Delaware Bankruptcy American Inn of Court

# Stern v. Marshall: 10 Months Later
# May 15, 2012

**Presented by the May Pupilage Team**
**Led by Mike Busenkell and Jennifer Dering**

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# May Pupilage Team

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131 S.Ct. 2594
Supreme Court of the United States

Howard K. STERN, Executor of the Estate of Vickie Lynn Marshall, Petitioner,
v.
Elaine T. MARSHALL, Executrix of the Estate of E. Pierce Marshall.

No. 10–179. | Argued Jan. 18, 2011. | Decided June 23, 2011.

## Synopsis

**Background:** Widow brought adversary proceeding in her Chapter 11 bankruptcy case to recover for her stepson's alleged tortious interference with her expectancy of inheritance or gift from her deceased husband. The United States Bankruptcy Court for the Central District of California, Samuel L. Bufford, J., 253 B.R. 550, entered judgment for widow, and stepson appealed. The District Court, David O. Carter, J., 275 B.R. 5, treated Bankruptcy Court's judgment as proposed findings of fact and conclusions of law and adopted them as modified. Both widow and stepson appealed. The United States Court of Appeals for the Ninth Circuit, Beezer, Circuit Judge, 392 F.3d 1118, vacated. After granting certiorari, the Supreme Court, Justice Ginsburg, 547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480, remanded. On remand, the Court of Appeals, 600 F.3d 1037, reversed and remanded with instructions.

**[Holding:]** After again granting certiorari, the Supreme Court, Chief Justice Roberts, held that Bankruptcy Court lacked authority under Article III to enter final judgment on widow's counterclaim.

Affirmed.

Justice Scalia filed concurring opinion.

Justice Breyer filed dissenting opinion in which Justice Ginsburg, Justice Sotomayor, and Justice Kagan joined.

West Headnotes (9)

[1] **Bankruptcy**
⇦Counterclaims
**Bankruptcy**
⇦State law claims

51Bankruptcy
51IIn General
51I(C)Jurisdiction
51k2048Actions or Proceedings by Trustee or Debtor
51k2048.4Counterclaims
51Bankruptcy
51IIn General
51I(C)Jurisdiction
51k2048Actions or Proceedings by Trustee or Debtor
51k2049State law claims

Bankruptcy court had statutory authority to enter final judgment on widow's tortious interference counterclaim, which she asserted in response to her stepson's defamation claim against her bankruptcy estate, since counterclaim was a core proceeding, even though it did not arise under Title 11 of Bankruptcy Code. 11 U.S.C.A. § 523; 28 U.S.C.A. § 157(b)(2)(C).

262 Cases that cite this headnote

[2] **Constitutional Law**
⇦Avoidance of doubt
**Constitutional Law**
⇦Limitations of Rules and Special Circumstances Affecting Them

92Constitutional Law
92VIEnforcement of Constitutional Provisions
92VI(C)Determination of Constitutional Questions
92VI(C)3Presumptions and Construction as to Constitutionality
92k1001Doubt
92k1003Avoidance of doubt
92Constitutional Law
92VIEnforcement of Constitutional Provisions
92VI(C)Determination of Constitutional Questions
92VI(C)3Presumptions and Construction as to Constitutionality
92k1024Limitations of Rules and Special Circumstances Affecting Them
92k1025In general

Courts will, where possible, construe federal statutes so as to avoid serious doubt of their constitutionality, but that canon of construction does not give the courts the prerogative to ignore the legislative will in order to avoid

constitutional adjudication.

1 Cases that cite this headnote

[3] **Bankruptcy**
⇐Assertion of claim against estate

51Bankruptcy
51IIn General
51I(C)Jurisdiction
51k2058Consent to or Waiver of Objections to Jurisdiction or Venue
51k2059Assertion of claim against estate

Stepson consented to bankruptcy court's adjudication of his defamation claim against his stepmother's bankruptcy estate by failing to object to court's adjudication until after two years and several adverse discovery rulings. 28 U.S.C.A. § 157(b)(5).

55 Cases that cite this headnote

[4] **Constitutional Law**
⇐Nature and scope in general

92Constitutional Law
92XXSeparation of Powers
92XX(C)Judicial Powers and Functions
92XX(C)1In General
92k2450Nature and scope in general

Under the basic concept of separation of powers that flows from the scheme of a tripartite government adopted in the Constitution, the judicial power of the United States can no more be shared with another branch than the Chief Executive can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. U.S.C.A. Const. Art. 3, § 1 et seq.

1 Cases that cite this headnote

[5] **Constitutional Law**
⇐Encroachment on Judiciary

92Constitutional Law
92XXSeparation of Powers
92XX(B)Legislative Powers and Functions
92XX(B)2Encroachment on Judiciary
92k2350In general

In general, Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty. U.S.C.A. Const. Art. 3, § 1 et seq.

10 Cases that cite this headnote

[6] **Bankruptcy**
⇐Counterclaims
**Bankruptcy**
⇐State law claims
**Constitutional Law**
⇐Establishment, Organization, and Jurisdiction of Courts

51Bankruptcy
51IIn General
51I(C)Jurisdiction
51k2048Actions or Proceedings by Trustee or Debtor
51k2048.4Counterclaims
51Bankruptcy
51IIn General
51I(C)Jurisdiction
51k2048Actions or Proceedings by Trustee or Debtor
51k2049State law claims
92Constitutional Law
92XXSeparation of Powers
92XX(B)Legislative Powers and Functions
92XX(B)2Encroachment on Judiciary
92k2354Establishment, Organization, and Jurisdiction of Courts
92k2355In general

Bankruptcy court lacked authority under Article III to enter final judgment on widow's tortious interference counterclaim, which she asserted in response to her stepson's defamation claim against her bankruptcy estate, even though counterclaim was core proceeding under Bankruptcy Act; widow's counterclaim arose under state common law and was between two private parties, it did not flow from federal statutory scheme and was not matter of public right, and it would not necessarily be resolved by process of ruling on stepson's proof of claim in bankruptcy proceedings. U.S.C.A. Const. Art. 3, § 1 et seq.; 28 U.S.C.A. § 157(b)(2)(C).

224 Cases that cite this headnote

[7] **Constitutional Law**
⇦Establishment, Organization, and Jurisdiction of Courts

92Constitutional Law
92XXSeparation of Powers
92XX(B)Legislative Powers and Functions
92XX(B)2Encroachment on Judiciary
92k2354Establishment, Organization, and Jurisdiction of Courts
92k2355In general

What makes a right public rather than private, such that the right can be decided by a Congressionally assigned legislative court, rather than by the Judicial Branch, is that the right is integrally related to particular federal government action. U.S.C.A. Const. Art. 3, § 1 et seq.

7 Cases that cite this headnote

[8] **Bankruptcy**
⇦Jurisdictional provisions; courts and judges
**Bankruptcy**
⇦Bankruptcy Jurisdiction
**Constitutional Law**
⇦Establishment, Organization, and Jurisdiction of Courts

51Bankruptcy
51IIn General
51I(B)Constitutional and Statutory Provisions
51k2013Validity of Bankruptcy Laws
51k2016Jurisdictional provisions; courts and judges
51Bankruptcy
51IIn General
51I(C)Jurisdiction
51k2041Bankruptcy Jurisdiction
51k2041.1In general
92Constitutional Law
92XXSeparation of Powers
92XX(B)Legislative Powers and Functions
92XX(B)2Encroachment on Judiciary
92k2354Establishment, Organization, and Jurisdiction of Courts
92k2355In general

Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case; rather, the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. U.S.C.A. Const. Art. 3, § 1 et seq.

66 Cases that cite this headnote

[9] **Constitutional Law**
⇦Constitutionality of Statutory Provisions

92Constitutional Law
92VConstruction and Operation of Constitutional Provisions
92V(F)Constitutionality of Statutory Provisions
92k655In general

The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.

3 Cases that cite this headnote

**West Codenotes**

**Unconstitutional as Applied**
28 U.S.C.A. § 157(b)(2)(C)

***2595 *Syllabus****

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Article III, § 1, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that the judges of those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services[ ] a Compensation[ ] [that] shall not be diminished" during their tenure. The questions presented in this case are whether a bankruptcy court judge who did not enjoy such tenure and salary protections had the authority under 28 U.S.C. § 157 and

Article III to enter final judgment on a counterclaim filed by Vickie Lynn Marshall (whose estate is the petitioner) against Pierce Marshall (whose estate is the respondent) in Vickie's bankruptcy proceedings.

Vickie married J. Howard Marshall II, Pierce's father, approximately a year before his death. Shortly before J. Howard died, Vickie filed a suit against Pierce in Texas state court, asserting that J. Howard meant to provide for Vickie through a trust, and Pierce tortiously interfered with that gift. After J. Howard died, Vickie filed for bankruptcy in federal court. Pierce filed a proof of claim in that proceeding, asserting that he should be able to recover damages from Vickie's bankruptcy estate because Vickie had defamed him by inducing her lawyers to tell the press that he had engaged in fraud in controlling his father's assets. Vickie responded by filing a counterclaim for tortious ***2596** interference with the gift she expected from J. Howard.

The Bankruptcy Court granted Vickie summary judgment on the defamation claim and eventually awarded her hundreds of millions of dollars in damages on her counterclaim. Pierce objected that the Bankruptcy Court lacked jurisdiction to enter a final judgment on that counterclaim because it was not a "core proceeding" as defined by 28 U.S.C. § 157(b)(2)(C). As set forth in § 157(a), Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case under title 11." District courts may refer all such proceedings to the bankruptcy judges of their district, and bankruptcy courts may enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." §§ 157(a), (b)(1). In non-core proceedings, by contrast, a bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court." § 157(c)(1). Section 157(b)(2) lists 16 categories of core proceedings, including "counterclaims by the estate against persons filing claims against the estate." § 157(b)(2)(C).

The Bankruptcy Court concluded that Vickie's counterclaim was a core proceeding. The District Court reversed, reading this Court's precedent in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598, to "suggest[ ] that it would be unconstitutional to hold that any and all counterclaims are core." The court held that Vickie's counterclaim was not core because it was only somewhat related to Pierce's claim, and it accordingly treated the Bankruptcy Court's judgment as proposed, not final. Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court went on to decide the matter itself, in Vickie's favor. The Court of Appeals ultimately reversed. It held that the Bankruptcy Court lacked authority to enter final judgment on Vickie's counterclaim because the claim was not "so closely related to [Pierce's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." Because that holding made the Texas probate court's judgment the earliest final judgment on matters relevant to the case, the Court of Appeals held that the District Court should have given the state judgment preclusive effect.

*Held:* Although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so. Pp. 2603 – 2620.

1. Section 157(b) authorized the Bankruptcy Court to enter final judgment on Vickie's counterclaim. Pp. 2604 – 2608.

(a) The Bankruptcy Court had the statutory authority to enter final judgment on Vickie's counterclaim as a core proceeding under § 157(b)(2)(C). Pierce argues that § 157(b) authorizes bankruptcy courts to enter final judgments only in those proceedings that are both core and either arise in a Title 11 case or arise under Title 11 itself. But that reading necessarily assumes that there is a category of core proceedings that do not arise in a bankruptcy case or under bankruptcy law, and the structure of § 157 makes clear that no such category exists. Pp. 2604 – 2605.

(b) In the alternative, Pierce argues that the Bankruptcy Court lacked jurisdiction to resolve Vickie's counterclaim because his defamation claim is a "personal injury tort" that the Bankruptcy Court lacked jurisdiction to hear under ***2597** § 157(b)(5). The Court agrees with Vickie that § 157(b)(5) is not jurisdictional, and Pierce consented to the Bankruptcy Court's resolution of the defamation claim. The Court is not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such. See generally *Henderson v. Shinseki,* 562 U.S. ——, 131 S.Ct. 1197, 179 L.Ed.2d 159; *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097. Section 157(b)(5) does not have the hallmarks of a jurisdictional decree, and the statutory context belies Pierce's claim that it is jurisdictional. Pierce consented to the Bankruptcy Court's resolution of the defamation claim by repeatedly advising that court that he was happy to litigate his claim there. Pp. 2606 – 2608.

2. Although § 157 allowed the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution did not. Pp. 2608 – 2620.

(a) Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline,* 458 U.S., at 58, 102 S.Ct. 2858 (plurality opinion). Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges to protect the integrity of judicial decisionmaking.

This is not the first time the Court has faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline,* the Court considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—who also lacked the tenure and salary guarantees of Article III—could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. *Id.,* at 53, 87, n. 40, 102 S.Ct. 2858 (plurality opinion). The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. A full majority of the Court, while not agreeing on the scope of that exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case, and rejected the debtor's argument that the Bankruptcy Court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals. *Id.,* at 69–72, 102 S.Ct. 2858; see *id.,* at 90–91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment). After the decision in *Northern Pipeline,* Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. With respect to the "core" proceedings listed in § 157(b)(2), however, the bankruptcy courts under the Bankruptcy Amendments and Federal Judgeship Act of 1984 exercise the same powers they wielded under the 1978 Act. The authority exercised by the newly constituted courts over a counterclaim such as Vickie's exceeds the bounds of Article III. Pp. 2608 – 2611.

(b) Vickie's counterclaim does not fall within the public rights exception, however defined. The Court has long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. 272, 18 How. 272, 284, 15 L.Ed. 372. The Court has also recognized that "[a]t the same time there are matters, involving public rights, ... which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may ***2598** deem proper." *Ibid.* Several previous decisions have contrasted cases within the reach of the public rights exception—those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—and those that are instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell v. Benson,* 285 U.S. 22, 50, 51, 52 S.Ct. 285, 76 L.Ed. 598.

Shortly after *Northern Pipeline,* the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular Federal Government action. See *United States v. Jicarilla Apache Nation,* 564 U.S. ——, ——, 131 S.Ct. 2313, 180 L.Ed.2d 187, 2011 WL 2297786, *8–9 (2011); *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 584, 105 S.Ct. 3325, 87 L.Ed.2d 409; *Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, 844, 856, 106 S.Ct. 3245, 92 L.Ed.2d 675.

In *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26, the most recent case considering the public rights exception, the Court rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the exception. Vickie's counterclaim is similar. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee,* 18 How., at 284; it does not flow from a federal statutory scheme, as in *Thomas,* 473 U.S., at 584–585, 105 S.Ct. 3325; and it is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor,* 478 U.S., at 856, 106 S.Ct. 3245. This case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers the Court has long recognized into mere wishful thinking. Pp. 2611 – 2615.

(c) The fact that Pierce filed a proof of claim in the bankruptcy proceedings did not give the Bankruptcy Court the authority to adjudicate Vickie's counterclaim. Initially, Pierce's defamation claim does not affect the nature of Vickie's tortious interference counterclaim as one at common law that simply attempts to augment the bankruptcy estate—the type of claim that, under *Northern Pipeline* and *Granfinanciera,* must be decided by an Article III court. The cases on which Vickie relies, *Katchen v. Landy,* 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391, and *Langenkamp v. Culp,* 498 U.S. 42, 111 S.Ct. 330, 112 L.Ed.2d 343 (*per curiam* ), are inapposite. *Katchen* permitted a bankruptcy referee to exercise jurisdiction over a trustee's voidable preference claim against a creditor only where there was no question that the referee was required to decide whether there had been a voidable preference in determining whether and to what ***2599** extent to allow the creditor's claim. The *Katchen* Court "intimate[d] no opinion concerning whether" the bankruptcy referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of ] claim." 382 U.S., at 333, n. 9, 86 S.Ct. 467. The *per curiam* opinion in *Langenkamp* is to the same effect. In this case, by contrast, the Bankruptcy Court—in order to resolve Vickie's counterclaim—was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim. In both *Katchen* and *Langenkamp,* moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. Vickie's claim is instead a state tort action that exists without regard to any bankruptcy proceeding. Pp. 2615 – 2618.

(d) The bankruptcy courts under the 1984 Act are not "adjuncts" of the district courts. The new bankruptcy courts, like the courts considered in *Northern Pipeline,* do not "ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law" or engage in "statutorily channeled factfinding functions." 458 U.S., at 85, 102 S.Ct. 2858 (plurality opinion). Whereas the adjunct agency in *Crowell v. Benson* "possessed only a limited power to issue compensation orders ... [that] could be enforced only by order of the district court," *ibid.,* a bankruptcy court resolving a counterclaim under § 157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§ 157(b)(1), 158(a)-(b). Such a court is an adjunct of no one. Pp. 2618 – 2619.

(e) Finally, Vickie and her *amici* predict that restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the bankruptcy process. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha,* 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317. In addition, the Court is not convinced that the practical consequences of such limitations are as significant as Vickie suggests. The framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by state courts and district courts, see §§ 157(c), 1334(c), and the Court does not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the statute. Pp. 2619 – 2620.

600 F.3d 1037, affirmed.

ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

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**Opinion**

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This "suit has, in course 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. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."

Those words were not written about this case, see C. Dickens, Bleak House, in 1 Works of Charles Dickens 4–5 (1891), but they could have been. This is the second time we have had occasion to weigh in on this long-running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas. The Marshalls' litigation has worked its way through state and federal courts in Louisiana, Texas, and California, and two of those courts—a Texas state probate court and the Bankruptcy Court for the Central District of California—have reached contrary decisions on its merits. The Court of Appeals below held that the Texas state decision controlled, after concluding that the Bankruptcy Court lacked the authority to enter final judgment on a counterclaim that Vickie brought against Pierce in her bankruptcy proceeding.[1] To determine whether the Court of Appeals was correct in that regard, we must resolve two issues: (1) whether the Bankruptcy Court had the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on Vickie's counterclaim; and (2) if so, whether conferring that authority on the Bankruptcy Court is constitutional.

1 Because both Vickie and Pierce passed away during this litigation, the parties in this case are Vickie's estate and Pierce's estate. We continue to refer to them as "Vickie" and "Pierce."

Although the history of this litigation is complicated, its resolution ultimately turns on very basic principles. Article III, § 1, of the Constitution commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. *Ibid.* Those requirements ***2601** of Article III were not honored here. The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection. We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so.

## I

Because we have already recounted the facts and procedural history of this case in detail, see *Marshall v. Marshall,* 547 U.S. 293, 300–305, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006), we do not repeat them in full here. Of current relevance are two claims Vickie filed in an attempt to secure half of J. Howard's fortune. Known to the public as Anna Nicole Smith, Vickie was J. Howard's third wife and married him about a year before his death. *Id.,* at 300, 126 S.Ct. 1735; see *In re Marshall,* 392 F.3d 1118, 1122 (C.A.9 2004). Although J. Howard bestowed on Vickie many monetary and other gifts during their courtship and marriage, he did not include her in his will. 547 U.S., at 300, 126 S.Ct. 1735. Before J. Howard passed away, Vickie filed suit in Texas state probate court, asserting that Pierce—J. Howard's younger son—fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half his property. Pierce denied any fraudulent activity and defended the validity of J. Howard's trust and, eventually, his will. 392 F.3d, at 1122–1123, 1125.

After J. Howard's death, Vickie filed a petition for bankruptcy in the Central District of California. Pierce filed a complaint in that bankruptcy proceeding, contending that Vickie had defamed him by inducing her lawyers to tell members of the press that he had engaged in fraud to gain control of his father's assets. 547 U.S., at 300–301, 126 S.Ct. 1735; *In re Marshall,* 600 F.3d 1037, 1043–1044 (C.A.9 2010). The complaint sought a declaration that Pierce's defamation claim was not dischargeable in the bankruptcy proceedings. *Ibid.*; see 11 U.S.C. § 523(a). Pierce subsequently filed a proof of claim for the defamation action, meaning that he sought to recover damages for it from Vickie's bankruptcy estate. See § 501(a). Vickie responded to Pierce's initial complaint by asserting truth as a defense to the alleged defamation and by filing a counterclaim for tortious interference with the gift she expected from J. Howard. As she had in state court, Vickie alleged that Pierce had

wrongfully prevented J. Howard from taking the legal steps necessary to provide her with half his property. 547 U.S., at 301, 126 S.Ct. 1735.

On November 5, 1999, the Bankruptcy Court issued an order granting Vickie summary judgment on Pierce's claim for defamation. On September 27, 2000, after a bench trial, the Bankruptcy Court issued a judgment on Vickie's counterclaim in her favor. The court later awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages. 600 F.3d, at 1045; see 253 B.R. 550, 561–562 (Bkrtcy.Ct.C.D.Cal.2000); 257 B.R. 35, 39–40 (Bkrtcy.Ct.C.D.Cal.2000).

In post-trial proceedings, Pierce argued that the Bankruptcy Court lacked jurisdiction over Vickie's counterclaim. In particular, Pierce renewed a claim he had made earlier in the litigation, asserting that the Bankruptcy Court's authority over the counterclaim was limited because Vickie's counterclaim was not a "core proceeding" under 28 U.S.C. § 157(b)(2)(C). See 257 B.R., at 39. As explained below, bankruptcy courts may hear and enter final ***2602** judgments in "core proceedings" in a bankruptcy case. In non-core proceedings, the bankruptcy courts instead submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. The Bankruptcy Court in this case concluded that Vickie's counterclaim was "a core proceeding" under § 157(b)(2)(C), and the court therefore had the "power to enter judgment" on the counterclaim under § 157(b)(1). *Id.*, at 40.

The District Court disagreed. It recognized that "Vickie's counterclaim for tortious interference falls within the literal language" of the statute designating certain proceedings as "core," see § 157(b)(2)(C), but understood this Court's precedent to "suggest[ ] that it would be unconstitutional to hold that any and all counterclaims are core." 264 B.R. 609, 629–630 (C.D.Cal.2001) (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79, n. 31, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion)). The District Court accordingly concluded that a "counterclaim should not be characterized as core" when it "is only somewhat related to the claim against which it is asserted, and when the unique characteristics and context of the counterclaim place it outside of the normal type of set-off or other counterclaims that customarily arise." 264 B.R., at 632.

Because the District Court concluded that Vickie's counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court's judgment as "proposed[,] rather than final," and engage in an "independent review" of the record. *Id.*, at 633; see 28 U.S.C. § 157(c)(1). Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court declined to give that judgment preclusive effect and went on to decide the matter itself. 271 B.R. 858, 862–867 (C.D.Cal.2001); see 275 B.R. 5, 56–58 (C.D.Cal.2002). Like the Bankruptcy Court, the District Court found that Pierce had tortiously interfered with Vickie's expectancy of a gift from J. Howard. The District Court awarded Vickie compensatory and punitive damages, each in the amount of $44,292,767.33. *Id.*, at 58.

The Court of Appeals reversed the District Court on a different ground, 392 F.3d, at 1137, and we—in the first visit of the case to this Court—reversed the Court of Appeals on that issue. 547 U.S., at 314–315, 126 S.Ct. 1735. On remand from this Court, the Court of Appeals held that § 157 mandated "a two-step approach" under which a bankruptcy judge may issue a final judgment in a proceeding only if the matter both "meets Congress' definition of a core proceeding *and* arises under or arises in title 11," the Bankruptcy Code. 600 F.3d, at 1055. The court also reasoned that allowing a bankruptcy judge to enter final judgments on all counterclaims raised in bankruptcy proceedings "would certainly run afoul" of this Court's decision in *Northern Pipeline*. 600 F.3d, at 1057. With those concerns in mind, the court concluded that "a counterclaim under § 157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the [Bankruptcy] Code only if the counterclaim is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." *Id.*, at 1058 (internal quotation marks omitted; second brackets added). The court ruled that Vickie's counterclaim did not meet that test. *Id.*, at 1059. That holding made "the Texas probate court's judgment ... the earliest final judgment entered on matters relevant to this proceeding," and therefore the Court of Appeals concluded that the District Court should have "afford[ed] ***2603** preclusive effect" to the Texas "court's determination of relevant legal and factual issues." *Id.*, at 1064–1065.2

2 One judge wrote a separate concurring opinion. He concluded that "Vickie's counterclaim ... [wa]s not a core proceeding, so the Texas probate court judgment preceded the district court judgment and controls." 600 F.3d, at 1065 (Kleinfeld, J.). The concurring judge also "offer[ed] additional grounds" that he believed required judgment in Pierce's favor. *Ibid.* Pierce presses only one of those additional grounds here; it is discussed below, in Part II–C.

We again granted certiorari. 561 U.S. ——, 131 S.Ct. 63, 177 L.Ed.2d 1152 (2010).

## II

### A

With certain exceptions not relevant here, the district courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case under title 11." § 157(a). District courts may refer any or all such proceedings to the bankruptcy judges of their district, *ibid.*, which is how the Bankruptcy Court in this case came to preside over Vickie's bankruptcy proceedings. District courts also may withdraw a case or proceeding referred to the bankruptcy court "for cause shown." § 157(d). Since Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Act), bankruptcy judges for each district have been appointed to 14–year terms by the courts of appeals for the circuits in which their district is located. § 152(a)(1).

The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved. Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." § 157(b)(1). "Core proceedings include, but are not limited to" 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing claims against the estate." § 157(b)(2)(C).3 Parties may appeal final ***2604** judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. See § 158(a); Fed. Rule Bkrtcy. Proc. 8013.

3 In full, §§ 157(b)(1)-(2) provides:
"(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
"(2) Core proceedings include, but are not limited to—
"(A) matters concerning the administration of the estate;
"(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
"(C) counterclaims by the estate against persons filing claims against the estate;
"(D) orders in respect to obtaining credit;
"(E) orders to turn over property of the estate;
"(F) proceedings to determine, avoid, or recover preferences;
"(G) motions to terminate, annul, or modify the automatic stay;
"(H) proceedings to determine, avoid, or recover fraudulent conveyances;
"(I) determinations as to the dischargeability of particular debts;
"(J) objections to discharges;
"(K) determinations of the validity, extent, or priority of liens;
"(L) confirmations of plans;
"(M) orders approving the use or lease of property, including the use of cash collateral;
"(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
"(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
"(P) recognition of foreign proceedings and other matters under chapter 15 of title 11."

When a bankruptcy judge determines that a referred "proceeding ... is not a core proceeding but ... is otherwise related to a case under title 11," the judge may only "submit proposed findings of fact and conclusions of law to the district court." § 157(c)(1). It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects. *Ibid.*

### B

**[1]** Vickie's counterclaim against Pierce for tortious interference is a "core proceeding" under the plain text of § 157(b)(2)(C). That provision specifies that core proceedings include "counterclaims by the estate against persons filing claims against the estate." In past cases, we have suggested that a proceeding's "core" status alone authorizes a bankruptcy judge, as a statutory matter, to enter final judgment in the proceeding. See, *e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 50, 109

S.Ct. 2782, 106 L.Ed.2d 26 (1989) (explaining that Congress had designated certain actions as " 'core proceedings,' which bankruptcy judges may adjudicate and in which they may issue final judgments, if a district court has referred the matter to them" (citations omitted)). We have not directly addressed the question, however, and Pierce argues that a bankruptcy judge may enter final judgment on a core proceeding only if that proceeding also "aris[es] in" a Title 11 case or "aris[es] under" Title 11 itself. Brief for Respondent 51 (internal quotation marks omitted).

Section 157(b)(1) authorizes bankruptcy courts to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." As written, § 157(b)(1) is ambiguous. The "arising under" and "arising in" phrases might, as Pierce suggests, be read as referring to a limited category of those core proceedings that are addressed in that section. On the other hand, the phrases might be read as simply describing what core proceedings are: matters arising under Title 11 or in a Title 11 case. In this case the structure and context of § 157 contradict Pierce's interpretation of § 157(b)(1).

As an initial matter, Pierce's reading of the statute necessarily assumes that there is a category of core proceedings that neither arise under Title 11 nor arise in a Title 11 case. The manner in which the statute delineates the bankruptcy courts' authority, however, makes plain that no such category exists. Section 157(b)(1) authorizes bankruptcy judges to enter final judgments in "core proceedings arising under title 11, or arising in a case under title 11." Section 157(c)(1) instructs bankruptcy judges to instead submit proposed findings in "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." Nowhere does § 157 specify what bankruptcy courts are to do with respect to the category of matters that Pierce posits—core proceedings that do *not* arise under Title 11 or in a Title 11 case. To the contrary, § 157(b)(3) only instructs a bankruptcy judge to "determine, ***2605** on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11." Two options. The statute does not suggest that any other distinctions need be made.

Under our reading of the statute, core proceedings are those that arise in a bankruptcy case or under Title 11. The detailed list of core proceedings in § 157(b)(2) provides courts with ready examples of such matters. Pierce's reading of § 157, in contrast, supposes that some core proceedings will arise in a Title 11 case or under Title 11 and some will not. Under that reading, the statute provides no guidance on how to tell which are which.

We think it significant that Congress failed to provide any framework for identifying or adjudicating the asserted category of core but not "arising" proceedings, given the otherwise detailed provisions governing bankruptcy court authority. It is hard to believe that Congress would go to the trouble of cataloging 16 different types of proceedings that should receive "core" treatment, but then fail to specify how to determine whether those matters arise under Title 11 or in a bankruptcy case if—as Pierce asserts—the latter inquiry is determinative of the bankruptcy court's authority.

Pierce argues that we should treat core matters that arise neither under Title 11 nor in a Title 11 case as proceedings "related to" a Title 11 case. Brief for Respondent 60 (internal quotation marks omitted). We think that a contradiction in terms. It does not make sense to describe a "core" bankruptcy proceeding as merely "related to" the bankruptcy case; oxymoron is not a typical feature of congressional drafting. See *Northern Pipeline,* 458 U.S., at 71, 102 S.Ct. 2858 (plurality opinion) (distinguishing "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, ... from the adjudication of state-created private rights"); Collier on Bankruptcy ¶ 3.02[2], p. 3–26, n. 5 (16th ed. 2010) ("The terms 'non-core' and 'related' are synonymous"); see also *id.,* at 3–26, ("The phraseology of section 157 leads to the conclusion that there is no such thing as a core matter that is 'related to' a case under title 11. Core proceedings are, at most, those that arise in title 11 cases or arise under title 11" (footnote omitted)). And, as already discussed, the statute simply does not provide for a proceeding that is simultaneously core and yet only related to the bankruptcy case. See § 157(c)(1) (providing only for "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11").

[2] As we explain in Part III, we agree with Pierce that designating all counterclaims as "core" proceedings raises serious constitutional concerns. Pierce is also correct that we will, where possible, construe federal statutes so as "to avoid serious doubt of their constitutionality." *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 841, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (internal quotation marks omitted). But that "canon of construction does not give [us] the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Ibid.* In this case, we do not think the plain text of § 157(b)(2)(C) leaves any room for the canon of avoidance. We would have to "rewrit[e]" the statute, not interpret it, to bypass the constitutional issue § 157(b)(2)(C) presents. *Id.,* at 841, 106 S.Ct. 3245 (internal quotation marks omitted).

That we may not do. We agree with Vickie that § 157(b)(2)(C) permits the bankruptcy court to enter a final judgment on her tortious interference counterclaim.

***2606 C**

[3] Pierce argues, as another alternative to reaching the constitutional question, that the Bankruptcy Court lacked jurisdiction to enter final judgment on his defamation claim. Section 157(b)(5) provides that "[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose." Pierce asserts that his defamation claim is a "personal injury tort," that the Bankruptcy Court therefore had no jurisdiction over that claim, and that the court therefore necessarily lacked jurisdiction over Vickie's counterclaim as well. Brief for Respondent 65–66.

Vickie objects to Pierce's statutory analysis across the board. To begin, Vickie contends that § 157(b)(5) does not address subject matter jurisdiction at all, but simply specifies the venue in which "personal injury tort and wrongful death claims" should be tried. See Reply Brief for Petitioner 16–17, 19; see also Tr. of Oral Arg. 23 (Deputy Solicitor General) (Section "157(b)(5) is in [the United States'] view not jurisdictional"). Given the limited scope of that provision, Vickie argues, a party may waive or forfeit any objections under § 157(b)(5), in the same way that a party may waive or forfeit an objection to the bankruptcy court finally resolving a non-core claim. Reply Brief for Petitioner 17–20; see § 157(c)(2) (authorizing the district court, "with the consent of all the parties to the proceeding," to refer a "related to" matter to the bankruptcy court for final judgment). Vickie asserts that in this case Pierce consented to the Bankruptcy Court's adjudication of his defamation claim, and forfeited any argument to the contrary, by failing to seek withdrawal of the claim until he had litigated it before the Bankruptcy Court for 27 months. *Id.*, at 20–23. On the merits, Vickie contends that the statutory phrase "personal injury tort and wrongful death claims" does not include non-physical torts such as defamation. *Id.*, at 25–26.

We need not determine what constitutes a "personal injury tort" in this case because we agree with Vickie that § 157(b)(5) is not jurisdictional, and that Pierce consented to the Bankruptcy Court's resolution of his defamation claim.4 Because "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial ***2607** system," *Henderson v. Shinseki*, 562 U.S. ——, —— – ——, 131 S.Ct. 1197, 1201–03, 179 L.Ed.2d 159 (2011), we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such. See generally *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) ("when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character").

4 Although Pierce suggests that consideration of "the 157(b)(5) issue" would facilitate an "easy" resolution of the case, Tr. of Oral Arg. 47–48, he is mistaken. Had Pierce preserved his argument under that provision, we would have been confronted with several questions on which there is little consensus or precedent. Those issues include: (1) the scope of the phrase "personal injury tort"—a question over which there is at least a three-way divide, see *In re Arnold*, 407 B.R. 849, 851–853 (Bkrtcy.Ct.M.D.N.C.2009); (2) whether, as Vickie argued in the Court of Appeals, the requirement that a personal injury tort claim be "tried" in the district court nonetheless permits the bankruptcy court to resolve the claim short of trial, see Appellee's/Cross–Appellant's Supplemental Brief in No. 02–56002 etc. (CA9), p. 24; see also *In re Dow Corning Corp.*, 215 B.R. 346, 349–351 (Bkrtcy.Ct.E.D.Mich.1997) (noting divide over whether, and on what grounds, a bankruptcy court may resolve a claim pretrial); and (3) even if Pierce's defamation claim could be considered only by the District Court, whether the Bankruptcy Court might retain jurisdiction over the counterclaim, cf. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) ("when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over pendent state-law claims"). We express no opinion on any of these issues and simply note that the § 157(b)(5) question is not as straightforward as Pierce would have it.

Section 157(b)(5) does not have the hallmarks of a jurisdictional decree. To begin, the statutory text does not refer to either district court or bankruptcy court "jurisdiction," instead addressing only where personal injury tort claims "shall be tried."

The statutory context also belies Pierce's jurisdictional claim. Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. See §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See § 157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in non-core case). By the same

token, § 157(b)(5) simply specifies where a particular category of cases should be tried. Pierce does not explain why that statutory limitation may not be similarly waived.

We agree with Vickie that Pierce not only could but did consent to the Bankruptcy Court's resolution of his defamation claim. Before the Bankruptcy Court, Vickie objected to Pierce's proof of claim for defamation, arguing that Pierce's claim was unenforceable and that Pierce should not receive any amount for it. See 29 Court of Appeals Supplemental Excerpts of Record 6031, 6035 (hereinafter Supplemental Record). Vickie also noted that the Bankruptcy Court could defer ruling on her objection, given the litigation posture of Pierce's claim before the Bankruptcy Court. See *id.,* at 6031. Vickie's filing prompted Pierce to advise the Bankruptcy Court that "[a]ll parties are in agreement that the amount of the contingent Proof of Claim filed by [Pierce] shall be determined by the adversary proceedings" that had been commenced in the Bankruptcy Court. 31 Supplemental Record 6801. Pierce asserted that Vickie's objection should be overruled or, alternatively, that any ruling on the objection "should be continued until the resolution of the pending adversary proceeding litigation." *Ibid.* Pierce identifies no point in the record where he argued to the Bankruptcy Court that it lacked the authority to adjudicate his proof of claim because the claim sought recompense for a personal injury tort.

Indeed, Pierce apparently did not object to any court that § 157(b)(5) prohibited the Bankruptcy Court from resolving his defamation claim until over two years—and several adverse discovery rulings—after he filed that claim in June 1996. The first filing Pierce cites as raising that objection is his September 22, 1998 motion to the District Court to withdraw the reference of the case to the Bankruptcy Court. See Brief for Respondent 26–27. The District Court did initially withdraw the reference as requested, but it then returned the proceeding to the Bankruptcy Court, observing that Pierce "implicated the jurisdiction of that bankruptcy court. He chose to be a party to that litigation." App. 129. Although Pierce had objected in July 1996 to the Bankruptcy Court's exercise of jurisdiction over Vickie's counterclaim, he advised the court at that time that he was "happy to litigate [his] claim" there. 29 Supplemental Record 6101. Counsel stated that even though Pierce thought it was "probably cheaper for th[e] estate if [Pierce's claim] were sent back or joined back with the State Court litigation," ***2608** Pierce "did choose" the Bankruptcy Court forum and "would be more than pleased to do it [t]here." *Id.,* at 6101–6102; see also App. to Pet. for Cert. 266, n. 17 (District Court referring to these statements).

Given Pierce's course of conduct before the Bankruptcy Court, we conclude that he consented to that court's resolution of his defamation claim (and forfeited any argument to the contrary). We have recognized "the value of waiver and forfeiture rules" in "complex" cases, *Exxon Shipping Co. v. Baker,* 554 U.S. 471, 487–488, n. 6, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008), and this case is no exception. In such cases, as here, the consequences of "a litigant ... 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor," *Puckett v. United States,* 556 U.S. 129, ——, 129 S.Ct. 1423, 1428–29, 173 L.Ed.2d 266 (2009) (some internal quotation marks omitted)—can be particularly severe. If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly. See *United States v. Olano,* 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (" 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited ... by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it' " (quoting *Yakus v. United States,* 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944))). Instead, Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.

## III

Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.

### A

Article III, § 1, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The same section provides that the judges of those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services[ ] a Compensation[ ] [that] shall not be diminished" during their tenure.

**[4]** As its text and our precedent confirm, Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern*

*Pipeline,* 458 U.S., at 58, 102 S.Ct. 2858 (plurality opinion). Under "the basic concept of separation of powers ... that flow[s] from the scheme of a tripartite government" adopted in the Constitution, "the 'judicial Power of the United States' ... can no more be shared" with another branch than "the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States v. Nixon,* 418 U.S. 683, 704, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (quoting U.S. Const., Art. III, § 1).

In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[ ] truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton put it, quoting Montesquieu, " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " ***2609** *Ibid.* (quoting 1 Montesquieu, Spirit of Laws 181).

We have recognized that the three branches are not hermetically sealed from one another, see *Nixon v. Administrator of General Services,* 433 U.S. 425, 443, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), but it remains true that Article III imposes some basic limitations that the other branches may not transgress. Those limitations serve two related purposes. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States,* 564 U.S. ——, ——, 131 S.Ct. 2355, ——, 180 L.Ed.2d 269, 2011 WL 2369334, *8 (2011).

Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence ¶ 11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the 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 the "[c]lear heads ... and honest hearts" deemed "essential to good judges." 1 Works of James Wilson 363 (J. Andrews ed. 1896).

**[5]** Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. 272, 18 How. 272, 284, 15 L.Ed. 372 (1856). When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Northern Pipeline,* 458 U.S., at 90, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law"—to the Judiciary. *Id.,* at 86–87, n. 39, 102 S.Ct. 2858 (plurality opinion).

**B**

This is not the first time we have faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline,* we considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III—could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity ***2610** that was not otherwise part of the bankruptcy proceedings. 458 U.S., at 53, 87, n. 40, 102 S.Ct. 2858 (plurality opinion); see *id.,* at 89–92, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment). The Court concluded that assignment of such state law claims for resolution by those judges "violates Art. III of the Constitution." *Id.,* at 52, 87, 102 S.Ct. 2858 (plurality opinion); *id.,* at 91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment).

The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. That opinion concluded that this "public rights" exception extended "only to matters arising between" individuals and the Government "in connection with the performance of the constitutional

functions of the executive or legislative departments ... that historically could have been determined exclusively by those" branches. *Id.*, at 67–68, 102 S.Ct. 2858 (internal quotation marks omitted). A full majority of the Court, while not agreeing on the scope of the exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case. *Id.*, at 69–72, 102 S.Ct. 2858; see *id.*, at 90–91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment) ("None of the [previous cases addressing Article III power] has gone so far as to sanction the type of adjudication to which Marathon will be subjected .... To whatever extent different powers granted under [the 1978] Act might be sustained under the 'public rights' doctrine of *Murray's Lessee* ... and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained").5

5 The dissent is thus wrong in suggesting that less than a full Court agreed on the points pertinent to this case. *Post,* at 2622 (opinion of BREYER, J.).

A full majority of Justices in *Northern Pipeline* also rejected the debtor's argument that the bankruptcy court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals. *Id.*, at 71–72, 81–86, 102 S.Ct. 2858 (plurality opinion); *id.*, at 91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment) ("the bankruptcy court is not an 'adjunct' of either the district court or the court of appeals").

After our decision in *Northern Pipeline,* Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. In the 1984 Act, Congress provided that the judges of the new bankruptcy courts would be appointed by the courts of appeals for the circuits in which their districts are located. 28 U.S.C. § 152(a). And, as we have explained, Congress permitted the newly constituted bankruptcy courts to enter final judgments only in "core" proceedings. See *supra,* at 2603 – 2604.

With respect to such "core" matters, however, the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978 (1978 Act), 92 Stat. 2549. As in *Northern Pipeline,* for example, the newly constituted bankruptcy courts are charged under § 157(b)(2)(C) with resolving "[a]ll matters of fact and law in whatever domains of the law to which" a counterclaim may lead. 458 U.S., at 91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment); see, *e.g.,* 275 B.R., at 50–51 (noting that Vickie's counterclaim required the bankruptcy court to determine whether Texas recognized a cause of action for tortious interference with an *inter vivos* gift—something the Supreme Court of Texas had yet to do). As in *Northern Pipeline,* the new courts in core proceedings "issue final judgments, ***2611** which are binding and enforceable even in the absence of an appeal." 458 U.S., at 85–86, 102 S.Ct. 2858 (plurality opinion). And, as in *Northern Pipeline,* the district courts review the judgments of the bankruptcy courts in core proceedings only under the usual limited appellate standards. That requires marked deference to, among other things, the bankruptcy judges' findings of fact. See § 158(a); Fed. Rule Bkrtcy. Proc. 8013 (findings of fact "shall not be set aside unless clearly erroneous").

**C**

[6] Vickie and the dissent argue that the Bankruptcy Court's entry of final judgment on her state common law counterclaim was constitutional, despite the similarities between the bankruptcy courts under the 1978 Act and those exercising core jurisdiction under the 1984 Act. We disagree. It is clear that the Bankruptcy Court in this case exercised the "judicial Power of the United States" in purporting to resolve and enter final judgment on a state common law claim, just as the court did in *Northern Pipeline.* No "public right" exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline.* Vickie argues that this case is different because the defendant is a creditor in the bankruptcy. But the debtors' claims in the cases on which she relies were themselves federal claims under bankruptcy law, which would be completely resolved in the bankruptcy process of allowing or disallowing claims. Here Vickie's claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy. *Northern Pipeline* and our subsequent decision in *Granfinanciera,* 492 U.S. 33, 109 S.Ct. 2782, rejected the application of the "public rights" exception in such cases.

Nor can the bankruptcy courts under the 1984 Act be dismissed as mere adjuncts of Article III courts, any more than could the bankruptcy courts under the 1978 Act. The judicial powers the courts exercise in cases such as this remain the same, and a court exercising such broad powers is no mere adjunct of anyone.

**1**

Vickie's counterclaim cannot be deemed a matter of "public right" that can be decided outside the Judicial Branch. As explained above, in *Northern Pipeline* we rejected the argument that the public rights doctrine permitted a bankruptcy court to adjudicate a state law suit brought by a debtor against a company that had not filed a claim against the estate. See 458 U.S., at 69–72, 102 S.Ct. 2858 (plurality opinion); *id.*, at 90–91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment). Although our discussion of the public rights exception since that time has not been entirely consistent, and the exception has been the subject of some debate, this case does not fall within any of the various formulations of the concept that appear in this Court's opinions.

We first recognized the category of public rights in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 18 How. 272, 15 L.Ed. 372 (1856). That case involved the Treasury Department's sale of property belonging to a customs collector who had failed to transfer payments to the Federal Government that he had collected on its behalf. *Id.*, at 274, 275. The plaintiff, who claimed title to the same land through a different transfer, objected that the Treasury Department's calculation of the deficiency and sale of the property was void, because it was a judicial act that could not be assigned to the Executive under Article III. *Id.*, at 274–275, 282–283.

***2612** "To avoid misconstruction upon so grave a subject," the Court laid out the principles guiding its analysis. *Id.*, at 284. It confirmed that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Ibid.* The Court also recognized that "[a]t the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Ibid.*

As an example of such matters, the Court referred to "[e]quitable claims to land by the inhabitants of ceded territories" and cited cases in which land issues were conclusively resolved by Executive Branch officials. *Ibid.* (citing *Foley v. Harrison,* 56 U.S. 433, 15 How. 433, 14 L.Ed. 761 (1854); *Burgess v. Gray,* 57 U.S. 48, 16 How. 48, 14 L.Ed. 839 (1854)). In those cases "it depends upon the will of congress whether a remedy in the courts shall be allowed at all," so Congress could limit the extent to which a judicial forum was available. *Murray's Lessee,* 18 How., at 284. The challenge in *Murray's Lessee* to the Treasury Department's sale of the collector's land likewise fell within the "public rights" category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity. *Id.*, at 283–284. The point of *Murray's Lessee* was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.

Subsequent decisions from this Court contrasted cases within the reach of the public rights exception—those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—and those that were instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell v. Benson,* 285 U.S. 22, 50, 51, 52 S.Ct. 285, 76 L.Ed. 598 (1932).[6] See ***2613** *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442, 458, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977) (Exception extends to cases "where the Government is involved in its sovereign capacity under ... [a] statute creating enforceable public rights," while "[w]holly private tort, contract, and property cases, as well as a vast range of other cases ... are not at all implicated"); *Ex parte Bakelite Corp.,* 279 U.S. 438, 451–452, 49 S.Ct. 411, 73 L.Ed. 789 (1929). See also *Northern Pipeline, supra,* at 68, 102 S.Ct. 2858 (plurality opinion) (citing *Ex parte Bakelite Corp.* for the proposition that the doctrine extended "only to matters that historically could have been determined exclusively by" the Executive and Legislative Branches).

6 Although the Court in *Crowell* went on to decide that the facts of the private dispute before it could be determined by a non-Article III tribunal in the first instance, subject to judicial review, the Court did so only after observing that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court. 285 U.S., at 38, 44–45, 54, 52 S.Ct. 285; see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 78, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion). In other words, the agency in *Crowell* functioned as a true "adjunct" of the District Court. That is not the case here. See *infra,* at 2618 – 2619.

Although the dissent suggests that we understate the import of *Crowell* in this regard, the dissent itself recognizes—repeatedly—that *Crowell* by its terms addresses the determination of *facts* outside Article III. See *post,* at 2623 (*Crowell* "upheld Congress' delegation of primary factfinding authority to the agency"); *post,* at 2627 (quoting *Crowell,* 285 U.S., at 51, 52 S.Ct. 285, for the proposition that " 'there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges' "). *Crowell* may well have additional significance in the context of expert administrative agencies that

oversee particular substantive federal regimes, but we have no occasion to and do not address those issues today. See *infra,* at 2615. The United States apparently agrees that any broader significance of *Crowell* is not pertinent in this case, citing to *Crowell* in its brief only once, in the last footnote, again for the limited proposition discussed above. Brief for United States as *Amicus Curiae* 32, n. 5.

[7] Shortly after *Northern Pipeline,* the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular federal government action. See *United States v. Jicarilla Apache Nation,* 564 U.S. ——, ——, 131 S.Ct. 2313, 180 L.Ed.2d 187, 2011 WL 2297786, *8–9 (2011) ("The distinction between 'public rights' against the Government and 'private rights' between private parties is well established," citing *Murray's Lessee* and *Crowell* ).

Our decision in *Thomas v. Union Carbide Agricultural Products Co.,* for example, involved a data-sharing arrangement between companies under a federal statute providing that disputes about compensation between the companies would be decided by binding arbitration. 473 U.S. 568, 571–575, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). This Court held that the scheme did not violate Article III, explaining that "[a]ny right to compensation ... results from [the statute] and does not depend on or replace a right to such compensation under state law." *Id.,* at 584, 105 S.Ct. 3325.

*Commodity Futures Trading Commission v. Schor* concerned a statutory scheme that created a procedure for customers injured by a broker's violation of the federal commodities law to seek reparations from the broker before the Commodity Futures Trading Commission (CFTC). 478 U.S. 833, 836, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986). A customer filed such a claim to recover a debit balance in his account, while the broker filed a lawsuit in Federal District Court to recover the same amount as lawfully due from the customer. The broker later submitted its claim to the CFTC, but after that agency ruled against the customer, the customer argued that agency jurisdiction over the broker's counterclaim violated Article III. *Id.,* at 837–838, 106 S.Ct. 3245. This Court disagreed, but only after observing that (1) the claim and the counterclaim concerned a "single dispute"—the same account balance; (2) the CFTC's assertion of authority involved only "a narrow class of common law claims" in a " 'particularized area of law' "; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise"; (4) the parties had freely elected to resolve their differences before the CFTC; and (5) CFTC orders were "enforceable only by order of the district court." *Id.,* at 844, 852–855, 106 S.Ct. 3245 (quoting *Northern Pipeline,* 458 U.S., at 85, 102 S.Ct. 2858); see 478 U.S., at 843–844; 849–857, 106 S.Ct. 3245. Most significantly, ***2614** given that the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount, the Court repeatedly emphasized that it was "necessary" to allow the agency to exercise jurisdiction over the broker's claim, or else "the reparations procedure would have been confounded." *Id.,* at 856, 106 S.Ct. 3245.

The most recent case in which we considered application of the public rights exception—and the only case in which we have considered that doctrine in the bankruptcy context since *Northern Pipeline*—is *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). In *Granfinanciera* we rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the "public rights" exception. We explained that, "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Id.,* at 54–55, 109 S.Ct. 2782. We reasoned that fraudulent conveyance suits were "quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.,* at 56, 109 S.Ct. 2782. As a consequence, we concluded that fraudulent conveyance actions were "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.,* at 55, 109 S.Ct. 2782.7

7 We noted that we did not mean to "suggest that the restructuring of debtor-creditor relations is in fact a public right." 492 U.S., at 56, n. 11, 109 S.Ct. 2782. Our conclusion was that, "even if one accepts this thesis," Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court. *Ibid.* Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here.

Vickie's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee,* 18 How., at 284, or one that "historically could have been determined exclusively by" those branches, *Northern Pipeline, supra,* at 68, 102 S.Ct. 2858 (citing *Ex parte Bakelite Corp.,* 279 U.S., at 458, 49 S.Ct. 411). The claim is instead one under state common law between two private parties. It does not "depend[ ] on the will of congress," *Murray's Lessee, supra,* at 284; Congress has nothing to do with it.

In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme, as in *Thomas,* 473 U.S., at 584–585, 105 S.Ct. 3325, or *Atlas Roofing,* 430 U.S., at 458, 97 S.Ct. 1261. It is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor,* 478 U.S., at 856, 106 S.Ct. 3245. And in contrast to the objecting party in *Schor, id.,* at 855–856, 106 S.Ct. 3245, Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate. See *Granfinanciera, supra,* at 59, n. 14, 109 S.Ct. 2782 (noting that "[p]arallel reasoning [to *Schor* ] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum ***2615** to the bankruptcy court in which to pursue their claims").[8]

8 Contrary to the claims of the dissent, see *post,* at 2627 – 2628, Pierce did not have another forum in which to pursue his claim to recover from Vickie's prebankruptcy assets, rather than take his chances with whatever funds might remain after the Title 11 proceedings. Creditors who possess claims that do not satisfy the requirements for nondischargeability under 11 U.S.C. § 523 have no choice but to file their claims in bankruptcy proceedings if they want to pursue the claims at all. That is why, as we recognized in *Granfinanciera,* the notion of "consent" does not apply in bankruptcy proceedings as it might in other contexts.

Furthermore, the asserted authority to decide Vickie's claim is not limited to a "particularized area of the law," as in *Crowell, Thomas,* and *Schor. Northern Pipeline,* 458 U.S., at 85, 102 S.Ct. 2858 (plurality opinion). We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris.* See *ibid.*; *id.,* at 91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment). This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell,* 285 U.S., at 46, 52 S.Ct. 285; see *Schor, supra,* at 855–856, 106 S.Ct. 3245. The "experts" in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay.

The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as " 'establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.' " *Post,* at 2624 (quoting *Thomas, supra,* at 584, 105 S.Ct. 3325). Just so: Substitute "tort" for "contract," and that statement directly covers this case.

We recognize that there may be instances in which the distinction between public and private rights—at least as framed by some of our recent cases—fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme. Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.

What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

**2**

Vickie and the dissent next attempt to distinguish *Northern Pipeline* and *Granfinanciera* on the ground that Pierce, unlike the defendants in those cases, had filed a proof of claim in the bankruptcy proceedings. Given Pierce's participation in those proceedings, Vickie argues, the Bankruptcy ***2616** Court had the authority to adjudicate her counterclaim under our decisions in *Katchen v. Landy,* 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966), and *Langenkamp v. Culp,* 498 U.S. 42, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990) (*per curiam* ).

We do not agree. As an initial matter, it is hard to see why Pierce's decision to file a claim should make any difference with respect to the characterization of Vickie's counterclaim. " '[P]roperty interests are created and defined by state law,' and '[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.' " *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 451, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007) (quoting *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)). Pierce's claim for defamation in no way affects the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court.

Contrary to Vickie's contention, moreover, our decisions in *Katchen* and *Langenkamp* do not suggest a different result. *Katchen* permitted a bankruptcy referee acting under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as "summary jurisdiction" over a voidable preference claim brought by the bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding. See 382 U.S., at 325, 327–328, 86 S.Ct. 467. A voidable preference claim asserts that a debtor made a payment to a particular creditor in anticipation of bankruptcy, to in effect increase that creditor's proportionate share of the estate. The preferred creditor's claim in bankruptcy can be disallowed as a result of the preference, and the amounts paid to that creditor can be recovered by the trustee. See *id.*, at 330, 86 S.Ct. 467; see also 11 U.S.C. §§ 502(d), 547(b).

Although the creditor in *Katchen* objected that the preference issue should be resolved through a "plenary suit" in an Article III court, this Court concluded that summary adjudication in bankruptcy was appropriate, because it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue. 382 U.S., at 329–330, 332–333, and n. 9, 334, 86 S.Ct. 467. There was no question that the bankruptcy referee could decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. Once the referee did that, "nothing remains for adjudication in a plenary suit"; such a suit "would be a meaningless gesture." *Id.*, at 334, 86 S.Ct. 467. The plenary proceeding the creditor sought could be brought into the bankruptcy court because "the same issue [arose] as part of the process of allowance and disallowance of claims." *Id.*, at 336, 86 S.Ct. 467.

It was in that sense that the Court stated that "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure." *Id.*, at 333, n. 9, 86 S.Ct. 467. In *Katchen* one of those consequences was resolution of the preference issue as part of the process of allowing or disallowing claims, and accordingly there was no basis for the creditor to insist that the issue be resolved in an Article III court. See *id.*, at 334, 86 S.Ct. 467. Indeed, the *Katchen* Court expressly noted that it "intimate[d] no opinion concerning whether" the bankruptcy ***2617** referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." *Id.*, at 333, n. 9, 86 S.Ct. 467.

Our *per curiam* opinion in *Langenkamp* is to the same effect. We explained there that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because *then* "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship." 498 U.S., at 44, 111 S.Ct. 330. If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does *not* "become[ ] part of the claims-allowance process" subject to resolution by the bankruptcy court. *Ibid.*; see *id.*, at 45, 111 S.Ct. 330.

In ruling on Vickie's counterclaim, the Bankruptcy Court was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim for defamation, which the court had denied almost a year earlier. *Katchen, supra,* at 332, n. 9., 86 S.Ct. 467 There was some overlap between Vickie's counterclaim and Pierce's defamation claim that led the courts below to conclude that the counterclaim was compulsory, 600 F.3d, at 1057, or at least in an "attenuated" sense related to Pierce's claim, 264 B.R., at 631. But there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim. See *id.*, at 631, 632 (explaining that "the primary facts at issue on Pierce's claim were the relationship between Vickie and her attorneys and her knowledge or approval of their statements," and "the counterclaim raises issues of law entirely different from those raise[d] on the defamation claim"). The United States acknowledges the point. See Brief for United States as *Amicus Curiae*, p. (I) (question presented concerns authority of a bankruptcy court to enter final judgment on a compulsory counterclaim "when adjudication of the counterclaim requires resolution of issues that are not implicated by the claim against the estate"); *id.*, at 26.

The only overlap between the two claims in this case was

the question whether Pierce had in fact tortiously taken control of his father's estate in the manner alleged by Vickie in her counterclaim and described in the allegedly defamatory statements. From the outset, it was clear that, even assuming the Bankruptcy Court would (as it did) rule in Vickie's favor on that question, the court could not enter judgment for Vickie unless the court additionally ruled on the questions whether Texas recognized tortious interference with an expected gift as a valid cause of action, what the elements of that action were, and whether those elements were met in this case. 275 B.R., at 50–53. Assuming Texas accepted the elements adopted by other jurisdictions, that meant Vickie would need to prove, above and beyond Pierce's tortious interference, (1) the existence of an expectancy of a gift; (2) a reasonable certainty that the expectancy would have been realized but for the interference; and (3) damages. *Id.,* at 51; see 253 B.R., at 558–561. Also, because Vickie sought punitive damages in connection with her counterclaim, the Bankruptcy Court could not finally dispose of the case in Vickie's favor without determining whether to subject Pierce to the sort of "retribution," "punishment[,] and deterrence," *Exxon Shipping Co.,* 554 U.S., at 492, 504, 128 S.Ct. 2605 (internal quotation marks omitted), those damages are designed to impose. There thus was never reason to believe that the process of ruling ***2618** on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim.

In both *Katchen* and *Langenkamp,* moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. In *Langenkamp,* we noted that "the trustee instituted adversary proceedings under 11 U.S.C. § 547(b) to recover, as avoidable preferences," payments respondents received from the debtor before the bankruptcy filings. 498 U.S., at 43, 111 S.Ct. 330; see, *e.g.,* § 547(b)(1) ("the trustee may avoid any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor"). In *Katchen,* "[t]he Trustee ... [asserted] that the payments made [to the creditor] were preferences inhibited by Section 60a of the Bankruptcy Act." Memorandum Opinion (Feb. 8, 1963), Tr. of Record in O.T.1965, No. 28, p. 3; see 382 U.S., at 334, 86 S.Ct. 467 (considering impact of the claims allowance process on "action by the trustee under § 60 to recover the preference"); 11 U.S.C. § 96(b) (1964 ed.) (§ 60(b) of the then-applicable Bankruptcy Act) ("preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby ... has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent"). Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.

**[8]** In light of all the foregoing, we disagree with the dissent that there are no "relevant distinction[s]" between Pierce's claim in this case and the claim at issue in *Langenkamp. Post,* at 2628. We see no reason to treat Vickie's counterclaim any differently from the fraudulent conveyance action in *Granfinanciera.* 492 U.S., at 56, 109 S.Ct. 2782. *Granfinanciera* 's distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res," *ibid.,* reaffirms that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. Vickie has failed to demonstrate that her counterclaim falls within one of the "limited circumstances" covered by the public rights exception, particularly given our conclusion that, "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." *Northern Pipeline,* 458 U.S., at 69, n. 23, 77, n. 29, 102 S.Ct. 2858 (plurality opinion).

**3**

Vickie additionally argues that the Bankruptcy Court's final judgment was constitutional because bankruptcy courts under the 1984 Act are properly deemed "adjuncts" of the district courts. Brief for Petitioner 61–64. We rejected a similar argument in *Northern Pipeline,* see 458 U.S., at 84–86, 102 S.Ct. 2858 (plurality opinion); *id.,* at 91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment), and our reasoning there holds true today.

To begin, as explained above, it is still the bankruptcy court itself that exercises the essential attributes of judicial power over a matter such as Vickie's counterclaim. See *supra,* at 2610. The new bankruptcy courts, like the old, do not "ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law" or engage in "statutorily channeled factfinding functions." *Northern Pipeline,* 458 U.S., at 85, 102 S.Ct. 2858 (plurality opinion). Instead, bankruptcy courts under the 1984 Act resolve ***2619** "[a]ll matters of fact and law in whatever domains of the law to which" the parties' counterclaims might lead. *Id.,* at 91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment).

In addition, whereas the adjunct agency in *Crowell v. Benson* "possessed only a limited power to issue compensation orders ... [that] could be enforced only by order of the district court," *Northern Pipeline, supra,* at

85, 102 S.Ct. 2858, a bankruptcy court resolving a counterclaim under 28 U.S.C. § 157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§ 157(b)(1), 158(a)-(b). It is thus no less the case here than it was in *Northern Pipeline* that "[t]he authority—and the responsibility—to make an informed, final determination ... remains with" the bankruptcy judge, not the district court. 458 U.S., at 81, 102 S.Ct. 2858 (plurality opinion) (internal quotation marks omitted). Given that authority, a bankruptcy court can no more be deemed a mere "adjunct" of the district court than a district court can be deemed such an "adjunct" of the court of appeals. We certainly cannot accept the dissent's notion that judges who have the power to enter final, binding orders are the "functional [ ]" equivalent of "law clerks[ ] and the Judiciary's administrative officials." *Post,* at 2627. And even were we wrong in this regard, that would only confirm that such judges should not be in the business of entering final judgments in the first place.

It does not affect our analysis that, as Vickie notes, bankruptcy judges under the current Act are appointed by the Article III courts, rather than the President. See Brief for Petitioner 59. If—as we have concluded—the bankruptcy court itself exercises "the essential attributes of judicial power [that] are reserved to Article III courts," *Schor,* 478 U.S., at 851, 106 S.Ct. 3245 (internal quotation marks omitted), it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains. See The Federalist No. 78, at 471 ("Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [a judge's] necessary independence").

**D**

**[9]** Finally, Vickie and her *amici* predict as a practical matter that restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the bankruptcy process. See, *e.g.,* Brief for Petitioner 34–36, 57–58; Brief for United States as *Amicus Curiae* 29–30. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha,* 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

In addition, we are not convinced that the practical consequences of such limitations on the authority of bankruptcy courts to enter final judgments are as significant as Vickie and the dissent suggest. See *post,* at 2630. The dissent asserts that it is important that counterclaims such as Vickie's be resolved "in a bankruptcy court," and that, "to be effective, a single tribunal must have broad authority to restructure [debtor-creditor] relations." *Post,* at 2628, 2629 (emphasis deleted). But the framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts. ***2620** Section 1334(c)(2), for example, requires that bankruptcy courts abstain from hearing specified non-core, state law claims that "can be timely adjudicated[ ] in a State forum of appropriate jurisdiction." Section 1334(c)(1) similarly provides that bankruptcy courts may abstain from hearing any proceeding, including core matters, "in the interest of comity with State courts or respect for State law."

As described above, the current bankruptcy system also requires the district court to review *de novo* and enter final judgment on any matters that are "related to" the bankruptcy proceedings, § 157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, § 157(d). Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide[s]" them. Brief for Respondent 61. We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a "narrow" one. Brief for United States as *Amicus Curiae* 23.

If our decision today does not change all that much, then why the fuss? Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy? The short but emphatic answer is yes. A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. "Slight encroachments create new boundaries from which legions of power can seek new territory to capture." *Reid v. Covert,* 354 U.S. 1, 39, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion). Although "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form," we cannot overlook the intrusion: "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886). We

cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.

* * *

Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy 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. Accordingly, the judgment of the Court of Appeals is affirmed.

*It is so ordered.*

Justice SCALIA, concurring.

I agree with the Court's interpretation of our Article III precedents, and I accordingly join its opinion. I adhere to my view, however, that—our contrary precedents notwithstanding—"a matter of public rights ... must at a minimum arise between the government and others," *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 65, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) (SCALIA, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

***2621** The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area. I count at least seven different reasons given in the Court's opinion for concluding that an Article III judge was required to adjudicate this lawsuit: that it was one "under state common law" which was "not a matter that can be pursued only by grace of the other branches," *ante,* at 2614; that it was "not 'completely dependent upon' adjudication of a claim created by federal law," *ibid.;* that "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings," *ibid.;* that "the asserted authority to decide Vickie's claim is not limited to a 'particularized area of the law,' " *ante,* at 2615; that "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim," *ante,* at 2617; that the trustee was not "asserting a right of recovery created by federal bankruptcy law," *ante,* at 2618; and that the Bankruptcy Judge "ha[d] the power to enter 'appropriate orders and judgments'—including final judgments—subject to review only if a party chooses to appeal," *ante,* at 2619.

Apart from their sheer numerosity, the more fundamental flaw in the many tests suggested by our jurisprudence is that they have nothing to do with the text or tradition of Article III. For example, Article III gives no indication that state-law claims have preferential entitlement to an Article III judge; nor does it make pertinent the extent to which the area of the law is "particularized." The multifactors relied upon today seem to have entered our jurisprudence almost randomly.

Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason—and not because of some intuitive balancing of benefits and harms—I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true "public rights" cases. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 71, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion). Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate, see, *e.g.,* Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr.L.J. 567, 607–609 (1998); the subject has not been briefed, and so I state no position on the matter. But Vickie points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN, join dissenting.

Pierce Marshall filed a claim in Federal Bankruptcy Court against the estate of Vickie Marshall. His claim asserted that Vickie Marshall had, through her lawyers, accused him of trying to prevent her from obtaining money that his father had wanted her to have; that her accusations violated state defamation law; and that she consequently owed Pierce Marshall damages. Vickie Marshall filed a compulsory counterclaim in which she asserted that Pierce Marshall had unlawfully interfered with her husband's efforts to grant her an *inter vivos* gift and that he consequently owed her damages.

The Bankruptcy Court adjudicated the claim and the

counterclaim. In doing so, ***2622** the court followed statutory procedures applicable to "core" bankruptcy proceedings. See 28 U.S.C. § 157(b). And ultimately the Bankruptcy Court entered judgment in favor of Vickie Marshall. The question before us is whether the Bankruptcy Court possessed jurisdiction to adjudicate Vickie Marshall's counterclaim. I agree with the Court that the bankruptcy statute, § 157(b)(2)(C), authorizes a bankruptcy court to adjudicate the counterclaim. But I do not agree with the majority about the statute's constitutionality. I believe the statute is consistent with the Constitution's delegation of the "judicial Power of the United States" to the Judicial Branch of Government. Art. III, § 1. Consequently, it is constitutional.

## I

My disagreement with the majority's conclusion stems in part from my disagreement about the way in which it interprets, or at least emphasizes, certain precedents. In my view, the majority overstates the current relevance of statements this Court made in an 1856 case, *Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. 272, 18 How. 272, 15 L.Ed. 372 (1856), and it overstates the importance of an analysis that did not command a Court majority in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), and that was subsequently disavowed. At the same time, I fear the Court understates the importance of a watershed opinion widely thought to demonstrate the constitutional basis for the current authority of administrative agencies to adjudicate private disputes, namely, *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). And it fails to follow the analysis that this Court more recently has held applicable to the evaluation of claims of a kind before us here, namely, claims that a congressional delegation of adjudicatory authority violates separation-of-powers principles derived from Article III. See *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985); *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986).

I shall describe these cases in some detail in order to explain why I believe we should put less weight than does the majority upon the statement in *Murray's Lessee* and the analysis followed by the *Northern Pipeline* plurality and instead should apply the approach this Court has applied in *Crowell, Thomas,* and *Schor.*

### A

In *Murray's Lessee,* the Court held that the Constitution permitted an executive official, through summary, nonjudicial proceedings, to attach the assets of a customs collector whose account was deficient. The Court found evidence in common law of "summary method[s] for the recovery of debts due to the crown, and especially those due from receivers of the revenues," 18 How., at 277, and it analogized the Government's summary attachment process to the kind of self-help remedies available to private parties, *id.,* at 283. In the course of its opinion, the Court wrote:

> "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of ***2623** the courts of the United States, as it may deem proper." *Id.,* at 284.

The majority reads the first part of the statement's first sentence as authoritatively defining the boundaries of Article III. *Ante,* at 2609. I would read the statement in a less absolute way. For one thing, the statement is in effect dictum. For another, it is the remainder of the statement, announcing a distinction between "public rights" and "private rights," that has had the more lasting impact. Later Courts have seized on that distinction when *upholding* non-Article III adjudication, not when striking it down. See *Ex parte Bakelite Corp.,* 279 U.S. 438, 451–452, 49 S.Ct. 411, 73 L.Ed. 789 (1929) (Court of Customs Appeals); *Williams v. United States,* 289 U.S. 553, 579–580, 53 S.Ct. 751, 77 L.Ed. 1372 (1933) (Court of Claims). The one exception is *Northern Pipeline,* where the Court struck down the Bankruptcy Act of 1978. But in that case there was no majority. And a plurality, not a majority, read the statement roughly in the way the Court does today. See 458 U.S., at 67–70, 102 S.Ct. 2858.

### B

At the same time, I believe the majority places insufficient weight on *Crowell,* a seminal case that clarified the scope of the dictum in *Murray's Lessee.* In

that case, the Court considered whether Congress could grant to an Article I administrative agency the power to adjudicate an employee's workers' compensation claim against his employer. The Court assumed that an Article III court would review the agency's decision *de novo* in respect to questions of law but it would conduct a less searching review (looking to see only if the agency's award was "supported by evidence in the record") in respect to questions of fact. *Crowell,* 285 U.S., at 48–50, 52 S.Ct. 285. The Court pointed out that the case involved a dispute between private persons (a matter of "private rights") and (with one exception not relevant here) it upheld Congress' delegation of primary factfinding authority to the agency.

Justice Brandeis, dissenting (from a here-irrelvant portion of the Court's holding), wrote that the adjudicatory scheme raised only a due process question: When does due process require decision by an Article III judge? He answered that question by finding constitutional the statute's delegation of adjudicatory authority to an agency. *Id.,* at 87, 52 S.Ct. 285.

*Crowell* has been hailed as "the greatest of the cases validating administrative adjudication." Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L.J. 233, 251 (1990). Yet, in a footnote, the majority distinguishes *Crowell* as a case in which the Court upheld the delegation of adjudicatory authority to an administrative agency simply because the agency's power to make the "specialized, narrowly confined factual determinations" at issue arising in a "particularized area of law," made the agency a "true 'adjunct' of the District Court." *Ante,* at 2612, n. 6. Were *Crowell's* holding as narrow as the majority suggests, one could question the validity of Congress' delegation of authority to adjudicate disputes among private parties to other agencies such as the National Labor Relations Board, the Commodity Futures Trading Commission, the Surface Transportation Board, and the Department of Housing and Urban Development, thereby resurrecting important legal questions previously thought to have been decided. See 29 U.S.C. § 160; 7 U.S.C. § 18; 49 U.S.C. § 10704; 42 U.S.C. § 3612(b).

**C**

The majority, in my view, overemphasizes the precedential effect of the plurality ***2624** opinion in *Northern Pipeline. Ante,* at 2609 – 2610. There, the Court held unconstitutional the jurisdictional provisions of the Bankruptcy Act of 1978 granting adjudicatory authority to bankruptcy judges who lack the protections of tenure and compensation that Article III provides. Four Members of the Court wrote that Congress could grant adjudicatory authority to a non-Article III judge only where (1) the judge sits on a "territorial cour[t]" (2) the judge conducts a "courts-martial," or (3) the case involves a "public right," namely, a "matter" that "at a minimum arise[s] 'between the government and others.' " 458 U.S., at 64–70, 102 S.Ct. 2858 (plurality opinion) (quoting *Ex parte Bakelite Corp., supra,* at 451, 49 S.Ct. 411). Two other Members of the Court, without accepting these limitations, agreed with the result because the case involved a breach-of-contract claim brought by the bankruptcy trustee on behalf of the bankruptcy estate against a third party who was not part of the bankruptcy proceeding, and none of the Court's preceding cases (which, the two Members wrote, "do not admit of easy synthesis") had "gone so far as to sanction th[is] type of adjudication." 458 U.S., at 90–91, 102 S.Ct. 2858 (Rehnquist, J. concurring in judgment).

Three years later, the Court held that *Northern Pipeline*

> "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas,* 473 U.S., at 584, 105 S.Ct. 3325.

**D**

Rather than leaning so heavily on the approach taken by the plurality in *Northern Pipeline,* I would look to this Court's more recent Article III cases *Thomas* and *Schor*—cases that commanded a clear majority. In both cases the Court took a more pragmatic approach to the constitutional question. It sought to determine whether, in the particular instance, the challenged delegation of adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch.

**1**

In *Thomas,* the Court focused directly upon the nature of the Article III problem, illustrating how the Court should determine whether a delegation of adjudicatory authority to a non-Article III judge violates the Constitution. The statute in question required pesticide manufacturers to

submit to binding arbitration claims for compensation owed for the use by one manufacturer of the data of another to support its federal pesticide registration. After describing *Northern Pipeline* 's holding in the language I have set forth above, *supra,* at 2624, the Court stated that "*practical attention to substance* rather than doctrinaire reliance on formal categories should inform application of Article III." *Thomas,* 473 U.S., at 587, 105 S.Ct. 3325 (emphasis added). It indicated that Article III's requirements could not be "determined" by "the identity of the parties alone," *ibid.,* or by the "private rights"/"public rights" distinction, *id.,* at 585–586, 105 S.Ct. 3325. And it upheld the arbitration provision of the statute.

The Court pointed out that the right in question was created by a federal statute, it "represent[s] a pragmatic solution to the difficult problem of spreading [certain] costs," and the statute "does not preclude review of the arbitration proceeding by an ***2625** Article III court." *Id.,* at 589–592, 105 S.Ct. 3325. The Court concluded:

> "Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme." *Id.,* at 590, 105 S.Ct. 3325.

2

Most recently, in *Schor,* the Court described in greater detail how this Court should analyze this kind of Article III question. The question at issue in *Schor* involved a delegation of authority to an agency to adjudicate a counterclaim. A customer brought before the Commodity Futures Trading Commission (CFTC) a claim for reparations against his commodity futures broker. The customer noted that his brokerage account showed that he owed the broker money, but he said that the broker's unlawful actions had produced that debit balance, and he sought damages. The broker brought a counterclaim seeking the money that the account showed the customer owed. This Court had to decide whether agency adjudication of such a counterclaim is consistent with Article III.

In doing so, the Court expressly "declined to adopt formalistic and unbending rules." *Schor,* 478 U.S., at 851, 106 S.Ct. 3245. Rather, it "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Ibid.* Those relevant factors include (1) "the origins and importance of the right to be adjudicated"; (2) "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; (3) the extent to which the delegation nonetheless reserves judicial power for exercise by Article III courts; (4) the presence or "absence of consent to an initial adjudication before a non-Article III tribunal"; and (5) "the concerns that drove Congress to depart from" adjudication in an Article III court. *Id.,* at 849, 851, 106 S.Ct. 3245.

The Court added that where "private rights," rather than "public rights" are involved, the "danger of encroaching on the judicial powers" is greater. *Id.,* at 853–854, 106 S.Ct. 3245 (internal quotation marks omitted). Thus, while non-Article III adjudication of "private rights" is not necessarily unconstitutional, the Court's constitutional "examination" of such a scheme must be more "searching." *Ibid.*

Applying this analysis, the Court upheld the agency's authority to adjudicate the counterclaim. The Court conceded that the adjudication might be of a kind traditionally decided by a court and that the rights at issue were "private," not "public." *Id.,* at 853, 106 S.Ct. 3245. But, the Court said, the CFTC deals only with a " 'particularized area of law' "; the decision to invoke the CFTC forum is "left entirely to the parties"; Article III courts can review the agency's findings of fact under "the same 'weight of the evidence' standard sustained in *Crowell* " and review its "legal determinations ... *de novo* "; and the agency's "counterclaim jurisdiction" was necessary to make "workable" a "reparations procedure," which constitutes an important part of a congressionally enacted "regulatory scheme." *Id.,* at 852–856, 106 S.Ct. 3245. The Court concluded that for these and other reasons "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis.*" *Id.,* at 856, 106 S.Ct. 3245.

II

A

This case law, as applied in *Thomas* and *Schor,* requires us to determine pragmatically ***2626** whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III. That is to say, we must determine through an examination of certain relevant factors whether that delegation constitutes a significant encroachment by the Legislative or Executive Branches of Government upon the realm of authority that Article III reserves for exercise by the Judicial Branch of Government. Those factors include (1) the nature of the

claim to be adjudicated; (2) the nature of the non-Article III tribunal; (3) the extent to which Article III courts exercise control over the proceeding; (4) the presence or absence of the parties' consent; and (5) the nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections. The presence of "private rights" does not automatically determine the outcome of the question but requires a more "searching" examination of the relevant factors. *Schor, supra,* at 854, 106 S.Ct. 3245.

Insofar as the majority would apply more formal standards, it simply disregards recent, controlling precedent. *Thomas, supra,* at 587, 105 S.Ct. 3325 ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"); *Schor, supra,* at 851, 106 S.Ct. 3245 ("[T]he Court has declined to adopt formalistic and unbending rules" for deciding Article III cases).

**B**

Applying *Schor'* s approach here, I conclude that the delegation of adjudicatory authority before us is constitutional. A grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III.

First, I concede that *the nature of the claim to be adjudicated* argues against my conclusion. Vickie Marshall's counterclaim—a kind of tort suit—resembles "a suit at the common law." *Murray's Lessee,* 18 How., at 284. Although not determinative of the question, see *Schor,* 478 U.S., at 853, 106 S.Ct. 3245, a delegation of authority to a non-Article III judge to adjudicate a claim of that kind poses a heightened risk of encroachment on the Federal Judiciary, *id.,* at 854, 106 S.Ct. 3245.

At the same time the significance of this factor is mitigated here by the fact that bankruptcy courts often decide claims that similarly resemble various common-law actions. Suppose, for example, that ownership of 40 acres of land in the bankruptcy debtor's possession is disputed by a creditor. If that creditor brings a claim in the bankruptcy court, resolution of that dispute requires the bankruptcy court to apply the same state property law that would govern in a state court proceeding. This kind of dispute arises with regularity in bankruptcy proceedings.

Of course, in this instance the state-law question is embedded in a debtor's counterclaim, not a creditor's claim. But the counterclaim is "compulsory." It "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. Rule Civ. Proc. 13(a); Fed. Rule Bkrtcy. Proc. 7013. Thus, resolution of the counterclaim will often turn on facts identical to, or at least related to, those at issue in a creditor's claim that is undisputedly proper for the bankruptcy court to decide.

Second, *the nature of the non-Article III tribunal* argues in favor of constitutionality. That is because the tribunal is made up of judges who enjoy considerable protection ***2627** from improper political influence. Unlike the 1978 Act which provided for the appointment of bankruptcy judges by the President with the advice and consent of the Senate, 28 U.S.C. § 152 (1976 ed., Supp. IV), current law provides that the federal courts of appeals appoint federal bankruptcy judges, § 152(a)(1) (2006 ed.). Bankruptcy judges are removable by the circuit judicial counsel (made up of federal court of appeals and district court judges) and only for cause. § 152(e). Their salaries are pegged to those of federal district court judges, § 153(a), and the cost of their courthouses and other work-related expenses are paid by the Judiciary, § 156. Thus, although Congress technically exercised its Article I power when it created bankruptcy courts, functionally, bankruptcy judges can be compared to magistrate judges, law clerks, and the Judiciary's administrative officials, whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch.

Third, *the control exercised by Article III judges over bankruptcy proceedings* argues in favor of constitutionality. Article III judges control and supervise the bankruptcy court's determinations—at least to the same degree that Article III judges supervised the agency's determinations in *Crowell,* if not more so. Any party may appeal those determinations to the federal district court, where the federal judge will review all determinations of fact for clear error and will review all determinations of law *de novo.* Fed. Rule Bkrtcy. Proc. 8013; 10 Collier on Bankruptcy ¶ 8013.04 (16th ed.2011). But for the here-irrelevant matter of what *Crowell* considered to be special "constitutional" facts, the standard of review for factual findings here ("clearly erroneous") is more stringent than the standard at issue in *Crowell* (whether the agency's factfinding was "supported by evidence in the record"). 285 U.S., at 48, 52 S.Ct. 285; see *Dickinson v. Zurko,* 527 U.S. 150, 152, 153, 119 S.Ct. 1816, 144 L.Ed.2d 143 (1999) ( "unsupported by substantial evidence" more deferential than "clearly erroneous" (internal quotation marks omitted)). And, as *Crowell* noted, "there is no requirement that, in order to maintain the essential attributes of the judicial power, all

determinations of fact in constitutional courts shall be made by judges." 285 U.S., at 51, 52 S.Ct. 285.

Moreover, in one important respect Article III judges maintain greater control over the bankruptcy court proceedings at issue here than they did over the relevant proceedings in any of the previous cases in which this Court has upheld a delegation of adjudicatory power. The District Court here may "withdraw, in whole or in part, any case or proceeding referred [to the Bankruptcy Court] ... on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. § 157(d); cf. *Northern Pipeline,* 458 U.S., at 80, n. 31, 102 S.Ct. 2858 (plurality opinion) (contrasting pre–1978 law where "power to withdraw the case from the [bankruptcy] referee" gave district courts "control" over case with the unconstitutional 1978 statute, which provided no such district court authority).

Fourth, the fact that *the parties have consented* to Bankruptcy Court jurisdiction argues in favor of constitutionality, and strongly so. Pierce Marshall, the counterclaim defendant, is not a stranger to the litigation, forced to appear in Bankruptcy Court against his will. Cf. *id.,* at 91, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment) (suit was litigated in Bankruptcy Court "over [the defendant's] objection"). Rather, he appeared voluntarily in Bankruptcy Court as one of Vickie Marshall's creditors, seeking a favorable resolution of his claim against Vickie Marshall to the detriment of her other creditors. ***2628** He need not have filed a claim, perhaps not even at the cost of bringing it in the future, for he says his claim is "nondischargeable," in which case he could have litigated it in a state or federal court after distribution. See 11 U.S.C. § 523(a)(6). Thus, Pierce Marshall likely had "an alternative forum to the bankruptcy court in which to pursue [his] clai[m]." *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 59, n. 14, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

The Court has held, in a highly analogous context, that this type of consent argues strongly in favor of using ordinary bankruptcy court proceedings. In *Granfinanciera,* the Court held that when a bankruptcy trustee seeks to void a transfer of assets from the debtor to an individual on the ground that the transfer to that individual constitutes an unlawful "preference," the question of whether the individual has a right to a jury trial "depends upon whether the creditor has submitted a claim against the estate." *Id.,* at 58, 109 S.Ct. 2782. The following year, in *Langenkamp v. Culp,* 498 U.S. 42, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990) *(per curiam),* the Court emphasized that when the individual files a claim against the estate, that individual has

> "trigger[ed] the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction.*" *Id.,* at 44, 111 S.Ct. 330 (quoting *Granfinanciera,* 492 U.S., at 58, 109 S.Ct. 2782; citations omitted).

As we have recognized, the jury trial question and the Article III question are highly analogous. See *id.,* at 52–53, 111 S.Ct. 330. And to that extent, *Granfinanciera* 's and *Langenkamp* 's basic reasoning and conclusion apply here: Even when private rights are at issue, non-Article III adjudication may be appropriate when both parties consent. Cf. *Northern Pipeline, supra,* at 80, n. 31, 102 S.Ct. 2858 (plurality opinion) (noting the importance of consent to bankruptcy jurisdiction). See also *Schor,* 478 U.S., at 849, 106 S.Ct. 3245 ("[A]bsence of consent to an initial adjudication before a non-Article III tribunal was relied on [in *Northern Pipeline* ] as a significant factor in determining that Article III forbade such adjudication"). The majority argues that Pierce Marshall "did not truly consent" to bankruptcy jurisdiction, *ante,* at 2614 – 2615, but filing a proof of claim was sufficient in *Langenkamp* and *Granfinanciera,* and there is no relevant distinction between the claims filed in those cases and the claim filed here.

Fifth, *the nature and importance of the legislative purpose served* by the grant of adjudicatory authority to bankruptcy tribunals argues strongly in favor of constitutionality. Congress' delegation of adjudicatory powers over counterclaims asserted against bankruptcy claimants constitutes an important means of securing a constitutionally authorized end. Article I, § 8, of the Constitution explicitly grants Congress the "Power To ... establish ... uniform Laws on the subject of Bankruptcies throughout the United States." James Madison wrote in the Federalist Papers that the

> "power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the ***2629** parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, p. 271 (C. Rossiter ed.1961).

Congress established the first Bankruptcy Act in 1800. 2 Stat. 19. From the beginning, the "core" of federal bankruptcy proceedings has been "the restructuring of

debtor-creditor relations." *Northern Pipeline, supra,* at 71, 102 S.Ct. 2858 (plurality opinion). And, to be effective, a single tribunal must have broad authority to restructure those relations, "having jurisdiction of the parties to controversies brought before them," "decid[ing] all matters in dispute," and "decree[ing] complete relief." *Katchen v. Landy,* 382 U.S. 323, 335, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) (internal quotation marks omitted).

The restructuring process requires a creditor to file a proof of claim in the bankruptcy court. 11 U.S.C. § 501; Fed. Rule Bkrtcy. Proc. 3002(a). In doing so, the creditor "triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp, supra,* at 44, 111 S.Ct. 330 (quoting *Granfinanciera, supra,* at 58, 109 S.Ct. 2782). By filing a proof of claim, the creditor agrees to the bankruptcy court's resolution of that claim, and if the creditor wins, the creditor will receive a share of the distribution of the bankruptcy estate. When the bankruptcy estate has a related claim against that creditor, that counterclaim may offset the creditor's claim, or even yield additional damages that augment the estate and may be distributed to the other creditors.

The consequent importance to the total bankruptcy scheme of permitting the trustee in bankruptcy to assert counterclaims against claimants, *and resolving those counterclaims in a bankruptcy court,* is reflected in the fact that Congress included "counterclaims by the estate against persons filing claims against the estate" on its list of "[c]ore proceedings." 28 U.S.C. § 157(b)(2)(C). And it explains the difference, reflected in this Court's opinions, between a claimant's and a nonclaimant's constitutional right to a jury trial. Compare *Granfinanciera, supra,* at 58–59, 109 S.Ct. 2782 ("Because petitioners ... have not filed claims against the estate" they retain "their Seventh Amendment right to a trial by jury"), with *Langenkamp, supra,* at 45, 111 S.Ct. 330 ("Respondents filed claims against the bankruptcy estate" and "[c]onsequently, they were not entitled to a jury trial").

Consequently a bankruptcy court's determination of such matters has more than "some bearing on a bankruptcy case." *Ante,* at 2618 (emphasis deleted). It plays a critical role in Congress' constitutionally based effort to create an efficient, effective federal bankruptcy system. At the least, that is what Congress concluded. We owe deference to that determination, which shows the absence of any legislative or executive motive, intent, purpose, or desire to encroach upon areas that Article III reserves to judges to whom it grants tenure and compensation protections.

Considering these factors together, I conclude that, as in *Schor,* "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis.*" 478 U.S., at 856, 106 S.Ct. 3245. I would similarly find the statute before us constitutional.

## III

The majority predicts that as a "practical matter" today's decision "does not change all that much." *Ante,* at 2619 – 2620. But I doubt that is so. Consider a typical case: A tenant files for bankruptcy. The landlord files a claim for unpaid rent. The tenant asserts a counterclaim for damages ***2630** suffered by the landlord's (1) failing to fulfill his obligations as lessor, and (2) improperly recovering possession of the premises by misrepresenting the facts in housing court. (These are close to the facts presented in *In re Beugen,* 81 B.R. 994 (Bkrtcy.Ct.N.D.Cal.1988).) This state-law counterclaim does not "ste[m] from the bankruptcy itself," *ante,* at 2618, it would not "necessarily be resolved in the claims allowance process," *ibid.,* and it would require the debtor to prove damages suffered by the lessor's failures, the extent to which the landlord's representations to the housing court were untrue, and damages suffered by improper recovery of possession of the premises, cf. *ante,* at 2617 – 2618. Thus, under the majority's holding, the federal district judge, not the bankruptcy judge, would have to hear and resolve the counterclaim.

Why is that a problem? Because these types of disputes arise in bankruptcy court with some frequency. See, *e.g., In re CBI Holding Co.,* 529 F.3d 432 (C.A.2 2008) (state-law claims and counterclaims); *In re Winstar Communications, Inc.,* 348 B.R. 234 (Bkrtcy.Ct.Del.2005) (same); *In re Ascher,* 128 B.R. 639 (Bkrtcy.Ct.N.D.Ill.1991) (same); *In re Sun West Distributors, Inc.,* 69 B.R. 861 (Bkrtcy.Ct.S.D.Cal.1987) (same). Because the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases. Administrative Office of the United States Courts, J. Duff, Judicial Business of the United States Courts: Annual Report of the Director 14 (2010). Because unlike the "related" non-core state law claims that bankruptcy courts must abstain from hearing, *see ante,* at 2619, compulsory counterclaims involve the same factual disputes as the claims that may be finally adjudicated by the bankruptcy courts. Because under these circumstances, 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.

For these reasons, with respect, I dissent.

**Parallel Citations**

180 L.Ed.2d 475, 79 BNA USLW 4564, 65 Collier Bankr.Cas.2d 827, 55 Bankr.Ct.Dec. 1, Bankr. L. Rep. P 82,032, 11 Cal. Daily Op. Serv. 7728, 2011 Daily Journal D.A.R. 9305, 22 Fla. L. Weekly Fed. S 1232

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*Exhibit 2*

## STERN V. MARSHALL – WHERE ARE WE NOW?[1]

## INTRODUCTION AND BACKGROUND

In *Stern v. Marshall*, __ U.S. ___, 131 S.Ct. 2594, 180 L. Ed. 2d 26 (2011), the United States Supreme Court held, under the facts of that case, that the Bankruptcy Court, as a court established under Article I of the United States Constitution, did not have the Constitutional authority to issue a final order on a state law counterclaim to a proof of claim, even though the court acknowledged that such counterclaim was a "core proceeding" under 28 U.S.C. § 157(b)(2)(C) for which the United States Judicial Code purports to grant Bankruptcy Courts the authority to "enter appropriate orders and judgments . . ." *See* 28 U.S.C. § 157(b)(1).

The response to *Stern* has been extraordinary. No bankruptcy case in recent memory has spawned as much confusion, litigation and commentary as this self-described "narrow" decision. *See Stern*, 131 S.Ct. at 2819. According to Judge Gross's decision in *Burtsch v. Seaport Capital, LLC (In re Direct Response Media, Inc.)*, 466 B.R. 626 (Bankr. D. Del. 2012), as of January, 2012, there were over 130 cases in which issues pertaining to *Stern* were addressed and the analysis in these decisions was, not surprisingly, inconsistent. *See Direct Response*, 466 B.R. 626, ___, 2012 Bankr. LEXIS 41, at 15 n.7. And the flood of litigation prompted by *Stern* does not appear likely to recede any time soon - if anything, as the case law develops, more issues arise and many of those issues have become increasingly complex.

What follows below is a discussion of the Supreme Court's decision in *Stern*, with a particular focus on court's analysis of the Constitutional issues raised by the decision prefaced by a discussion of certain of the non-Constitutional issues that were disposed of by the Supreme Court, some of which appear to have caused unnecessary confusion for some litigants. Following the *Stern* discussion are brief observations about some issues that would appear to be settled by *Stern*. Thereafter, we will discuss the jurisprudence under *Stern* in the United States Bankruptcy Court for the District of Delaware. Finally, for reference purposes, we include a brief summary of certain key *Stern* decisions outside of our jurisdiction (and, in particular, those that have interpreted *Stern* broadly or narrowly).

## STERN V. MARSHALL – WHAT DOES IT SAY?

The underlying facts of *Stern* are well known to most bankruptcy lawyers and will be discussed here in summary fashion.

The case arose from disputes between Vickie Lyn Marshall (a/k/a Anna Nicole Smith) and Pierce Marshall pertaining to the assets of Vickie's husband and Pierce's father, Texas mogul J. Howard Marshall II. Before J. Howard died, Vickie filed a suit against Pierce in

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[1]The below summary of the *Stern v. Marshall* case along with our observations on *Stern* and our summary of Delaware jurisprudence pertaining to *Stern* was prepared by Henry Jaffe of Pepper Hamilton LLP. Evan Miller of Byard, P.A. prepared the summary of certain key cases on the issues raised by *Stern* decided by courts outside of Delaware. We thank Douglas Candeub of Morris James LLP for his thoughts and input in preparing these materials.

state court in Texas asserting that J. Howard intended to provide for Vickie, through a trust, and that Pierce tortiously interfered with that gift. After J. Howard died, Vickie filed for bankruptcy under Chapter 11 and Pierce filed a complaint in Vickie's bankruptcy case alleging that Vickie had defamed him by inducing her lawyers to tell the press that he engaged in fraud to control his father's assets, and further alleging that the defamation liability was non-dischargeable under 11 U.S.C. § 523. Pierce then filed a proof of claim asserting the defamation claim. Vickie, in turn, filed her now infamous counterclaim to Pierce's proof of claim in Bankruptcy Court asserting Pierce's tortious interference with the gift she expected from J. Howard.

Thereafter, the parties rushed to get judgments on their respective and parallel claims pending in the Bankruptcy Court and in Texas state court. The Bankruptcy Court first granted Vicki summary judgment on Pierce's claim and awarded her hundreds of millions of dollars of damages on her counterclaim. Pierce objected to the Bankruptcy Court's ability to enter a final order, arguing that the Court did not have "jurisdiction" to enter such an order and that the proceeding was not a core proceeding, but the Bankruptcy Court found the matter to be core and purported to enter its judgment. The District Court reversed, finding the matter not to be core but entering judgment in favor of Vickie even though, in the interval between the entry of the Bankruptcy Court's "order" and the District Court's order, the Texas state court had conducted a jury trial and entered judgment in favor of Pierce. The Fifth Circuit Court of Appeals reversed the District Court's decision, finding that the proceeding was not core (and, therefore, the Bankruptcy Court's determination was not a final "order") and further finding that the District Court should have given preclusive effect to the Texas state court's earliest final judgment. The Supreme Court granted a writ of certiorari to hear the appeal filed by the executor of Vickie's estate, thus ensuring that the litigation would last longer than the original litigants themselves, all of whom passed away during the pendency of these various suits.

Before reaching the key Constitutional issue before it – namely, whether the Bankruptcy Court possessed the Constitutional authority to enter a final order on Vickie's counterclaim – the Supreme Court passed on certain jurisdictional and statutory threshold issues. Pierce argued that the Bankruptcy Court's authority to enter final orders under 28 U.S.C. § 157(b)(1) is limited to those "core" proceedings that arise in or arise under title 11 and the counterclaims at issue were not of the type that arose in or under title 11. *See id.* at 2604-05. The Court rejected this argument, finding it implausible that Congress would make such a distinction and holding that the counterclaim at issue in this proceeding was clearly defined by statute as a "core" proceeding. *See id.* Thus, the statute purported to give the Bankruptcy Court the authority to enter a final order with respect to Vickie's counterclaim (which, of course, begged the question reached later in the decision - whether the statute granting such authority passed Constitutional muster with respect to such counterclaim).

Next, Pierce argued that the Bankruptcy Court lacked the jurisdictional authority to enter a final judgment on his defamation claim (as asserted in his proof of claim), as a "personal injury tort" claim under 28 U.S.C. § 157(b)(5) for which he was entitled to a District Court determination. The Supreme Court, however, held that section 157(b)(5) was not a jurisdictional provision but, rather, only addressed where such tort claims should be tried. *See id.* at 2606-07. Furthermore, the Court found that Pierce could consent and in fact did consent to the Bankruptcy Court's adjudication of his defamation claim and, thus, even if the matter was subject to 157(b)(5) (and the Court questioned such premise), the Bankruptcy Court had the

jurisdiction and power to hear the matter. *Id.* at 2607-08. As such, *Stern* is also important precedent for the proposition that the parties can agree to have a Bankruptcy Court enter a final judgment on a claim that section 157 directs that the District Court should hear, and, more broadly, *Stern* suggests that the right to have a matter decided by an Article III judge may be waived by explicit or implicit consent.

The Court then proceeded to attack the more thorny issues of the case pertaining to whether the Bankruptcy Court had the Constitutional authority to enter a final order on Vickie's counterclaim. The Court's discussion began with an historical overview of Article III of the Constitution as it pertained to the appointment and tenure of Federal Judges, noting that their appointment by Congress and their lifetime tenure help ensure their independence from an overreaching executive, this independence, in turn, permits them to better protect individual liberties. *See id.* at 2608-09. In order to ensure that independence, other branches of government cannot withdraw from the jurisprudential power of an Article III judge those matters that, at the time the Constitution was ratified, were traditionally heard by a judge - namely suits at common law, in equity or in admiralty. *See id.* at 2609 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856). Thus, when a suit contains the "stuff of the traditional actions at common law tried by the courts at Westminster in 1789" the job of deciding that suit belongs to an Article III judge. *Id.* at 2609 (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982)).

Having traced the historical rationale for limiting the scope of a non-Article III court's jurisdiction, the Court set about defining the matters upon which a Bankruptcy Court, as an Article I court, has the ability to enter a final order. In this regard, the Court, relying on its 1982 *Marathon* decision, the court noted that there are matters of "public rights" that Congress may assign to "legislative" (*i.e.*, non-Article III) courts for determination. This exception relates "'only to matters' arising between individuals and the Government 'in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically only could have been determined exclusively by those' branches." *Id.* at 2610 (quoting *Marathon*, 458 U.S. at 67-68). By contrast, "private rights" generally must be decided by Article III judges to determine the liability of one individual to another. *Id.* at 2612. *Marathon* determined that a state law claim was not among the matters to which the public rights exception applied and was a claim for which a Bankruptcy Court did not have the power to issue a final order. *Id.* Following *Marathon*, Congress passed legislation granting to Bankruptcy Courts the power to enter final judgments in "core" proceedings, which include counterclaims under section 157(b)(2)(C).

The Supreme Court held that the Bankruptcy Court, exercising the judicial power of the United States, did not have the authority to enter a final judgment on Vickie's state law counterclaim. Further, her counterclaim did not fall within the "public rights" exception, and, therefore that exception did not excuse the failure to comply with Article III. *Id.* at 2611. Moreover, the fact that Pierce filed a claim did not bring the counterclaim within the "public rights" exception because the counterclaim was not necessarily resolvable by ruling on Pierce's proof of claim. *Id.*

In attempting to draw the line between private and public rights, the Supreme Court examined its seminal decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

In that case, the court refused to apply the public rights exception with respect to a fraudulent conveyance action filed on behalf of a bankruptcy estate against a non-creditor in a bankruptcy proceeding that had asserted its jury trial rights. In so finding, the Supreme Court noted that if a statutory right is not closely intertwined with a federal regulatory program, and if it neither belongs to nor can be asserted against the Federal Government, it must be decided by an Article III court. *Id.* at 2614 (quoting *Granfinanciera*, 492 U.S. at 54-5. Under this rationale, fraudulent conveyance claims more closely related to state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do to the ordering of claims to a pro rata share of a bankruptcy "res" (in other words, the estate). *Id.* at 2614 (quoting *Granfinanciera*, 492 U.S. at 56). The Supreme Court found, however, that Vickie's state law counterclaim failed all of the relevant tests that have been employed by the Court to determine whether a matter fell within the "public rights" exception as it was not a matter that: (a) could only be pursued by a governmental branch; (b) could only have been decided by a governmental branch; (c) flowed from a federal statutory scheme; or (d) was limited to a particularized area of the law. *See id.* at 2614-16.

Moreover, the Court refused to find that the filing of Pierce's proof of claim constituted his "consent" to have the counterclaim decided by the Bankruptcy Court. For one, Pierce was compelled to file the proof of claim if he wished to recover from Vickie's bankruptcy estate. *Id.* at 2614-15.

The Court rejected Vickie's attempt to distinguish this case from *Marathon* and *Granfinanciera* on the ground that Pierce had filed a proof of claim in Vickie's bankruptcy proceeding. The Court found that existence of Pierce's claim did not in any way affect the nature of Vickie's counterclaim that "simply attempts to augment the bankruptcy estate" and was the precise type of state law claim which those Supreme Court cases said must be tried by an Article III court. *See id.* at 2616. The Court also distinguished this case from its prior decisions in *Katchen v. Landy*, 382 U.S. 323 (1966) and *Langenkamp v. Culp*, 482 U.S. 42 (1990) (*per curiam*), in which the Bankruptcy Court was granted the authority to enter final judgment on preference claims (under the former Bankruptcy Act and the Bankruptcy Code) where the creditor had filed a proof of claim in the bankruptcy case. One distinguishing factor in those cases, however, was that, under applicable bankruptcy law, the existence of a preference liability would result in the disallowance of the claim filed by the creditor and, therefore, resolution of the preference issue was part and parcel of the claims-allowance process. *Id.* at 2616-17. By contrast, the resolution of Pierce's claim would not necessarily resolve numerous issues raised by Vickie's counterclaim even though there was admittedly some overlap between the claims. *Id.* at 2617-18. In addition, the court distinguished Vickie's counterclaims under state law with the preference causes of action arising under the Bankruptcy Code – in other words, bankruptcy law was not the source of these counterclaims. Notwithstanding this distinction, the court noted, in important *dicta*, that it saw no reason to treat Vickie's counterclaim any differently from the bankruptcy-related fraudulent transfer action in *Granfinanciera* because:

> *Granfinanciera's* distinction between actions that seek 'to augment the bankruptcy estate' and those that seek a 'pro rata share of the bankruptcy res' . . . reaffirms that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action stems from the bankruptcy itself or would necessarily be resolved in the claims

allowance process. Vickie has failed to demonstrate that her counterclaim falls within one of the 'limited circumstances' covered by the public rights exception, particularly given our conclusion that '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.'"

*Id.* at 2618 (quoting *Granfinanciera*, 458 U.S. at 69, n. 23, 77) (emphasis added).

Finally, the Court dismissed the "judicial efficiency" argument made by Vickie that depriving Bankruptcy Courts of the ability to enter final orders on compulsory counterclaims will create significant delays and impose additional costs. The Court reasoned that efficiency and convenience do not justify results that are at odds with the Constitution. *See id.* at 2619. In any event, the Court was not convinced that the practical consequences of these limitations on the Bankruptcy Court's authority were as significant as Vickie suggested. *Id.* at 2620. Rather, since the Bankruptcy Court still had the power to hear such matters and make proposed findings of fact and conclusions of law, the ruling would not materially change the division of labor between the District Court and the Bankruptcy Court, and, thus, the question presented to the Supreme Court was a narrow one. *Id.*

## STERN V. MARSHALL – WHAT ISSUES DOES IT APPEAR TO RESOLVE?

Before discussing the practical effect of the *Stern* decision and the questions left unanswered by this case, it is critical to discuss what issues, aside from its purportedly "narrow" holding, *Stern* appears to resolve.

First, *Stern* would not appear to be a case about the scope of the Bankruptcy Court's jurisdiction to hear disputes. *Stern* merely addressed whether a Bankruptcy Court has the Constitutional authority to issue a final judgment. In the wake of *Stern*, even where the Bankruptcy Court does not have the statutory or Constitutional authority to issue a final judgment, so long as the matter is "related to" the bankruptcy case under 28 U.S.C. § 1334, the Bankruptcy Court has the jurisdiction to hear the matter and enter proposed findings of fact and conclusions of law.

Second, *Stern* resolves that Congress' attempt to divide those matters on which a Bankruptcy Court has the authority to issue a final judgment through the "core" versus "non-core" distinction was not entirely successful. In other words, there are at least some matters that Congress designated as core – including, at the very least, certain counterclaims under state law - on which a bankruptcy judge does not have the right to enter a final judgment (absent the consent of the parties). That said, a clear delineation of what counts as "public rights" versus "private rights" has yet to be established by the courts and promises to be fertile ground for litigants for the foreseeable future.

Third, although *Stern* does not precisely address whether the parties may consent to the Bankruptcy Court's entry of a final order on a non-core matter (the Supreme Court's consent analysis pertained directly to whether the parties could, by consent, permit the Bankruptcy Court to enter a final judgment on a personal injury tort claim under 28 U.S.C. § 157(b)(5)), nonetheless, it is extremely strong persuasive authority for the proposition that the

parties may consent to the Bankruptcy Court's entry of a final judgment on a non-core matter (or on a core matter over which the Bankruptcy Court does not otherwise have the Constitutional power to enter a final order).

## STERN V. MARSHALL – NARROW VERSUS BROAD INTERPRETATIONS

Perhaps the most difficult challenge presented by *Stern* is determining its scope. Is it a decision that applies narrowly only to state law counterclaims whose determination is not essential to a determination of the proof of claim filed by the counterclaim defendant? Or, rather, is it a broad decision whose rationale applies generally to prevent Bankruptcy Courts from entering final orders on any matter not coming within the limited "public rights" exception articulated by the Supreme Court? Not surprisingly, courts disagree considerably regarding the scope and application of *Stern*.

The opposing positions taken by these courts was summarized aptly by Judge Gross in his recent decision in *Burtch v. Seaport Capital, LLC (In re Direct Response Media, Inc.)*, 466 B.R. 626, 2012 Bankr. LEXIS 41 (Bankr. D. Del. 2012). The key to the broad view adopted by certain courts appears to reside chiefly in the *Stern* court's discussion, and reaffirmation, of the rationale and holding of the *Granfinanciera* case. Particularly, the critical distinction that the *Granfinanciera* court made in holding that a fraudulent conveyance action (where the defendant had not filed a proof of claim) was not subject to the public rights exception permitting a Bankruptcy Court to enter a final order without a jury trial, was between an action that sought to augment the bankruptcy estate versus an action that seeks a pro rata share of the bankruptcy res (*i.e.*, the bankruptcy estate). *Direct Response*, 2012 Bankr. LEXIS 41, at * 21-22. The so-called "Broad Interpretation":

> argues that *Stern's* guidance on the bankruptcy courts' authority to enter final judgments is threefold: (1) the adjudication of a debtor's state law counterclaim against a defendant who had filed a proof of claim in the bankruptcy case, did not fall with the public rights exception; (2) the *Stern* Court reaffirmed the *Granfinanciera* Court's distinction between two types of actions that the estate might assert against a defendant; and (3) the Supreme Court held that actions which seek to augment the estate, which presumably would include avoidance actions, require adjudication by an Article III court because those legal actions seek through a monetary judgment to take the defendant's property and that adjudication can only be made by a member of the independent Article III judiciary.

*Id.* at *23-24. Thus, concluded Judge Gross, if he were to adopt the "Broad Interpretation" the Bankruptcy Court would not be able to make final adjudications of the avoidance claims at issue in that case (which included preference, state and federal law fraudulent transfer, and turnover counts as well as numerous state law counts) even though the defendant in that case filed proofs of claim because those actions sought to augment the estate. *Id.* at * 24-25. Instead, that Court would have had to issue a report and recommendation to the District Court which would make its own determination about whether a final judgment could be entered. *Id.* at *25.

Judge Gross then articulated the position taken by the "Narrow Interpretation" courts with regard to *Stern*. Relying on other language in *Stern*, these courts reason that the *Stern* holding specifically removed a debtor's state law counterclaim under 28 U.S.C. § 157(b)(2)(C), as a subset of core proceedings under section 157(b)(2), from the final adjudicatory power of the Bankruptcy Court. *Id.* at *26-27. To hold that *Stern* applied any more broadly would be contrary to the Supreme Court's emphasis on the narrowness of the opinion and its confirmation that such decision would not meaningfully change the division of labor between the Bankruptcy and District Courts. *Id.* at *27. Moreover, those espousing the "Narrow Interpretation" note that Justice Scalia, while issuing a concurrence in which he wrote that he "join[s]" in the Court's opinion, so clearly criticized the analysis employed by the Court that, arguably, it should be treated as an opinion concurring only in the result and, therefore, a majority of the Supreme Court did not adopt the expansive rationale used in the *Stern* decision and relied upon by proponents of the "Broad Interpretation." *See id.* at *29-33 (citing *Stern*, at 131 S.Ct. 2620-21).[2] Justice Scalia criticized the nebulous mutli-factored test used by the Supreme Court and reasoned that an Article III judge is required in all federal adjudications with some possible exceptions pertaining to certain adjudications by federal administrative agencies, federal adjudications with a firmly established historical precedent and perhaps also the processing of claims. *Id.* at *31-32 (citing and quoting *Stern*, at 131 S.Ct. 2621).

## THE JUDGES OF THE DELAWARE BANKRUPTCY COURT HAVE UNIFORMLY ADOPTED THE NARROW INTERPRETATION OF STERN

In *Direct Response*, Judge Gross, after explaining at length, the position asserted by the broad and narrow interpretation camps adopted the narrow view with respect to a motion to dismiss filed by the defendant on a complaint asserting, among other causes of action, preference claims, state and federal fraudulent transfer claims, a turnover action and various state law causes of action, including negligence, conversion, unjust enrichment and various corporate mismanagement claims. *Id.* at 8-11. The Court held that it had the authority to enter a final judgment on a preference or fraudulent conveyance claim. *Id.* at *33-35. In so holding, the Court noted that the "Broad Interpretation is based on a holding that the Supreme Court has never made, namely, that restructuring of the debtor-creditor relationship is not a public right, nor falls within any other exception that would permit a non-Article III court to finally adjudicate those matters." *Id.* at *33. Thus, the Court found that *Stern* only removed the Bankruptcy Court's power to enter a final order over one narrow type of core matter and, therefore, by extension, did not remove the authority of the Court to finally adjudicate other core matters such as preference and fraudulent conveyance claims. See i*d.* at *33-34.

Judge Gross relied heavily on Judge Sontchi's opinion in *In re USDigital, Inc.*, 461 B.R. 276 (Bankr. D. Del. 2011), *discussed infra*, in which that Court limited its

[2] Even if this assertion is correct, however, Justice Scalia appears to view the exclusive Article III power of District Courts even *more broadly* than did the *Stern* Court and, thus, it would seem to be difficult to use the Court's lack of unanimity in reasoning, or the analysis in Justice Scalia's concurrence, as a basis to bolster a *narrow* interpretation of *Stern*.

inquiry to two questions. First, whether the matter before it was a core matter on which it was granted the statutory authority to render a final judgment. *Id.* at *35. If the matter is non-core the court does not have the power to issue a final judgment. *Id.* Second, if the matter is core, then the court is required to determine, under *Stern*, whether it has the Constitutional authority to enter a final order. *Id.* As explained below, Judge Sontchi construed *Stern* narrowly – applying the decision only to state law counterclaims to a proof of claim - per what the *USDigital* Court found to be the Supreme Court's plain instructions. *Id.* at *37-40 (citing *USDigital).* Adopting the reasoning of *USDigital*, Judge Gross had little difficulty holding that, by statute, preference and fraudulent transfer claims are core matters and, moreover, such claims do not fall within the narrow exception identified in the *Stern* decision and, therefore, the Court had the authority to enter final orders with respect to such claims. *Id.* at *39-40.

In the *US Digital* case cited above, Judge Sontchi held that an equitable subordination claim was a core matter over which that Court had the power to issue a final judgment. *USDigital*, 461 B.R. 276.

In *US Digital*, Judge Sontchi analyzed separately whether a claim of equitable subordination was a statutory "core" proceeding and, if so, whether the Court had the Constitutional authority to enter a final judgment on such claim. In passing on the first issue (whether the matter was core), he reiterated the Supreme Court's analysis in *Stern* which found that core matters are those "arising in" or "arising under" title 11. *USDigital,* 461 B.R. at 283. By contrast, "related to" matters are by definition non-core matters on which the Bankruptcy Court has only the power to enter proposed findings of fact and conclusions of law. *USDigital*, 416 B.R. at 283. 28 U.S.C. § 157(b)(2), however, sets forth a non-exclusive list of matters that are core proceedings and, in this respect, the Court, relying on Third Circuit precedent, found that a matter that was not included in the list of enumerated core matters, could still qualify as a core matter if invoked a substantive right provided by title 11 or was a proceeding that, by its nature, could arise only in the context of bankruptcy. *See USDigital*, 416 B.R. at 284-85 (citing *Shubert v. Lucent Techs. (In re Winstar Communs., Inc.)*, 554 F.3d 382, 405 (3d Cir.). The Court found that equitable subordination, although not specifically enumerated as a core proceeding in section 157(b)(2), was nonetheless a statutory core claim because it is a substantive right provided by title 11 and is a unique creature of bankruptcy law. *USDigital*, 416 B.R. at 285.

The *USDigital* Court next examined whether the Court had the Constitutional authority to enter a final judgment on a claim of equitable subordination. The Court, like the *Direct Response* Court, articulated both the broad and narrow interpretations of the *Stern* decision. With regard to the broad construction, the Court noted that the Supreme Court used broad terms in its opinion such as "cause of action under common law," and "state common law claim," that, read in isolation would support an argument for a broad construction of the decision. *Id.* at 289-90. In the end, however, Judge Sontchi found that the Supreme Court "took back what it had appeared to have given and made it clear that its holding was a narrow one." *Id.* at 290. In support of this narrow construction, the Court relied on *Stern*'s various pronouncements including those regarding the narrow scope and limited holding of the opinion, the fact that the Supreme

Court believed that its opinion would not meaningfully change the division of labor between the District Courts and Bankruptcy Courts, and language in the opinion suggesting that the Constitutional problem the Court was facing was "slight." *Id.* at 290-91. Having concluded its analysis, the *USDigital* Court found that, because the equitable subordination claim at issue did not involve a state law counterclaim to a proof of claim, the holding in *Stern* was inapplicable. *Id.* at 291. Therefore, the Court held that it had the statutory and Constitutional authority to enter a final judgment on such claim. *See id.*

Judge Walsh has issued at least two decisions touching upon the issues raised by *Stern*. In the recent decision of *Zazzali v. 1031 Exchange Group (In re DBSI, Inc.)*, 2012 Bankr. LEXIS 1600 (Bankr. D. Del. 2012), certain defendants filed motions to dismiss adversary proceedings asserting among other claims, certain preference, state and federal law fraudulent transfer claims, post-petition avoidance claims, the disallowance of claims under section 502(d) of the Bankruptcy Code, an unjust enrichment and federal securities law claims. The basis of the motions was that the Bankruptcy Court lacked the authority to enter final judgments in those proceedings. *DBSI*, 2012 Bankr. LEXIS 1600, at *11. Judge Walsh, however, found that "Movants both misinterpret Stern's narrow holding and do not acknowledge the distinction between the bankruptcy court's ability to hear a proceeding and to adjudicate such proceeding." *Id.*

After discussing the factual background of *Stern*, Judge Walsh highlighted the general positions of the narrow and broad interpretation camps and stated that he agreed with his Delaware colleagues that "*Stern's* holding should be narrowly read and thus restricted to the case of a "state-law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Id.* at *15. He also noted that many other recent decisions outside of Delaware agree with the narrow interpretation (although one of the decisions cited by Judge Walsh – the Bankruptcy Court's decision in *Kirschner v. Agolia (In re Refco, Inc.)*, 461 B.R. 181 (Bankr. S.D. N.Y. 2011) – has since been reversed). Consequently, like Judge Sontchi, he found that *Stern* did not apply because it did not relate to state law counterclaims. *Id.* at *17. Thus, he found that he had the authority to issue a final judgment on the core preference, post-petition transfer, fraudulent transfer and unjust enrichment claims and could only issue proposed findings of fact and conclusions of law on the non-core claims. *Id.*

Judge Walsh next addressed the movants' argument that the Court did not have the statutory authority to submit proposed findings of fact and conclusions of law on matters which were "core" but upon which it is barred, by Article III of the Constitution, from issuing a final judgment. *See id.* at 19. The movants based this argument on the language of 28 U.S.C. § 157(c) which provides that a bankruptcy judge may hear, and enter proposed findings of fact and conclusions of law, in a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. *See* 28 U.S.C. § 157(c). In sum, movants were arguing that the statute makes no provision for a court to issue proposed findings of fact and conclusions of law on a matter which is core but for which, under *Stern*, it is deprived of the Constitutional authority to issue a final judgment. *See id.* at *20-21. Putting aside the fact that he concluded that he *did* have the Constitutional authority to finally adjudicate the core issues raised in this case, he rejected the argument

because it suggested that the Bankruptcy Court did not have the jurisdiction to hear certain matters (whether core or non-core) and the Supreme Court viewed the statutory provisions regarding core and non-core matters as merely allocating authority between the Bankruptcy and District Courts to enter a final judgment, not as affecting the underlying jurisdiction of those courts. *Id.* (citing *Stern*, 131 S.Ct. at 2607). Therefore, according to the Court, the *Stern* majority opinion "strongly suggests" that core proceedings for which the Bankruptcy Court does not have the power to issue a final judgment are to be treated as "related to" proceedings over which the Bankruptcy Court has the power to issue proposed findings of fact and conclusions of law. *Id.* at *20-21. Indeed, the Court agreed that it would be absurd to conclude that a Bankruptcy Court lacked jurisdiction to hear a matter designated as core, for Article III reasons, when Congress gave such Courts the power to issue proposed findings and conclusions in non-core matters. *Id.* at 22. Rather, in such instances, these statutorily misidentified core claims are to be treated as "related to" claims over which the court has jurisdiction and can issue proposed findings of fact and conclusions of law. *Id.*

Finally, after disposing of the movants' judicial efficiency arguments, the Court noted that the determination of whether the Court had the authority to enter a final order was rendered academic by the Amended Standing Order of Reference by the United States District Court for the District of Delaware. The existing standing order was amended to add the following:

> If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

*Id.* at 25-26 (quoting Amended Standing Order of Reference, dated Feb. 29, 2012). Thus, noted the Court, the effect of this order is that "the District Court can treat any order issued by this Court as a recommendation if it later determines that Article III precluded me from entering a final judgment." *Id.* at 26.

Judge Walsh's view that *Stern* is <u>not</u> a decision that impacts upon the Bankruptcy Court's subject matter jurisdiction was first set forth in *Liquidating Trustee of the MPC Liquidating Trust v. Granite Financial Solutions, Inc.*, 465 B.R. 384 (Bankr. D. Del. 2012). In that case, the plaintiff, a liquidating trustee, filed a complaint against the defendant for breach of contract and unjust enrichment for failure to pay for goods shipped before the bankruptcy petitions were filed. The defendant moved to dismiss the adversary proceeding on the ground that the Bankruptcy Court lacked subject matter jurisdiction to hear the matter.

One of the jurisdictional arguments made by the plaintiff in *MPC* was that the Bankruptcy Court lacked jurisdiction because, for it to enter judgment would be a so-called unconstitutional exercise of judicial power over state law claims. *Id.* at 388. The court opined, however, that *Stern* merely addressed the narrow issues of whether a state law counterclaim constituted a core matter and, if so, whether the Bankruptcy Court had the Constitutional authority to enter a final judgment on such claim. *Id.* As the Court pointed out, however, even where the matter is one over which a court cannot enter a final judgment, a Bankruptcy Court still has the *jurisdictional* authority to enter proposed findings of fact and conclusions of law. *Id.* at 389. Thus, the Court's authority to enter final judgments and the jurisdiction to hear matters are two entirely separate questions and *Stern* did not deprive the Court of subject matter jurisdiction over the instant dispute. *See id.* at 389-90.

In *In re Washington Mutual, Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011), Judge Walrath decided whether, under *Stern*, the Court had the requisite authority to enter a final order on the confirmation of a chapter 11 plan and, in particular, the authority to approve a so-called Global Settlement Agreement (the "GSA") pursuant to the plan that would resolve certain causes of action against JPMorgan Chase Bank, N.A. ("JPMC") and the FDIC.

Certain objectors to the plan contended that because the Bankruptcy Court did not have the jurisdiction over the estate's causes of action against JPMC and the FDIC, which allegedly consisted of the "stuff" of classic English common law claims that must be decided by Article III courts, it likewise did not have the jurisdiction to approve a settlement of those claims. *See id.* at 213-14. Supporters of the plan pointed to those aspects of the *Stern* decision in which the Supreme Court emphasized the narrowness of its opinion. *Id.* at 214.

In determining the proper analytical framework to review the question before it, the Bankruptcy Court observed that the Supreme Court commanded that courts should look to whether the action at issued stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. *See id.* (quoting *Stern*, 131 S.Ct. at 2618). Likewise, the Court observed that Justice Scalia's concurrence in *Stern* suggested that "where there is 'a firmly established historical practice' allowing non-Article III judges to make a determination, they should be permitted to continue doing so." *Washington Mutual*, 461 B.R. at 214 (quoting Justice Scalia's concurrence in *Stern*, 131 S.Ct. at 2621).

In terms of the historical practice, the Bankruptcy Court observed that there has been a long historical precedent permitting bankruptcy judges to settle matters in bankruptcy cases. Current Federal Rule of Bankruptcy Procedure 9019 authorizes the court to approve settlements in cases under the Bankruptcy Code and is the successor to Bankruptcy Rule 919 which authorized courts to approve settlements pursuant to section 27 of the former Bankruptcy Act. *Id.* at 214-15. Thus, Judge Walrath found that "[c]ompromises were routinely approved under the Bankruptcy Act and continue to be approved by bankruptcy courts in the context of almost every bankruptcy case." *Id.* at 215. These settlements are often incorporated into a plan of reorganization. *Id.*

Furthermore, the Court stated that there is a critical fundamental distinction between approving a settlement and entering a final order on the underlying claims themselves. *See id.* Therefore, a court need not have jurisdiction over the underlying claim in order to have the authority to approve a compromise of such claim. *See id.* at 216 (citing *Masushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996)). In addition, the standard that the Bankruptcy Court uses to approve settlements (*i.e.* the lenient "range of reasonableness" standard) established that the court was not, by approving the settlement, entering a final decision on the merits. *Washington Mutual*, 461 B.R. at 216.

Finally, the Bankruptcy Court reasoned that the underlying claims settled by the GSA were particularly within the court's core jurisdiction. *Id.* at 216-17. Specifically, the GSA settled claims as to who owned property of the bankruptcy estate and it is clear that the Bankruptcy Court exercises exclusive jurisdiction over all of the debtor's property, which includes the jurisdiction to decide whether disputed property is property of the bankruptcy estate. *Id.* at 217.

Consequently, Judge Walrath held that the Bankruptcy Court had the jurisdiction to decide the confirmation of the modified plan before it, including the GSA. *Id.*[3]

## ***STERN V. MARSHALL* – WHERE IS THE REST OF THE COUNTRY?**

## CASES ADOPTING THE BROAD INTERPRETATION OF *STERN*

- **Southern District of New York**
-
    - Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, 462 B.R. 457 (S.D.N.Y. 2011)
        - **Background:** Pre-Stern, plan administrator of bankrupt law firm brought thirteen separate New York state partnership, contract, and fraudulent conveyance claims against ten law firms employing debtor's former partners for profits generated from "unfinished business" the former partners took with them. After Stern was issued, the defendants filed a motion to withdraw the reference, and requesting the District Court either to abstain from hearing the "unfinished business" claims in favor of the New York state courts or to review the merits of the Bankruptcy Court's ruling permitting the claims to proceed.
        - **Holding:** Because the proceedings were premised on state law, the rights existed prior to and independent of any bankruptcy proceedings. Thus, the Bankruptcy Court lacked the ability to finally rule on the claims.

[3] When it used the term "jurisdiction" it appears that the Bankruptcy Court meant that it had the authority to enter a final judgment on the confirmation of the plan rather than merely entering proposed findings of fact and conclusions of law.

proposed findings of fact and conclusions of law; thus, withdrawal of the reference was not warranted.

- "Having concluded that the bankruptcy court cannot enter a final judgment on a fraudulent conveyance action, the question remains whether the Court is required to withdraw the reference, or, if not required, exercise its discretion to do so."

- **Northern District of Texas**

  - In re Am. Hous. Found., 09-20232-RLJ-11, 2012 WL 443967 (Bankr. N.D. Tex. Feb. 10, 2012)
    - **Background:** Ninety-six defendants filed motions to dismiss fraudulent transfer actions based on substantive federal and state law, the majority of whom did not file proofs of claim or consent to the Bankruptcy Court's jurisdiction.
    - **Holding:** Stern does not require dismissal of the fraudulent transfer and preference claims. The court was still permitted to hear cases and issue proposed findings of fact and conclusions of law, even if the Bankruptcy Court assumed it was not able to issue final rulings on them.
      - "The Court appreciates the quandary raised by Stern. Preference and fraudulent transfer actions are labeled as core proceedings under § 157(b)(2)(F) and (H), respectively; they arise under or in the Bankruptcy Code and thus satisfy Stern's definition of a core proceeding. Even if they were not "arising" matters, they certainly would be related to the bankruptcy case. In either event, the Court, at least arguably, cannot decide these suits because doing so would constitute an unconstitutional exercise of authority improperly conferred on this Court, and all bankruptcy courts, by Congress."

- **Northern District of Illinois**

  - In re Canopy Financial, Inc., 2011 WL 3911082 (N.D. Ill. Sept. 1, 2011)
    - **Background:** Chapter 7 trustee filed multi-count complaint for avoidance and recovery of fraudulent transfers pursuant to 548 and 550 as well as Illinois state law; trustee also included a count for unjust enrichment under Illinois state law. Defendant sought to withdraw the reference, arguing that the reference violated Article III.
    - **Holding:** Stern made clear that the Bankruptcy Court lacks constitutional authority to enter final judgment on the claims; however, it did not strip the bankruptcy court of the authority to hear the trustee's claims and to propose findings of fact and conclusions of law on those claims to this court. Therefore, the Court held that the movant failed to show cause for withdrawing the reference.

- **Western District of Michigan**

- In re Sutton, HG 10-13202, 2012 WL 1605591 (Bankr. W.D. Mich. Apr. 27, 2012)
  - **Background:** Trustee sued to recover sums allegedly owing on open account, and question arose regarding the Bankruptcy Court's authority to enter money judgment in trustee's favor when alleged account obligor defaulted in responding to trustee's complaint.
  - **Holdings:** The Bankruptcy Court held that it (1) did not have constitutional authority, as an Article I court, to enter money judgment in favor of trustee; (2) individual allegedly indebted to debtor on open account did not consent to entry of money judgment against him simply by failing to respond to trustee's turnover complaint
    - "...Stern's implications are much broader—that the due process concerns it raised requires that the remainder of what 28 U.S.C. § 157(b)(2) delineates as a bankruptcy judge's core authority must also be tested."

- In re Teleservices Group, Inc., 456 B.R. 318 (Bankr. W.D. Mich. 2011)
  - **Background:** Trustee sought to hold defendant liable under bankruptcy statute governing liability of transferees of avoided transfers, and defendant objected that court was without constitutional authority to enter multimillion judgment against it.
  - **Holding:** The Bankruptcy Court held that as a non-Article III court, it lacked constitutional authority to enter multimillion dollar judgment against transferee on avoided transfer except with parties' consent.
    - Bankruptcy court could not adjudicate the debtor's fraudulent conveyance proceeding against a bank because "only an Article III judge can enter a judgment associated with the estate's recovery of contract and tort claims to augment the estate." That fact does not change "by making the recovery part of the claims allowance process." Regardless of whether or not the defendant filed a proof of claim against the estate to make the recovery part of the claims allowance process, actions or defenses based on state law or federal avoidance actions, cannot be adjudicated to a final order by a non-Article III judge "if the relief sought by the estate included the involuntary recovery of property from a third party" for purposes of augmenting the estate.

- **Middle District of North Carolina**

  - In re Se. Materials, Inc., 467 B.R. 337 (Bankr. M.D.N.C. 2012)
    - **Background:** Chapter 7 trustee brought fraudulent transfer adversary proceeding (under bankruptcy statute and strong-arm powers pursuant to state law) against debtor's officers and employees who filed a proof of claim, as well as against officer's closely held corporation, and controversy arose over whether court could enter final decision on trustee's claims without parties' consent.

- **Holding:** Court could finally resolve actions against defendants who filed a proof of claim, but the court could not finally resolve actions against defendants who had not filed a proof of claim
    - "Thus, fraudulent conveyance actions under Section 544(b) and Section 548 do not "stem from the Bankruptcy Code" in the context of applying the second prong of the Stern test. Bankruptcy courts may not enter final orders in fraudulent conveyance actions, at least where the defendant has not filed a proof of claim."

## CASES ADOPTING THE NARROW INTERPRETATION OF *STERN*

- **Southern District of New York**

  - Fox v. Picard (In re Madoff),–F.Supp.2d–, Nos. 10 Civ. 4652(JGK), 10 Civ. 7101(JGK), 10 Civ. 7219(JGK), 11 Civ. 1298(JGK), 11 Civ. 1328(JGK), 2012 WL 990829 (S.D.N.Y. Mar. 26, 2012)
    - **Background**: Bankruptcy appellants filed state law actions against a Madoff co-conspirator in Florida that the Bankruptcy Court declared void for violating the automatic stay. The Florida actions were duplicative of the fraudulent transfer actions brought by the Trustee in the New York bankruptcy case. After the appellate hearing, the appellants sent a letter to the District Court claiming that the Bankruptcy Court lacked authority to enter a final judgment due to Stern.
    - **Holding:** The Court found the apellants' argument unpersuasive.
      - "[Appellant] points to no language in Stern that can reasonably be interpreted as holding that the power explicitly accorded by Congress to the bankruptcy courts to enter judgment in fraudulent transfer actions ... violates Article III of the United States Constitution. The specific issue in Stern was the constitutional authority for a bankruptcy court to enter judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.... The adjudication of fraudulent transfer and avoidance actions is a basic feature of that division of labor."

- **Middle District of Florida**

  - In re Safety Harbor Resort and Spa, 456 B.R. 703 (Bankr. M.D. Fla. 2011)
    - **Background:** Creditor enjoined from pursuing non-debtor guarantors of debtor's debt while it received plan distributions requested restrictions be put in place to prevent the guarantors from disposing of assets. Guarantor objected on the grounds that the court lacked subject matter jurisdiction to impose such restrictions.
    - **Holding:** Objection overruled. The matter was core; moreover, Stern does not preclude bankruptcy courts from adjudicating core claims; rather that it was a "narrow" holding that Congress exceeded the limits of Article III in "one isolated respect".

- **Northern District of Illinois**

  - In re Olde Prairie Block Owner, LLC, No. 10 B 22668, 457 B.R. 692 (Bankr. N.D. Ill. 2011)
    - **Background:** Prepetition lender filed a proof of claim asserting a secured claim for unpaid amounts due under a loan contract. The Debtor objected and filed five counterclaims, based on (I) economic duress, (II) tortious

interference, (III) breach of contractual duty of good faith, (IV) breach of an extracontractual fiduciary duty, and (V) negligence.

- **Holding:** Stern has a "narrow effect".
  - "Counts I and III of [the] Counterclaim . . . are core proceedings under statute and are not limited by Stern, both because they are necessarily resolved in ruling on [creditor]'s claim and because the parties consented to final judgment. While Counts II, IV, and V of Debtor's Counterclaim are statutorily core, under Stern they must be treated as non-core proceedings. They do relate to Debtor's bankruptcy case . . . and both Debtor and [creditor] expressly consented to final adjudication of those and the other Counts by a Bankruptcy Judge."

- **Southern District of Florida**

  - In re Custom Contractors, LLC, 462 B.R. 901 (Bankr. S.D. Fla. 2011)
    - **Background:** Federal government objected to the Bankruptcy Court treating a chapter 7 trustee's 544, 548, 550, and Florida-based fraudulent transfer claim as a core proceeding with the power to enter final judgment.
    - **Holding:** Objection overruled. The trustee's claims were creatures of the bankruptcy code, and the analysis did not change just because 544 authorizes a trustee to avoid a transfer that could be recovered under state law by an actual creditor of the debtor. Even if were to be determined that the proceeding involved non-core claims that are merely related to the bankruptcy, the court may still enter final orders because the government explicitly and impliedly consented to final resolution of these claims.
      - "It is incumbent upon this Court to apply Stern's holding recognizing, as the Supreme Court stated, that the question presented in Stern was a "narrow" one."
      - "This Court's job is not to extend Stern to fraudulent transfer actions based on Supreme Court dicta, and in so doing, upend the division of labor between district and bankruptcy courts that has been in effect for nearly thirty years."
      - "The Stern Court did not directly address the authority of bankruptcy courts to enter final orders in fraudulent conveyance actions and explicitly intended its decision to be read narrowly."

*Exhibit 3*

**5/15/12 DBIC *Stern v. Marshall* Presentation:**

**Arguments and Practice Pointers Related to *Stern* Derived from Recent Delaware Decisions**

- Authority to Consider in Crafting Your *Stern* Argument:
  - Delaware District Court's *Amended Standing Order of Reference*, dated February 29, 2012;
  - 28 U.S.C. § 157(b)(2) – defines core proceedings;
  - 28 U.S.C. § 157(c)(1) – procedure for non-core "related to" matters; and
  - 28 U.S.C. § 157(d) – withdrawal of the reference.
- Unique Contexts in which *Stern*-based Arguments have been Made:
  - **Plan Objection** -- *i.e.*, a creditor objects to a proposed Chapter 11 Plan and in particular to the proposed settlement of certain state law causes of action contained within the Plan. The creditor argues the Bankruptcy Court lacks jurisdiction to enter a final judgment on the merits of state law claims settled pursuant to the Plan, so the Bankruptcy Court lacks jurisdiction to approve the Plan as well. Judge Walrath addressed this argument in Washington Mutual. Specifically, while the Bankruptcy Court disputed whether it lacked jurisdiction over the settled claims at issue (because the claims involved property of the estate), it nonetheless determined that it can approve the settlement even if it is the settlement of litigation for which it could not enter a final judgment. *In re Washington Mutual, Inc.* 461 B.R. 200. 213-17 (Bankr. D. Del. 2011) (Walrath, J.). The objection was overruled.
  - **Motion for Remand** -- Plaintiff in an existing Chancery Court action files a proof of claim in the California bankruptcy case initiated by the defendant in the Delaware Chancery Court action. The proof of claim asserts the same rights the Plaintiff was seeking to enforce in the Delaware Chancery Court action. After the Debtor-defendant removed the Delaware Chancery Court Action to Delaware District Court, the Delaware District Court is required to determine whether the matter should either be (a) transferred to California and resolved in connection with the bankruptcy case or (b) remanded to Delaware Chancery Court for a final determination in state court. Plaintiff argues that where the same substantive issue is before a state court and a bankruptcy court, the state court process should be favored because the bankruptcy court lacks jurisdiction to enter a final order. The Delaware District Court decides that if resolution of the proof of claim would resolve all of the state court action, there is no argument under *Stern* to favor the state court action. *Kurz v. Emak Worldwide, Inc.*, 464 B.R. 635, 645 n.6 (Bankr.

D. Del. 2011) (Hillman, J.) The motion to transfer was granted and the motion to remand was denied. *Id.* at 18.

- Subject Matter Jurisdiction of Bankruptcy Court to Hear State Law Claims: If a party challenges the Bankruptcy Court's subject matter jurisdiction to hear state law claims, you have a ready response. The Delaware Bankruptcy Court has determined that *Stern* does not cover "subject matter jurisdiction" under 28 U.S.C. § 157. *See, e.g., In re MPC Computers, LLC,* 465 B.R. 384, 389 (Bankr. D. Del. Feb. 7, 2012) (Walsh, J.) ("[t]he question pondered by the Supreme Court in *Stern,* whether the bankruptcy judge had the power to enter a final judgment in a state law counterclaim by the estate, is entirely separate from the question of whether a bankruptcy judge has jurisdiction to hear a matter without entering a final judgment.") A Bankruptcy Court can still hear such a proceeding and issue proposed findings of fact and conclusions of law because *Stern* has no impact on a bankruptcy court's subject matter jurisdiction under 28 U.S.C. §§ 1334 and 157(a). *See Zazzali v. 1031 Exchange Group. (In re DBSI, Inc.),* 2012 WL 1242305, at *4-5 (Bankr. D. Del. April 12, 2012) (Walsh, J.).

- Forum Shopping by Filing Motions to Withdraw the Reference in Light of *Stern* where Adversary Proceedings Involve State Law Claims: If a party seeks to withdraw the reference to challenge the Bankruptcy Court's ability to hear matters defined as "core" under 28 U.S.C. § 157(b)(2) because the Bankruptcy Court may not constitutionally make a final determination (*i.e.*, issue a final order or judgment), look to the Delaware District Court's *Amended Standing Order of Reference*, dated February 29, 2012 that allows for the Bankruptcy Court to continue to hear core matters and the bankruptcy court can reach a decision as to whether it has the power to issue a final order. If the Delaware District Court later determines that the Bankruptcy Court lacked the constitutional authority to enter a final order then the District Court can treat the order/judgment as proposed findings of fact and conclusions of law (*i.e.*, subject to *de novo* review).

- Bankruptcy Court's Constitutional Authority to Enter Final Orders in Fraudulent Conveyance/Preference Actions: If a party argues that the Bankruptcy Court does not have the constitutional authority to enter final judgments covering avoidance actions brought to augment the estate, the Delaware Bankruptcy Courts have provided you with a response. Specifically, the Delaware Bankruptcy Courts have determined that they can enter final judgments that cover state law claims, including fraudulent transfer and preference actions. *See, e.g., In re Direct Response Media, Inc.,* 466 B.R. 626, 638-646 (Bankr D. Del. 2012) (Gross, J.) (adopting the narrow interpretation of *Stern* and holding "that Stern only removed a non-Article III court's authority to finally adjudicate one type of core matter, a debtor's state law counterclaim asserted under § 157(b)(2)(C)"); *see also In re American Bus. Fin. Services, Inc.,* 457 B.R. 314, 319-20 (Bankr. D. Del. 2011) (Walrath, J.) (In action challenging post-petition conduct, court commented that *Stern* was of no impact as its holding was narrow and the claims arose after the bankruptcy and would not exist but for the bankruptcy).

- Stipulating that a Proceeding is Core: The Delaware Bankruptcy Court has acknowledged that it is unclear whether parties may stipulate that a matter is a core proceeding. *Burtch v. Huston, et al. (In re USDIGITAL),* 461 B.R. 276, 279 (Bankr. D. Del. 2011) (Sontchi, J.). Thus, even if the parties to a dispute are willing to stipulate that a matter is core for the purpose of obtaining a final order from a bankruptcy judge, this strategy may not be viable. Also importantly, simply stipulating that a matter is core also will not insulate the parties from a determination under *Stern* that a bankruptcy court lacks sufficient judicial power to enter a final order. *Id.*

- Determining if a Proceeding is Core after *Stern*: In determining what qualifies as a core proceeding beyond the categories enumerated in 28 U.S.C. § 157(b)(2), the Delaware Bankruptcy Court may look to the two-part second prong of the Third Circuit's test for determining whether a claim is a core proceeding, even though the first prong of the same test which looks to whether the claim falls into the enumerated categories in 28 U.S.C. § 157(b)(2) has likely been overturned by *Stern*. *See Burtch v. Huston, et al. (In re USDIGITAL),* 461 B.R. 276, 284-85 (Bankr. D. Del. 2011) (Sontchi, J.). This two-part second prong of the test provides that 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." *Id.* at 285 *citing Shubert v. Lucent Techs. (In re Winstar Communs., Inc.),* 554 F.3d 382, 405 (3d Cir. 2009).

- Equitable Subordination Claims: A claim for equitable subordination has been found to satisfy the *Lucent* test described above and thus, is a core proceeding. *See Burtch v. Huston, et al. (In re USDIGITAL),* 461 B.R. 276, 285 (Bankr. D. Del. 2011) (Sontchi, J.).

- Division of Labor between the Delaware Bankruptcy Court and Delaware District Court: The Delaware Bankruptcy Court makes the point that the United States Supreme Court would have never contemplated that its holding would transform all state common law claims from core under 28 U.S.C. § 157(b) to non-core under the Constitution while also stating its ruling would not meaningfully change the division of labor between the bankruptcy courts and district courts. *See Burtch v. Huston, et al. (In re USDIGITAL),* 461 B.R. 276, 290 (Bankr. D. Del. 2011) (Sontchi, J.) This may suggest that in disputes over whether *Stern* is implicated, policy arguments examining the division of labor between the two courts might be effective. Consider the type of claim you are dealing with, and if the Delaware Bankruptcy Court has traditionally handled the type of claim in large volume prior to *Stern,* thus unburdening the Delaware District Court.

- Effect of *Stern* on other "Judicial Authority" Cases: The Delaware Bankruptcy Court has stated that other United States Supreme Court cases relating to whether a bankruptcy court has judicial authority to enter final orders in certain matters (*i.e., Northern Pipeline, Contsr. Co. v. Marathon Pipe Line Co., Ganfinanciera, S.A. v. Nordberg, Katchen v. Landy*, and *Langenkamp v. Culp* (citations omitted)) are not inapplicable because of *Stern*. Rather, *Stern* is just the most recent and broadest iteration of the Supreme Court's jurisprudence relating to judicial authority and was the most relevant to the issue before the Court in the particular case at bar. Inasmuch, in general, potential arguments based upon these other cases should not be abandoned simply because of

*Stern. See Burtch v. Huston, et al. (In re USDIGITAL),* 461 B.R. 276, 280 n. 17 (Bankr. D. Del. 2011) (Sontchi, J.)

- 11 U.S.C. § 544 Actions vs. 11 U.S.C. § 548 Actions: The Delaware Bankruptcy Court has made the point that *Stern* distinguishes state law counterclaims that exist without regard to bankruptcy proceeding under federal law from those actions that "flow from a federal statutory scheme" and are "completely dependent upon adjudication of a claim created by federal law" and thus can be adjudicated by non-Article III courts. *Zazzali v. 1031 Exchange Group. (In re DBSI, Inc.),* 2012 WL 1242305, at *6 n.9 (Bankr. D. Del. April 12, 2012) (Walsh, J.). Even more pointedly, the Delaware Bankruptcy Court has noted that the *Stern* court framed the question as "whether the action at issue *stems from the bankruptcy itself* or would necessarily be resolved in the claims allowance process", as is the case with a preference action. *Id.* From this, the Delaware Bankruptcy Court has concluded that fraudulent transfer at actions under § 548, which are expressly created by the Bankruptcy Code – and even actions under § 544, which creates the right for *the trustee* to step into the shoes of a creditor and pursue state law claims – do in fact "stem from the bankruptcy itself", similar to a preference action. *Id.*

*Exhibit 4*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In the Matter Of: | ) | |
| | ) | |
| STANDING ORDER OF REFERENCE RE: TITLE 11 | ) | **AMENDED STANDING ORDER OF REFERENCE** |
| | ) | |

Pursuant to 28 U.S.C. Section 157(a), any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 are referred to the bankruptcy judges for this district.

If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

SO ORDERED.

Gregory M. Sleet,
Chief Judge

Dated: Wilmington, Delaware
February 29, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



12 MISC 00032

In the Matter of:

Standing Order of Reference
Re: Title 11

AMENDED
STANDING ORDER
OF REFERENCE

M10-468

Pursuant to 28 U.S.C. Section 157(a) any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 are referred to the bankruptcy judges for this district.

If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

SO ORDERED.

Loretta A. Preska

Loretta A. Preska
Chief Judge

Dated: New York, New York
January 31, 2012

g:\bankruptcy\standing-bankruptcy amendment to Act 1984 re Title 11 - jan 2012.wpd

*Exhibit 5*

## Amendment of Delaware's Standing Reference Order to the Bankruptcy Court

*By: Patrick A. Jackson, Young Conaway Stargatt & Taylor, LLP*

28 U.S.C. § 157(a) permits the district courts to refer most matters falling within their bankruptcy jurisdiction under 28 U.S.C. § 1334 to the bankruptcy courts. (The lone statutory exception being trials of personal injury tort and wrongful death claims, which must proceed at the district court level per § 157(b)(5).) Section 157(b) provides that the bankruptcy court may "hear and determine" (*translation*: enter a final order or judgment upon) all proceedings designated as "core," examples of which are provided in subsection (b)(2). With respect to non-core proceedings, the bankruptcy court may only "submit proposed findings of fact and conclusions of law to the district court," which will then enter the final order or judgment.

This core/non-core dichotomy was adopted by Congress as an attempt to cure the Constitutional defect in the 1978 Code's jurisdictional scheme that was the subject of the Supreme Court's *Marathon* decision. And for about 26 years (a temporal "marathon," as it were)[1] Congress's cure seemed to work. *Stern v. Marshall*, however, proved definitively that a matter that is "core" within the meaning of § 157 may nonetheless be "non-core" for Article III purposes. Thus, post-*Stern*, "statutory core-ness" is a necessary, but not a sufficient, condition for entry of a final order by the bankruptcy court in a particular matter. To support entry of a final order by the bankruptcy court, the matter must be "constitutionally core" as well.[2]

When the Supreme Court issued *Marathon*, it stayed the effectiveness of the decision for some time to give Congress time to work on a solution that would prevent the total collapse of the bankruptcy system. *Stern*, by contrast, was effective immediately. And while the practical effects of *Stern* may not have not been as severe as the dissenting Justices had predicted, some mayhem has certainly ensued. *Samson v. Blixseth (In re Blixseth)*[3] is illustrative. Confronted with counts of an adversary complaint it concluded were statutorily but not constitutionally core, the bankruptcy court in *Blixseth* found itself in a jurisdictional bind and punted to the district court, reasoning as follows:

> Unlike 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. While 28 U.S.C. § 157(c)(1) allows a bankruptcy judge to render findings and conclusions in "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11," no other code provision allows bankruptcy judges to do the same in core proceedings. Similarly, no provision allows parties to consent to a bankruptcy court making final decisions in core

---

[1] A marathon is a foot race covering approximately 26 miles. The effective date of the Bankruptcy Amendments and Federal Judgeship Act of 1984, enacted in response to *Marathon*, was July 10, 1984. *Stern v. Marshall* was decided approximately on June 23, 2011, approximately 26 years later. Coincidence? (Yes, entirely.)

[2] As used herein, "constitutionally core" means that entry of a final order by the Bankruptcy Court with respect to the matter would be consistent with Article III of the United States Constitution. (Anecdotally, I have heard "constitutionally core" matters referred to as "hard core" bankruptcy, which dovetails nicely with the Supreme Court's apparent "we-know-it-when-we-see-it" approach to determining when a matter is out of bounds jurisdictionally.)

[3] Case No. 09-60452-7, 2011 Bankr. LEXIS 2953 (Bankr. D. Mont. Aug. 1, 2011), *reconsideration denied, amended by* 463 B.R. 896 (2012).

> proceedings as 28 U.S.C. § 157(c)(2) allows parties to consent for non-core proceedings. The code provides only that "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. § 157(b)(1). Since this Court may not constitutionally hear the [counts] as a core proceeding, and this Court does not have statutory authority to hear it as a non-core proceeding, it may in no case hear the [counts]. Therefore, this Court grants the parties fourteen days in which to move the District Court to withdraw its reference, in whole or in part, pursuant to 28 U.S.C. § 157(e), or else it will dismiss the [counts] for lack of subject matter jurisdiction.[4]

The *Blixseth* court later retreated from this ruling after further consideration of *Stern*.[5] However, absent guidance from the appellate courts, *Stern*-based motions to dismiss, or for reconsideration, or for withdrawal of the reference proliferated.

On February 2, 2012, the United States District Court for the Southern District of New York took a stand against the insanity, and revised its standing order referring matters to the bankruptcy court to include the following paragraph:

> If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

The revised standing order essentially codified the result in *Retired Partners of Coudert Brothers Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP)*.[6] Confronted with an appeal from a judgment in an adversary proceeding it concluded was statutorily but not constitutionally core, the district court in *Coudert Brothers* found itself in a "procedural morass" and crafted a practical solution, reasoning as follows:

> Having reached the conclusions I reach [regarding the bankruptcy court's inability to enter a final order consistent with Article III of the United States Constitution], I cannot consider the [plaintiff's] appeal on the merits, but must simply vacate the order of the Bankruptcy Court.

---

[4] *Id.* at *34-36.
[5] *Blixseth*, 463 B.R. at 907.
[6] App. Case No. 11-2785 (CM), 2011 U.S. Dist. LEXIS 110425 (S.D.N.Y. Sept. 22, 2011).

> However, there is no reason not to treat what Judge Drain thought was a "final" determination dismissing the Claims as a report and recommendation of dismissal, which I will review de novo. The [plaintiff's] "appellate brief["] will be deemed a set of objections to the report and recommendation. The [defendants] will have an opportunity to file an opposition to those objections, and the [plaintiff] to file a reply.
>
> This course of proceeding has several benefits. First, it conforms to the expectations of the parties; because the [plaintiff] "appeals" from a motion to dismiss, the Court would have reviewed Judge Drain's legal conclusions *de novo* in any event. But treating the findings below as mere recommendations subject to *de novo* review here also preserves as far as possible the division of labor intended by the 1984 Act. As discussed, the intent behind that Act is clear: Congress wanted Bankruptcy Judges to finally adjudicate bankruptcy-related matters whenever Article III permitted them to do so, and to issue recommended findings subject to de novo review in the District Court whenever it did not. Having concluded that the Bankruptcy Court in this case could not finally determine the Claims, this Court should effectuate the scheme as far as possible by treating the "final" conclusions as recommendations, and subject them to *de novo* review.[7]

The United States District Court for the District of Delaware followed suit on February 29, 2012, issuing its own revised standing order with the same language as the Southern District of New York's order. While it remains to be seen empirically whether the revised orders have resulted in less *Stern*-inspired procedural mayhem, anecdotally, it seems the orders have had a calming effect and returned the bankruptcy bench and bar, to the extent possible, to the *status quo* pre-*Stern*.

---

[7] *Id.* at *36-37.

*Exhibit 6*

**Proposed "Best Practices" Jurisdictional Statement for Pleadings in Bankr. D. Del.**

*By: Patrick A. Jackson, Young Conaway Stargatt & Taylor, LLP*

**TYPICAL JURISDICTIONAL STATEMENT:**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b).

**REVISED JURISDICTIONAL STATEMENT:**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 157, and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware* dated as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b) and the Court may enter a final order consistent with Article III of the United States Constitution.

**NOTES:**

(1) Any jurisdictional statement that does not reference the standing order is, strictly speaking, incomplete. There is no *bankruptcy court* jurisdiction in the absence of the order. Also, in order of analytical priority, the sources of bankruptcy court jurisdiction begin with § 1334 (not § 157). To wit, § 1334 defines the scope of federal bankruptcy jurisdiction (which resides, in the first instance, in the district courts), as distinct from other types of federal jurisdiction (*e.g.*, diversity or federal question). Section 157, in turn, defines the scope of this bankruptcy jurisdiction that the district court is *statutorily* authorized to delegate to the bankruptcy court (which expressly does not include, *e.g.*, jurisdiction to liquidate personal injury tort claims). The standing order, in turn, defines the scope of bankruptcy jurisdiction that the district court has *actually* authorized the bankruptcy court to exercise. *Stern* revealed that there is a disconnect between what § 157 purports to authorize the district court to delegate to the bankruptcy court, on the one hand, and what Article III actually permits to be delegated, on the other hand. The revised standing order attempts to fix this (its efficacy remains to be seen) by clarifying that the bankruptcy court is only delegated jurisdiction in a manner consistent with Article III. In sum, § 1334, § 157, *and* the standing order are all necessary components of the bankruptcy court's jurisdiction, and they always have been.

(2) The purpose of stating whether a matter is core or non-core is to alert the court and the other parties as to whether one believes the bankruptcy court has the authority to enter a final order. Bankruptcy Rule 7008(a) actually requires adversary complaints to "contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court." As *Stern* demonstrates, however, the bankruptcy court's ability to enter a final order does not hinge entirely upon whether a matter is "core" within the meaning of § 157. Therefore, for a jurisdictional statement to serve its intended purpose, it is necessary to go the step further and assert that the bankruptcy court may enter a final order consistent with Article III (assuming that is true, of course).

(3) While a core/non-core allegation may not be required, strictly speaking, in a contested matter subject to Bankruptcy Rule 9014 (to which Rule 7008(a) does not apply unless so ordered by the bankruptcy court), there may be a strategic advantage to the movant of staking out a position on this point early, because it forces the other parties to either accept or deny the asserted position. While the standing order itself permits the bankruptcy court to enter orders the finality of which will be sorted out later on appeal, if the non-moving party waits until the appellate phase to assert that the bankruptcy court lacked authority to enter a final order, the district court may conclude that the non-moving party implicitly waived any objection to the bankruptcy court's adjudication of the matter.

(4) Another benefit of putting the core/non-core/constitutionally core nature of a matter at issue is to solidify its effect for purposes of *res judicata* or issue preclusion. For example, suppose that a judgment or order of the bankruptcy court on a contested matter resolves an open claim or legal issue between the parties that is also implicated in a matter pending in another forum. If the bankruptcy court ruled that its order was final, the finality of the order should not be subject to collateral attack in the other forum—rather, the issue of the finality of the bankruptcy court's order should be addressed through ordinary appellate channels. If the bankruptcy court did *not* rule that its order was final, then the finality of the order is an open issue that could be decided in the first instance in the other forum. If the other forum decided that the bankruptcy court's order was not final, it would be free to reconsider the matters decided by the bankruptcy court notwithstanding the *res judicata* or issue-preclusive effect that a final order of the bankruptcy court might have had.

*Exhibit 7*

**Case No. 11-35162**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: BELLINGHAM INSURANCE AGENCY, INC.
*Debtor,*

EXECUTIVE BENEFITS INSURANCE AGENCY,
*Appellant,*

v.

PETER H. ARKISON, Chapter 7 Trustee of the Estate of Bellingham Insurance Agency, Inc.,
*Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NO. 2:10-CV-00929-MJP

## BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES IN SUPPORT OF APPELLEE, PETER H. ARKISON, CHAPTER 7 TRUSTEE AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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