What You Need to Know about *Stern v. Marshall*

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Stern v. Marshall, 131 S. Ct. 2594 (2011): The Practical (but Mostly Impractical) Impact on Bankruptcy Practice

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I. Introduction[2]

Stern v. Marshall is the Supreme Court's most important decision on bankruptcy jurisdiction in twenty years.[3] *Stern* arose out of parallel probate and bankruptcy proceedings involving bankruptcy debtor Vickie Lynn Marshall (better known as Anna Nicole Smith), and it curtails the power of bankruptcy judges in ways that are having an immediate impact on bankruptcy practice in North Carolina and around the nation.

At a theoretical level, *Stern* is consistent with the modern Supreme Court's brand of procedural judicial activism, and uses a formalistic, categorical interpretation of Article III power to curtail the power of bankruptcy judges.[4] For lawyers practicing bankruptcy law, however, *Stern*'s analysis demonstrates the Court's distance from the practicalities of bankruptcy litigation. At this level, *Stern* has the potential to create havoc in the bankruptcy courts and, taken to its logical extension, to disrupt the functions of other non-Article III federal adjudicators.[5]

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[2] The authors would like to thank Pedra D. Lee, North Carolina Central University School of Law, Class of 2012, for her assistance with research on this paper.

[3] 131 S. Ct. 2594 (2011). *Stern* is the most recent decision in a line of cases that begins with Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) and continues through Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

[4] Article III of the United States Constitution vests the judicial power of the United States in the Supreme Court and any other "inferior tribunals" established by Congress. Federal district courts and circuit courts of appeals are established pursuant to Article III and judges that serve on these courts are referred to as Article III judges. Article III provides these judges with two significant guarantees to safeguard their independence: (1) life tenure, and (2) assurance that their compensation may not be diminished while in office.

[5] The analysis in *Stern* is applicable to any federal adjudicator or tribunal that is not an Article III court. On September 9, 2011, the Fifth Circuit Court of Appeals ordered the parties to submit letter briefs addressing "whether the reasoning in *Stern* applies to magistrate judges which, like bankruptcy judges, are not Article III judges, and whether under *Stern*, a magistrate judge can enter final judgment in a case tried to a magistrate judge by consent." Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., No. 10-20640 (5th Cir. Sept. 9, 2011), Order at 2.

Part II of this paper describes the structure and statutory jurisdiction of the bankruptcy court system and its judges, as well as the constitutional problems inherent in the current bankruptcy system. Part III explains the analysis and holding in *Stern* and highlights the practical problems that the decision creates for bankruptcy judges and practitioners. Finally, Part IV gives an overview of selected recent lower court decisions dealing with the fallout from *Stern*.

II. Bankruptcy Courts and their Jurisdiction

A. Historical Background

Article I of the United States Constitution gives Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[6] For much of the nation's history, Congress was reluctant to use this power and adopted short-term bankruptcy laws that expired after the easing of the specific economic crisis that engendered the law.[7] The Bankruptcy Act of 1898 was the nation's first permanent bankruptcy law,[8] and it remained in effect until supplanted by the Bankruptcy Code of 1978.[9]

The 1898 Act did not originally provide for separate specialized bankruptcy courts. Professor Charles Tabb describes the development of the adjudicative system that existed under the 1898 Act:

> The federal district courts sat as "courts of bankruptcy," but the bulk of the judicial and administrative work was done by "referees in bankruptcy" appointed by the district courts. Referees were compensated on a fee basis

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[6] U.S. Const., art. I., § 8, cl. 4.
[7] *See, e.g.*, Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 13-22 (1995).
[8] Ch. 541, 30 Stat. 544.
[9] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The law adopted in 1978 is universally referred to as the Bankruptcy Code and was the subject of major amendments in 1984, 1986, 1994, and in 2005.

> which did not change until 1946, when a salary based compensation scheme was substituted. Referees became "bankruptcy judges" in 1973.[10]

The advent of specialized adjudicators known as bankruptcy judges led to the creation of a separate system of bankruptcy courts. These bankruptcy courts, like the referee tribunals that preceded them, assisted the district courts by relieving them of the burden of handling bankruptcy cases and associated litigation.

The 1898 Act's allocation of judicial power between district judges, bankruptcy referees, and eventually bankruptcy judges resulted in a confusing jurisdictional patchwork. In practice, the federal district courts referred much of their jurisdictional power over bankruptcy matters to bankruptcy referees and their successor bankruptcy judges. Although bankruptcy cases themselves are administrative proceedings, many bankruptcy cases involve associated litigation concerning property, claims against the bankruptcy estate, or claims by the estate against third parties. Then and now, state courts might retain concurrent jurisdiction over much of this associated litigation.

At the federal level, the 1898 Act drew a boundary around bankruptcy court jurisdiction by distinguishing between summary jurisdiction and plenary jurisdiction. Professor Tabb explains that summary jurisdiction "referred to proceedings over which federal courts of bankruptcy exercised exclusive jurisdiction; proceedings involving administration of the bankruptcy estate under the Bankruptcy Act, and those involving property in the bankruptcy court's possession."[11] Plenary jurisdiction, on the other hand, "referred to authority to

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[10] *Tabb, supra* note 4 at 25.
[11] *Id.*, fn. 167.

adjudicate disputes between the bankruptcy trustee . . . and third parties concerning property not in the possession of the bankruptcy court."[12] If the parties did not consent to the jurisdiction of the bankruptcy court, a plenary matter could be heard only by a state or federal district court that would have subject matter jurisdiction independent of the bankruptcy proceeding. [13]

As originally drafted, the Bankruptcy Reform Act of 1978 simplified this system by strengthening the stature of bankruptcy judges and providing them with wide-ranging jurisdiction over bankruptcy cases and associated litigation. However, after much debate, Congress refused to grant Article III status to the new bankruptcy judges, despite the significant expansion in their jurisdiction. The resulting legislation gave bankruptcy judges "jurisdiction over all matters arising in, under, or related to bankruptcy cases as adjuncts of the district court, with the protections of Article III."[14] However, in a significant legislative compromise, bankruptcy judges were appointed for 14-year terms by the President, with the advice and consent of the Senate, and were compensated under the Federal Salary Act.[15] As a result, non-Article III judges were granted comprehensive summary and plenary jurisdiction over bankruptcy cases and litigation.

B. The *Marathon* Problem

On June 28, 1982, the Supreme Court held the new Bankruptcy Code's broad grant of jurisdiction to Article I bankruptcy judges unconstitutional in *Northern*

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[12] *Id.*, fn. 168.
[13] *Id.*
[14] *Id.* at 34. This jurisdictional grant was found at 28 U.S.C. § 1471 (1976) (repealed).
[15] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982).

Pipeline Construction v. Marathon Pipe Line.[16] Northern Pipeline Construction (Northern) filed a bankruptcy petition in the United States Bankruptcy Court for the District of Minnesota in January of 1980. Three months later, Northern filed suit in the bankruptcy court against Marathon Pipe Line (Marathon). Northern's complaint sought damages for a variety of state law contract and tort claims, including breach of contract, breach of warranty, misrepresentation, coercion, and duress. Marathon responded by filing a motion to dismiss the lawsuit, contending that Congress had "unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution."[17]

The Supreme Court agreed. The majority opinion, written by Justice Brennan, began by stressing that the integrity of Article III is crucial to maintaining the separation of powers intended by the Framers. The federal judiciary was "designed by the Framers to stand independent of the Executive and Legislature," and "Art. III both defines the power and protects the independence of the Judicial Branch."[18] The "inexorable command" of the Constitution mandates that "the judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."[19]

Because it was undisputed that bankruptcy judges are not Article III judges, the Court next examined the arguments for upholding the broad jurisdictional powers granted to bankruptcy judges. These arguments fell into two categories. First, the appellant argued that Article I gives Congress the power to establish

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[16] *Id.*
[17] *Id.* at 56-57.
[18] *Id.* at 58.
[19] *Id.* at 59.

legislative courts in specialized areas like bankruptcy. Second, the appellant contended that the Code vested bankruptcy jurisdiction in the district courts and this jurisdiction was exercised by the bankruptcy courts only in their capacity as "adjuncts" of the district courts.

The Court found that legislative courts, while permitted, were allowed only in three narrow situations: non-Article III territorial courts, military courts martial, and legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights."[20] Of these three possibilities, legislative courts created to decide public rights offered the closest fit to bankruptcy courts. Justice Brennan, however, found that the "substantive legal rights at issue in the present action cannot be deemed 'public rights'" because they flowed from the liability of one person to another.[21] In Justice Brennan's view, a proceeding involving a public right must "arise 'between the government and others,'" indicating that the government must be a party in any action involving a public right.[22]

Finally, the Court rejected the appellant's argument that the bankruptcy courts functioned as mere adjuncts of the district courts. Although the Court recognized that Congress had the power to assign some judicial functions to an "adjunct adjudicator," it held that this assignment must be structured so that "'the

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[20] *Id.* at 62-76.
[21] *Id.* at 71.
[22] *Id.* at 69. *But see* Michael St. Patrick Baxter, S. Elizabeth Gibson, Randal C. Picker, & R. Patrick Vance, The Scope and Implications of Stern v. Marshall, 131 S. Ct. 2594 (2011), *available at* http://ssrn.com/abstract=1979503 at 5-6 (discussing the Court's subsequent retreat from this categorical approach in Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) and Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)).

essential attributes' of judicial power are retained in the Art. III court."[23] That was clearly not the case here, as the Court found that the bankruptcy courts created by the 1978 Bankruptcy Code exercised independent judicial power that far exceeded the power that would be granted to an adjunct. Indeed, Congress's original jurisdictional grant to the bankruptcy courts in the 1978 Code was essentially identical to the jurisdiction of the district courts, and included the power to preside over jury trials, issue declaratory judgments, issue writs of habeas corpus, and issue binding final judgments.

Based on this reasoning, *Marathon* holds that Congress had used the Bankruptcy Reform Act of 1978 to "impermissibly remove most, if not all of 'the essential attributes of the judicial power' from the Art. III district court, and [had] vested those attributes in a non-Art. III adjunct."[24] The 1978 Act's grant of broad and comprehensive jurisdiction to the bankruptcy courts was, accordingly, unconstitutional.

C. Fixing Bankruptcy Jurisdiction After *Marathon*

Recognizing the impact that its decision would have on bankruptcy cases and associated litigation, the Court held that *Marathon* did not apply retroactively.[25] The Court also stayed its judgment for three months, until October 4, 1982, to give Congress time to revise the now invalid jurisdictional structure of the bankruptcy

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[23] *Id.* at 80. The approval of "adjuncts" allows Congress to establish non-Article III adjudicators like United States Magistrate Judges, so long as the functions of these officers are under the control of the federal district courts.
[24] *Id.* at 87.
[25] *Id.* at 88.

courts.[26] Congress failed to act within the allotted time and, on motion of the Solicitor General, the Court extended the stay until December 24, 1982.[27]

Again, Congress failed to act, forcing the Judicial Conference of the United States to jerry rig a solution by devising an "Emergency Rule" that allowed the bankruptcy courts to continue to function.[28] The Emergency Rule was adopted as a local rule in every federal district court, and allowed core bankruptcy matters to be heard by the bankruptcy courts on reference from the district courts. The district courts were permitted to withdraw the reference at any time, and other, non-core matters, remained with the district court. Congress continued to decline to fix the constitutional problem exposed by *Marathon*, and bankruptcy matters proceeded under the Emergency Rule for the next eighteen months.

Congress was finally spurred to action by another Supreme Court decision, *NLRB v. Bildisco & Bildisco*,[29] which held that a collective bargaining agreement was an executory contract that could be unilaterally rejected by a chapter 11 debtor-in-possession. In answer to *Bildisco*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA).[30] BAFJA presented a combined response to the problems created by *Marathon* and *Bildisco*.[31]

In BAFJA, Congress again declined to extend Article III status to bankruptcy judges. Instead, BAFJA established a complicated, bifurcated, jurisdictional system

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[26] *Id.*
[27] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 459 U.S. 813, 813 (1982).
[28] *See, e.g.*, Vern Countryman, Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process, 22 Harv. J. on Legis. 1 (1985).
[29] 465 U.S. 513 (1984).
[30] Pub. L. No. 98-353, 98 Stat. 33.
[31] 11 U.S.C. § 1113, adopted in response to *Bildisco*, provided a new procedure governing the rejection of collective bargaining agreements.

that, in many respects, tracked the Emergency Rule. This is the system used today, and it is presently codified at 28 U.S.C. §§ 1334 and 157.

Section 1334(a) provides that the federal district courts have original and exclusive jurisdiction over all cases under title 11 (all bankruptcy cases). Section 1334(b) adds that the district courts have original, but not exclusive, jurisdiction over civil proceedings arising under title 11, or arising in or related to cases under title 11.

Section 157(a) then allows each district court to refer "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" to the bankruptcy judges for that district. Using the power provided by section 157(a), every federal district court in the United States has adopted a standing "Order of Reference" that refers all bankruptcy proceedings to the bankruptcy court for that district.[32] The order of reference allows bankruptcy cases and all proceedings arising in them, or related to them, to be filed with the bankruptcy court and heard by that court.

Section 157(b) and (c) then divide the jurisdiction of bankruptcy courts into the categories of "core" and "non-core." Section 157(b)(1) empowers bankruptcy judges to "hear and determine all cases arising under title 11 and all core proceedings arising under title 11 or arising in a case under title 11" and to enter judgments in these matters. Section 157(b)(2) gives a nonexclusive list of matters deemed by Congress to be core proceedings in bankruptcy. These include functions

[32] *See, e.g.*, General Order of Reference titled "Referral of Bankruptcy Matters to Bankruptcy Judges" (E.D.N.C., Aug. 3, 1984), *available* at http://www.nceb.uscourts.gov/documents/generalorders/General%20Order%20of%20Reference_1984_August%203.pdf.

integral to the bankruptcy process, for example, matters concerning the administration of the estate or allowance or disallowance of claims.[33] However, the listed core proceedings also include some matters that could arise outside bankruptcy, for example, counterclaims against persons filing claims against the estate.[34]

With respect to matters that are "non-core" but "otherwise related to" a bankruptcy case, section 157(c)(1) allows the bankruptcy judge to hear the matter and submit proposed findings of fact and conclusions of law to the district court, which is then charged with responsibility for entering the final judgment. Section 157(c)(2) also allows bankruptcy judges to enter judgments in non-core proceedings with the consent of all parties. Section 157(b)(3) empowers bankruptcy judges to determine whether any particular proceeding is a core proceeding or a non-core, "related to" matter. Section 157(d) completes the structure of the bankruptcy courts' statutory jurisdiction by allowing the district court to withdraw the reference and remove any matter from the bankruptcy judge at any time.

III. Stern v. Marshall

BAFJA creates a statutory jurisdictional framework that allows the bankruptcy courts to function, but that does not fully address the constitutional

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[33] 28 U.S.C. 157(b)(2)(A) and (B).

[34] Although this is exactly the phrase used in 28 U.S.C. 157(b)(2)(C), the statutory provision at issue in *Stern v. Marshall*, it presents something that would be a procedural rarity. A claim against the estate is normally presented in a proof of claim, not in a complaint. Objections may be raised to a proof of claim, but because an answer is not filed in response to a proof of claim, a counterclaim is not normally lodged against a creditor's claim in bankruptcy. A counterclaim is possible only if the creditor initiates an adversary proceeding against the debtor by filing a complaint – for example, to have its claim declared nondischargeable. This is what happened in *Stern*.

concerns raised in *Marathon*. For years, bankruptcy professionals "have expected the proverbial other shoe to drop and the Court to declare the 1984 jurisdictional scheme unconstitutional."[35] While *Stern* does not entirely fulfill this prophecy, it revitalizes *Marathon* by imposing explicit constitutional curbs on the bankruptcy courts' exercise of power under § 157. Although Justice Roberts stressed the narrowness of the holding in his majority opinion,[36] there is no reason why the logic of *Stern* should be confined to its facts, and the decision therefore has the potential to destabilize the existing bankruptcy system.

A. The Road to the Supreme Court

Stern v. Marshall arose out of a "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."[37] Vickie, 63 years younger than J. Howard, was his third wife and married him 14 months before he died at the age of 90.[38] Although J. Howard made many valuable gifts to Vickie during his life, he did not include her in his will. Vickie's efforts to claim a share of J. Howard's estate, estimated to be worth as much as $1.6 billion,[39] were vehemently opposed by J. Howard's youngest son Pierce.

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[35] Elizabeth Warren & Jay Lawrence Westbrook, The Law of Debtors and Creditors 811 (6th ed. 2009).
[36] Justice Roberts made this point in the last paragraph of the majority opinion. "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." Stern v. Marshall, 131 S. Ct. 2594, 2620 (emphasis added).
[37] 131 S. Ct. at 2600.
[38] David Stout, *Justices Hear a Drama Straight From the Tabloids*, N.Y. Times, March 10, 2006 (noting the irony inherent in J. Howard Marshall's earlier career as a lawyer who had taught Trusts and Estates at Yale Law School).
[39] *Id.*

The legal battle that ensued between Vickie and Pierce was fought in the state and federal courts of Louisiana, Texas, and California.[40] While J. Howard was still living, Vickie filed an action in Texas probate court claiming that Pierce had fraudulently induced his father to sign a living trust that omitted her. After J. Howard's death, Vickie filed a bankruptcy petition in the Central District of California. Pierce then filed an adversary proceeding in the bankruptcy court, bringing a claim for defamation against Vickie and arguing that this claim was nondischargeable in her bankruptcy case. Pierce subsequently filed a proof of claim for his defamation claim in the bankruptcy case, a necessity if he intended to recover damages from the estate. Finally, Vickie filed a counterclaim in Pierce's adversary proceeding, asserting that Pierce had tortiously interfered with her expectancy of receiving additional gifts or bequests from J. Howard.

In November of 1999, the bankruptcy court granted Vickie's motion for summary judgment on Pierce's defamation claim, leaving only Vickie's counterclaim to be decided. The court then conducted a bench trial on Vickie's counterclaim for tortious interference, found in her favor, and issued a judgment for $400 million in compensatory damages and $25 million in punitive damages. On appeal, Pierce argued that the bankruptcy court had lacked jurisdiction to enter a final judgment on Vickie's counterclaim because it was not a core proceeding.

The district court agreed.[41] Although Vickie's counterclaim was designated as core by the literal language of § 157(b)(2)(C), the district court understood

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[40] The proceedings described in this paper are only those pertinent to the Supreme Court's decision.
[41] The initial appeal from bankruptcy court is normally taken to the federal district court. 28 U.S.C. § 158.

Marathon to require that it be designated as non-core because it was only "somewhat related" to Pierce's claim in the bankruptcy case.[42] As a result, the district court found that it was required to treat the bankruptcy court's judgment as "proposed" and to independently review the record.

While these matters were unfolding in the California federal courts, Vickie's case in Texas probate court was proceeding simultaneously. After the bankruptcy judge's judgment – but before any decision was reached by the California district court – the Texas state court conducted a jury trial and entered a judgment in Pierce's favor on the same legal claim posed by Vickie's counterclaim in California. The California district court declined to give the Texas judgment preclusive effect and, agreeing with the bankruptcy judge, independently found that Pierce had tortiously interfered with Vickie's expectancy of a bequest from J. Howard. The district court then entered a judgment for $88 million in Vickie's favor.

The case was appealed to the Supreme Court under the name *Marshall v. Marshall*[43] and, in 2006, the Court held that the probate exception to federal subject matter jurisdiction did not deprive the bankruptcy court of jurisdiction to decide Vickie's tortious interference claim.[44] The case was then remanded back to the Ninth Circuit Court of Appeals for a determination as to whether the bankruptcy

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[42] Marshall v. Marshall (In re Marshall), 264 B.R. 609, 632 (C.D. Calif. 2001).
[43] 547 U.S. 293 (2006).
[44] The probate exception is created by case law and holds that federal courts do not have jurisdiction to probate wills, administer estates, or otherwise disturb property that is in the custody of the state for purposes of probate. *See* Markham v. Allen, 326 U.S. 490 (1946).

court had jurisdiction to decide Vickie's counterclaim – which the parties conceded was sufficiently related to Pierce's claim to be a compulsory counterclaim.[45]

On remand, the Ninth Circuit found that that Vickie's counterclaim could be heard by a bankruptcy judge only if it: (1) satisfied the definition of a core proceeding as given in § 157, and (2) either arose under or arose in title 11. The first test was satisfied by § 157(b)(2)(C), which expressly designates "counterclaims by the estate against persons filing claims against the estate" as core. However, the circuit court held that a counterclaim – even if falling within § 157(b)(2)(C) – was a core proceeding "only if the counterclaim is so closely related to the proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself."[46]

It followed that Vickie's counterclaim, although compulsory, was not a core proceeding. As a result, the bankruptcy judgment in Vickie's favor was invalid, and the Texas probate court's judgment in Pierce's favor was the earliest judgment left standing and therefore had preclusive effect on all issues. This holding prompted the Supreme Court to grant certiorari a second time in the same case – this time under the name *Stern v. Marshall*.

B. The Court's Analysis and Holding

The issue before the Supreme Court was whether the bankruptcy court, using statutory authority from 28 U.S.C. § 157(b)(2)(C), could constitutionally enter a final judgment on a compulsory counterclaim that was rooted in state law, or whether

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[45] A counterclaim is compulsory if it: "(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." Fed. R. Civ. P. 13(a).
[46] Marshall v. Stern (*In re* Marshall), 600 F.3d 1037, 1058 (9th Cir. 2010).

Article III of the Constitution prevented the bankruptcy court from entering such a final judgment. By a 5-4 margin, the Court held that while Congress had given the bankruptcy court authority in § 157(b)(2)(C) to issue a final judgment on a compulsory counterclaim based on state law, to do so would violate Article III if the counterclaim could "not [be] resolved in the process of ruling on a creditor's proof of claim."[47] Thus, despite Congress's broad grant of authority to bankruptcy courts in 28 U.S.C. § 157, the exercise of that authority was unconstitutional as applied to the facts in *Stern* because it infringed upon power granted only to Article III courts.

The Court began by focusing on the history and purpose of Article III's mandate that "the 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 Court emphasized that the integrity of Article III would be eroded "if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."[48]

To safeguard the integrity of the federal courts, the Framers provided two key protections to judges appointed under Article III. First, Article III judges have life tenure and may be removed only through the process of impeachment. Second, the compensation of an Article III judge may not be diminished while the judge is in office. These "defining characteristics of Article III judges" strengthen the independence of the judiciary and ensure that judicial decisions are not made "with

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[47] Stern v. Marshall, 131 S. Ct. at 2601. The majority opinion in *Stern* was written by Chief Justice Roberts and was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Breyer filed a dissenting opinion, which was joined by Justices Ginsburg, Sotomayor, and Kagan.
[48] *Id.* at 2609.

an eye toward currying favor with Congress or the Executive."[49] When the claims in a suit correspond to "the traditional actions at common law tried by the courts at Westminster in 1789," the Constitution requires those claims to be decided by Article III judges. [50]

As in *Marathon*, the Court recognized that Congress has the power to assign cases involving "public rights" to "legislative courts" for resolution.[51] The public rights exception, however, extends "'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."[52] Here, Vickie's counterclaim presented a state law claim that was independent of bankruptcy law and that could be resolved without a ruling on Pierce's proof of claim.

Accordingly, the majority found that Vickie's counterclaim did not present a matter of public right and must be decided by an Article III court – not by a bankruptcy court. In reaching this holding, the Court conceded that its earlier public rights decisions have been inconsistent and "the subject of some debate."[53] From this inconsistency, the Court drew the common point that a public right must be "integrally related to particular federal government action."[54] Vickie's counterclaim did not meet this requirement because it was not a matter that could be pursued only with authority from the legislative or executive branches; it did not flow from a

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[49] *Id.*
[50] *Id.*
[51] *Id.* at 2610.
[52] *Id., quoting Marathon* at 67-68.
[53] *Id.* at 2611 (summarizing earlier decisions at 2611-14).
[54] *Id.* at 2613, *citing* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011).

federal statutory scheme; and it did not depend on the resolution of any claim created by federal law.

To the contrary, Vickie's counterclaim was simply a state common law claim between two private parties. This case did not present a situation where Congress had established an expert legislative tribunal or administrative agency to determine specialized questions of fact. Instead,

> [T]his 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.[55]

The bankruptcy court's assertion of jurisdiction over Vickie's counterclaim was an example of the most common and basic exercise of Article III judicial power and, therefore, was unconstitutional.

Next, the Court addressed the assertion by the debtor and the dissent that Pierce had consented to the bankruptcy court's power by filing a proof of claim, thereby permitting the bankruptcy court to enter a final judgment on Vickie's counterclaim.[56] Disagreeing with that contention, the Court found that the creditor's claim did not give the bankruptcy court, a non-Article III tribunal, the power to enter a final decision on the debtor's counterclaim when the bankruptcy court would not have had this authority otherwise. Vickie's counterclaim could not have been disposed of by the resolution of Pierce's claim, because resolving the

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[55] *Id.* at 2615 (emphasis in original).
[56] *Id.* at 2615-16.

counterclaim required the bankruptcy court to "make several factual and legal determinations that were not disposed of in passing on objections to the creditor's proof of claim."[57]

In concluding its analysis of the effect of Pierce's proof of claim, the Court found that the primary question to be asked in determining whether a bankruptcy court has jurisdiction over a particular claim is "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[58] Here, Vickie's counterclaim did not stem from the bankruptcy nor could it be resolved in the claims allowance process as evidenced by the fact that the bankruptcy court found for the debtor, but could not enter a final judgment on the matter without making additional evidentiary findings that rested on state law.

C. Conclusion

The Supreme Court held that while the bankruptcy court had statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on the debtor's compulsory counterclaim based on state law, to do so would violate Article III if the counterclaim could "not [be] resolved in the process of ruling on a creditor's proof of claim."[59] While there was some overlap between Pierce's defamation claim and Vickie's counterclaim (enough to make the counterclaim compulsory), "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim."[60] To enter a final judgment on Vickie's compulsory counterclaim for tortious interference, the bankruptcy court

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[57] *Id.* at 2617.
[58] *Id.*
[59] *Id.* at 2601.
[60] *Id.* at 2617.

would have been required to make findings that were outside its purview and that properly should be decided by Article III courts. Thus, despite Congress's grant of authority to the bankruptcy court under 28 U.S.C. § 157(b)(2)(C), the exercise of that authority was unconstitutional as applied to the facts in *Stern*, and infringed on the power bestowed upon Article III courts.[61]

IV. The Impact of Stern v. Marshall

The majority opinion suggested that its opinion did not change the status quo of how cases and claims are adjudicated in bankruptcy court, but instead was defending Article III judicial power against an encroachment "that may seem innocuous at first blush."[62] In fact, Justice Roberts stated that the Court's "decision today does not change all that much,"[63] and emphasized that the decision's narrow holding was limited to the bankruptcy court's lack of "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."[64] Unfortunately, this prediction has not been borne out in practice, where *Stern* is having a wide-ranging impact on bankruptcy litigation.

A. The Impractical Impact

Stern holds that bankruptcy courts are purely administrative tribunals whose powers are limited to hearing and resolving matters that pertain to the administration of the estate and proofs of claim filed against that estate.[65] Despite

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[61] *Id.*
[62] *Id.* at 2620.
[63] *Id.*
[64] *Id.*
[65] *Stern* does not implicate the subject matter jurisdiction of the bankruptcy courts. Pursuant to § 1334, subject matter jurisdiction over bankruptcy cases and proceedings always lies with the district

the majority's disclaimer that *Stern's* holding is narrow, the logical extension of *Stern* is that bankruptcy courts do not have jurisdiction over a wide variety of other matters that – like the counterclaim in *Stern* – involve claims brought offensively for the purpose of adding assets into the estate. Thus, despite Justice Roberts' assurance of the narrowness of the majority holding, lower court judges charged with responsibility for determining the boundaries of their own jurisdiction will be forced to apply *Stern* to curtail the work of the bankruptcy courts in other ways.

Bankruptcy litigation is home to a variety of "offensive" claims brought by the trustee to enhance the estate. Like the counterclaim in *Stern*, these claims (many originating in state law) have historically been heard by bankruptcy judges and are denominated as core proceedings in § 157(b). This group of "*Stern*-like" claims includes fraudulent conveyance actions,[66] preference actions,[67] and actions to determine the dischargeability of claims.[68] The *Stern* analysis can also be extended to reach state law claims that are asserted defensively against a creditor's proof of claim.[69]

From the point of view of bankruptcy practitioners and judges, excluding these types of claims from the work of the bankruptcy courts will be extremely

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court pursuant to § 1334. As a "unit" of the district court, the bankruptcy court exercises statutory jurisdiction pursuant to § 157. *Stern*, like *Marathon*, holds that this statutory jurisdiction becomes unconstitutional when it allows bankruptcy judges to exercise power that Article III confers only on judges given the protections mandated by Article III.

[66] 28 U.S.C. § 157(b)(2)(H). *See* Heller Erhrman LLP v. Arnold & Porter, LLP (*In re* Heller Ehrman LLP), No. 3:11-cv-04848-CRB (N.D. Cal. Dec. 13, 2011), slip op. at 2. ("[T]he question is whether the holding of *Stern* applies to other "core" matters in the statute. Upon examination, the Court determines the reasoning of *Stern* does apply to the fraudulent conveyance claims in this case, and that the bankruptcy court cannot enter a final judgment on these claims."]

[67] 28 U.S.C. § 157(b)(2)(F).

[68] 28 U.S.C. § 157(b)(2)(I).

[69] *See* Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), _____ F.3d _____, 2011 WL 6880651 (7th Cir. Dec. 30, 2011).

inefficient. Procedurally, it makes sense that all claims arising from the same set of facts should be resolved together in one court.[70] Transactionally, it makes sense that a single court should have the ability to restructure all related aspects of the relationship between the debtor and her creditors. Financially, it makes sense to hear these claims together since funds that a trustee spends pursuing litigation in a non-bankruptcy forum are funds that, otherwise, would be distributed to creditors. Finally, if bankruptcy courts are unable to hear significant numbers of claims that were previously within their power, this work will necessarily be redistributed to the district courts and strain judicial resources at that level.

As Justice Roberts stated in Stern, "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."[71] As a matter of constitutional law, *Stern*, like *Marathon*, has drawn the line between the powers of constitutional courts and legislative courts. However, as a matter of practice, district courts, bankruptcy courts, and lawyers have powerful incentives to develop procedures that will allow as many *Stern*-type claims as possible to remain in the bankruptcy courts.

B. The Practical Impact

The majority in *Stern* expressed skepticism that "as a practical matter . . . restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the

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[70] This is the policy underlying supplemental jurisdiction and the requirement that certain counterclaims be compulsory.
[71] Stern v. Marshall, 131 S. Ct. at 2620, *quoting* INS v. Chadha, 462 U.S. 919, 944 (1983).

bankruptcy process."[72] Despite this prediction, as of January 5, 2012, *Stern v. Marshall* had been referenced in 228 published opinions.[73] Most of these decisions do not involve counterclaims by the estate, but other, more common, types of offensive claims brought on behalf of the estate. At this point in time, for example, the prototypical *Stern* claim is a fraudulent conveyance action.[74]

The final section of this paper examines the different approaches that lower courts are taking when faced with a *Stern*-type claims. Three primary options have emerged: (1) consent by the parties to the bankruptcy court's jurisdiction pursuant to § 157(c)(2); (2) allowing the bankruptcy judge to hear the proceeding and then submit proposed findings of fact and conclusions of law to the district court pursuant to § 157(c)(1); or (3) petitioning the district court to withdraw the reference pursuant to § 157(d).[75]

A. Consent

28 U.S.C. § 157(c)(2), adopted as part of BAFJA in 1984, allows bankruptcy courts to enter final judgments in non-core proceedings with the consent of all parties.[76]

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[72] *Id.* at 2619.

[73] Lauren Miller, *Stern v. Marshall Citation References*, Handout at "Marathon at Thirty," panel presentation moderated by Bankruptcy Judge J. Rich Leonard at the Annual Meeting of the American Association of Law Schools, Washington, D.C., Jan. 7, 2012.

[74] *See, e.g.*, Heller Erhrman LLP v. Arnold & Porter, LLP (*In re* Heller Ehrman LLP), No. 3:11-cv-04848-CRB (N.D. Cal. Dec. 13, 2011); BB&T v. Murray (*In re* Murray), *infra* note 76; McCarthy v. Wells Fargo Bank, N.A. (*In re* El-Atari), *infra* note 82; Paloian v. Am. Express Co. (*In re* Canopy Fin., Inc.), No. 11 C 5360; 2011 WL 3911082 (N.D. Ill. Sept. 1, 2011).

[75] Because these solutions all originate with § 157, their viability depends on the constitutionality of that section. That discussion is beyond the scope of this paper, but is addressed in Baxter, Gibson, Picker, & Vance, The Scope and Implications of Stern v. Marshall, 131 S. Ct. 2594 (2011), *supra* note 21 (analyzing the similarities and differences between the procedures in § 157 and 28 U.S.C. § 636, the Federal Magistrates Act, which has repeatedly been held constitutional).

[76] This provision tracks a similar procedure that allows United States Magistrate Judges to enter final judgments with the consent of the parties. *See* 28 U.S.C. § 636(c)(1).

> [T]he district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.[77]

After *Stern*, bankruptcy judges have continued to use this procedure to hear and determine *Stern*-type claims with the consent of the parties.[78]

If consent is not obtained, bankruptcy judges have generally defaulted to the procedure found in § 157(c)(1) and have entered proposed findings of fact and conclusions of law subject to approval by the district court.[79] After Stern, bankruptcy courts have been unwilling to imply consent from the parties' continued participation in litigation in bankruptcy court.[80] In practice, if the parties desire to have a *Stern*-type claim heard in the

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[77] 28 U.S.C. § 157(c)(2).

[78] *See* Janis v. Wefald (*In re* Wefald), Adv. Proc. No. 10-00266-8-SWH-AP, 2011 WL 6001134 (Bankr. E.D.N.C. Nov. 30, 2011) (parties expressly consented on the record to the bankruptcy judge's entry of final judgment on defamation claim); BB&T v. Murray (*In re* Murray), Adv. Proc. No. 11-00143-8-SWH (E.D.N.C), an adversary proceeding filed to avoid the transfers of 15 parcels of real property as fraudulent conveyances. After the bankruptcy judge directed the parties to brief the impact of Stern, the parties consented to the bankruptcy judge's authority to enter a final judgment in the case; Walter v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.), Adv. Proc. No. 10-02057, 2011 WL 5118419 (Bankr. M.D.N.C. Oct. 26, 2011), slip op. at 2, fn. 1 (recognizing that "the parties may consent to a bankruptcy court entering final judgments in both non-core, 'related to' matters and core matters where it lacks constitutional authority to do so under *Stern*").

[79] *See infra* part IV.B. *And see* Stoebner v. PNY Technologies, Inc. (*In re* Polaroid Corp.), 451 B.R. 493, 496 (Bankr. D. Minn. 2011). (In action for breach of contract, "[a]bsent consent, a presiding bankruptcy judge will have to suggest a rationale and a possible outcome to the district court . . . . With consent, a bankruptcy judge would direct entry of judgment here, i.e., by the clerk of the bankruptcy court.")

[80] New Bern Riverfront Development, LLC v. Weaver Cooke Constr., LLC (*In re* New Bern Riverfront Development, LLC), Adv. Proc. No. 10-00023-8-JRL (Bankr. E.D.N.C. Nov. 22, 2011) (parties directed to file a statement within 30 days stating whether claims are core or non-core, and whether the parties consent to the bankruptcy court's jurisdiction to enter final orders on non-core claims.); *but cf.* Fort v. SunTrust Bank (*In re* Int'l Payment Group, Inc.), Adv. No. 10-80049-HB, 2011 WL 5330783 (Bankr. D.S.C. Nov. 3, 2011) (treating defendants' Rule 12(b)(1) motion to dismiss as a motion to withdraw the reference which should be addressed to the district court, then instructing the parties that their failure to challenge the referral within 14 days would be treated as consent).

bankruptcy court, it will be advisable for them to expressly plead their consent in the complaint and answer.

B. Proposed Findings of Fact and Conclusions of Law

Also adopted in BAFJA as a response to *Marathon*, 28 U.S.C. § 157(c)(1) allows a bankruptcy judge to hear non-core matters on reference from the district court but, without the parties' consent, limits the bankruptcy judge to entering proposed findings of fact and conclusions of law.

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.[81]

This provision places the bankruptcy judge in the position of a special master, and is based on a similar procedure used by United States Magistrate Judges.[82]

In the wake of *Stern*, § 157(c)(1) offers a safe harbor procedure that places the ultimate power to enter judgments on constitutionally questionable claims with the district court. Although this procedure has been in place and applicable to non-core claims since 1984, *Stern* now requires the bankruptcy court to independently examine claims treated as core by § 157(b) to determine whether they fall within the zone of claims that constitutionally may be heard by a bankruptcy judge. If the bankruptcy

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[81] 28 U.S.C. § 157(c)(1).
[82] 28 U.S.C. § 636(b)(1)(B) and (C).

judge's power is not clear, prudence indicates that – absent consent - the judge should default to the procedure in 157(c)(1). This is the course taken in a number of post-*Stern* decisions, both locally[83] and nationally.[84]

C. Withdrawal of the Reference

One or more of the parties may file a motion asking the district court to remove non-core claims from the bankruptcy courts by asking the district court to withdraw the reference pursuant to § 157(d).

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.[85]

Courts have generally been unwilling to withdraw the reference in *Stern*-type claims, preferring instead to leave these claims with the bankruptcy court either through consent or with jurisdiction limited to the entry of proposed findings of fact and conclusions of law.[86] This is not universally true, however, and *Stern* makes a motion to withdraw the reference a more powerful tool when parties wish to avoid the bankruptcy court's jurisdiction.[87]

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[83] Walter v. Freeway Foods, Inc. (*In re* Freeway Foods of Greensboro, Inc.), Adv. Proc. No. 10-02057, 2011 WL 5118419 (Bankr. M.D.N.C. Oct. 26, 2011); McCarthy v. Wells Fargo Bank, N.A. (*In re* El-Atari), No. 1:11cv1090 (LMB/IDD), 2011 WL 5828013 (E.D. Va. (Nov. 18, 2011); D & B Swine Farms, Inc. v. Murphy-Brown, L.L.C. (*In re* D & B Swine Farms, Inc.), Adv. Proc. No. 09-00160-8-JRL, 2011 WL 6013218 (Bankr. E.D.N.C. Dec. 2, 2011).

[84] *See, e.g.*, Stoebner v. PNY Techs., Inc. (*In re* Polaroid Corp.), 451 B.R. 493 (Bankr. D. Minn. 2011); Heller Erhrman LLP v. Arnold & Porter, LLP (*In re* Heller Ehrman LLP), *supra* note 73.

[85] 28 U.S.C. § 157(d).

[86] McCarthy v. Wells Fargo Bank, N.A. (*In re* El-Atari), *supra* note 82; Fort v. SunTrust Bank (*In re* Int'l Payment Group, Inc.); *supra* note 79; Walker, Truesdale, Roth & Assocs. v. The Blackstone Group LP (*In re* Extended Stay, Inc.), Adv. Pro. No. 11-2398 (S.D.N.Y. Nov. 10, 2011).

[87] *See* Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP, ___ B.R. ___, 2011 WL 5244463 (S.D.N.Y. Nov. 2, 2011) (reference withdrawn in fraudulent conveyance actions).

D. In re *Ortiz*

In re *Ortiz*,[88] the first opinion from a circuit court of appeals addressing the impact of *Stern* on bankruptcy jurisdiction, indicates that the circuit courts may not be as willing as lower courts to devise solutions to the practical problems posed by *Stern*. In *Ortiz*, the Seventh Circuit takes an extremely narrow view of the powers of bankruptcy judges that is possibly unwarranted, even under *Stern*.

Ortiz involves two class actions filed by separate groups of consumer bankruptcy debtors in Wisconsin. Aurora Health Care, Inc., a medical provider in Wisconsin, had filed proofs of claim in 3200 bankruptcy cases in the Eastern District of Wisconsin over a five-year period. Aurora's proofs of claim, public filings that were available on the court's docket and could be viewed over the Internet, disclosed health care information about the bankruptcy debtors without their permission. This disclosure violated Wis. Stat. § 146.84, which created a cause of action in favor of the bankruptcy debtors. One set of debtors filed a class action in the bankruptcy court. The second set of debtors filed a class action in state court, and this action was removed to the bankruptcy court by Aurora.

According to the circuit court, all parties sought to avoid litigating this action in the bankruptcy court. One set of debtors filed a motion asking the bankruptcy court to abstain in favor of a state court, while the second set of debtors filed a motion to remand the case back to state court. Aurora filed a motion with the district court asking it to withdraw the reference to the bankruptcy court. The bankruptcy court denied the motions to abstain and remand, and the district court

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[88] Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), _____ F.3d _____, 2011 WL 6880651 (7th Cir. Dec. 30, 2011).

denied the motion to withdraw the reference. The bankruptcy court then entered summary judgment for Aurora in both class actions, finding that the debtors had failed to point to evidence in the record establishing actual damages. All parties then filed a motion for certification for direct appeal to the circuit court, which the circuit court granted under § 158(d)(2)(B)(ii).

In this published opinion, the Seventh Circuit held that its decision to grant a direct appeal was "improvident" in light of the holding in *Stern.*[89]

> Like the debtor's counterclaim in *Stern v. Marshall*, the debtors' claims are based on a state law that is 'independent of the federal bankruptcy law' and 'not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy.' The responsibility for deciding the debtors' claims 'rests with Article III judges in Article III courts.' Even though Congress gave the bankruptcy judge statutory authority to adjudicate the debtors' claims as 'core' matters under 28 U.S.C. § 157(b), *Stern v. Marshall* reveals the absence of constitutional authority for the bankruptcy judge to enter summary judgment, or any form of final judgment, on the debtors' claims.[90]

In the absence of a final judgment, the circuit court found it had no basis for appellate jurisdiction and, accordingly, dismissed the appeals. The cases were remanded to the bankruptcy court, presumably for the ultimate entry of a final judgment by the district court.

The decision in *Ortiz* is notable for several reasons. First, unlike the debtor's claim in *Stern*, the debtors' claims in *Ortiz* were created during the bankruptcy process. Their claims arose directly from the proofs of claim filed by Aurora and, although created by state law, would not have existed outside of the bankruptcy case. Second, and even more telling, the Seventh Circuit specifically found that the

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[89] *In re* Ortiz, 2011 WL 6880651 at *1.
[90] *Id.*

debtors' claims "fit within the category of "arising in" cases generally defined as 'administrative matters that arise *only* in bankruptcy cases.'"[91] Taken literally, this statement means that the debtors' claims in *Ortiz* are both statutorily core and also constitutionally core.

Despite this, the circuit court concludes that the debtors' claims are "simply ordinary state-law claims" involving private parties, and therefore must be heard by an Article III judge.[92] In the view of the circuit court, the fact "[t]hat the factual circumstances of the debtors' claims arise from bankruptcy procedures does not alter the fact that bankruptcy judges are not Article III judges. The question is whether the nature of the debtors' claims allowed Congress to withdraw them from 'the bounds of federal jurisdiction.'"[93] This holding takes a broad view of *Stern* and, in doing so, narrows the powers of bankruptcy judges even further.

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[91] *Id.* at *4 (emphasis in original).
[92] *Id.* at *6.
[93] *Id.*

Random Stern-Related Cases

John Gustafson, Chapter 13 Trustee
Northern District of Ohio, Western Division

In re Deitz, 469 B.R. 11 (9th Cir. BAP 2012). Bankruptcy court had authority to liquidate the amount of a nondischargeable debt, even after Stern.

In re American Housing Foundation, 469 B.R. 257, 269-270 (Bankr. N.D. Tex. 2012). Court could enter proposed findings of fact and conclusions of law even in "core" proceedings.

> An even more involved analysis of the statute reveals that its text does not bar the Court from issuing non-binding findings of fact and conclusions of law. Section 157(b)(1) provides as follows: "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) (emphasis added). Likewise, section 157(c)(1) provides:
>
> > A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> 28 U.S.C. §157(c)(1) (emphasis added).
>
> Defendants read these two sections in tandem to stand for the proposition that the Court is limited to only issuing final orders when hearing core matters, just as the Court is limited to only proposing findings and conclusions on related-to matters. They are correct on the latter point given § 157(c)(1)'s use of the word "shall." *See, e.g., Defenders of Wildlife v. United States EPA*, 450 F.3d 394, 399 n.4 (9th Cir. 2006) (Kozinski, J., dissenting) ([Under a statute] "'shall' means shall").
>
> However, the text of § 157(b)(1) is flexible. It states that the bankruptcy courts may hear and decide bankruptcy cases (the bankruptcy cases) and core proceedings within such cases. *See Fogerty v. Fantasy Inc.*, 510 U.S. 517, 533, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994) ("The word 'may' clearly connotes

> discretion"). Unlike subsection (c)(1), which accords the bankruptcy court no discretion, the plain text of subsection (b)(1) does not bar the bankruptcy court from hearing the case and proposing findings and conclusions. Indeed, the mandatory language in § 157(c)(1), contrasted with the permissive language in subsection (b)(1), suggests that bankruptcy courts have discretion in deciding how to handle (b)(1) core proceedings as compared to (c)(1) related-to proceedings. *See Lopez v. Davis*, 531 U.S. 230, 241, 121 S. Ct. 714, 148 L. Ed. 2d 635 (2001) ("Congress' use of the permissive 'may' in [a statute's section] contrasts with the legislators' use of a mandatory 'shall' in the very same section."). This makes sense. Congress, reacting to *Northern Pipeline*, through use of the word "shall" in § 157(c)(1) ensured that bankruptcy courts would not have the power to finally determine cases that have less to do with the debtor and the bankruptcy process itself, i.e., cases that potentially implicate constitutional problems under Article III. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84-85, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982). Congress did not intend for §157 to prohibit bankruptcy courts from issuing non-binding findings of fact and conclusions of law to a district court on core matters.

In re McElwee, 469 B.R. 566 (Bankr. M.D. Pa. 2012). Bankruptcy court had constitutional authority to enter final judgment on claim objection.

In re Appalachian Fuels, LLC, 472 B.R. 731 (E.D. Ky. 2012). Bankruptcy court could constitutionally adjudicate fraudulent transfer and preference claims.

In re Capco Energy, Inc., 472 B.R. 378 (Bankr. S.D. Tex. 2012). Bankruptcy court could not adjudicate claims arising under a purchase agreement and guarantees executed as part of the Chapter 11 Plan:

> Because bankruptcy judges are not Article III judges, they may not exercise the judicial power of the *United States. Stern v. Marshall*, 131 S.Ct. 2594, 2609, 180 L. Ed. 2d 475 (2011) ("[T]he judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in [Article III]."). Bankruptcy judges therefore may not enter final judgments or orders in matters that fall within the exclusive authority of the Article III judiciary.
>
> The Court may, however, exercise authority over essential bankruptcy matters under the public rights doctrine. Under *Thomas v. Union Carbide Agricultural Products Co.*, a right closely integrated into a public regulatory scheme may be resolved by a non-Article III tribunal. 473 U.S. 568, 593, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985). The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including "the exercise of exclusive

> jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her or it from further liability for old debts." *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2005); *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) (noting in dicta that the restructuring of debtor-creditor relations "may well be a 'public right'"). *But see Stern*, 131 S.Ct. at 2614 n.7 ("We noted [in *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 56 n.11, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989) that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.'").
>
> This proceeding does not involve bankruptcy law and is instead concerned with the enforcement of state-law contract rights. Although the Trustee's rights under the purchase and sale agreement and the guaranties were established in connection with a chapter 11 plan, the rights are not established by bankruptcy law and cannot be enforced through the Court's *in rem* jurisdiction over the bankruptcy estate. *See West v. Freedom Medical, Inc. (In re Apex Long Term Acute Care—Katy, L.P.)*, 465 B.R. 452, at 460 (Bankr. S.D. Tex. 2011) (concluding that *Stern* requires an examination of whether a disputed right is established by the Bankruptcy Code, whether the substantive outcome is affected by bankruptcy law, and whether the proceeding can be resolved through the exercise of *in rem* jurisdiction over the bankruptcy estate).
>
> The Court holds that it does not have constitutional authority to enter a final judgment in this proceeding. The Court will therefore submit this memorandum opinion, along with the two January 25, 2012 memorandum opinions, as part of its report and recommendation to the District Court with respect to entry of a final judgment.

DiVittorio v. HSBC Bank USA, NA (In re Divittorio), 670 F.3d 273, 283 n.4 (1st Cir. 2012). In deciding claims under the Massachusetts equivalent of TILA, the First Circuit Court of Appeals held:

> We do not believe that the Supreme Court's recent decision in *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), affects the jurisdiction of the bankruptcy court to render a decision in this matter. *Stern* held:
>
> > 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.
>
> 131 S. Ct. at 2620. Here, however, it first was necessary to resolve the validity of Mr. DiVittorio's claim under the MCCCDA to determine whether HSBC was entitled to relief from the automatic stay.

In re Old Cutters, Inc., 474 B.R. 219 (Bankr. D. Idaho 2012). Proceedings challenging creditor's claim and lien were within the "arising in" jurisdiction of the bankruptcy court.

In re Madison Bentley Assoc., 474 B.R. 430 (S.D.N.Y. 2012). Withdrawal of the reference was not warranted in adversary proceeding raising fraudulent transfer and alter ego claims.

In re Merrillville Surgery Center, LLC, 474 B.R. 618 (Bankr. N.D. Ind. 2012). Reference should not be withdrawn based on the court's alleged inability to adjudicate avoidance claims.

Other limitation issues of interest:

In re Holley, 473 B.R. 212, 216 (Bankr. E.D. Mich. 2012). Bankruptcy court lacked authority to award punitive damages for willful violation of the discharge injunction. Punitive damages can only be awarded for criminal contempt, and the bankruptcy court lacks criminal contempt powers.

In re Kinderknecht, 470 B.R. 149, 165-166 (Bankr. D. Kan. 2012). In situations where jury trial rights make withdrawal of the reference appropriate, that withdrawal can be delayed until after dispositive motions are ruled on – even if the court's ruling is going to be proposed findings of fact and conclusions of law:

> I first re-examine my authority to enter a final order on the defendants' summary judgment motion. The defendants timely demanded a jury trial on all of the trustee's claims and withheld their consent to a bankruptcy judge conducting that jury trial. In making my recommendation to the District Court concerning their initial motion to withdraw the reference, I concluded that the motion should be deferred pending my deciding the summary judgment motion now before me and that the reference should be withdrawn as to any surviving actions. Nothing

> offered by the defendants in support of their renewed *Stern* motion changes that view.
>
> Of the trustee's five causes of action, only her fraudulent transfer claim is a core proceeding under 28 U.S.C. §157(b)(2)(H). Defendants are entitled to a jury trial on that claim, but that fact does not preclude my entering a final order granting summary judgment if that is warranted. The balance of the trustee's claims are non-core proceedings that are, at best, related to the case as that term is used in §157(c)(1). Whether they are matters of private right or not, I remain empowered to decide them and submit proposed findings of fact and conclusions of law to the District Court for its review. As I have noted in my recently-entered order in Lewis involving similar litigation, I do not consider these cases to be at all similar to the circumstances in *Stern v. Marshall*, nor is my jurisdiction of them limited by the rule in that case: that bankruptcy courts lack the power to enter a final judgment on a counterclaim against a claimant under §157(b)(2)(C). Neither of these defendants is a claimant in Kinderknecht's bankruptcy and the trustee's claims are not counterclaims. Therefore, except with respect to any order I may enter on the §548(a) fraudulent transfer claim, my findings of fact and conclusions of law made in determining the instant summary judgment motion should be deemed proposed findings of fact and conclusions of law under Fed. R. Bankr. P. 9033.

While Kindernecht makes that decision from the Bankruptcy Court perspective, the decision in Equip. Finders of Tenn. v. Fireman's Ins. Co., 2011 U.S. Dist. LEXIS 130734 at *7 (M.D. Tenn. Nov. 10, 2011) makes the same decision from the District Court perspective:

> Defendants next argue that "even if the Bankruptcy Court has subject matter jurisdiction, withdrawal of the reference is appropriate where, as in this case, the debtor/plaintiff has asserted a right to a jury [trial]." (Docket No. 2 at 4). While withdrawal of the reference at some point may indeed be appropriate, that does not mean that withdrawal is appropriate at this time.

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 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.

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[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