Practical Effects of *Stern v. Marshall*

GENERAL SESSION

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U.S. Bankruptcy Court (W.D. Tenn.); Memphis

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Formalism without a Foundation: Stern v Marshall

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The Supreme Court's recent decision in Stern v Marshall,[1] has a narrow holding, but potentially enormous implications for bankruptcy courts and litigation in the federal courts. The case received media attention because it involved Anna Nicole Smith, known in this litigation as Vickie Lynn Marshall, a young woman who married a much older, very wealthy man. After the death of her husband, J. Howard Marshall II, a fierce battle for his estate ensued between her and his son, E. Pierce Marshall. Anna Nicole Smith became a familiar figure in the tabloids, but the issue before the Supreme Court was hardly one to make the cover of supermarket newspapers: Can a bankruptcy court issue a final judgment on a state law counterclaim for tortious interference with property?

The Court held, in a 5-4 decision split along familiar ideological lines,[2] that the bankruptcy court could not issue a final judgment over the state law counterclaim even though Congress clearly had given it the authority to do so. Chief Justice Roberts concluded the majority opinion by painting it as a narrow

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[1] 131 S Ct 2594 (2011).

[2] Chief Justice Roberts wrote for the Court, joined by Justices Scalia (who wrote a short concurrence), Kennedy, Thomas, and Alito. Justice Breyer wrote a dissent, which was joined by Justices Ginsburg, Sotomayor, and Kagan.

holding and declaring: "We conclude today that Congress, in one isolated respect, exceeded [the limitation of Article III] in the Bankruptcy Act of 1984."[3]

But if this provision of the Bankruptcy Act is unconstitutional, then what other provisions are similarly impermissible in giving bankruptcy courts authority to issue final judgments? Bankruptcy courts constantly decide state law questions; after Stern v Marshall when can they issue final judgments on these matters? This is potentially enormously important on a practical level because of the sheer volume of matters handled by bankruptcy courts. As Justice Breyer noted in his dissent, "the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 260,000 civil cases and 78,000 criminal cases."[4] Stern v Marshall may well mean that a significant number of bankruptcy court decisions must be reviewed by the federal district courts. Moreover, if bankruptcy courts cannot issue final judgments because their judges lack the life tenure required by Article III of the Constitution, what about other non-Article III judges, such as federal magistrate judges, and their ability to issue final judgments?[5]

Beyond trying to assess the impact of the decision, there is the basic normative question as to why it is objectionable for a bankruptcy judge to issue a

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[3] 131 S Ct at 2620.

[4] Id at 2630 (Breyer dissenting).

[5] Magistrate judges are appointed by the federal district courts and serve eight year terms. 28 USC § 636(c). Bankruptcy judges are appointed by the federal court of appeals and serve 14 year terms. 28 USC § 152(a). This is discussed below at text accompanying notes 113–114.

final judgment on a state law counterclaim. Chief Justice Roberts' majority opinion emphasized the essential role of life tenure under Article III of the Constitution in ensuring judicial independence.[6] He wrote that "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."[7]

Stern v Marshall, though, does not involve Congress trying to undermine judicial independence by placing a matter of federal law or of great constitutional significance in a court where the judges lack life tenure. This case involves a state law counterclaim and state law matters are usually adjudicated in state courts whose judges generally do not have life tenure. There is a significant disconnect between the lofty goal of protecting judicial independence and the holding that the bankruptcy court cannot issue a final judgment on a state law counterclaim for tortious interference with recovery from a large estate. Never does the Court explain why allowing a bankruptcy court to issue a final judgment on a state law counterclaim risks undermining judicial independence in any way.

The only way to understand Stern v Marshall is to see it as a very formalistic application of legal rules that have developed over more than a century and a half

[6] Stern, 131 S Ct at 2608–09.
[7] Id at 2609.

concerning when Congress can vest judicial matters in non-Article III judges. On examination, these rules make little sense and so application of them in a formalistic way likewise is inherently unsatisfying.

Seeing Stern v Marshall in this way also helps to explain why the case divided 5-4 along ideological lines. After all, the scope of bankruptcy court authority would not be thought of as the type of issue, like gun control or affirmative action or abortion, that would divide the Court ideologically. But if the case is seen through the lens of a formalistic as opposed to a more functional approach to constitutional adjudication, a key difference between the conservative and liberal justices on the current Court, then the basis for the 5-4 split in Stern v Marshall becomes much clearer.

In Part I, I briefly review the facts of Stern v Marshall and the Court's holding that it was unconstitutional for the bankruptcy court to issue a final judgment in favor of Vickie Lynn Marshall. Part II then focuses on the normative premise of Stern v Marshall— that it offends separation of powers to allow a non-Article III court to issue a final judgment as to a state law matter—and argues that this makes little sense and can be understood only as the Court following in a formalistic way a series of decisions that themselves make little sense. In fact, the case is a marked departure from other, more recent Supreme Court decisions which took a far more functional approach to deciding when Congress could assign

judicial matters to non-Article III judges.[8] Part III then explores the implications of Stern v Marshall and especially the key question which is likely to determine its impact: can consent solve the problem and allow a non-Article III court to issue a final judgment in a matter otherwise beyond its power?

I. What happened?

Chief Justice Roberts began his majority opinion by quoting from Charles Dickens's Bleak House and the analogy certainly seems apt.[9] The litigation began even before J. Howard Marshall's death in 1995.[10] Only a relatively brief recitation of the facts is needed to understand the constitutional issue presented.

Vickie Lynn Marshall and J. Howard Marshall met in October 1991 and were married on June 27, 1994. Although he lavished gifts and significant sums of money on Vickie during their courtship and marriage, J. Howard did not include anything for Vickie in his will.[11] Before J. Howard passed away in August 1995, Vickie filed suit in Texas probate court, claiming that Pierce Marshall—J. Howard's younger son—fraudulently induced his father to sign a living trust that

[8] Commodities Futures Trading Commission v Schor, 478 US 833 (1986); Thomas v Union Carbide Agricultural Products Co, 473 US 568 (1985).

[9] Stern, 131 S Ct at 2600 (citation omitted).

[10] The facts are recounted in more detail in Marshall v Marshall, 547 US 293 (2006), the first time the matter came to the Supreme Court on the issue of whether the probate exception precluded federal court jurisdiction (and the Court held that it did not). The Court also presents the key facts at the beginning of its opinion in Stern, 131 S Ct at 2601–03.

[11] Because there are three different individuals named Marshall involved—J. Howard Marshall, Pierce Marshall, and Vickie Lynn Marshall—it is easiest to refer to them by first names.

did not include her. She maintained that J. Howard meant to leave her half of his estate. Pierce denied any fraudulent activity and defended the trust and, after his father's death, the will.

Soon after J. Howard died, in January 1996, Vickie filed a petition for bankruptcy in the United States District Court for the Central District of California. In June 1996, Pierce filed a proof of claim in the federal bankruptcy proceeding, alleging that Vickie had defamed him when attorneys representing Vickie told members of the press that Pierce had engaged in forgery, fraud, and overreaching to gain control of his father's assets. Vickie answered, asserting truth as a defense. She also filed counterclaims, among them a claim that Pierce had tortiously interfered with a gift she expected. She contended that Pierce essentially imprisoned J. Howard against his wishes; surrounded him with hired guards for the purpose of preventing contact with Vickie; made misrepresentations to J. Howard; and transferred property against J. Howard's expressed wishes.[12]

The Bankruptcy Court granted summary judgment in favor of Vickie on Pierce's claim and, after a trial on the merits, entered judgment for Vickie on her tortious interference counterclaim.[13] The Bankruptcy Court also held that both Vickie's objection to Pierce's claim and Vickie's counterclaim qualified as "core

[12] Marshall, 547 US at 301.
[13] In re Marshall, 253 BR 550, 558–59 (Bankr CD Cal 2000).

proceedings" under the Bankruptcy Act which meant that the court had authority to enter a final judgment disposing of those claims.[14] The court awarded Vickie compensatory damages of more than $449 million—less whatever she recovered in the ongoing probate action in Texas—as well as $25 million in punitive damages.[15]

The District Court concluded that the Bankruptcy Court lacked the authority to issue a final judgment on Vickie's counterclaim and thus said that it would treat the Bankruptcy Court's judgment as "proposed rather than final" and engaged in an "independent review of the record."[16]

However, subsequent to the Bankruptcy Court decision, but prior to the decision of the District Court, the Texas probate court had conducted a jury trial and ruled in favor of Pierce Marshall. The District Court, however, did not give preclusive effect to this decision and agreed with the Bankruptcy Court that Pierce had tortuously interfered with Vickie's inheritance. The District Court reduced the damages to approximately $88 million, divided equally between compensatory and punitive damages.

The Ninth Circuit reversed the District Court based on the matter falling within the probate exception to federal jurisdiction, but the Supreme Court

[14] In re Marshall, 257 BR 35, 39–40 (CD Cal 2000).
[15] Id at 40.
[16] In re Marshall, 264 BR 609, 633 (CD Cal 2001) ("[A] counterclaim should not be characterized as core [if 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 the normal type of set-off or other counterclaims that customarily arise.")

unanimously reversed and remanded the case back to the Ninth Circuit.[17] The Ninth Circuit then ruled in favor of Pierce, holding that the counterclaim was not properly within the core jurisdiction of the Bankruptcy Court and thus that it lacked the authority to issue a final judgment.[18] Because the Bankruptcy Court could not issue a final judgment, its ruling lacked preclusive effect; thus, the Texas probate court decision was binding.

That was the issue before the Supreme Court. If the Bankruptcy Court had the authority to issue a final judgment, then its ruling was preclusive of the Texas probate court's decision and Vickie's estate wins. But if the Bankruptcy Court lacked the authority to issue a final judgment, then there was no preclusion of the Texas probate court and Pierce's estate wins. The Court, 5-4, took the latter approach.

Chief Justice Roberts wrote for the Court. The Court said that the Bankruptcy Act in § 157(b)(2)(c) expressly makes counterclaims "core" proceedings over which the bankruptcy court could issue a final judgment.[19] But the Court found that this violated the Constitution because bankruptcy judges do not have life tenure. Chief Justice Roberts majority opinion began by stressing the

[17] Marshall v Marshall, 547 US 293 (2006) (holding that the "probate exception" to federal court jurisdiction did not bar a federal court, including a bankruptcy court, from deciding a claim of tortious interference with recovery from an estate).

[18] In re Marshall, 600 F3d 1037, 1058–59 (9th Cir 2010).

[19] Stern, 131 S Ct at 2604–05. The Bankruptcy Act designates some matters as core, over which the bankruptcy court can issue a final judgment and some matters as non-core, over which the bankruptcy court can issue a final judgment with consent of the parties or otherwise makes a report and recommendation to the federal district court.

essential nature of Article III protections for separation of powers and the protection of individual liberties. He wrote:

> "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. . . . 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.'"[20]

The Court concluded that it violated Article III for Congress to authorize the bankruptcy court to issue a final judgment over the state law counterclaim. The Court explained that this did not fit into any of the traditional exceptions where non-Article III courts are allowed, such as for "public rights" matters where it is a claim against the United States and Congress has waived its sovereign immunity but with the condition that the matter be heard in a non-Article III court.[21] Nor the

[20] Id at 2609 (citations omitted).

[21] Id at 2611 ("Vickie's counterclaim cannot be deemed a matter of 'public right' that can be decided outside the Judicial Branch.") The public rights exception is based on the notion that since sovereign immunity bars claims against the United States, Congress can waive sovereign immunity on the condition that the matter be

Court said could the bankruptcy court be seen as an "adjunct" of the district court. Chief Justice Roberts explained that given its expansive 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."[22]

In what is likely the most important language of the opinion in terms of when bankruptcy courts can issue final judgments, the Court said that "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[23] Vickie's counterclaim for tortious interference did not fit within this definition and thus the bankruptcy court decision was not a final judgment and had no preclusive effect over the Texas probate court decision.

II. Why?

The basis for the Court's decision was that it was unconstitutional for Congress to give non-Article III judges the authority to issue a final judgment over the state law counterclaim. But it is questionable as to why this is unconstitutional. Chief Justice Roberts focused, at some length, on the importance of Article III in ensuring the independence of the federal judiciary.[24]

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brought in a non-Article III court. The public rights exception is derived from Murray's Lessee v Hoboken Land and Improvement Co, 59 US 272 (1856).

[22] Stern, 131 S Ct at 2619.

[23] Id at 2618.

[24] Id at 2608–09.

The Court's emphasis on the importance of an independent judiciary would make sense if this were an issue of federal constitutional law, especially one where life tenure might make judges more inclined to withstand popular pressure and uphold the Constitution. But the issue in Stern v Marshall was a state law claim that by itself would not even fit within the scope of the matters which federal courts are allowed to hear under Article III, section 2 of the Constitution. State law claims are generally adjudicated by state law judges who rarely have life tenure. What then was so objectionable about Congress authorizing bankruptcy judges without life tenure to hear the matters?

Chief Justice Roberts' only answer to this question comes at the end of the majority opinion. He writes: "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."[25]

But Congress has "chipped away" at the "authority of the Judicial Branch" by assigning judicial matters to non-Article III courts in many different situations since the earliest days of American history. The question, which the Court does not answer, is what is objectionable about this matter being assigned to a non-

[25] Id at 2620.

Article III court in light of all that proceeded it in terms of situations in which non-Article III judges are allowed. This question, of course, can be assessed only in the context of what the Court previously has said about when non-Article III courts are permitted. Section A reviews this history and shows that the Court never has developed a coherent explanation for why non-Article III courts are permissible under the Constitution. Section B then looks at the Supreme Court's decision in Northern Pipeline Construction Co v Marathon Pipeline Co,[26] which limited the ability of bankruptcy courts to decide state law claims.[27] Northern Pipeline is the foundation for Stern v Marshall and yet it, too, lacks a persuasive justification for why bankruptcy courts cannot decide state law matters. Section C then concludes by arguing that the Court's decision in Stern v Marshall is deeply flawed because it is an exercise in formalism that is based on a foundation that cannot be justified.

A. Article III and non-Article III Courts

The text of Article III seemingly requires that all federal judges have life tenure and salaries that cannot be decreased during their terms of office. Article III, §1says 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 judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive

[26] 458 US 50 (1982).
[27] Id at 87.

compensation, which shall not be diminished during their continuance in office."[28] This flatly declares that all inferior courts that Congress creates must have judges with these protections. No exceptions are mentioned.

But it never has been that way.[29] The first Congress authorized executive officers in the Treasury Department to decide matters, such as claims to veterans' benefits, that fell within Article III.[30] The Supreme Court has upheld the constitutionality of non-Article III courts, sometimes called "legislative courts," since 1828.[31] Over time, the Supreme Court has recognized three situations where it will allow Congress to create inferior courts whose judges do not have life tenure and salary protection.

First, the Court allowed non-Article III courts for the territories. In American Insurance Co v Canter,[32] in 1828, the Court considered the constitutionality of a court created for the territory of Florida, which was not yet a state.[33] Judges on this territorial court were appointed for four-year terms. Chief Justice Marshall, writing for the Court, upheld the constitutionality of the territorial courts. The Court contrasted "constitutional courts" established by Congress pursuant to Article III, with "legislative courts," which were created pursuant to

[28] US Const Art III, § 1.
[29] For a thorough history of the use of non-Article III courts, see James Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv L Rev 643 (2004).
[30] Richard H. Fallon, Of Legislative Courts, Administrative Agencies and Article III, 101 Harv L Rev 915, 919 (1988).
[31] American Insurance Co v Canter, 26 US (1 Pet) 511 (1828).
[32] Id.
[33] Id at 511.

Congress's legislative powers under Articles I and IV of the Constitution. Chief Justice Marshall declared: "These Courts, then, are not constitutional Courts. . . . They are legislative Courts, created in virtue of that general right of sovereignty which exists in the government, or in virtue of the clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States."[34]

Congress created territorial courts with judges lacking life tenure primarily to avoid a surplus of federal judges after the territories were admitted into statehood.[35] The territorial courts decided all judicial matters—both federal and state law questions—arising in the territories. Thus, there was a need for more territorial judges than there would be for federal judges once the territory became a state. In Florida, for example, there were five territorial judges, but after it became a state, there was only one federal court judge.[36] The Supreme Court later explained that "[i]t would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic . . . to fashion on those judges a guarantee of tenure that Congress could not put to use and that the exigencies of the territories did not require." [37]

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[34] Id at 546.
[35] See Glidden Co v Zdanok, 370 US 530, 544–47 (1962) (explaining the rationale behind territorial courts).
[36] Id.
[37] Id.

Yet, it is questionable whether this policy rationale justifies the Court's permitting a departure from the literal language of Article III. Article III says that all inferior federal courts—that is all federal courts subordinate to the United States Supreme Court—shall have judges with life tenure who are protected against reductions in salary. By definition, the territorial courts are inferior courts of the United States.

Second, the Supreme Court has allowed non-Article III courts for the military. In Dynes v Hoover,[38] in 1858, the Supreme Court upheld Congress's power to create legislative courts for the military.[39] The Court explained that Congress's authority under Article I permitted it "to provide for the trial and punishment of military and naval offences . . . without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States."[40]

The argument for separate courts for the military is that specialized tribunals and procedures are justified by the need for discipline and order in the armed services. But this only explains the need for a distinct military court system and some differences in procedures; it does not explain why judges in military courts should not be accorded life tenure and salary protections.

[38] 61 US (20 How) 65 (1858).
[39] Id at 79. In Weiss v United States, 510 US 163, 181 (1994), the Supreme Court held that the due process clause does not require that military judges have fixed terms of office.
[40] Id at 79.

Third, the Supreme Court has allowed for non-Article III courts for deciding disputes between the United States government and private parties. These are often referred to as "public rights" cases and this exception was expressly discussed in Stern v Marshall.[41] The use of legislative courts for civil disputes between the government and private citizens was first approved by the Supreme Court in Murray's Lessee v Hoboken Land & Improvement Co,[42] which also was discussed in Stern v Marshall. In Murray's Lessee, the Court stated that Congress could not withdraw from federal "judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[43] But the Court said "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." [44]

Under the public rights doctrine, many disputes between the government and private citizens are decided, at least initially, in administrative agencies or Article I courts. The Tax Court, for example, has judges who sit for fifteen-year terms.[45]

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[41] 130 S Ct at 2611–15.
[42] 59 US (18 How) 272 (1856).
[43] Id at 284.
[44] Id. It should be noted that Murray's Lessee did not actually involve a legislative court. The holding was that Congress could authorize summary distraint of property to satisfy debts owed to the United States.
[45] See Freytag v Commissioner of Internal Revenue, 501 US 868, 890–92 (1991) (upholding the constitutionality of the Tax Courts and their ability to appoint judges for specific matters).

Because the Tax Court resolves disputes between the government and citizens, Article I judges are permitted.[46]

Similarly, administrative agencies often perform adjudicatory tasks. Federal agencies, employing administrative law judges, decide a large volume of cases involving benefits under government entitlement programs, such as the Social Security Act. Immigration cases are yet another category of civil cases arising under federal law, albeit ones where the consequences of decisions are usually great, that are handled in administrative proceedings. These are just a few of countless instances in which civil disputes between the government and private citizens are decided by legislative courts.[47]

The Supreme Court has offered several explanations for why public law matters can be decided in non-Article III tribunals. One rationale is based on sovereign immunity. Because the United States government has sovereign immunity it may be sued only if Congress authorizes such suit. Also, the federal government has the power to sue only if Congress grants it such authority. The argument is that because Congress has discretion whether to permit such litigation, it can choose to authorize the suits on the condition that they be brought in a

[46] For example, a constitutional challenge to the Tax Court was rejected on the ground that the Tax Court fit into the traditional public rights exception because it adjudicated disputes between the government and private citizens. Simanonok v Commissioner of Internal Revenue, 731 F2d 743 (11th Cir 1984).

[47] Similarly, a federal court of appeals upheld the authority of the Benefits Review Board, which reviews the award of benefits for conditions, such as black lung disease. The court emphasized the ability of Congress to assign the adjudication of statutorily created rights to administrative agencies. Gibas v Saginaw Mining Co, 748 F2d 1112, 1119 (6th Cir 1984), cert denied, 471 US 1116 (1984).

particular tribunal, such as a legislative court. In fact, the Supreme Court has explained that "[t]he doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued."[48]

Another justification for the public rights doctrine is that the framers intended that Congress should be able to create legislative courts for such matters. Justice Brennan explained that "the framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or administrative agency."[49]

The Supreme Court also has invoked history to justify permitting Congress to assign public rights matters to legislative courts. The Court said that there is "a historically recognized distinction" between inherently judicial matters, which must be decided by an Article III court, and those that can be decided in other tribunals.[50] The Court stated that "[p]rivate rights disputes . . . lie at the core of the historically recognized judicial power."[51] But according to the Court public law

[48] Northern Pipeline, 458 US at 67.
[49] Id at 68.
[50] Id.
[51] Id at 70.

matters—civil disputes between the government and private citizens—are not inherently judicial and may be assigned to legislative courts.

However, these rationales are open to question. A strong argument can be made that an independent judiciary is especially important in a dispute between the government and a private citizen. A primary purpose of the United States Constitution is to protect people from the arbitrary exercise of power by the federal government. Judges with life tenure and salary protection are more likely to perform this checking function than are those answerable to the legislature and executive branches.[52] Moreover, it can be argued that although Congress has discretion to allow the United States to be sued, once such suits are authorized it would be an "unconstitutional condition" to require the litigation be brought in courts that are otherwise unconstitutional.[53] Under this view, Congress can choose only whether the suit will be permitted; once litigation is allowed it must be in an Article III court.

B. Article III Meets Bankruptcy Courts: Northern Pipeline

It was against this legal backdrop that the Supreme Court in 1982 decided Northern Pipeline and articulated the basis for the limits on the powers of the bankruptcy courts that was invoked in Stern v Marshall. In Northern Pipeline, the

[52] See, for example, Kenneth S. Klein, The Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment, 21 Hastings Const L Q 1013 (1994); Mary Ellen Fullerton, No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts, 49 Brooklyn L Rev 207, 230–31 (1983).

[53] See, for example, Martin H. Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L J 197, 214 (1983).

Court—without a majority opinion—declared unconstitutional the bankruptcy courts created by the Bankruptcy Act of 1978. Under that Act, bankruptcy judges appointed to fourteen-year terms had broad jurisdiction to decide private civil disputes. The Court held that this authority violated Article III.

The facts of the case were simple. The Northern Pipeline Construction Company sued the Marathon Pipe Line Company in the United States District Court for the Western District of Kentucky. Subsequently, Northern Pipeline filed for bankruptcy in the United States Bankruptcy Court for the District of Minnesota. Northern Pipeline also filed a claim in the bankruptcy court against Marathon Pipe Line for breach of contract. This was identical to the suit it had filed in federal court in Kentucky. Marathon Pipe Line argued that it was unconstitutional for the breach of contract claim to be tried in the bankruptcy court because the judges lacked life tenure and the salary protections required under Article III.

The Supreme Court agreed and ruled that the bankruptcy courts were unconstitutional. There were three major opinions, none of which was joined by a majority of the Court. Justice Brennan wrote for a plurality including Justices Marshall, Blackmun, and Stevens. Justice Brennan's plurality opinion stressed that legislative courts were permitted only in a few instances—for territories, the military, and public rights disputes—and that bankruptcy did not fit into these

exceptions.[54] Moreover, the plurality opinion said that legislative courts could be used as an adjunct to Article III courts only under limited circumstances. The existence of review by an Article III court was deemed insufficient to permit the use of a legislative court. Justice Brennan wrote: "Appellants suggest . . . that Art. III is satisfied so long as some degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution. . . . Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication."[55]

Justices Rehnquist and O'Connor concurred in the judgment. Their position was that it was unconstitutional for Congress to vest in the bankruptcy courts broad authority to adjudicate state law matters that were only tangentially related to the adjudication of bankruptcy under federal law.[56] They agreed with the plurality that appellate review in an Article III court was insufficient to cure this constitutional defect.[57] Unlike the plurality, the concurrence said that it was unnecessary to express an opinion on anything other than this aspect of the bankruptcy courts' jurisdiction. However, because Justices Rehnquist and O'Connor agreed that it was uncertain what Congress would have enacted had it been unable to vest plenary

[54] Northern Pipeline, 458 US at 86 n 39.
[55] Id at 81–86.
[56] Id at 91 (bankruptcy courts are not an adjunct to Article III courts).
[57] Chief Justice Burger also wrote a short, separate dissenting opinion to emphasize the narrowness of the concurring opinion authored by Justices Rehnquist and O'Connor and hence the narrowness of the ultimate holding in Northern Pipeline. Id at 92. (Burger dissenting).

jurisdiction in the bankruptcy courts, they concurred in declaring the courts unconstitutional.

Justice White wrote a lengthy dissent joined by Chief Justice Burger and Justice Powell.[58] The dissent emphasized a functional approach to analyzing the constitutionality of legislative courts focusing on whether the particular court undermines separation of powers and checks and balances. Justice White explained: "The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts."[59] Justice White's approach openly balances the benefits of a legislative court against its effects on separation of powers and judicial independence.

In this instance, the dissent found little reason to object to the use of a legislative court. Justice White emphasized that when a legislative court is "designed to deal with issues likely to be of little interest to the political branches," there is no fear that Congress is creating such tribunals to aggrandize its own power.[60] Moreover, Justice White explained, that for the sake of flexibility,

[58] Northern Pipeline, 458 US at 115 (White dissenting).
[59] Id.
[60] Id.

Congress understandably did not want to create several hundred bankruptcy judges with life tenure. In light of the existence of appellate review by Article III courts, the dissent would have upheld the constitutionality of the bankruptcy courts.

Thus, in Northern Pipeline six of the justices found it objectionable to assign state law matters to a non-Article III judge. But why? Why did the plurality draw the line at legislative courts being permissible for the territories, the military, and public rights disputes but for nothing else? In Palmore v United States,[61] the Court spoke of the constitutionality of legislative courts for "specialized areas having particularized needs and warranting distinctive treatment."[62] Bankruptcy certainly is a "specialized area" with "particularized needs," especially the desire to make sure that all of the claims by or against the bankruptcy estate are resolved in a single proceeding. The plurality in Northern Pipeline found legislative courts for the territories, the military, and public rights matters to fit within this exception, but not bankruptcy courts. Yet, the justices gave little explanation for why they were drawing the line at this point.[63]

Justice Brennan, writing for the plurality, said that if Congress creates a right, Congress can decide the forum where it will be adjudicated. But this is not so for state law claims since, by definition, they were not created by Congress.

[61] 411 US 389 (1973).
[62] Id at 408.
[63] Northern Pipeline, 458 US at 86 n 39.

Justice Brennan wrote: "Indeed, the cases before us, which center upon appellant Northern's claim for damages for breach of contract and misrepresentation, involve a right created by state law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court. Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III 'adjunct,' plainly must be deemed at a minimum."[64]

But still there is no explanation for why it is objectionable for state law matters to be decided by a non-Article III court or an answer to Justice White's arguments in dissent that this is not a situation in which the structural protections of Article III are needed. There is a highly formalistic approach by the plurality which seems uncharacteristic of Justice Brennan's approach to constitutional law.

I would suggest that the decision in Northern Pipeline—and especially the plurality comprised of the Court's most liberal justices (Brennan, Marshall, Blackmun, and Stevens)—was a reflection of the context of the times. In 1980, Ronald Reagan won the presidency and Republicans gained control of the Senate. In 1981, a number of bills were introduced into the new Congress to strip the Supreme Court and the lower federal courts of the ability to decide particular issues, such as challenges to state laws restricting abortion or allowing prayer in

[64] Id at 84 (emphasis in original).

public schools.[65] Tremendous attention was paid in law reviews in 1981 as to whether such bills would be constitutional, including Professor Lawrence Sager's Foreword to the November 1981 issue of the Harvard Law Review.[66]

It was in this context that the Court decided Northern Pipeline in June 1982. I always have believed that the liberal plurality in Northern Pipeline was attempting to send a message to Congress about limits on congressional power to take matters away from the Article III courts.[67] The jurisdiction of the bankruptcy courts to hear state law matters just happened to be the vehicle that was before the Court at exactly that time. The plurality could not articulate a persuasive reason why having bankruptcy courts decide state law matters was particularly objectionable, especially in light of other instances in which non-Article III courts were allowed, but it could and did make clear that the Court would prevent Congress from removing other matters from the Article III judiciary.

C. Stern v Marshall

After Northern Pipeline, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, which provides that bankruptcy judges are

[65] See, for example, S 158, 97th Cong, 1st Sess, in 127 Cong Rec S 496 (Jan 19, 1981); HR 3225, 97th Cong, 1st Sess, in 127 Cong Rec H 7324 (Apr 10, 1981) (bills restricting federal court jurisdiction in abortion cases); S 481, 97th Cong, 1st Sess, in 127 Cong Rec S 2184 (Feb 16, 1981); HR 4756, 97th Cong, 1st Sess, in 127 Cong Rec H 24228 (Oct 15,1981) (bills restricting federal court jurisdiction over cases that involve voluntary school prayer).

[66] Lawrence Sager, Foreword: Constitutional Limits on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv L Rev 17 (1981); see also Laurence Tribe, Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts, 16 Harv CR–CL L Rev 129 (1981).

[67] Professor Judith Resnik made this point not long after Northern Pipeline was decided. Judith Resnik, The Mythic Meaning of Article III Courts, 56 U Colo L Rev 581, 599 (1985).

appointed for fourteen-year terms by the United States Courts of Appeals.[68] Bankruptcy judges are said to be officers of the district courts. The 1984 Act changed the jurisdiction of the bankruptcy courts. The new law drew a distinction between "core" and "noncore" bankruptcy proceedings. Core matters are those involving the bankrupt's property or assets within the jurisdiction of the bankruptcy court. Bankruptcy courts may "hear and decide" these core proceedings.

Noncore matters are those that earlier would have been within the bankruptcy courts' plenary jurisdiction. Here, the 1984 Act draws a further distinction between noncore matters that would have fit within federal court jurisdiction absent the bankruptcy act (e.g., because of diversity or federal question jurisdiction) and those that a federal court could not otherwise have heard. As to noncore matters for which there is an independent basis for federal jurisdiction, the bankruptcy courts make proposed findings of fact and conclusions of law to the federal district court. A final order is not entered until after the district court engages in de novo review of any matters to which an objection was made. But noncore matters, for which there is not a separate basis for federal jurisdiction, should be dismissed upon a motion if state proceedings exist that can provide a timely resolution of the issue. Also, the bankruptcy courts specifically are

[68] Granfinanciera, S.A., 492 US 33 (1989).

prevented from exercising jurisdiction over personal injury tort and wrongful death claims.

The statute delineates what are "core" proceedings and specifically includes within this "counterclaims by the estate against persons filing claims against the estate."[69] Thus, Vickie Lynn Marshall's state law counterclaim against Pierce Marshall was a "core" proceeding and the bankruptcy court was authorized by statute to issue a final judgment. But the Supreme Court held that Congress could not constitutionally authorize non-Article III courts to issue a final judgment over such state law matters.

The Court, though, never explains why it threatens the independence of the judiciary and individual liberty for the non-Article III bankruptcy courts to decide the state law counterclaim. There is a highly formalistic quality to Chief Justice Roberts' majority opinion. Indeed, he reasons in a syllogism:

Major premise: Congress may create non-Article III courts with power to issue final judgments only for territories, the military, and public rights matters.

Minor premise: The state law counterclaim of Vickie Lynn Marshall does not involve the territories, the military, or public rights matters.

Conclusion: It is unconstitutional for the bankruptcy court to issue a final judgment over Vickie Lynn Marshall's counterclaim.

[69] 28 USC § 157(b)(2)(C).

But as with any syllogism, the conclusion follows only if the premises are true. The Court never explains why the line is to be drawn in that way, other than that is what Northern Pipeline said. Chief Justice Roberts emphasizes at length the importance of judicial independence to protect individual liberties. He fails, however, to explain why that is implicated in a case involving a state law counterclaim.

The Court's formalism is even more questionable because subsequent to Northern Pipeline the Court took a far more functional approach to deciding when non-Article III courts are permissible. In fact, in these later decisions the Court used exactly the functional approach urged by Justice White in his dissent in Northern Pipeline.

The first post-Northern Pipeline decision was Thomas v Union Carbide Agricultural Products Co.[70] In Thomas, the Supreme Court upheld the constitutionality of an arbitration system designed to resolve valuation disputes among participants in a pesticide registration program. Federal law required manufacturers to submit research data regarding the health, safety, and environmental effects of all pesticides. The law permitted the data submitted by one company to be used by another that sought to register the same or a similar product, but a company using another company's data had to pay for the costs of

[70] 473 US at 584.

the data generation. The Environmental Protection Agency (EPA) was entrusted with determining the appropriate amount of compensation owed and resolving disputes. To relieve the EPA of this burden, Congress shifted the task of valuation for compensation purposes to a system of negotiations and binding arbitrations. Judicial review was limited to instances of "fraud, misrepresentation, or other misconduct." [71]

The issue in Thomas was whether Congress could assign this private law dispute to a non-Article III court. In upholding the constitutionality of the arbitration system, the Court narrowly stated what it understood to be the holding of Northern Pipeline. Justice O'Connor, writing for the majority, said that the earlier decision established 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." [72]

The Court said that legislative courts were permissible for private disputes that were closely related to government regulatory activities. In perhaps the most important language of the majority opinion, Justice O'Connor stated: "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under

[71] 7 USC § 136a(c)(1)(D)(ii).
[72] Thomas, 473 US at 593–94.

article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution."[73] The Court adopted a functional approach, considering the desirability of a non-Article III tribunal and the degree of encroachment on the federal judiciary. In this way, the Court's approach seems similar to the balancing test endorsed by Justice White in Northern Pipeline.[74]

The Court again adopted a functional approach to the constitutionality of non-Article III courts in Commodity Futures Trading Commission v Schor.[75] The Commodity Futures Trading Commission has the statutory authority to provide reparations to individuals who are injured by fraudulent or illegally manipulative conduct by brokers.[76] The commission also promulgated regulations that enabled it to hear all counterclaims arising out of the same allegedly impermissible transactions.

The Court separately considered these two aspects of the commission's jurisdiction: the authority to provide reparations and the power to adjudicate counterclaims. As to the former, the Court found that the commission's jurisdiction to order reparations to injured consumers was "of unquestioned constitutional

[73] Id at 593.
[74] Id at 589–90, 593–94.
[75] Schor, 478 US 833 (1986).
[76] 7 USC § 18.

validity."[77] Because the commission could not enforce its own orders, which instead required federal court action, the Court concluded that the commission served as an adjunct to the federal court.

The more difficult question was whether the commission could hear state law counterclaims. In Northern Pipeline, both the plurality and the concurrence found objectionable the bankruptcy courts' authority to decide state law matters. However, in Schor, the Court approved the commission's authority to rule on the state law counterclaims. The Court expressly endorsed a balancing test in appraising the constitutionality of legislative courts.[78]

The Court identified the benefits of an administrative alternative to federal court litigation in terms of efficiency and expertise.[79] At the same time, the Court said that these interests had to be balanced against "the purposes underlying the requirements of Article III."[80] The Court considered two goals of Article III: ensuring fairness to litigants by providing an independent judiciary and maintaining the "structural" role of the judiciary in the scheme of separation of powers. As to fairness, the Court said that the defendant had consented to the

[77] Schor, 478 US at 856.
[78] Id at 856.
[79] Id at 847.
[80] Id at 849–50.

administrative proceedings as an alternative to federal court litigation and hence could not claim that the commission adjudication was inherently unfair.[81]

As to separation of powers, the Court declared: "In determining the extent to which a given congressional decision to authorize the adjudication of article III business in a non-article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules."[82] Justice O'Connor, writing for the majority, said that instead the Court focuses on several factors including "the extent to which the 'essential attributes of judicial power' are reserved to article III courts, and conversely, the extent to which the non-article III forum exercises the range of jurisdiction and powers normally vested only in article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of article III."[83]

It is not possible to reconcile the functional approach in Thomas and Schor with the formalistic approach in Stern v Marshall. The Court in Stern v Marshall returned to the earlier formalism of Northern Pipeline, but without ever acknowledging that the cases subsequent to it had taken a dramatically different method of analyzing when Congress can give authority to non-Article III courts.

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[81] Schor, 478 US at 851.
[82] Id.
[83] Id at 856.

The Court in Stern v Marshall could have recognized and disavowed the functional approach of Thomas and Schor and reaffirmed the formalism of Northern Pipeline. Or it could have embraced the functional approach of Thomas and Schor and acknowledged that they had replaced the formalism of Northern Pipeline. This would have required a very different majority opinion, and likely a different result, in Stern v Marshall. But the Court did neither and ignored the underlying differences in approaches in these cases.

Chief Justice Roberts' majority opinion in Stern v Marshall distinguished Thomas and Schor, but without acknowledging or addressing their expressly functional approach to determining when non-Article III courts are permissible.[84] The Court said that Thomas was different because "any right to compensation result[ed] from the statute" and did not "depend on or replace a right to compensation under state law."[85] As for Schor, the Court said the Vickie's claim to relief "is not 'completely dependent upon adjudication of a claim created by federal law, as in Schor. Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if we wished to recover from Vickie's estate."[86]

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[84] The Court in Stern v Marshall could have recognized and disavowed the functional approach of Thomas and Schor and reaffirmed the formalism of Northern Pipeline. Or it could have embraced the functional approach of Thomas and Schor and acknowledged that they had replaced the formalism of Northern Pipeline. This would have required a very different majority opinion, and likely a different result, in Stern v Marshall. But the Court did neither and ignored the underlying differences in approaches in these cases.

[85] Stern, 131 S Ct at 2613, quoting Thomas, 473 US at 584.

[86] Stern, 131 S Ct at 2614.

Although these are distinctions between Stern v Marshall and Thomas and Schor, they miss the point that the Court was departing from the functional and pragmatic approach of the latter decisions. This was the central point of the dissent. Justice Breyer, writing for the dissenting justices, declared:

> 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.[87]

The formalistic approach of Stern is very different from the functional approach of Thomas and Schor.[88] Chief Justice Roberts' opinion in Stern doesn't even try to reconcile these approaches. The difference between the majority and

[87] Id at 2624 (Breyer dissenting).

[88] Justice Breyer makes this point: "Insofar as the majority would apply more formal standards, it simply disregards recent, controlling precedent. Thomas, 473 US at 587 ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"); ("[T]he Court has declined to adopt formalistic and unbending rules" for deciding Article III cases).

the dissent in Stern v Marshall, then, seems less about views over state law counterclaims in bankruptcy or even the proper role of non-Article III courts and much more a disagreement about how the Constitution should be interpreted. Formalism is inherent to the originalism of conservative justices like Scalia and Thomas who believe that the meaning of a constitutional provision is fixed when it is adopted and changeable only by constitutional amendment. By contrast, more liberal justices, who believe that the Constitution is a living document, which must be interpreted in light of modern circumstances, take a more pragmatic approach to constitutional law.[89] In this context, it is not surprising that Stern v Marshall was a 5-4 decision, split along traditional ideological grounds.

For all of the familiar reasons, formalism is inherently unsatisfying in constitutional law where the premises are almost always likely to be disputed and where there is a need to interpret constitutional provisions in light of modern circumstances.[90] In Stern v Marshall the formalism is particularly unpersuasive because Chief Justice Roberts begins by emphasizing the need for judges with life tenure to ensure independence of the judiciary and to protect individual liberty, but he never explains why allowing bankruptcy judges to issue final judgments as to state law counterclaims compromises these goals. Furthermore, the Court through

[89] In fact, Justice Breyer, the author of the dissent, has written two recent books defending what he describes as a pragmatic approach to constitutional interpretation. Stephen G. Breyer, Making Our Democracy Work: A Judge's View (Knopf 2010); Stephen G. Breyer, Active Liberty: Interpreting Our Democratic Constitution (Knopf 2005).

[90] A critique of formalism and a defense of the view that it should be a "living Constitution" are obviously beyond the scope of this paper.

American history has used a functional approach in allowing other non-Article III courts. The use of formalism in deciding the powers of a legislative court thus seems particularly inappropriate and out of place.

Nor can the Court's decision in Stern v Marshall be reduced to the traditional difference between the conservative majority taking an originalist approach while a liberal dissent takes the non-originalist view. From an originalist perspective, any non-Article III federal court is dubious. As explained above, Article III provides that all inferior courts created by Congress shall have judges with life tenure. No one has pointed to anything at the Constitutional Convention or the state ratifying conventions which indicates a view that Congress could establish federal courts without such judges. Non-Article III court began to exist in the early 19th century to deal with practical needs in the territory and the military. Once they were allowed for functional reasons, the inherent problem – and the one that underlies Stern v Marshall—is when functional considerations are sufficient to permit non-Article III courts. Originalism can provide no answer to that question. Nor can a retreat to formalism.

A functional approach to deciding when non-Article III courts are allowed would focus on whether a particular court undermines separation of powers and checks and balances.[91] This is exactly the approach urged by Justice White in his

[91] Northern Pipeline, 458 US at 115 (White dissenting).

dissent in Northern Pipeline and by the subsequent majorities in Thomas and Schor. From this perspective, it is difficult to see why allowing a bankruptcy court to hear a state law counterclaim in any way undermines the values and purposes of Article III.

III. What will it mean?

Stern v Marshall immediately caused enormous litigation as to its scope and application.[92] Two questions are crucial: what other matters will be outside the power of bankruptcy courts to issue final judgments and can consent cure the defect?

As for the scope of the holding, Chief Justice Roberts concluded the majority opinion by saying that the Court was holding only that in "one isolated respect" Congress had violated Article III.[93] But it is impossible to see the decision in such a narrow way; if bankruptcy courts cannot issue a final judgment as to state law counterclaims, what other state law claims are outside the scope of bankruptcy courts power to issue final judgments? The day after Stern v Marshall was decided, I received a phone call from a bankruptcy judge who said that he issued between 80,000 and 90,000 orders a year and he estimated that about 25 percent of them involve a state law claim that might be implicated by the decision. He asked as to which of these he could still issue final judgments.

[92] Some of these cases are mentioned below in notes 97 and 113–115.
[93] Stern, 131 S Ct at 2620.

Simple examples illustrate the importance of this question. Justice Breyer, in dissent, gives the example of a tenant who files for bankruptcy.[94] The landlord files a claim for unpaid rent and the tenant then presents various state law counter-claims against the landlord. After Stern v Marshall, it is hard to see how the bankruptcy court can issue a final judgment as to those state law counterclaims. Also, in the months after Stern was decided, a number of bankruptcy courts ruled that they no longer could issue final judgments as to claims of fraudulent conveyance, an issue that arises with great frequency in bankruptcy court proceedings.[95]

The scope of the Court's holding is made more difficult to understand because the Court cited, with approval, its earlier decision in Katchen v Landy.[96] In Katchen, the Supreme Court held that the bankruptcy judge (then called a "referee") had authority to hear a counterclaim filed by a trustee in bankruptcy

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[94] Id at 2629–30 (Breyer dissenting).

[95] See Sitka Enters., Inc v Segarra-Miranda, 2011 US Dist LEXIS 90243, *8 (D Puerto Rico) ("[T]he fraudulent conveyance action brought by the trustee cannot by adjudicated by the Bankruptcy Court, a non-Article III court, for lack of constitutional authority to do so."); Samson v Blixseth, 2011 WL 3274042, *4, *11 (Bankr D Mont); In re Teleservices Group, Inc, 456 BR 318, 324 (Bankr WD Mich 2011). On November 3,2011, the Ninth Circuit issued an order: "The court invites supplemental briefs by any amicus curiae addressing the following questions: Does Stern v. Marshall, —— U.S. ——, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance? If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?" In re Bellingham Insurance Agency, Inc, 661 F3d 476, 476 (9th Cir 2011). In Granfinanceria, S.A. v Nordberg, 492 US 33, 47–49 (1989), the Court ruled, in the context of a fraudulent conveyance action, that a jury trial must be provided in bankruptcy court when the relief sought is money damages. The Court did not decide the question of whether it violates Article III for Congress to authorize bankruptcy courts to preside over jury trials subject to review is the district courts.

[96] 382 US 323 (1966).

against a creditor who had filed a claim against a bankruptcy estate. The Court held that the bankruptcy referee had jurisdiction to finally adjudicate the trustee's preference counterclaim as a necessary incident to its jurisdiction to allow or disallow the creditor's claim against the estate.[97] The Court's reasoning was that bankruptcy courts could issue final judgments over matters that would fit within the scope of supplemental jurisdiction. The Court in Schor explained that in Katchen "this Court upheld a bankruptcy referee's power to hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction."[98]

But in Stern v Marshall, the Court does not accept that supplemental jurisdiction can bring matters within the scope of the bankruptcy court's authority to issue a final judgment. Justice Breyer's dissent urged this,[99] but the majority implicitly rejected it. As one commentator noted: "The Stern v. Marshall majority, however, very abruptly (and with no explanation) refuses to even acknowledge the possibility that supplemental jurisdiction is a valid concept in the context of non-Article III adjudications. The Court very conspicuously (to anyone

[97] Id at 325–26.
[98] Schor, 478 US at 852.
[99] Stern, 131 S Ct at 2626, 2629 (Breyer dissenting).

who has read Katchen even casually) simply ignores Katchen's primary reliance upon more general supplemental jurisdiction reasoning."[100]

The majority opinion in Stern v Marshall does give a clear indication as to its scope and it is far broader than Chief Justice Roberts' conclusion acknowledged. The Court stated: "[T]he question is whether the action at issue stems from the bankruptcy itself or would necessarily be allowed in the claims allowance process."[101] This rule is quite restrictive and would place most state law counterclaims, and many other matters, outside the scope of bankruptcy courts to issue final judgments.

What difference would this make? It would seem that bankruptcy courts would have to make "reports and recommendations" to the district courts so that they could issue final judgments.[102] As Justice Breyer points out in dissent, there are 1.6 million bankruptcy filings a year (as compared to 280,000 civil cases and 78,000 criminal cases), and to require that a significant portion of these now be reviewed by the federal district courts would have a staggering impact.[103] As Justice Breyer explains in his conclusion, "under these circumstances, a constitutionally required game of jurisdictional ping-pong between courts would

[100] Ralph Brubaker, Article III's Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges' Core Jurisdiction, 31 Bankr L Let 1, 12 (Sept 2011).
[101] Stern, 131 S Ct at 2618.
[102] There actually is a statutory problem with this: The Bankruptcy Act recognizes two kinds of cases: core and non-core proceedings. It provides for bankruptcy courts to issue reports and recommendations as to the latter. But Stern v Marshall creates a third category: core proceedings where bankruptcy courts cannot issue final judgments. Are these to be treated as non-core proceedings under the statute?
[103] Stern, 131 S Ct at 2630 (Breyer dissenting).

lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."[104]

The crucial practical question will be whether consent can cure this and whether bankruptcy courts can issue final judgments with consent of the parties. If so, the effect of Stern v Marshall will be greatly reduced; if not, the implications of Stern v Marshall are enormous and transcend the bankruptcy context.

It is impossible to find an answer to this question in the majority's opinion. Chief Justice Roberts points out that Pierce Marshall consented to the bankruptcy court's jurisdiction for his claim of defamation against Vickie Lynn Marshall. The Court says: "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."[105] But this is in the context of Pierce's consent to have his claim heard in the bankruptcy court; it is not about whether he agreed to have Vickie's counter-claim heard there. As to that, the Court says: "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings."[106]

No principle of federal jurisdiction is more clearly established than that a limit on the power of a federal court cannot be overcome by consent.[107] Article III

[104] Id.
[105] Id at 2608.
[106] Id at 2614.
[107] See, for example, Sosna v Iowa, 419 US 393, 398 (1975); Mitchell v Mauer, 293 US 237, 244 (1934).

defines the authority of a federal court and because it is about the Constitution's structure, the consent of the parties cannot place a matter within the power of an Article III court which otherwise would not be there. Stern v Marshall held that Article III of the Constitution did not permit the bankruptcy court to issue a final judgment on Vickie Lynn Marshall's counterclaim for tortious interference. Consent cannot increase the power of a federal court.

Some courts have argued that this is wrong because there is a distinction between the subject matter jurisdiction of a bankruptcy court and its power to issue final judgments; consent cannot cure a defect in the former, but it can allow for the latter.[108] The Court in Stern recognized that the bankruptcy court had subject matter jurisdiction pursuant to 28 USC § 1334 and that the division between core and non-core proceedings in the Bankruptcy Act did not implicate subject matter jurisdiction. Chief Justice Roberts wrote: "Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction."[109] The Court cited to Section 157(c)(2) which provides that parties may consent to entry of final judgment by Bankruptcy Judge in non-core areas.[110] The assertion is that bankruptcy courts cannot gain subject matter jurisdiction by consent, but they can gain the power to issue final judgments via consent of the parties.

[108] See In re Olde Prairie Block Owner, LLC, 457 BR 692, 700 (Bankr ND Ill 2011).
[109] Stern, 131 S Ct at 2607.
[110] Id.

In fact, in the first months after Stern v Marshall, bankruptcy courts have consistently invoked this distinction and ruled that consent can cure the problem. Courts have relied on the language in Stern stating that Section 157 allocates authority to enter final judgments between bankruptcy and district courts; an allocation that does not implicate questions of subject matter jurisdiction.[111] Because subject matter jurisdiction is not implicated, consent permits a bankruptcy court's final judgment. Some courts have analogized to binding arbitration proceedings where parties can agree to final determinations made by arbitrators.[112] For courts that have followed this logic, if parties may consent to binding arbitration, then they should be permitted to consent to bankruptcy courts entering final judgments if they desire, especially because, as one court stated, arbitrators do not enjoy the same attributes as Article III judges or bankruptcy judges.[113]

But this reasoning seems highly problematic. It assumes that a limit on the Article III power of a court can be overcome via consent. The argument is that there are two kinds of restrictions on the authority imposed by Article III: lack of subject matter jurisdiction and lack of power to issue a final judgment; consent cannot cure the former, but can solve the latter. But there is no apparent basis for this distinction. Article III is a constitutional, structural limit on the powers of the

[111] In re Pro-Pac, Inc, 456 BR 894, 902–03 (Bankr ED Wis 2011); In re Oxford Expositions, LLC, 2011 WL 4074028, *8 (Bankr ND Miss).
[112] In re Teleservices Group, Inc, 456 BR at 338.
[113] Id; In re Oxford Expositions, LLC, 2011 WL 4074028 at *8 ("Indeed, many arbitrators are not licensed attorneys, and unlike United States Bankruptcy Judges, they are not appointed to fourteen year terms by an Article III Court of Appeals, nor do they have their compensation statutorily linked to the compensation of Article III district judges.")

federal judiciary. There is no reason why any Article III deficiency can be overcome by consent.[114] It is one thing for parties by consent to submit a matter to an arbiter for a decision; that does not implicate the Article III powers of a federal court. But if Congress mandates binding arbitration over state law claims and gives the arbiters the authority to issue a binding judgment, then under the reasoning of Stern v Marshall and Northern Pipeline there is every reason to believe that would be unconstitutional as well.[115]

In fact, that is why the implications of Stern v Marshall are so great. In addition to the constitutional problems with congressionally mandated binding arbitration for state law claims, any final decision by a non-Article III judge over state law claims would be unconstitutional. Federal magistrate judges are non-Article III judges who are appointed for eight year terms. In United States v Raddatz,[116] the Supreme Court held that magistrate judges are constitutional as adjuncts of the federal district courts.[117] The Court concluded that because "the entire process takes place under the district court's total control and jurisdiction . . .

[114] See Richard Lieb, The Supreme Court, in Stern v. Marshall, by Applying Article III of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders, 20 J Bankr L & Prac 4 Art 1 (2011).
[115] Professor Judith Resnik has made the point that the cases decided by non-Article III judges far outnumber those decided by Article III courts and that this only will increase. Judith Resnik, Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character, 71 Geo Wash L Rev 798, 808 (2003) ("My assumption is that one hundred years from now, life-tenured judges will at best comprise about one quarter of the federal judicial work force and will mostly do appellate work, reviewing decisions of non-Article III judges.").
[116] 447 US 667 (1980)
[117] Id at 687.

[the Act] strikes the proper balance between the demands of due process and the constraints of Art. III." [118]

But magistrate judges also can hold trials in civil proceedings, including jury trials, with consent of the parties. Consent need not even be explicit; in Roell v Withrow,[119] the Court held that consent to trial by a magistrate judge can be implied from a party's conduct during litigation.[120] In such matters, magistrate judges are not in any meaningful sense adjuncts of the district court, any more than the bankruptcy court in Stern v Marshall was functioning as an adjunct of the district court. Yet, ten circuits have upheld the Federal Magistrate Statute, which permits parties to consent to magistrate judges entering final judgments.[121] If consent is not sufficient to permit a non-Article III judge to issue a final judgment over state law matters, then these decisions are wrong at least as to state law claims, such as through supplemental state law claims or state law counterclaims, that would be presented for final judgments to magistrate judges.

Conclusion

The easiest thing to say about Stern v Marshall is that it is causing enormous confusion and litigation concerning its scope. There is a desperate need for the Supreme Court to clarify the scope of its holding and whether consent is sufficient

[118] Id at 681, 683–84.
[119] 538 US 580 (2003).
[120] Id at 590.
[121] In re Safety Harbor Resort & Spa, 456 BR 703, 718 (Bankr MD Fla 2011), citing Sinclair v Wainwright, 814 F2d 1516, 1519 (11th Cir 1987).

to cure the defect. In reading Chief Justice Roberts' majority opinion, it is apparent that the Court had not thought through the problems its ruling would create in countless cases in bankruptcy courts across the country. Chief Justice Roberts attempt to dismiss the dissent's concern by saying that the ruling "does not change all that much"[122] indicates that the Court did not consider what it would mean to hold that bankruptcy courts, and likely other non-Article III courts, cannot issue binding judgments on some state law claims.

The Court's reasoning in Stern v Marshall is inherently unpersuasive because it is built on a framework that makes little sense. The language of Article III of the Constitution seemingly requires that all who exercise the federal judicial power have life tenure and salary protections, but for practical reasons that has not been the law since the early 19th century when the Court began to allow non-Article III courts. The Court has allowed them in three instances—for territories, for the military, and for public law matters—but never has explained why just these three and not others. Northern Pipeline, the predicate for Stern v Marshall, held that it was constitutionally impermissible for bankruptcy judges to decide state law claims, but never justified what is objectionable about this in terms of the need to assure judicial independence. The Court in Stern v Marshall likewise stresses the need for life tenure to ensure judicial independence, but does not

[122] Stern, 131 S Ct at 2620 ("If our decision today does not change all that much, then why the fuss?")

explain why this means that a state law counterclaim must be decided by an Article III judge. Decisions after Northern Pipeline, Thomas and Schor, emphasized the need for a functional and not a formalistic approach to determining when non-Article III courts are permissible, but the Court in Stern v Marshall ignores this shift toward the pragmatic.

Ultimately, it is the highly formalistic approach of Stern v Marshall that makes it most unsatisfying and unpersuasive. The Court has rejected formalism in this area of the law in allowing other non-Article III courts for almost 200 years. The distinctions which need to be drawn to come to the Court's conclusion in Stern v Marshall are impossible to justify. More generally, formalism is inherently unsuitable for interpreting a Constitution written over 200 years ago for a vastly different society and that has to be applied to an infinite variety of problems which could not have been anticipated at the time.

The dispute between Vickie Lynn Marshall and Pierce Marshall made the tabloids because of interest in a beautiful woman in her 20s marrying a very rich man in his 80s and because of the nasty fight over a large inheritance. But the constitutional questions go to the very core of the meaning of Article III and how the Constitution should be interpreted.

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