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

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“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.”

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: “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.”

Ironically, even after the Court’s decision, the “curse” has continued and many, especially those of the bankruptcy bar, are in disagreement as to the ultimate outcome and unforeseen consequences of Stern.

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

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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.” 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” by enacting statutes delegating such power to non-Article III judges. The Constitution grants judicial power to courts whose judges enjoy tenure during good behavior and salary protections.

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.” 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. The public rights exception applies in cases where a “right is integrally related to particular federal government action.”

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. 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. Some scholars have theorized that the “denial of Article III power and prestige to the bankruptcy court” 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.

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)).
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).
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," leading Chief Justice Roberts to ask, "Why all the fuss?" 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; (2) forum shopping; (3) a prolongation of the tension between Article III judges and bankruptcy judges; (4) separation of powers issues; and (5) misunderstanding as to the role consent plays in bankruptcy proceedings.

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, and are not unique by-products of the Stern decision.


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 infra note 223.

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.").

Under the current system, Congress has granted jurisdiction over bankruptcy to the district courts. The district courts may refer cases to bankruptcy courts, which function as units of the district courts. Bankruptcy proceedings involve substantive entitlements and rules based on state laws. A bankruptcy judge must then decide whether the proceeding is a core or non-core proceeding. 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. A lot of uncertainty revolves around the designation of core versus non-core proceedings. 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*.” *Stern*, therefore, only echoes the Supreme Court’s prior statement that the constitutional separation of powers must be revered. The decision only conjures up, and, to some extent, exacerbates the many unresolved problems plaguing the American bankruptcy system.

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.

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

37 Id. at 167.
38 Id. at 167.
39 Id. at 168.
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. The statute of Queen Anne, passed in 1705, decriminalized bankruptcy law and allowed for the discharge of debts. This Statute was in effect at the time the forefathers suspended their relationship with England and established the United States of America. Though the Industrial Revolution brought more favorable perceptions of bankruptcy, the stigma attached to debt and debtors was transferred nonetheless to American society.

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. The limited jurisdiction of the referees under the Act became a major obstacle to the efficient administration of bankruptcy cases. 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.

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 . . . .” The bankruptcy court was to be a separate entity from the district court. In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 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.
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.
in the absence of Article III protections.\(^\text{55}\) To remedy the Reform Act’s jurisdictional problems, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984.\(^\text{56}\) 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.\(^\text{57}\)

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.\(^\text{58}\) An action is “related to” bankruptcy if the “outcome might have a conceivable effect on the estate.”\(^\text{59}\) In core proceedings, which “arise in” a case under title 11 or “arise under” title 11, a bankruptcy judge may enter final judgment.\(^\text{60}\) “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.’”\(^\text{61}\) 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.\(^\text{62}\) Under 28 U.S.C. § 157(b)(2)(C), “counterclaims by [a debtor’s] estate against persons

55 Daley & Shuster, supra note 26, at 387.
58 28 U.S.C. § 157(c) (2008); see Block-Lieb, supra note 57, at 796.
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.
filing claims against the estate are core proceedings, which means bankruptcy courts are granted statutory authority to enter final judgment on such claims. This provision was the source of the conflict in *Stern*.

C. Recent Limitations on Bankruptcy Courts’ Jurisdiction

In *Stern*, the Court found that 28 U.S.C. § 157(b)(2)(C) 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. 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. Pierce denied any such conduct on his part.

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. 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.

The bankruptcy court entered judgment in Vickie’s favor on the tortious interference counterclaim. On appeal, Pierce argued that the bankruptcy court lacked jurisdiction over Vickie’s counterclaim. 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. 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-

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64 *Id.*
65 See Block-Lieb, *supra* note 57, at 796.
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.\textsuperscript{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.\textsuperscript{77} The appellate court reversed the district court’s ruling, but on different grounds.\textsuperscript{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.\textsuperscript{79} Nevertheless, the Court found that such statutory grant of authority to bankruptcy courts was in contravention of Article III.\textsuperscript{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.\textsuperscript{81} The bankruptcy judgeship was created under Article I and is not afforded any Article III protections – that is, tenure and salary guarantees.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{85} The only exception to this general rule regards cases in which the ‘public rights’ doctrine is applicable.\textsuperscript{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.\textsuperscript{87} In \textit{Stern}, Vickie’s counterclaim was simply a state tort action that was not “derived from or dependent on bankruptcy law.”\textsuperscript{88} The Court, therefore, concluded that Congress exceeded its authority, and held that the “Bankruptcy

\begin{footnotes}
\item[76] Id.
\item[77] Id.
\item[78] \textit{Stern}, 131 S. Ct. at 2602.
\item[79] Id. at 2605.
\item[80] Id. at 2608.
\item[81] U.S. CONST. art. III, § 1.
\item[82] \textit{See} U.S. CONST. art. I, § 8.
\item[83] \textit{Stern}, 131 S. Ct. at 2608.
\item[84] Id. at 2609.
\item[85] Id.
\item[86] Id. at 2610.
\item[87] Id. at 2613.
\item[88] Id. at 2618.
\end{footnotes}
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.\textsuperscript{89}

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

Therefore, the dissent’s position in \textit{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 \textit{Schor} and \textit{Thomas}.\textsuperscript{99} The dissent further reasoned that, at most, the intrusion on Article III turf was de minimis, and hence, permissible.\textsuperscript{100} To substantiate this point, the dissent argued that although the counterclaim in \textit{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.”\textsuperscript{101} In addition, con-

\begin{thebibliography}{99}
\bibitem{89} Stern, 131 S. Ct. at 2620.
\bibitem{90} Id. at 2622 (Breyer, J., dissenting).
\bibitem{91} Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833 (1986).
\bibitem{93} Stern, 131 S. Ct. at 2622 (Breyer, J., dissenting); see also Lieb, \textit{supra} note 24, at 463.
\bibitem{94} Thomas, 473 U.S. at 587.
\bibitem{95} Schor, 478 U.S. at 853-56.
\bibitem{96} Id. at 837.
\bibitem{97} Id. at 837-38.
\bibitem{98} Id. at 841.
\bibitem{99} Stern, 131 S. Ct. at 2625-26 (Breyer, J., dissenting).
\bibitem{100} Id. at 2628-29.
\bibitem{101} Id. at 2626.
\end{thebibliography}
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.”

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. Furthermore, the parties in Stern consented to the jurisdiction of the bankruptcy court. Pierce could have brought his claim in a state or federal court, but chose to bring it in the bankruptcy proceeding. 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 power: 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. 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.

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. The flurry is partly because the case “has a narrow holding, but potentially enormous implications for bankruptcy courts and litigation in the federal courts.” 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 has found in excess of 130 cases in which bankruptcy courts have addressed Stern. The analyses and decisions are not consistent.”). 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.
will not change anything about how bankruptcy law is practiced.” But for others, “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.” Overall, many speculate that Stern will have an adverse effect on bankruptcy practice. 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. The broad multifarious rationales in the decision 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. An inventory of cases post-Stern, reveals that the decision has been subject to both a broad and a narrow interpretation: the difference in interpretation basically boils down to how much weight a court decides to give the dicta in Stern.

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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.


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.”).


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.

An apparent majority of bankruptcy courts maintain that *Stern* is a very narrow holding — a point that *Stern* expressly made. Within this camp, and at its narrowest, *Stern* only applies to proceedings that mirror the unique circumstances of that case. This interpretation is supported by the Court’s emphasis on the point that its holding was “narrow” and applicable “in one isolated respect.” 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.” 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.

By contrast, courts employing the broad interpretation of Stern look beyond its holding and rely heavily on the Court’s reasoning. 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-

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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 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.”).

erty and can only be finally adjudicated by an Article III judge.”

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. In addition, judicial dicta – contrasted with obiter dicta – should not be ignored. These concepts are even more pertinent when applying Stern, because of the cardinal principles the Court addressed before getting to its ultimate conclusion.

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. 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.” The 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.” 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.
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.”).
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

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133 Kuney, supra note 6, at 9.
134 Id. at 9-10.
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.
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.”

Similarly, in *In re Freeway Foods of Greensboro, Inc.*, after a careful examination of much of the Court’s dicta, the court concluded that *Stern* provided a two-prong test. 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.” If either prong is answered in the affirmative, a bankruptcy court has authority to enter a final order. If neither prong is satisfied, the bankruptcy court can only enter findings of fact and conclusions of law.

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. 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. 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. 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.

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*. Brunstad con-

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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.
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.”

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.” 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. 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.

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. 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.” 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 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
only be prosecuted by a bankruptcy trustee on behalf of a bank-
ruptcy estate, and because a trustee and a bankruptcy estate are
strictly creatures of the Bankruptcy Code, there would be no le-
gal basis for this action were there no bankruptcy estate.” ( cita-
tion omitted) These claims simply would not exist but for the
bankruptcy. (citation omitted) The analysis does not change be-
cause § 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 bankrupt-
cy 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] determina-
tion 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)

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 ‘pri-
ivate’ right that is so closely integrated into a public regulatory scheme
as to be a matter appropriate for agency resolution with limited in-
volvement 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 Con-
gress 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

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

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. It is very common for counter-claims that resemble suits at common law and that involve the same factual disputes as core claims, to arise during bankruptcy proceedings. 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.” 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.

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.

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. 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. To highlight a few, Stern is being used to challenge the following: subject matter jurisdiction; bankruptcy courts’ authority to hear claims based on state law; the bankruptcy courts on the issue of consent; the bankruptcy court’s authority in Chapter 5 actions; and especially, the bankruptcy court’s authority in fraudulent conveyance actions. 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

173 See infra notes 174-78.
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-BL W, 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 Cog., 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.”).
Debtors in this context “are not likely to have the financial resources to oppose such proceedings that financial institutions can afford to pursue.” 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.

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. 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.”

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. Where bankruptcy is infused with state substantive law, and claims akin to those at common law are commonplace during the process, the current statutory structure – jurisdiction to district courts and bankruptcy courts authority dependent on core versus non-core distinction – 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.” In other words, “creditors facing state law claims by a bank-

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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.
187 See Block-Lieb, supra note 57.
188 Scott, supra note 171, at 4.
The bankruptcy estate may choose between the bankruptcy judge and a district court as the fact finder in the case.” 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*. 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.”

Forum-shopping is not a unique product of *Stern*. Rather, it has been a problem since the inception of bankruptcy courts. Forum shopping has been “problematic with amendments to the Act throughout the twentieth century,” partly fueled by the vagueness of 28 U.S.C. § 157, which embodies bankruptcy’s jurisdictional structure. The indefinite wording of the statute left much up to the discretion of bankruptcy courts in determining what is a ‘core’ proceeding. 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” in disputes that were independent of the federal bankruptcy statutory scheme. *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.

In addition, the American hybrid bankruptcy system – a federal system ingrained with substantive entitlements and rules based on state laws – 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

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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.”).
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.
199 See Cole, supra note 25, at 515.
with special procedures and no special substantive law.\textsuperscript{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.\textsuperscript{206} 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.\textsuperscript{202} The problem of forum shopping, therefore, existed way before \textit{Stern}. Furthermore, creditors still had some ability to choose between a bankruptcy judge and a district court judge prior to \textit{Stern} in cases where a jury trial was required and where the creditor had not filed a proof of claim.

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

The Court’s decision in \textit{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.\textsuperscript{204} One concern, however, is that the true undercurrent of the decision is Article III courts’ lack of confidence in the bankruptcy courts.\textsuperscript{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.\textsuperscript{206} And it is no secret that Article III judges have not been immune to prevailing stereotypes of the bankruptcy system.\textsuperscript{207}

The Judicial Conference, made up of Article III judges\textsuperscript{208}, 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

\textsuperscript{200} See id. at 512.
\textsuperscript{201} See id. at 521.
\textsuperscript{203} Scott, supra note 171, at 1.
\textsuperscript{205} The \textit{Calvo} court, citing \textit{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 \textit{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.”).
\textsuperscript{206} See supra notes 43-48.
\textsuperscript{207} See Coco, supra note 15.
\textsuperscript{208} See id.
1978. 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.” 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. The Chief Justice went under fire for breaching separation of power delineations, but he probably thought it worth it in the end, as ultimately bankruptcy courts were not granted Article III status.

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. Another perspective is that the stigma attached to bankruptcy has relegated the practice to a subordinate position in the legal hierarchy. 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. In addition, debt and financial failure has always been taboo in societies – past and present. Initially, bankruptcy was practiced by a marginalized group of lawyers, and more successful firms had no interest in engaging in the practice. 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. A mixture of these reasons led to bankruptcy occupying a subordinated position in the legal system.

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. 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.

4. Separation of Powers Issues and Consent

Another criticism of Stern is that it implicates separation of power issues. 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. 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 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.

In Stern, the Court also left mixed signals as to the role of consent in bankruptcy proceedings. 28 U.S.C. § 157(c)(2) allows bankruptcy courts to enter final orders in ‘non-core’ proceedings, where the parties have consented. 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-

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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., Kuney, 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.”).
appropriate for parties to bypass all these safeguards simply by consenting to jurisdiction.\textsuperscript{229} For example, in Vickie’s instance, “Pierce repeatedly consented to the bankruptcy court’s adjudication of his defamation claim against the estate.”\textsuperscript{230} Nevertheless, the Court concluded that Pierce did not “truly consent,”\textsuperscript{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.”\textsuperscript{232} Further, Stern seems to be a departure from the Court’s position in Lagenkamp,\textsuperscript{233} that “even when private rights are at issues, non-Article III adjudication may be appropriate when both parties consent.”\textsuperscript{234} The dissent pointed out that there is no relevant distinction between claims filed in Stern with those in Lagenkamp\textsuperscript{235} and Granfinanciera\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{240} Stern “recognized the value of waiver

\begin{itemize}
\item See Lieb, supra note 24, at 466.
\item See Moody & Spector, supra note 18.
\item Brunstad Br., supra note 153, at 25.
\item Stern, 131 S. Ct. at 2628 (Breyer, J., dissenting).
\item Lagenkamp, 498 U.S. at 42-44.
\item Stern, 131 S. Ct. at 2628 (Breyer, J., dissenting).
\item See In re Custom Contractors, 462 B.R. 901, 910 (Bankr. S.D. Fla. 2011).
\end{itemize}
and forfeiture rules,” and there is really no reason for the Supreme Court to have held otherwise. 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. 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.”

With the majority’s strict prohibitions on Congress even slightly encroaching on Article III turf, 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.”

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. 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. Just as it took the Supreme Court over twenty years after Northern Pipeline to rule that Congress’ attempt to define bankruptcy jurisdiction

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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).
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. This is not a novel proposition, but it is one that has become fundamental after *Stern*.

Why should courts with “reputations for fast-paced, efficient, result-oriented adjudication” 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? 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? The time is

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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 ‘the 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 Kuney, supra note 6, at 2.
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 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

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257 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 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.”).

258 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-

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262 Norton and Lieb, supra note 251, at 85.
263 Id. at 85-86.
264 Id. at 85.
265 Id.
267 Id. at 2614.
268 See id.
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.\footnote{Id. at 851.}

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.\footnote{See Stern v. Marshall, 131 S. Ct. 2594 (2011)}. As the dissenting opinion in Stern highlighted, Schor\footnote{478 U.S. 833 (1986).} and Thomas\footnote{Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985).} allowed for a more pragmatic approach in determining the adjudicatory authority of a non-Article III judge;\footnote{Stern v. Marshall, 131 S. Ct. 2594, 2624 (2011) (Breyer, J., dissenting.).} that is, de minimis intrusion on Judicial Branch was permissible to avoid practical negative consequences of a formalistic approach.\footnote{Id. at 2624-29.} 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.\footnote{In re Custom Contractors, 462 B.R. 901, 910 (Bankr. S.D. Fla. 2011).} After Stern, however, and in light of prior precedent,\footnote{See supra notes 229-37.} 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.\footnote{See Countryman, supra note 209; Coco, supra note 15.} 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.\footnote{See Countryman, supra note 209, at 9.} 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.\footnote{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. 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. First, appellate review may not be a sufficient check on bankruptcy courts, as only a relatively small percentage of decisions get appealed. Second, matters handled by the bankruptcy courts are not narrow and technical. 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.” Bankruptcy cases “routinely implicate non-bankruptcy-specific rules of decision,” which further implicate economic and social policy. Because of this, bankruptcy judges are not as insulated from political interest, as some may think.

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.

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”).

McKenzie, supra note 222.

Id. at 777.

Id. at 772-76.

Id. at 747, 751.

Id. at 773.

Id. at 774-76.

Id.