁹ *In re Extended Stay Inc.*, 418 B.R. 49, 55 (Bankr. S.D.N.Y. 2009).

⁶⁰ 28 U.S.C. 157(b) (2008); see Block-Lieb, *supra* note 57, at 796.

⁶¹ *In re Fairchild Corp.*, 452 B.R. 525, 530 (Bankr. D. Del. 2011). There is much debate surrounding the distinction between core and non-core proceedings, and courts arrive at that demarcation using different rationales. For example, in *In re USDigital*, the court adopted the Third Circuit's two-step process to aid in its determination of whether a claim is a core proceeding: "First, a court must consult § 157(b) to determine if the claim at issue fits within that provision's illustrative list of proceedings that may be considered core. If so, a proceeding is core [1] if it invokes a substantive right provided by title 11 or [2] if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case. The two-part second element of the test must be met for a proceeding to be core, regardless of whether it is enumerated in section 157(b)(2)." *In re USDigital, Inc.*, 461 B.R. 276, 284-85 (Bankr. D. Del. 2011) (alterations in original) (footnotes and quotation marks omitted).

Expounding on the issue, the court further stated: "Why would the Third Circuit create an arguably superfluous element to its test? This Court believes that the Third Circuit—like the Ninth—was seeking to establish a test covering both the statute and the Constitution. *Stern* has divided the Court's inquiry into two elements: statutory and constitutional. But, given the overlap between the enumerated core proceedings and the second element of the Third Circuit's test, this Court finds it to be an appropriate measure in determining whether a matter is a non-enumerated core proceeding." *Id.* at 285 n.42.

⁶² See *In re McClelland*, 460 B.R. 397, 401 (Bankr. S.D.N.Y. 2011).

⁶³ 28 U.S.C. § 157(b)(2)(C) (2008).

filing claims against the estate”⁶⁴ are core proceedings, which means bankruptcy courts are granted statutory authority to enter final judgment on such claims.⁶⁵ This provision was the source of the conflict in *Stern*.⁶⁶

C. Recent Limitations on Bankruptcy Courts’ Jurisdiction

In *Stern*, the Court found that 28 U.S.C. § 157(b)(2)(C)⁶⁷ violated Article III of the Constitution, and held that bankruptcy courts “lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.”⁶⁸ Vickie Lynn Marshall (a.k.a. Anna Nicole Smith) brought an action in a Texas probate court, prior to the death of her husband, Howard Marshall, against her stepson, E. Pierce Marshall, alleging that Pierce fraudulently induced Howard to sign a living trust that did not include her.⁶⁹ Pierce denied any such conduct on his part.⁷⁰

After Howard’s death, and while the probate case was pending, Vickie filed a petition for bankruptcy in the United States Bankruptcy Court for the Central District of California.⁷¹ Pierce brought a defamation suit against Vickie in the bankruptcy proceeding, to which Vickie asserted truth as a defense and raised a counterclaim for tortious interference.⁷²

The bankruptcy court entered judgment in Vickie’s favor on the tortious interference counterclaim.⁷³ On appeal, Pierce argued that the bankruptcy court lacked jurisdiction over Vickie’s counterclaim.⁷⁴ The district court found that the bankruptcy court did have statutory authority, but concluded that, as a constitutional matter, the counterclaim should not have been characterized as core.⁷⁵ The district court, therefore, treated the bankruptcy court’s judgment as proposed rather than final, engaged in an independent review of the record, and even-

⁶⁴ *Id.*

⁶⁵ See Block-Lieb, *supra* note 57, at 796.

⁶⁶ *Stern v. Marshall*, 131 S. Ct. 2594, 2603-08 (2011).

⁶⁷ 28 U.S.C. § 157(b)(2)(C) (2008).

⁶⁸ *Stern*, 131 S. Ct. at 2620.

⁶⁹ *Id.* at 2601.

⁷⁰ *Id.*

⁷¹ Cole & Zywicki, *supra* note 25, at 522-23. Vickie’s filing of a petition for bankruptcy was in response to a default judgment of \$884,607.98 that was entered against her in a sexual harassment suit brought by her former housekeeper.

⁷² *Stern*, 131 S. Ct. at 2601.

⁷³ *Id.*

⁷⁴ *Id.* at 2602.

⁷⁵ *Id.*

tually ruled in Vickie’s favor.⁷⁶ Interestingly, the district court chose to disregard the judgment of the Texas probate court, which had reached a final resolution and entered judgment in Pierce’s favor.⁷⁷ The appellate court reversed the district court’s ruling, but on different grounds.⁷⁸

The Supreme Court agreed with the district court that 28 U.S.C. § 157(b)(2)(C) allowed the bankruptcy court to enter final judgment on Vickie’s tortious interference counterclaim.⁷⁹ Nevertheless, the Court found that such statutory grant of authority to bankruptcy courts was in contravention of Article III.⁸⁰ Article III requires that the judicial powers of the United States vest “in one supreme Court, and in such inferior courts” established by Congress, and also provides salary and tenure protections.⁸¹ The bankruptcy judgeship was created under Article I and is not afforded any Article III protections – that is, tenure and salary guarantees.⁸² Article III protections, the Court reasoned, are elemental in the constitutional system of checks and balances, and both define and protect the independence of the judiciary.⁸³ “[T]he Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the executive, but rather with ‘[c]lear heads . . . and honest hearts’ deemed essential to good judges.”⁸⁴

Hence, Congress cannot assign to legislative courts any matter which “is the subject of a suit at common law, or in equity, or admiralty” and brought “within the bounds of federal jurisdiction,” because responsibility for such matters rests with Article III judges.⁸⁵ The only exception to this general rule regards cases in which the ‘public rights’ doctrine is applicable.⁸⁶ The doctrine applies in cases where the claim being litigated is integrally related to a particular government action, and derives from a federal regulatory scheme.⁸⁷ In *Stern*, Vickie’s counterclaim was simply a state tort action that was not “derived from or dependent on bankruptcy law.”⁸⁸ The Court, therefore, concluded that Congress exceeded its authority, and held that the “Bankruptcy

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Stern*, 131 S. Ct. at 2602.

⁷⁹ *Id.* at 2605.

⁸⁰ *Id.* at 2608.

⁸¹ U.S. CONST. art. III, § 1.

⁸² See U.S. CONST. art. I, § 8.

⁸³ *Stern*, 131 S. Ct. at 2608.

⁸⁴ *Id.* at 2609.

⁸⁵ *Id.*

⁸⁶ *Id.* at 2610.

⁸⁷ *Id.* at 2613.

⁸⁸ *Id.* at 2618.

Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."⁸⁹

The dissent disagreed with the majority's conclusion that 28 U.S.C. § 157(b)(2)(C) was unconstitutional.⁹⁰ The dissent, penned by Justice Breyer, stated that the Court deviated from prior precedent – more specifically, from *Commodity Futures Trading Commission v. Schor*⁹¹ and *Thomas v. Union Carbide Agricultural Products Co.*⁹² – which allowed for a more pragmatic approach in determining the adjudicatory authority of a non-Article III judge.⁹³ In *Thomas*, the Court emphasized that “practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”⁹⁴ Expounding on this principle, the Court in *Schor*, after conceding that adjudication of the counterclaim by the administrative court might be of the kind traditionally decided by an Article III judge, concluded that ‘de minimis’ intrusion on the judicial branch was permissible to avoid practical negative consequences of a formalistic approach.⁹⁵ In *Schor*, a customer filed reparations complaints with the Commodity Futures Trading Commission (CFTC) against his commodity futures broker.⁹⁶ The broker counterclaimed by seeking recovery of debit balances on the customer's account.⁹⁷ Ultimately, the Court held that the CFTC could entertain the state law counterclaim in the reparation proceedings, without violating Article III.⁹⁸

Therefore, the dissent's position in *Stern* was that the statutory grant of authority to a bankruptcy court, which allows it to adjudicate compulsory counterclaims, should be permissible in light of *Schor* and *Thomas*.⁹⁹ The dissent further reasoned that, at most, the intrusion on Article III turf was de minimis, and hence, permissible.¹⁰⁰ To substantiate this point, the dissent argued that although the counterclaim in *Stern* resembled a kind normally decided by Article III courts, the mitigating factor was that bankruptcy courts often decide “claims that similarly resemble various common-law actions.”¹⁰¹ In addition, con-

⁸⁹ *Stern*, 131 S. Ct. at 2620.

⁹⁰ *Id.* at 2622 (Breyer, J., dissenting).

⁹¹ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

⁹² *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

⁹³ *Stern*, 131 S. Ct. at 2622 (Breyer, J., dissenting); *see also* Lieb, *supra* note 24, at 463.

⁹⁴ *Thomas*, 473 U.S. at 587.

⁹⁵ *Schor*, 478 U.S. at 853-56.

⁹⁶ *Id.* at 837.

⁹⁷ *Id.* at 837-38.

⁹⁸ *Id.* at 841.

⁹⁹ *Stern*, 131 S. Ct. at 2625-26 (Breyer, J., dissenting).

¹⁰⁰ *Id.* at 2628-29.

¹⁰¹ *Id.* at 2626.

trary to the majority's assertion, bankruptcy judges are not prone to improper influence by the other branches of government because bankruptcy judges are appointed by Article III judges, may be removed by Article III judges, and have their salaries "pegged to those of the federal district judges."¹⁰²

The dissent also pointed out that bankruptcy proceedings are supervised and controlled by Article III courts, and parties are free to appeal to the district court.¹⁰³ Furthermore, the parties in *Stern* consented to the jurisdiction of the bankruptcy court.¹⁰⁴ Pierce could have brought his claim in a state or federal court, but chose to bring it in the bankruptcy proceeding.¹⁰⁵ Moreover, the dissent highlighted the fact that Congress's grant of authority over counterclaims to bankruptcy courts was an important means of carrying out its Article 1, section 8 power¹⁰⁶: these counterclaims often have more than "some bearing on a bankruptcy case," and hence, 28 U.S.C. § 157(b)(2)(C) is important for an efficient and effective bankruptcy system.¹⁰⁷ Finally, the dissent argued that contrary to the majority's contention that the decision in *Stern* would not change much, as a practical matter, it will create an inefficient and costly bankruptcy system.¹⁰⁸

III. APPLICATION AND IMPACT OF *STERN* ON BANKRUPTCY LAW AND PRACTICE

Bankruptcy judges, members of the bankruptcy bar, and the media have been in a frenzy since the decision was rendered in *Stern*.¹⁰⁹ The flurry is partly because the case "has a narrow holding, but potentially enormous implications for bankruptcy courts and litigation in the federal courts."¹¹⁰ There are those, however, who posit that *Stern*

¹⁰² *Id.* at 2627.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2627-28.

¹⁰⁵ *Stern*, 131 S. Ct. at 2627-28.

¹⁰⁶ *Id.* at 2628.

¹⁰⁷ *Id.* at 2629.

¹⁰⁸ *Id.* at 2630.

¹⁰⁹ See *supra* note 18 and accompanying text; see also *Turturici v. Nat'l Mortg. Servicing, LP*, No. CIV S-10-2853 KJM, 2011 WL 4480169, at *3 n.3 (E.D. Cal. Sept. 26, 2011) (acknowledging the potentially enormous impact of *Stern*); *In re Direct Response Media, Inc.*, 466 B.R. 626, 638 (Bankr. D. Del. 2012) ("There are two views as to the effect and holding of *Stern* . . . In the face of confusion, the Court as have many others throughout the nation, will attempt to present a reasoned analysis of the issues before it, based on this Court's interpretation of *Stern*."). The court in *In re Direct Response* further noted that: "The Court has found in excess of 130 cases in which bankruptcy courts have addressed *Stern*. The analyses and decisions are not consistent." *In re Direct Response*, 466 B.R. at 638 n.7.

¹¹⁰ Erwin Chemerinsky, *Enormous Confusion*, NAT'L L.J., Aug. 29, 2011, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202512531253&slreturn=1>. Chemerinsky also

will not change anything about how bankruptcy law is practiced.¹¹¹ But for others,¹¹² “bombshell does fairly describe *Stern’s* impact upon the more practical issue of how bankruptcy judges are to perform what the Code still calls [them] to do.”¹¹³ Overall, many speculate that *Stern* will have an adverse effect on bankruptcy practice.¹¹⁴ Part A of this section briefly examines the major trends in the interpretation and application of *Stern*. Part B explores the various consequences being promulgated by those at bar and by the media, and concludes that these problems are not novelties of *Stern*. Rather, these are latent concerns in existence since the inception of modern bankruptcy courts and a by-product of the structure of the American bankruptcy system.

A. Interpretation

1. Dicta or Holding?

Stern’s frenzied reception is fueled by disagreement on what the case ultimately means.¹¹⁵ The broad multifarious rationales in the decision¹¹⁶ leave many open-ended questions on the one hand, and, on the other hand, require pause for courts trying to make sense of it all.¹¹⁷ An inventory of cases post-*Stern*, reveals that the decision has been subject to both a broad and a narrow interpretation¹¹⁸: the difference in interpretation basically boils down to how much weight a court decides to give the dicta in *Stern*.¹¹⁹

noted that: “*Stern v. Marshall* made news only because it involved Anna Nicole Smith. But few Supreme Court decisions will have a larger impact on the day-to-day work of judges and lawyers.” *Id.*

¹¹¹ See, e.g., Dan Schechter, *Statutory Power of Bankruptcy Courts to Hear and Determine Compulsory State-Law Counterclaims Against Non-Bankrupt Claimants is Unconstitutional*, *Stern v. Marshall*, (U.S.), 2011 COM. FIN. NEWSL. 51 (2011) (“I think the majority is right about at least one thing: in the long run, this is not going to be a game changer.”).

¹¹² See *supra* note 18.

¹¹³ *In re Teleservices Grp., Inc.*, 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011).

¹¹⁴ See *supra* note 18.

¹¹⁵ See, e.g., *In re McClelland*, 460 B.R. 397, 402 (Bankr. S.D.N.Y. 2011) (“The work is compounded by the failure of the Supreme Court to definitively rule that the bankruptcy court is empowered by the “public rights” doctrine to make final adjudications regarding matters that are fundamentally concerned with the restructuring of debtor-creditor relations.”).

¹¹⁶ *In re Wilderness Crossings, LLC*, No. 09-14547, 2011 WL 5417098, at *2 (Bankr. W.D. Mich. Nov. 8, 2011).

¹¹⁷ See, e.g., *supra* note 115 and accompanying text; see also Kuney, *supra* note 6, at 1 (“The majority took pains to state that its decision was a narrow one . . . This statement is belied by its reasoning, which is broad and applicable to each of the 16 subsections of 28 U.S.C.A. § 157(b)(2), which define the bankruptcy courts’ core jurisdiction.”).

¹¹⁸ See *infra* notes 120-34.

¹¹⁹ See *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

An apparent majority of bankruptcy courts maintain that *Stern* is a very narrow holding — a point that *Stern* expressly made.¹²⁰ Within this camp, and at its narrowest, *Stern* only applies to proceedings that mirror the unique circumstances of that case.¹²¹ This interpretation is supported by the Court’s emphasis on the point that its holding was “narrow” and applicable “in one isolated respect.”¹²² For further support, proponents of the idea that *Stern*’s holding was very limited posit that, since Justice Scalia’s concurrence agreed to the ultimate outcome of the case, but not the Chief Justice’s reasoning or underpinnings, “the decision is a 4-4-1 plurality that must be ‘narrowly’ interpreted.”¹²³ Other courts within this camp acknowledge the inconsistencies between the Court’s ‘narrow’ holding and its far reaching rationales. These courts include in their opinions a statement which provides that, if on appeal the district court finds that the bankruptcy court exceeded its constitutional authority, the district court should treat the opinion as a recommendation and not a final order.¹²⁴

By contrast, courts employing the broad interpretation of *Stern* look beyond its holding and rely heavily on the Court’s reasoning.¹²⁵ Parties to a case that assert this position will argue that “*Stern* strips bankruptcy courts of authority to enter a final judgment in any case where the debtor is bringing any action which seeks to augment the estate because they are legal actions that seek to take another’s prop-

¹²⁰ See *id.* at 2620 (“[T]he question presented here is a ‘narrow’ one We conclude today that Congress, in one isolated respect, exceeded that limitation”); see, e.g., *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011) (“The Debtor reads *Stern* too broadly. The Supreme Court’s holding in *Stern* was very narrow. The Supreme Court merely held that Congress exceeded its authority under the Constitution in one isolated instance by granting bankruptcy courts jurisdiction to enter final judgments on counterclaims that are not necessarily resolved in the process of ruling on a creditor’s proof of claim.”); *In re Wilderness*, 2011 WL 5417098, at *2 (“Although the multifarious rationales in *Stern* are quite broad, the holding is mercifully narrow.”); *In re Crescent Res., LLC*, 457 B.R. 506, 510 n.2 (Bankr. W.D. Tex. 2011) (opining that *Stern* should be applied narrowly); *In re McClelland*, 460 B.R. at 401 (“In *Stern v. Marshall*, the Supreme Court held that one kind of “core” proceeding, that of counterclaims of the estate against parties filing proofs of claim, was unconstitutional in that it violated the separation of powers doctrine.”); see also *Kurz v. EMAK Worldwide, Inc.*, 464 B.R. 635, 645 n.6 (Bankr. D. Del. 2011) (finding that *Stern*’s holding is very limited).

¹²¹ See, e.g., *In re Salander O’Reilly Galleries*, 453 B.R. 106, 115 (Bankr. S.D.N.Y. 2011) (“*Stern* is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case.”); see also *In re Direct Response Media, Inc.*, 466 B.R. 626, 638 (Bankr. D. Del. 2012).

¹²² See *Stern*, 131 S. Ct. at 2620.

¹²³ *In re Direct Response*, 466 B.R. at 644.

¹²⁴ See *In re Hudson*, 455 B.R. 648, 656-57 (Bankr. W.D. Mich. 2011) (“Except for the types of counterclaims addressed in *Stern v. Marshall*, a bankruptcy judge remains empowered to enter final orders in all core proceedings If this court’s order is appealed, and the district court decides this court is not constitutionally authorized to issue a final order in this adversary proceeding, this opinion should be treated as a report and recommendation.”).

¹²⁵ See, e.g., *In re Blixseth*, No. 09-60452-7, 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011).

erty and can only be finally adjudicated by an Article III judge.”¹²⁶ A court’s decision to employ a broad interpretation is partly justified by the fact that, while dicta is not binding, the Court’s dicta carries great weight.¹²⁷ In addition, judicial dicta – contrasted with obiter dicta – should not be ignored.¹²⁸ These concepts are even more pertinent when applying *Stern*, because of the cardinal principles the Court addressed before getting to its ultimate conclusion.¹²⁹

For example, the Court stated that Congress may not encroach on the authority of Article III judges by delegating matters “made of ‘the stuff of the traditional actions at common law tried by courts at Westminster in 1789 . . . and . . . brought within the bounds of federal jurisdiction’ to non-Article III courts.”¹³⁰ Further, the Court stated that the bankruptcy court exceeded its constitutional authority by “purporting to resolve and enter final judgment on a state common law claim . . . independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor’s proof of claim in bankruptcy.”¹³¹ These broad assertions by the Court may effectively rebut the idea that *Stern* is applicable only in limited instances: these assertions encapsulate fundamental constitutional principles that need to be applied by all courts.

Similarly, as Professor Kuney points out, although the Court stated that its holding is narrow, its reasoning seemingly applies to other sections of the Code dealing with claims which “would have been the sort heard by the courts at Westminster in 1789.”¹³² For instance, “non-bankruptcy law counterclaims, especially mandatory counterclaims arising out of the same core of operative facts, in particular are impli-

¹²⁶ *In re Direct Response*, 466 B.R. at 638.

¹²⁷ See Robert G. Scofield, *The Distinction Between Judicial Dicta And Obiter Dicta: Unlike Obiter Dicta, Which Are Not Binding, Judicial Dicta Carry Great Authority*, 25 L.A. LAW. 17 (2002).

¹²⁸ *Id.* at 17 (“Obiter dicta are ‘by the way’ statements. Since courts usually do not give as serious consideration to the statements they make in passing as they do to the ratio decidendi, the statements do not constitute the binding part of a judicial precedent But judicial dicta are the product of a comprehensive discussion of legal issues and therefore should be granted greater weight than obiter dicta. Judicial dicta should be followed unless they are erroneous or there are particularly strong reasons for not doing so.”).

¹²⁹ See *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

¹³⁰ *Id.* at 2609.

¹³¹ *Id.* at 2611.

¹³² Kuney, *supra* note 6, at 9. Professor Kuney explains that *Stern* could easily apply to 28 U.S.C. § 157(b)(2)(A) (matters concerning the administration of the estate), § 157(b)(2)(F) (preference avoidance and recovery), § 157(b)(2)(H) (“proceedings to determine, avoid, or recover fraudulent conveyances” whether under incorporation of state law through 11 U.S.C. § 544 or under § 548), and § 157(b)(2)(O) (“other proceedings affecting the liquidation of the assets of the estate”).

cated”¹³³ Professor Kuney further states that if a bankruptcy court decides that a claim is the kind normally heard at Westminster in 1798 then the court cannot enter final judgment, and it also lacks authority to issue a recommendation to the district court, as this is only available for non-core matters, absent consent.¹³⁴

To date, the broadest interpretation given to *Stern* may very well be that of the court in *In re Blixseth*.¹³⁵ The position in *Blixseth* has led other courts to expressly differ.¹³⁶ After a thorough analysis of *Stern*, *Blixseth*’s conclusions were that: (1) “[u]nlike in non-core proceedings, a bankruptcy court has no statutory authority to render findings of fact and conclusions of law for core proceedings that it may not constitutionally hear”;¹³⁷ and (2) parties’ consent cannot authorize a bankruptcy court to enter a final judgment where it would not be able to otherwise.¹³⁸ By taking this position, the *Blixseth* court has gone beyond what *Stern* identified as its narrow holding, and has opted to apply the dicta instead.

Whether courts subscribe to a narrow or broad interpretation, one common thread is the detailed, full-length analysis courts engage in to dissect *Stern*. In this methodological approach, many courts construct and apply tests. For example, in *In re Olde Prairie Block Owner, LLC*,¹³⁹ to determine jurisdiction, the court asked whether as an Article I court it could enter final judgment on the debtor’s counterclaims as a core proceeding under § 157(b), provided the counterclaims rulings were required to adjudicate the claim itself, or whether the claims were non-core but otherwise related and parties consented.¹⁴⁰ The court also noted that *Stern* required that “each Counterclaim Count must be separately analyzed.”¹⁴¹ Further, the court stated that after *Stern*, bankruptcy judges’ authority with regards to ‘core’ claims have been limited.¹⁴² After an analysis of much of *Stern*’s dicta, the court

¹³³ Kuney, *supra* note 6, at 9.

¹³⁴ *Id.* at 9-10.

¹³⁵ No. 09-60452-7, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug. 1, 2011).

¹³⁶ See, e.g., *In re Universal Mktg., Inc.*, 459 B.R. 573, 578 (Bankr. E.D. Pa. 2011) (“Respectfully, I believe *Blixseth* is incorrect and I decline to follow it.”); *In re Freeway Foods of Greensboro, Inc.*, 466 B.R. 750, 770 (Bankr. M.D.N.C. 2012) (“Although the *Blixseth* court found that the consent of the parties cannot authorize a bankruptcy court to enter a final judgment on a cause of action . . . the overwhelming majority of courts have concluded that ‘the bankruptcy court has authority to render final judgments even in non-core proceedings with the consent of the parties.’”).

¹³⁷ *In re Blixseth*, 2011 WL 3274042, at *12.

¹³⁸ *Id.*

¹³⁹ 457 B.R. 692 (Bankr. N.D. Ill. 2011).

¹⁴⁰ *Id.* at 696-97.

¹⁴¹ *Id.*

¹⁴² *Id.*

ultimately stated that the holding was narrow, but it was not limited to the counterclaim at issue in *Stern*; the court found the holding also applied to “others substantially like it.”¹⁴³

Similarly, in *In re Freeway Foods of Greensboro, Inc.*,¹⁴⁴ after a careful examination of much of the Court’s dicta, the court concluded that *Stern* provided a two-prong test.¹⁴⁵ After a review of *Stern*’s discussion on the lack of authority of bankruptcy courts to enter final orders in “non-bankruptcy matters that are based on the common law or state law,” the court stated that the *Stern* test asks: “whether the action stems from bankruptcy itself or would necessarily be resolved in the claims allowance process.”¹⁴⁶ If either prong is answered in the affirmative, a bankruptcy court has authority to enter a final order.¹⁴⁷ If neither prong is satisfied, the bankruptcy court can only enter findings of fact and conclusions of law.¹⁴⁸

2. Questioning Fraudulent Conveyance Actions

Post-*Stern*, many courts have faced the question of whether a bankruptcy court can finally adjudicate a fraudulent conveyance action.¹⁴⁹ This question is a direct function of the Supreme Court’s broad reasoning in the decision, which potentially applies to other subsections of the Code.¹⁵⁰ Among courts adopting the broad interpretation, one view is that the statutory grant of authority to adjudicate fraudulent conveyances is constitutionally suspect in lieu of *Stern* and *Granfinanciera*, combined.¹⁵¹ This camp concludes that, while a bankruptcy judge may issue a report and recommendation, after *Granfinanciera* and *Stern*, it is apparent that bankruptcy courts may not enter final judgment in fraudulent conveyance actions.¹⁵²

In support of this conclusion, statutory authority notwithstanding, Eric Brunstad, in an Amicus Brief, made a persuasive argument supported by the Supreme Court’s reasoning in *Stern*.¹⁵³ Brunstad con-

¹⁴³ *Id.* at 698.

¹⁴⁴ 466 B.R. 750 (Bankr. M.D.N.C. 2012).

¹⁴⁵ *Id.* at 768.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *In re Refco Inc.*, 461 B.R. 181, 186 (Bankr. S.D.N.Y. 2011) (stating that “reasonable people may differ over whether *Stern*’s prohibition on the bankruptcy court’s issuance of a final judgment extends to fraudulent transfer claims”, and providing a laundry list of cases that take divergent positions on the issue).

¹⁵⁰ See Kuney, *supra* notes 6 and 132.

¹⁵¹ *In re Teleservices Grp. Inc.*, 456 B.R. 318, 338 (Bankr. W.D. Mich. 2011).

¹⁵² See *id.*

¹⁵³ Brief for G. Eric Brunstad as Amicus Curiae Supporting Neither Party at 8, *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 665 F.3d 1036 (9th Cir. 2011) [herein-

cluded that bankruptcy courts may enter final judgment only where the parties have expressly consented because, as *Stern* stated, fraudulent conveyance suits are “quintessential[] suits at common law,” and are more “accurately characterized as private rather than a public right.”¹⁵⁴ In addition, “even with respect to matters that arguably fall within the scope of the ‘public rights’ doctrine, the presumption is in favor of Art. III courts.”¹⁵⁵ And, where a proof of claim has been filed, a bankruptcy court can only adjudicate where the “action would necessarily be resolved in the process of ruling on” that claim.¹⁵⁶ Brunstad further reasoned that where a bankruptcy court improperly issues a final order on a fraudulent conveyance action, an Article III court may adequately cure the defect by treating the decision as a submission of “proposed findings of fact and conclusions of law” subject to *de novo* review.¹⁵⁷

To rebut this argument, narrow-interpretation courts point out that *Stern* did not address the question of whether bankruptcy courts can enter final orders in fraudulent conveyance actions, and it is, in fact, replete with language indicating that the case should be read narrowly.¹⁵⁸ Further, to extend *Stern* to fraudulent transfer actions, based on the Court’s dicta would “upend the division of labor between district and bankruptcy courts that has been in effect for nearly thirty years.”¹⁵⁹ Proponents of this view further argue that, even under the broad interpretation, bankruptcy courts may still finally adjudicate fraudulent transfers because these actions arise only in bankruptcy. To support this position, and conclude that fraudulent transfer actions are core, the court in *In re Custom Contractors*¹⁶⁰ engaged in the following analysis:

[C]laims asserted by the Trustee are authorized by, and arise under §§ 544(b) and 548 of the Bankruptcy Code. Such claims “may

after Brunstad Br.]. Brunstad has argued several cases in front of the US Supreme Court, lectures at Yale, and is a contributing author for the Collier treatise on bankruptcy law. Brunstad’s profile can be found on his firm’s website. See *G. Eric Brunstad Jr.*, DECHERT, LLP, http://www.dechert.com/eric_brunstad/ (last visited June 29, 2013).

¹⁵⁴ *Stern v. Marshall*, 131 S. Ct. 2594, 2614 (2011); Brunstad Br., *supra* note 153, at 9.

¹⁵⁵ Brunstad Br., *supra* note 153, at 23 (citing *Stern*, 131 S. Ct. at 2618).

¹⁵⁶ *Id.* at 24 (citing *Stern*, 131 S. Ct. at 2620).

¹⁵⁷ *Id.* at 14.

¹⁵⁸ *In re Custom Contractors*, 462 B.R. 901, 906 (Bankr. S.D. Fla. 2011).

¹⁵⁹ *Id.* at 908; see also *In re Heller Ehrman LLP*, No. 08-32514DM, 2011 WL 4542512, *6 (Bankr. N.D. Cal. 2011) (stating that “After *Stern*, some courts have concluded that they cannot hear fraudulent conveyance claims as core proceedings. They are focusing on the dicta of *Stern*, not its holding. I believe that this approach thrusts unnecessary burdens on already overworked district courts, especially when bankruptcy courts have a particular expertise in and familiarity with avoidance actions.”).

¹⁶⁰ *Custom Contractors*, 462 B.R. at 901.

only be prosecuted by a bankruptcy trustee on behalf of a bankruptcy estate, and because a trustee and a bankruptcy estate are strictly creatures of the Bankruptcy Code, there would be no legal basis for this action were there no bankruptcy estate.” (citation omitted) These claims simply would not exist but for the bankruptcy. (citation omitted) The analysis does not change because § 544(b) authorizes a trustee to avoid a transfer that could be recovered under state law by an actual creditor of the debtor. (citation omitted) This action is not prosecuted by one of the debtor’s creditors to avoid a transfer under state law, but by a bankruptcy trustee as the official representative of the bankruptcy estate to avoid prepetition transfers under the Bankruptcy Code. (citation omitted) Although § 544 incorporates state law to provide the “rules of decision,” the claim still arises under § 544 which is a federal bankruptcy cause of action stemming from the bankruptcy itself. (citation omitted) In addition, “[a] determination that a proceeding is not a core proceedings shall not be made solely on the basis that its resolution may be affected by State law.” (citation omitted)¹⁶¹

To substantiate the position that fraudulent transfers are core proceedings, one may reference *Thomas*¹⁶², where the Supreme Court recognized that, in rare cases, Congress “may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”¹⁶³ On the flip side, however, this argument is weakened by the Court’s position in *Granfinanciera* and *Stern*, that fraudulent conveyance actions are “more accurately characterized as a private rather than a public right,”¹⁶⁴ and they are “not closely intertwined with a federal regulatory program that Congress has power to enact.”¹⁶⁵

In this sea of uncertainty, where courts are struggling to reconcile apparent inconsistencies in *Stern*, one thing seems sure – *Stern* has left the door open for a continuance of jurisdictional disputes. Courts, like the one in *Blixseth*,¹⁶⁶ seem to refuse to wait for the reprimand that is

¹⁶¹ *Id.* at 907. In its analysis, the Court cited to 28 U.S.C. § 157(b)(3); *In re Bujak*, No. 10-03569-JDP, 2011 WL 5326038, *2-3 (Bankr. D. Idaho Nov. 3, 2011); *In re Heller Ehrman*, 2011 WL 4542512, at *5; and *In re Universal Mktg., Inc.*, 2011 WL 5553280, *3 (Bankr. E.D. Pa. Nov. 15, 2011).

¹⁶² *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

¹⁶³ *Id.*

¹⁶⁴ *Stern v. Marshall*, 131 S. Ct. 2594, 2614 (2011).

¹⁶⁵ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54-56 (1989).

¹⁶⁶ See *In re Blixseth*, No. 09-60452-7, 2011 WL 5509484 (Bankr. D. Mont. 2011) (placing as much emphasis on *Stern*’s dicta as it does the holding).

almost sure to come years down the line, and give as much weight to *Stern's* dicta as its holding. Other courts, however, while cognizant of the fact that years from now the Supreme Court may use *Stern* as a platform to invalidate other portions of the Code, are grounded in knowing that “the job of bankruptcy courts is to apply the law as it is written and interpreted today. Bankruptcy courts should not invalidate a Congressional statute . . . or otherwise limit its authority to finally resolve other core proceedings—simply because dicta in *Stern* suggests the Supreme Court may do the same down the road.”¹⁶⁷

B. Impact and Consequences

1. Inefficiency and Case Overload

The dissent in *Stern*, penned by Justice Breyer, was first to highlight that the decision, as a practical matter, has the potential to result in an inefficient bankruptcy process.¹⁶⁸ It is very common for counterclaims that resemble suits at common law and that involve the same factual disputes as core claims, to arise during bankruptcy proceedings.¹⁶⁹ As Justice Breyer warned, “[A] constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.”¹⁷⁰ There are particular efficiency and cost concerns in the present socio-economic climate, where thousands of debtors striving to save their homes from foreclosure will likely face motions seeking to move these cases to district court, which is a favorite forum for creditors.¹⁷¹

¹⁶⁷ See, e.g., *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 718 (Bankr. M.D. Fla. 2011) (explaining that although the Supreme Court may at a later date hold that section 157(b)(2)(F) dealing with fraudulent conveyances is unconstitutional, the job of courts are to apply the law as is). The court also noted that the “Supreme Court does not ordinarily decide important questions of law by cursory dicta.” *Id.* (citing *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)). In agreement with the decision by the *In re Safety* court to not extend *Stern's* limited holding, the judge in *In re BankUnited Fin. Corp.* stated: “Moreover, I am not going to be one of those bankruptcy judges who seizes on, and seeks to analyze, every line in the *Stern* opinion to determine what ripples may emerge from the self-described isolated pebble dropped in the jurisdictional waters.” 462 B.R. 885, 892 (Bankr. S.D. Fla. 2011).

¹⁶⁸ See *Stern v. Marshall*, 131 S. Ct. 2594, 2630 (2011) (Breyer, J., dissenting); see also Kuney, *supra* note 6, at 1 (“As a result, each assertion of core jurisdiction is now open for challenge and is subject to uncertainty. Without legislative action, this uncertainty will only be clarified through the lengthy process of litigation in each of the various federal circuits, a process that has already begun and that will continue for some time, at great expense.”).

¹⁶⁹ *Stern*, 131 S. Ct. at 2626, 2630 (Breyer, J., dissenting).

¹⁷⁰ *Id.* at 2630.

¹⁷¹ See Lieb, *supra* note 24, at 463-64; Patrick Scott, *Supreme Court Addresses Limits On Bankruptcy Judges' Powers*, 33 NO. 21 WESTLAW J. ASBESTOS 12, 4 (2011).

It is already evident that *Stern* has become the mantra for strategic and tactical litigants, who would rather litigate in a forum other than the bankruptcy court.¹⁷² A survey of cases post-*Stern* reveal that litigants are raising *Stern* for a plethora of issues, thereby extending the case beyond its intended effect.¹⁷³ To highlight a few, *Stern* is being used to challenge the following: subject matter jurisdiction;¹⁷⁴ bankruptcy courts' authority to hear claims based on state law;¹⁷⁵ the bankruptcy courts on the issue of consent;¹⁷⁶ the bankruptcy court's authority in Chapter 5 actions;¹⁷⁷ and especially, the bankruptcy court's authority in fraudulent conveyance actions.¹⁷⁸ Practicing in bankruptcy court may very well have become too focused on gamesmanship instead of argument; for example, parties may choose to wait until the

¹⁷² *In re Ambac Fin. Grp., Inc.*, 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011).

¹⁷³ See *infra* notes 174-78.

¹⁷⁴ See, e.g., *In re Universal Mktg., Inc.*, 459 B.R. 573, 574-75 (Bankr. E.D. Pa. 2011) ("The Defendant also asserts that the bankruptcy court lacks subject matter jurisdiction Defendant's jurisdictional argument is based on the recent Supreme Court decision, *Stern v. Marshall*."); see also *New York v. Fairchild Corp. (In re Fairchild Corp.)*, 452 B.R. 525, 530 n.14 (Bankr. D. Del. 2011) ("*Stern v. Marshall* is not a case about subject matter jurisdiction. Rather it addresses the power of the bankruptcy court to enter final orders, assuming that subject matter jurisdiction exists."); *In re Heller Ehrman LLP*, No. 08-32514DM, 2011 WL 4542512, *2 n.8 (Bankr. N.D. Cal. 2011) (quoting *Stern*, 131 S. Ct. at 2607) ("Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. [] That allocation does not implicate questions of subject matter jurisdiction.").

¹⁷⁵ See, e.g., *In re Soo Bin Kim*, No. 10-54472-C, 2011 WL 2708985, *2 n.2 (Bankr. W.D. Tex. 2011) ("Defendant has suggested that this court cannot hear any of this matter because it touches on probate issues, and cites the Supreme Court recent decision in *Stern v. Marshall* The defendant overreads that case and its application to this proceeding."); see also *In re Salander O'Reilly Galleries*, 453 B.R. 106, 118 (Bankr. S.D.N.Y. 2011) (stating that from *Stern*'s narrow holding it is clear that "the Bankruptcy Court is empowered to apply state law when doing so would finally resolve a claim"); *In re Byce*, No. 1:11-CV-00378-BLW, 2011 WL 6210938, *2-3 (D. Idaho 2011) ("The bankruptcy court thus has constitutional authority to finally determine JustMed's claim – including state-law issues that arise within that claim. *Stern* did not hold that the bankruptcy court may not rule on state law issues when determining a proof of claim Again, it was not the mere presence of state law issues that drove the *Stern* decision").

¹⁷⁶ See, e.g., *Mercury Cos., Inc. v. FNF Sec. Acquisition, Inc.*, 460 B.R. 778, 780 (D. Colo. 2011) ("Defendants argue, *inter alia*, that one cannot consent to the Bankruptcy Court's jurisdiction where the Bankruptcy Court does not have the authority to resolve claims before it.").

¹⁷⁷ See, e.g., *In re Wilderness Crossings, LLC*, No. 09-14547, 2011 WL 5417098, *1 (Bankr. W.D. Mich. 2011) ("With the benefit of case development and further reflection, however, this court is unwilling to automatically extend the dicta in *Stern* to default judgment motions under Chapter 5").

¹⁷⁸ See, e.g., *In re Custom Contractors, LLC*, 462 B.R. 901, 904 (Bankr. S.D. Fla. 2011) ("The IRS argues that although it admitted in its Answer that this is a core proceeding, the intervening decision in *Stern v. Marshall* limits the Court's authority to enter a final order in this fraudulent transfer action."); *In re Bujak*, No. 10-03569-JDP, 2011 WL 5326038, *1 (Bankr. D. Idaho 2011) ("Relying upon an extension of the Supreme Court's holding in *Stern v. Marshall* . . . , the County argues that this Bankruptcy Court lacks constitutional power to enter a final judgment on Trustee's fraudulent conveyance claims, and as a result, the claims are dismissed.").

eve of trial before raising objections.¹⁷⁹ Debtors in this context “are not likely to have the financial resources to oppose such proceedings that financial institutions can afford to pursue.”¹⁸⁰ Additional risks of delay, uncertainty and increased costs are exacerbated by the fact that a party may raise lack of subject matter jurisdiction at any stage of the case; doing so could result in upsetting a final order in a case based on a last-minute jurisdictional plea.¹⁸¹

On the other hand, arguably, *Stern* really changes nothing as bankruptcy courts will continue to hear all non-core claims involved in proceedings, submit findings as proposals – as opposed to final orders – and district courts will simply imprint their stamp of approval. Additionally, parties have always had the opportunity to appeal to the district court from final orders entered by bankruptcy judges.¹⁸² In this business-as-usual atmosphere, parties will come out with “two pieces of paper from two different courts, and a useless extra helping of delay and expense.”¹⁸³

Further, at most, *Stern* has exacerbated certain defects in the bankruptcy process, but it sure did not create them, as the significant delay and expense involved in bankruptcy proceedings are attributable to the American hybrid, two-tiered bankruptcy system.¹⁸⁴ Where bankruptcy is infused with state substantive law,¹⁸⁵ and claims akin to those at common law are commonplace during the process,¹⁸⁶ the current statutory structure – jurisdiction to district courts and bankruptcy courts authority dependent on core versus non-core distinction¹⁸⁷ – is a breeding ground for uncertainty, delay and litigation over jurisdiction. This system is the cradle for the endless back-and-forth between the Supreme Court and Congress on the authority of bankruptcy judges.

2. Forum Shopping

In addition to efficiency concerns, another proposition is that “the principal significance of the *Stern* decision is that it will encourage a permissible type of forum-shopping” – especially in favor of creditor-defendants, who “most often prefer the fact finder to be a district judge.”¹⁸⁸ In other words, “creditors facing state law claims by a bank-

¹⁷⁹ See, e.g., *In re Peacock*, 455 B.R. 810, 812-14 (Bankr. M.D. Fla. 2011).

¹⁸⁰ Lieb, *supra* note 24, at 464.

¹⁸¹ *Id.* at 467.

¹⁸² See Block-Lieb, *supra* note 57, at 796.

¹⁸³ Schechter, *supra* note 111, at 51.

¹⁸⁴ See Daley & Shuster, *supra* note 26.

¹⁸⁵ *Id.*

¹⁸⁶ See *Stern v. Marshall*, 131 S. Ct. 2594, 2630 (2011) (Breyer, J., dissenting).

¹⁸⁷ See Block-Lieb, *supra* note 57.

¹⁸⁸ Scott, *supra* note 171, at 4.

ruptcy estate may choose between the bankruptcy judge and a district court as the fact finder in the case.”¹⁸⁹ As the impact of *Stern* starts to manifest, the issue of forum-shopping has become evident: litigants are seeking to forum-shop by tactfully making very creative arguments, very late in the case, based on *Stern*.¹⁹⁰ For example, in one case the plaintiff tried to get out of bankruptcy court by arguing lack of consent, when the case was well under way; the court retorted that plaintiff’s actions was nothing but a “variation of forum shopping.”¹⁹¹

Forum-shopping is not a unique product of *Stern*. Rather, it has been a problem since the inception of bankruptcy courts.¹⁹² Forum shopping has been “problematic with amendments to the Act throughout the twentieth century,”¹⁹³ partly fueled by the vagueness of 28 U.S.C. § 157, which embodies bankruptcy’s jurisdictional structure.¹⁹⁴ The indefinite wording of the statute left much up to the discretion of bankruptcy courts in determining what is a ‘core’ proceeding.¹⁹⁵ Hence, pre-dating *Stern*, “forum-shopping problem[s] [arose] when core jurisdiction [was] viewed expansively, so as to effectively place bankruptcy judges on an equal footing with state courts and Article III federal courts”¹⁹⁶ in disputes that were independent of the federal bankruptcy statutory scheme.¹⁹⁷ *Stern* has curbed this problem to the extent that parties no longer have an option in bankruptcy courts for proceedings that are “not resolved in the process of ruling on a creditor’s proof of claim” or based in federal bankruptcy law.¹⁹⁸

In addition, the American hybrid bankruptcy system – a federal system ingrained with substantive entitlements and rules based on state laws¹⁹⁹ – creates the challenge and almost erases any chance of parties choosing their forum in a non-opportunistic way. The antidote to having the resolution of a dispute contingent on the forum in which the dispute is adjudicated was to make the bankruptcy court a place

¹⁸⁹ *Id.* at 1.

¹⁹⁰ See *supra* notes 174-78; *In re Bayonne Med. Ctr.*, No. 07-15195, 2011 WL 5900960, *6 (Bankr. D.N.J. 2011) (“The plaintiff’s late-day tactical change of heart will not be permitted. It is a variation of forum-shopping, undertaken only after full exposition by both sides of the contested issue and expansive court inquiry into and colloquy regarding the merits of various positions of the parties.”).

¹⁹¹ See *In re Bayonne Med. Ctr.*, 2011 WL 5900960, at *6.

¹⁹² See *Cole*, *supra* note 25, at 517.

¹⁹³ *Id.*

¹⁹⁴ See *id.* at 521.

¹⁹⁵ See *id.*

¹⁹⁶ *Id.* at 520.

¹⁹⁷ See *id.*

¹⁹⁸ *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

¹⁹⁹ See *Cole*, *supra* note 25, at 515.

with special procedures and no special substantive law.²⁰⁰ Over the years, however, litigants have been able to use the bankruptcy system to gain better results than they would in a state system, thanks to the vagueness of the statutory scheme.²⁰¹ Vickie was initially able, for example, to take her case to the bankruptcy court and win on state law counterclaims, where the state probate court had ruled in Pierce's favor.²⁰² The problem of forum shopping, therefore, existed way before *Stern*. Furthermore, creditors still had some ability to choose between a bankruptcy judge and a district court judge prior to *Stern* in cases where a jury trial was required and where the creditor had not filed a proof of claim.²⁰³

3. Prolongation of the Tension Between Article III Judges and Bankruptcy Judges

The Court's decision in *Stern* expresses a lack of confidence in the ability of bankruptcy judges to rule with "clear heads" and "honest hearts" in the absence of Article III protections that make the judiciary immune to any inappropriate coercion from other branches of government.²⁰⁴ One concern, however, is that the true undercurrent of the decision is Article III courts' lack of confidence in the bankruptcy courts.²⁰⁵ This concern is not unfounded; as discussed above, there has been a stigma, almost disdain, attached to debtors and insolvency since the Roman Empire, which transfused into American society.²⁰⁶ And it is no secret that Article III judges have not been immune to prevailing stereotypes of the bankruptcy system.²⁰⁷

The Judicial Conference, made up of Article III judges²⁰⁸, was strongly opposed to Congress' intent to grant Article III status to bankruptcy courts, pursuant to recommendations by the House Judiciary Committee during the drafting of the Bankruptcy Code of

²⁰⁰ See *id.* at 512.

²⁰¹ See *id.* at 521.

²⁰² See *Marshall v. Marshall*, 547 U.S. 293 (2006).

²⁰³ Scott, *supra* note 171, at 1.

²⁰⁴ See *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011).

²⁰⁵ The *Calvo* court, citing *Stern*, made it a point to specify the reduced deference owed bankruptcy courts interpreting state law, as opposed to that given to federal courts. See *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 123 n.2 (2011) ("Plaintiff cited only one bankruptcy court decision in support of her argument that section 2932.5 applies to deeds of trust. We find the analysis in that case unpersuasive. Holdings of the federal courts are not binding or conclusive on California courts, though they may be entitled to respect and careful consideration. A federal bankruptcy court decision interpreting California law, however, is not due the same deference.").

²⁰⁶ See *supra* notes 43-48.

²⁰⁷ See *Coco*, *supra* note 15.

²⁰⁸ See *id.*

1978.²⁰⁹ Former District Judge, Simon Rifkind, and former Circuit Judge, Attorney General Griffin Bell, opposed granting Article III status to bankruptcy judges because “it ‘would dilute the significance, and prestige, of district judgeships’” and “diminish the . . . influence of our district courts.”²¹⁰ Chief Justice Warren Burger shared the same sentiment, and went as far as to make a personal supplication to the President to exercise the presidential veto.²¹¹ The Chief Justice went under fire for breaching separation of power delineations,²¹² but he probably thought it worth it in the end, as ultimately bankruptcy courts were not granted Article III status.²¹³

Explanation for this bizarre behavior on the part of members of the Judicial Conference may be attributed to a “sort of an ego trip” or jealousy of power.²¹⁴ Another perspective is that the stigma attached to bankruptcy has relegated the practice to a subordinate position in the legal hierarchy.²¹⁵ This position posits that, traditionally, within the legal hierarchy bankruptcy has been an inferior field of legal practice, in which bankruptcy attorneys were viewed to be of inferior caliber.²¹⁶ In addition, debt and financial failure has always been taboo in societies – past and present.²¹⁷ Initially, bankruptcy was practiced by a marginalized group of lawyers, and more successful firms had no interest in engaging in the practice.²¹⁸ There was also a lack of uniform rules, which made it an insider’s practice, and the appearance of the impartiality became a major problem.²¹⁹ A mixture of these reasons led to bankruptcy occupying a subordinated position in the legal system.²²⁰

As Professor Linda Coco has stated, this “bias is unsupported by contemporary bankruptcy court judicial ability, expertise, and work ethic, yet this perception, because it is accepted, operates to demoral-

²⁰⁹ See *id.*; see also Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 7-11 (1985).

²¹⁰ Countryman, *supra* note 209, at 9.

²¹¹ Coco, *supra* note 15, at 197.

²¹² Countryman, *supra* note 209, at 11.

²¹³ *Id.* at 11-12.

²¹⁴ See *id.* at 9 (stating that Judge Weinfeld was unable to deny that the real reason for opposition by two other Article III judges was an ‘ego trip’ and an effort to hold onto power). There have been parallels drawn between the egotistic reaction of judges during the drafting of the Bankruptcy Code of 1978 and the Court’s holding in *Stern*. For example, in his discussion of *Stern*, Professor Kuney states: “There is at least a hint of a bugle call to rally an embattled Article III judiciary to protect its turf.” Kuney, *supra* note 6, at 2.

²¹⁵ See Coco, *supra* note 15.

²¹⁶ See *id.* at 202-26.

²¹⁷ See *id.*

²¹⁸ See *id.* at 209.

²¹⁹ See *id.* at 213-26.

²²⁰ See *id.*

ize what is arguably one of the most vital and essential judicial forums in the United States today.”²²¹ Whatever justifications existed in the past for the inferior view of the bankruptcy practice are moot today in light of the level of professionalism in the bankruptcy bar – and especially in light of the caliber of bankruptcy judges and their invaluable contributions to American society.²²²

4. Separation of Powers Issues and Consent

Another criticism of *Stern* is that it implicates separation of power issues.²²³ It seems to be, however, a repeat of the back-and-forth between the Court and Congress in defining the limits of bankruptcy courts as happened in 1978 and 1982.²²⁴ Now that § 157(b)(2)(C) – which allows bankruptcy courts to hear counterclaims brought against the estate – has been stricken, Congress may have to make some changes, since the intent of the Act was to give bankruptcy courts broad powers;²²⁵ as early as the Bankruptcy Reform Act of 1978, Congress indicated that its intent was to expand the jurisdiction of bankruptcy courts and provide a single forum to adjudicate all issues relating to the administration of a bankruptcy case.²²⁶

In *Stern*, the Court also left mixed signals as to the role of consent in bankruptcy proceedings.²²⁷ 28 U.S.C. § 157(c)(2) allows bankruptcy courts to enter final orders in ‘non-core’ proceedings, where the parties have consented.²²⁸ After all the emphasis placed on the importance of Article III safeguards and the preservation of separation of powers, it seems unlikely, however, that the Court would find it ap-

²²¹ *Id.* at 225.

²²² See, e.g., Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 755 (2010) (“Moreover, the status and quality of the bankruptcy bar in general, and the bankruptcy courts in particular, have risen in tandem in the last thirty years as bankruptcy has regained its place of prominence in law practice.”). See also *Stern v. Marshall*, 131 S. Ct. 2594, 2630 (2011) (Breyer, J., dissenting) (stating that bankruptcy courts handled 1.6 million cases in 2010, compared to the federal courts’ 280,000 civil and 78,000 criminal cases). And this figure does not reflect adversary proceedings. *In re Teleservices Grp. Inc.*, 456 B.R. 318, 324 n.25 (Bankr. W.D. Mich. 2011).

²²³ See, e.g., Kunej, *supra* note 6, at 1-2, 9 (stating that *Stern* “appears to be a reaction, a slap back, to Congress’ practice of expansively defining the bankruptcy courts’ power,” and explaining that *Stern* could easily be used to invalidate other subsections of 28 U.S.C. § 157).

²²⁴ See Daley & Shuster, *supra* note 26.

²²⁵ See *id.* at 385. *But see* Schecter, *supra* note 111, at 2 (stating that no congressional action may be needed since section 157(b)(2)(C) was merely stricken and bankruptcy courts may still hear non-core proceedings).

²²⁶ See Daley & Shuster, *supra* note 26, at 385-86.

²²⁷ See, e.g., Lieb, *supra* note 24, at 466 (“Although not directly addressed by the majority, it is unclear whether express consent by the parties is, by itself, a sufficient basis upon which a bankruptcy judge may adjudicate a common law claim.”).

²²⁸ 28 U.S.C. § 157(c)(2) (2012).

appropriate for parties to bypass all these safeguards simply by consenting to jurisdiction.²²⁹ For example, in Vickie’s instance, “Pierce repeatedly consented to the bankruptcy court’s adjudication of his defamation claim against the estate.”²³⁰ Nevertheless, the Court concluded that Pierce did not “truly consent,”²³¹ which leaves the question of whether consent is still a determinative factor, and, if so, what quality of consent is required?

On the question of the quality of consent required, one view is that simply filing a proof of claim in bankruptcy proceedings may be insufficient since, unlike the party in *Schor*, he could have pursued his claim in federal court, “[p]arallel reasoning is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims.”²³² Further, *Stern* seems to be a departure from the Court’s position in *Lagenkamp*,²³³ that “even when private rights are at issues, non-Article III adjudication may be appropriate when both parties consent.”²³⁴ The dissent pointed out that there is no relevant distinction between claims filed in *Stern* with those in *Lagenkamp*²³⁵ and *Granfinanciera*,²³⁶ and hence, Pierce’s filing of a proof of claim, in the light of precedent, was ‘true’ consent to the jurisdiction of the bankruptcy court.²³⁷

Another perspective is that the commonsensical conclusion is that *Stern* has left the role of consent intact, seeing that district judges can allow parties before them to agree to final resolution of their issues by binding arbitration.²³⁸ To interpret *Stern* any differently could potentially create a case overload in district courts as not only would the bankruptcy court not be able to enter judgment when parties consent – a process that significantly lightens the workload of district courts – but also the ability of other Article I courts and magistrates to do so would be called into question.²³⁹ And though post-*Stern* cases evidence some hesitation about the role of consent, courts seem to be in agreement that parties may still consent to the bankruptcy courts’ final adjudication of claims.²⁴⁰ *Stern* “recognized the value of waiver

²²⁹ See Lieb, *supra* note 24, at 466.

²³⁰ See Moody & Spector, *supra* note 18.

²³¹ See *Stern v. Marshall*, 131 S. Ct. 2594, 2614 (2011).

²³² *Brunstad Br.*, *supra* note 153, at 25.

²³³ *Lagenkamp v. Culp*, 498 U.S. 42 (1990).

²³⁴ *Stern*, 131 S. Ct. at 2628 (Breyer, J., dissenting).

²³⁵ *Lagenkamp*, 498 U.S. at 42-44.

²³⁶ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

²³⁷ *Stern*, 131 S. Ct. at 2628 (Breyer, J., dissenting).

²³⁸ *In re Teleservices Grp. Inc.*, 456 B.R. 318, 338 (Bankr. W.D. Mich. 2011).

²³⁹ See *In re Custom Contractors*, 462 B.R. 901, 910 (Bankr. S.D. Fla. 2011).

²⁴⁰ See, e.g., *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 718 (Bankr. M.D. Fla. 2011); *In re Peacock*, 455 B.R. 810, 812-13 (Bankr. M.D. Fla. 2011).

and forfeiture rules”²⁴¹, and there is really no reason for the Supreme Court to have held otherwise.²⁴² In terms of the quality of consent required, courts on this side of the fence maintain that consent can be implied; courts are willing to do so to prevent parties from sandbagging the court, a practice even *Stern* disapproved of.²⁴³ Further, one court, post-*Stern*, has stated that authority exists to support the conclusion that “even a mistaken admission of core jurisdiction acts as consent.”²⁴⁴

With the majority’s strict prohibitions on Congress even slightly encroaching on Article III turf,²⁴⁵ Congress may have to change consent-based jurisdiction. In the meantime, there is sure to be a great amount of litigation surrounding the role of consent and the validity of section 157(c)(2). Failure to modify the consent provision makes it even more likely that there will be further back-and-forth between Congress and the judiciary on the question of bankruptcy court authority; “the issue that just won’t go away.”²⁴⁶

IV. SOLUTION TO JURISDICTIONAL ISSUES

As became evident in less than a year after *Stern*, a great deal of resources – especially time and money – will be expended by parties and by the courts, in an effort to interpret and enforce *Stern*.²⁴⁷ Without appropriate legislative action, every few years this game of ping-pong will continue. The questioning of the bankruptcy court’s authority has been occurring since the inception of bankruptcy courts.²⁴⁸ Just as it took the Supreme Court over twenty years after *Northern Pipeline*²⁴⁹ to rule that Congress’ attempt to define bankruptcy jurisdiction

²⁴¹ *In re Safety Harbor*, 456 B.R. at 718 (citing *Stern*, 131 S. Ct. at 2608).

²⁴² *Id.*; see also *In re Teleservices Grp.*, 456 B.R. at 338 (stating that had the defendant consented the court would have authority to enter final judgment on the Trustee’s fraudulent transfer action).

²⁴³ See, e.g., *In re Custom Contractors*, 462 B.R. at 909 (citing *Stern*, 131 S. Ct. at 2608). According to the Supreme Court in *Stern*, sandbagging occurs where a litigant “remain[s] silent about his objection and belatedly rais[es] the error only if the case does not conclude in his favor.” 131 S. Ct. 2594, 2608 (2011).

²⁴⁴ See *In re Peacock*, 455 B.R. 810, 812-13 (Bankr. M.D. Fla. 2011).

²⁴⁵ See *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

²⁴⁶ Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 529 (1998).

²⁴⁷ See *supra* notes 179-81; see also Kuney, *supra* note 6 at 10 (“But because the case’s reasoning was so broad, each action brought under one of the 16 subsections of 157(b)(2) is now subject to challenge and may be tested in litigation . . . [O]utcomes and conclusions on these issues are difficult to predict and, absent statutory revision, splits of authority are likely across the country.”).

²⁴⁸ See Daley & Shuster, *supra* note 26.

²⁴⁹ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). This case was the Supreme Court’s response to Congress’ attempt to broaden the powers of bankruptcy courts.

in light of that case was invalid, *Stern* is an omen of future challenges to the current bankruptcy system. A piecemeal fix by Congress will not suffice. To rectify this waste of time and resources, and to prohibit future violation of important constitutional principles, Congress should bestow Article III status on bankruptcy courts, as it thought of doing in 1978.²⁵⁰ This is not a novel proposition, but it is one that has become fundamental after *Stern*.²⁵¹

Why should courts with “reputations for fast-paced, efficient, result-oriented adjudication”²⁵² not have Article III status? Why should the court that handled 1.6 million cases in 2010, compared to the federal courts’ 280,000 civil and 78,000 criminal cases, not be worthy of Article III status?²⁵³ Why should the court that steered parties through the tumultuous economic climate, replete with Ponzi schemes, of the last few years, not also enjoy Article III protections?²⁵⁴ The time is

²⁵⁰ See Klee, *supra* note 15 and accompanying text.

²⁵¹ See, e.g., William L. Norton & Richard Lieb, *Restructuring The Bankruptcy Court in 1982: Congressional Constitutional Options*, 1997 ANN. SURV. OF BANKR. L. 3, 76-77, 93 (1997) (“The independent Bankruptcy Court system by Congress in 1978 is a good one. The sole missing element—Article II attributes—should now be supplied by Congress in order to implement its 1978 policy of conferring unitary jurisdiction over bankruptcy litigation upon a single bankruptcy trial court The Bankruptcy Court has demonstrated its present ability to exercise the broad jurisdiction and judicial powers conferred on it since October 1, 1979. It had been able to handle a caseload that has increased beyond congressional expectations formulated at least five years ago during the legislative processes. The Bankruptcy Court has become an engine of efficiency and has decided important issues that normally would have been decided in a District Court or state courts in the absence of a bankruptcy case. A grant of *de jure* Article III status to the Bankruptcy Court in essence would acknowledge its *de facto* Article III role. Official Article III status with judges by Presidential appointment and Senatorial approval may result in further improvement for a court that has already performed beyond reasonable expectations.”); Block-Lieb, *supra* note 246, at 566 (“The National Bankruptcy Review Commission recommended to Congress that ‘[t]he bankruptcy court should be established under Article III of the Constitution.’ It made this recommendation because the proposal ‘would create a constitutionally sound structure and eliminate costly litigation over bankruptcy court authority’ To fractionalize bankruptcy jurisdiction among bankruptcy, district and state courts diminishes the bankruptcy goal of expeditious administration, especially given the substantial doctrinal and constitutional uncertainty about just where these jurisdictional dividing lines are and ought to be. Fragmentation and uncertainty are the costs of a non-Article III bankruptcy court system.”); see also *In re Refco Inc.*, 461 B.R. 181, 185 (Bankr. S.D.N.Y. 2011) (pointing out that *Stern* has raised the issue of “whether there is a gap in the statutory scheme preventing the [Bankruptcy] Court’s submission of proposed conclusions of law to the district court if a matter falls into the new ‘core but precluded’ category”).

²⁵² Kunej, *supra* note 6, at 2.

²⁵³ See *Stern v. Marshall*, 131 S. Ct. 2594, 2630 (2011) (Breyer, J., dissenting). In addition, “the 1.6 million filings [J. Breyer] referenced do not reflect the numerous adversary proceedings that were commenced in connection with those bankruptcy cases.” *In re Teleservices Grp. Inc.*, 456 B.R. 318, 324 n.25 (Bankr. W.D. Mich. 2011).

²⁵⁴ See, e.g., Pacenti, *supra* note 18 (regarding the Rothstein Ponzi scheme); McKenzie, *supra* note 222, at 748-49 (“How much power should we grant to bankruptcy judges? That question has taken on new prominence as lawmakers and commentators consider responses to the financial crisis that contemplate an active role by bankruptcy courts Bankruptcy judges

particularly appropriate in light of the many holes courts are poking through the Code as they attempt, after in depth analysis of *Stern* and prior precedent, to navigate constitutional boundaries.²⁵⁵ “The known certainty of the law is the safety of all,”²⁵⁶ but bankruptcy practice seems to be anything but certain at this point. As this Article has shown, so many questions abound regarding the inconsistencies left by *Stern*, and litigants’ results depend on whether they end up in a court that is reading *Stern* narrowly or broadly. Agreeably, there is no “easy solution”²⁵⁷, but litigants and constitutional principles cannot afford “what I suspect will be years of uncertainty as the bankruptcy process grinds on.”²⁵⁸

Even for those who find refuge in the fact that bankruptcy courts can continue to hear claims and submit a report and recommendation to the district court which then enter an order – more like rubber stamp – the endless debate of which claims are core and which are non-core remains.²⁵⁹ With courts coming out differently on this issue, this hodgepodge proposition provides no real solution. Further, under this approach, bankruptcy judges become nothing but the glorified assistants of district courts,²⁶⁰ a result that runs contrary to Congress’ intent and one that yields little or no benefit to anyone – even district judges.²⁶¹ For this same reason, any bankruptcy system that in effect

similarly took center stage in debates about restructuring another swath of the national economy—the domestic automobile industry—as Chrysler and General Motors filed for reorganization under Chapter 11 of the Bankruptcy Code.”).

²⁵⁵ See *supra* notes 115-61; see, e.g., *In re Teleservices Grp. Inc.*, 456 B.R. 318 (Bankr. W.D. Mich. 2011) (the court in approximately 30 pages discusses and analyzes *Stern*, its implications and prior precedent); *In re Freeway Foods of Greensboro*, No. 10-11282, 2012 WL 112192, *10 (Bankr. M.D.N.C. 2012) (“On June 23, 2011, the Supreme Court decided *Stern v. Marshall*. Since then, many litigants and courts have struggled to understand the *Stern*’s reasoning and apply its holding.”).

²⁵⁶ *U.S. v. Leech*, 601 F. Supp. 956, 959 (W.D. Pa. 1985) (reciting the oft-quoted saying of Lord Coke).

²⁵⁷ *In re Teleservices Grp.*, 456 B.R. at 344.

²⁵⁸ *Id.*

²⁵⁹ See Norton and Lieb, *supra* note 251, at 85 (explaining that of the two Congressional options, one is to revert to the referee system. This system is impractical for present bankruptcy practice); Cole, *supra* note 25, at 519 (stating that the “distinction between core and non-core matters is crucial, albeit elusive”).

²⁶⁰ *In re Teleservices Grp.*, 456 B.R. at 327 (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2627 (2011) (Breyer, J., dissenting) stating that: “This, then, is why the lack of guidance in *Stern* is so disappointing. Chipping away at Authority Section 157(b)(2) subpart by subpart is a disservice to both the district courts and the bankruptcy courts if, in the end, the outcome is for the bankruptcy courts to have no independent authority at all However, unless some rationale is found to justify a different outcome, *Stern*’s sweeping statements concerning Article III’s reach portend a new world where my colleagues and I will in fact become only the functional equivalents of “magistrate judges, law clerks and the Judiciary’s administrative officials.”).

²⁶¹ See *id.* at 324 (“One alternative would be to play it safe and simply refer without reflection every future determination I make to a district judge for his or her final review. However, I

reverts to the “pre-1973 system does not offer practical choice.”²⁶² Such a system could not effectively address the mountainous workload of today’s bankruptcy system.²⁶³ And district courts have “little or no present capacity to take on trial or administrative responsibility for bankruptcy cases.”²⁶⁴ The only result of such a system would be to wastefully duplicate the efforts of the bankruptcy and district courts.²⁶⁵

Another suggestion may be that there is no need for Article III status since parties can still consent, and, thereby allow bankruptcy judges to adjudicate their claims. Waiver would be great but for the fact that after *Stern* there is a real question, as has been discussed in this article, about the role of consent. On the one hand, the Supreme Court suggested that Pierce did consent, and that it would be inequitable to have him sandbag the court.²⁶⁶ On the other hand, however, the Court stated that Pierce did not “truly consent”²⁶⁷; this begs the question as to what constitutes sufficient waiver. Further, it seems unlikely that the Supreme Court would be so adamant about protecting constitutional boundaries, where it concludes that Congress has encroached on the Judiciary, and give litigants the opportunity to disregard the system of checks and balances that Article III has in place.²⁶⁸

This point is substantiated by the Supreme Court’s discussion in *Schor*.²⁶⁹ The Court, while acknowledging that a litigant may waive the right to having an action heard in an Article III court, stated that this is not an absolute principle.²⁷⁰ Where Article III safeguards of the role of the Judiciary are implicated by “the encroachment or aggrandizement of one branch at the expense of the other . . . 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”²⁷¹ Con-

do not see how I can do so in good faith given Authority Section 157(b)(3)’s direction that I must decide even in instances when not requested whether I have the ability or not under that section to enter a final order. Cf. 28 U.S.C. § 157(b)(3). Moreover, I suspect that the Article III judges in my district would not be pleased with the extra workload such an approach would impose upon them.”).

²⁶² Norton and Lieb, *supra* note 251, at 85.

²⁶³ *Id.* at 85-86.

²⁶⁴ *Id.* at 85.

²⁶⁵ *Id.*

²⁶⁶ *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011).

²⁶⁷ *Id.* at 2614.

²⁶⁸ *See id.*

²⁶⁹ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847-51 (1986).

²⁷⁰ *Id.* at 848-51.

²⁷¹ *Id.* at 850-51.

sent, in this scenario, is not dispositive and a number of factors must be taken in account.²⁷²

Another indication that consent may not be the “cure all,” is the Supreme Court’s shift in *Stern*, from the practical approach taken in *Schor*, to a greater reliance on substantive principles underlying constitutional delineations among the branches.²⁷³ As the dissenting opinion in *Stern* highlighted, *Schor*²⁷⁴ and *Thomas*²⁷⁵ allowed for a more pragmatic approach in determining the adjudicatory authority of a non-Article III judge;²⁷⁶ that is, *de minimis* intrusion on Judicial Branch was permissible to avoid practical negative consequences of a formalistic approach.²⁷⁷ That being said, consent still plays an important role not only in bankruptcy courts but also in other Article I settings; for example, where parties consent, a Magistrate can enter final judgment after hearing a civil case.²⁷⁸ After *Stern*, however, and in light of prior precedent,²⁷⁹ it is apparent that consent will not be the cure all for some of the issues that continue to plague bankruptcy courts. Establishing Article III bankruptcy courts will be the most effective course of action going forward.

If this is such a rational choice, why has it not taken effect? The answer seems to lie in the politics and egos involved in the undercurrent. In fact, these were prominent issues that surfaced and dominated as part of the debate on bankruptcy reform in the 1970s.²⁸⁰ As noted earlier on, Article III judges, many of whom served on the Judicial Conference, were very vocal about their fear that their prestige would be diluted if bankruptcy judges were accorded Article III status.²⁸¹ But as this article has noted, whatever bankruptcy practice may have been decades ago that led to this stigma, today such ideological concerns should be nonexistent as bankruptcy judges are deemed to be some of the most brilliant, professional, and capable judges.²⁸²

²⁷² *Id.* at 851.

²⁷³ See *Stern v. Marshall*, 131 S. Ct. 2594 (2011)

²⁷⁴ 478 U.S. 833 (1986).

²⁷⁵ *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568 (1985).

²⁷⁶ *Stern v. Marshall*, 131 S. Ct. 2594, 2624 (2011) (Breyer, J., dissenting).

²⁷⁷ *Id.* at 2624-29.

²⁷⁸ *In re Custom Contractors*, 462 B.R. 901, 910 (Bankr. S.D. Fla. 2011).

²⁷⁹ See *supra* notes 229-37.

²⁸⁰ See Countryman, *supra* note 209; Coco, *supra* note 15.

²⁸¹ See Countryman, *supra* note 209, at 9.

²⁸² See McKenzie, *supra* note 222, at 755 (“Moreover, the status and quality of the bankruptcy bar in general, and the bankruptcy courts in particular, have risen in tandem in the last thirty years as bankruptcy has regained its place of prominence in law practice.”). See also Coco, *supra* note 15, at 225 (“This bias is unsupported by contemporary bankruptcy court judicial ability, expertise, and work ethic . . .”).

As far as Congress is concerned, establishing specialized Article III courts is not a novel concept, and it has been successfully accomplished in the past.²⁸³ The bifurcated nature of American bankruptcy practice makes it the perfect candidate for the Article I-to-III transition. As Professor McKenzie explained, the current structure of the bankruptcy courts does not fit the conventional justification for non-Article III tribunals.²⁸⁴ First, appellate review may not be a sufficient check on bankruptcy courts, as only a relatively small percentage of decisions get appealed.²⁸⁵ Second, matters handled by the bankruptcy courts are not narrow and technical.²⁸⁶ Rather, bankruptcy courts handle a broad spectrum of issues; that is, bankruptcy is a specialized process, but it has no specialized substance as bankruptcy judges address “matters sounding in contract, tort, property, labor, and almost every other area of civil law.”²⁸⁷ Bankruptcy cases “routinely implicate non-bankruptcy-specific rules of decision,”²⁸⁸ which further implicate economic and social policy.²⁸⁹ Because of this, bankruptcy judges are not as insulated from political interest, as some may think.²⁹⁰

V. CONCLUSION

Stern has done a great job of reminding us of the many problems that underline the American hybrid, bifurcated bankruptcy system. Unfortunately, the decision muddied the waters a lot more on issues such as the role of consent. At the end of the day, however, it feels more like déjà vu – that is, it takes us back roughly 20 years to the shuffle between the Supreme Court and Congress regarding the Reform Act and *Northern Pipeline*. This jurisdictional game, tainted by politics and a great amount of ego, will continue until Congress makes the most logical and productive move to bestow bankruptcy courts with Article III status. The need for certainty in bankruptcy practice and cardinal constitutional principles, demand an end to this jurisdictional ping-pong. But until Congress fixes it, and fixes it well, this game continues.

²⁸³ See Roger M. Whelan, *Bankruptcy Court Jurisdiction: Hard-Core Problem*, 1995 ANN. SURV. BANKR. L. 17, 515 (1995) (stating that the development and history of the Court of Claims, the Customs Court and the Court of Customs & Patent Appeals – all specialized courts bestowed with Article III status – “presents a sound precedent for the bankruptcy court’s Article III status”).

²⁸⁴ McKenzie, *supra* note 222.

²⁸⁵ *Id.* at 777.

²⁸⁶ *Id.* at 772-76.

²⁸⁷ *Id.* at 747, 751.

²⁸⁸ *Id.* at 773.

²⁸⁹ *Id.* at 774-76.

²⁹⁰ *Id.*