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Getting to the Core of Stern v. Marshall: History, Expertise, and the Separation of Powers

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Getting to the Core of *Stern v. Marshall*: History, Expertise, and the Separation of Powers

by

Troy A. McKenzie*

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I. INTRODUCTION

Until recently, the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹ was treated as something of a dead end.² To be sure, the judgment—effectively striking down the bankruptcy court system erected by Congress in 1978—had a profound impact on the

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¹458 U.S. 50 (1982).

²Scholars have tended to take this critical view of the case. See, e.g., James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646-47 (2004) (describing *Northern Pipeline* as “an ill-fated and relatively short-lived attempt to establish categorical limits to non-Article III adjudication”); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 515-16 (1987) (describing *Northern Pipeline* as an isolated example of the Supreme Court’s “voicing a formalistic view of separation-of-powers issues concerning the courts”); Adrian Vermeule, *The Judicial Power in the State (and Federal)*

shape of bankruptcy law and practice.³ Likewise, the Court's inability to speak through a majority opinion injected a dose of jurisdictional uncertainty into later bankruptcy litigation.⁴ As a doctrinal moment, however, *Northern Pipeline* was considered mystical and fleeting, because the reasoning employed in Justice Brennan's plurality opinion did not mark the path the Court took in subsequent Article III cases. Rather than adhere to the plurality's attempt to craft categorical cubbyholes for the exercise of power by non-Article III adjudicators, the Court later appeared to adopt a more pragmatic approach.⁵ *Stern v. Marshall* may signal a revival of the Court's interest in categorical line drawing in Article III cases, although predictions of grand consequences after *Stern* should be taken with a healthy dose of skepticism in light of the Court's own description of its decision as "a 'narrow' one."⁶

Nonetheless, there is one legacy of the *Northern Pipeline* decision that has become entrenched. The plurality opinion, while describing the categories of adjudication that can occur outside the domain of the Article III courts, placed the restructuring of debtor-creditor relations "at the core of the federal bankruptcy power."⁷ That term—"core" jurisdiction—was adopted by Congress when it amended the Judicial Code in response to *Northern Pipeline* in 1984.⁸ The distinction between "core" and "non-core" adjudication became a commonplace in bankruptcy litigation.⁹ Indeed, *Stern* has caused so much

Courts, 2000 SUP. CT. REV. 357, 416–17 (observing that the analytical framework developed by *Northern Pipeline*'s plurality "rapidly proved unsustainable" and was effectively repudiated in later cases).

³*Northern Pipeline* led to Congress's creation of the current division of labor between bankruptcy judges and district judges. It also led to the abandonment of the system of appointing bankruptcy judges through the political process, as had been contemplated in 1978. See Susan Bloch-Lieb, *What Congress Had to Say: Legislative History as a Rehearsal of Congressional Responses to Stern v. Marshall*, 86 AM. BANKR. L.J. 55 (2012).

⁴See Susan Bloch-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529 (1998).

⁵See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

⁶131 S. Ct. 2594, 2620 (2011) (citation omitted).

⁷*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

⁸See 28 U.S.C. § 157(b)(1) (2006) (permitting bankruptcy judges to hear and finally determine core proceedings); § 157(b)(2) (giving a nonexclusive list of core proceedings).

⁹The terms are also used, for example, in the Federal Rules of Bankruptcy Procedure. See, e.g., FED. R. BANKR. P. 7008(a) ("In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge."); FED. R. BANKR. P. 7012(b) ("A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core."); FED. R. BANKR. P. 9027(a)(1) ("The notice [of removal] shall . . . contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge . . ."); FED. R. BANKR. P. 9033(e)(3) ("Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core.").

disquiet among bankruptcy lawyers and judges in part due to the Court's treatment of the statutory definition of core proceedings.

But what exactly did the plurality opinion in *Northern Pipeline* mean by the term "core"? On one level, that is an unanswerable question (at least, to those of us who do not sit on the Supreme Court), because the answer would necessarily unlock the Article III riddle that the Court itself has not been able to solve definitively. But we can explore how the Court in *Stern* has interpreted *Northern Pipeline* and other Article III cases to ascertain the limits of core jurisdiction. What does that exploration reveal?

My claim is twofold. First, the Court's decision in *Stern* can be understood best when viewed through the lens of three interrelated arguments drawn from *Northern Pipeline*, the Article III cases that informed *Northern Pipeline*, and the cases that followed it. These arguments serve to give meaning—or multiple meanings—to core jurisdiction as it is comprehended in *Stern*. Second, these arguments may be inadequate guideposts for lower courts seeking to discern the constitutional limits of a bankruptcy court's core jurisdiction.¹⁰

The first argument is an argument from history—the (purportedly) accepted division of labor between the Article III judiciary and non-Article III adjudicators. The second is an argument from expertise—the assessment of those disputes most befitting a specialized non-Article III forum on the one hand or an Article III forum on the other. The third is an argument from separation of powers—the understanding of when the political branches may assign the resolution of disputes outside the tenured judiciary without undermining the independence of the third branch.

These three arguments inform the meaning of "core" jurisdiction in *Stern*. Historical practices serve as a partial guide to flesh out the true core of the bankruptcy court's powers. The Court also assesses which decisionmakers should be considered the "experts" in adjudicating the state law counterclaim at stake in the case. And the Court makes clear its admonition that expediency and convenience cannot excuse Congress's improper encroachment on the adjudicatory power of the judiciary. So, history, expertise, and the separation of powers are marshaled by the Court to justify striking down as unconstitutional the particular assignment of adjudicatory power that was challenged in *Stern*.

Reliance on these arguments to frame the constitutional core of a bankruptcy court's powers will present a number of puzzling questions. The argu-

¹⁰By using the term "core jurisdiction," I do not mean to suggest that *Stern* involves a question of subject matter jurisdiction, which is governed by 28 U.S.C. § 1334. As the Court explained, the statutory provision considered in *Stern*, 28 U.S.C. § 157, merely "allocates the authority to enter final judgment between the bankruptcy court and the district court," and "[t]hat allocation does not implicate questions of subject matter jurisdiction." *Stern*, 131 S. Ct. at 2607.

ment from history may provide some insight into the division between core and non-core proceedings, but it also has the power to mislead. As an initial matter, the metes and bounds of Article III were not the concerns of Congress—or, initially, the courts—when deciding the limits placed on adjudication by non-Article III referees in bankruptcy in the era before the Bankruptcy Code. The historical division between Article III and non-Article III adjudicators in bankruptcy was instead a response to concerns about the power of federal courts as against the state courts. More unsettling, historical practices were subject to ambiguity, contestation, and change that make line drawing based on history difficult. In other words, courts that turn to history for guidance in finding the limits of a bankruptcy judge's power to enter final judgments may learn that history proves too much or too little.

The argument from expertise presents its own problems. The Court in *Stern* emphasizes that, with respect to the claim at stake in the case, the Article III judiciary, and not the bankruptcy courts, possess expertise in adjudicating the dispute. But it is odd to speak of the Article III courts as “experts” in state law matters such as the disputed claim in *Stern*. Indeed, the Supreme Court has developed an entire body of law—the *Erie* Doctrine—that rejects the notion of federal court expertise on those claims. In any event, as between the Article III courts and the bankruptcy courts, many of the disputes that litigants may now try to insist are entitled to an Article III forum are disputes bankruptcy judges would almost certainly handle more confidently (and accurately) than their peers in the tenured judiciary. I doubt that Article III judges are more “expert” than bankruptcy judges in the correct application of state fraudulent conveyance law, to name one category of disputes that already has generated *Stern*-based objections to the adjudicatory power of bankruptcy judges.

The need to be vigilant in enforcing the separation of powers is the third argument that frames the decision in *Stern*. Standing alone, that argument might have been sufficient to support the Court's decision in *Northern Pipeline* in light of the appointment process for, and the powers of, the bankruptcy courts erected in 1978. But the Court's elaboration of separation of powers concerns in *Stern* is genuinely odd—and perhaps even paradoxical—when applied to the bankruptcy judiciary created in the aftermath of *Northern Pipeline*. In attempting to distinguish cases blessing the exercise of power by non-Article III adjudicators, the Court appears to separate, for analytical purposes, adjudication by administrative agencies (acceptable) and by bankruptcy courts (suspect). That choice in linedrawing is puzzling. If concerns about the excessive encroachment by the political branches on the role of the judiciary are central to Article III's limitations, why should adjudication by administrative agencies be *less* troubling than adjudication by bankruptcy judges? Unlike administrative agencies, bankruptcy judges are selected by

the Article III judiciary, which ultimately decides which disputes, if any, are assigned to the bankruptcy courts. Bankruptcy judges are largely shielded from the overt political influences that legitimately shape the administrative state. Yet, the fact that the bankruptcy court is a *court* was held to doom its exercise of core jurisdiction in *Stern*.

Although the Court mustered a majority in *Stern*, we should not expect its opinion to give much more guidance to future readers—or the lower courts—than the splintered decision in *Northern Pipeline*. To put the point differently, the tension and ambiguity inherent in arguments from history, expertise, and the separation of powers will produce tension and ambiguity in the application of the Court’s decision. Like *Northern Pipeline*, *Stern* is unlikely to settle and clarify the law governing the power of bankruptcy judges.

II. THE MULTIPLE CORES OF *STERN*

I begin by retelling the *Stern* opinion as a tale with multiple approaches to the core of bankruptcy power. Some of this retelling may overlap with what other commentators have observed since the Court’s decision, but my goal is to emphasize how three arguments carry much of the analytical weight in *Stern*. In the Court’s opinion, history is called upon to sketch out the limits of non-Article III adjudication. The Court also makes an assessment of the relative expertise of bankruptcy judges and district judges in deciding the dispute at hand. And the Court places its decision within a broader concern about the need for clear lines and defensible boundaries in maintaining the separation of powers.

A. HISTORY

One approach to determining the meaning of core jurisdiction looks to historical practices in the era before the adoption of the Bankruptcy Code. That search for a historical core of bankruptcy power can be found throughout Justice Brennan’s plurality opinion in *Northern Pipeline*. The plurality began by observing that the Bankruptcy Reform Act of 1978 (“1978 Act”) and the Code it created represented a break from past practices under the Bankruptcy Act of 1898 (“1898 Act”). The 1978 Act, the opinion noted, “made significant changes in both the substantive and procedural law of bankruptcy.”¹¹ Recalling the pre-Code provisions governing the power of bankruptcy judges—and pointedly choosing to call bankruptcy judges “referees” in the opinion¹²—Justice Brennan noted that “the jurisdiction of the bankruptcy courts created by the [1978] Act is much broader than that exercised

¹¹*Northern Pipeline*, 458 U.S. at 53.

¹²*Id.* at 53 n.2 (“Bankruptcy referees were redesignated as ‘judges’ in 1973. For purposes of clarity, however, we refer to all judges under the old Act as ‘referees.’” (citation omitted)).

under the former referee system.”¹³ In particular, the Act had eliminated the prior distinction between “summary” and “plenary” jurisdiction in bankruptcy. Under the 1898 Act, bankruptcy referees, as officers of the district courts, could exercise the district court’s summary jurisdiction in matters referred to them.¹⁴ Summary proceedings—as the name suggests—were relatively quick and informal. No formal pleadings were required, and the procedures ordinarily required for suits in equity or actions at law did not apply to summary proceedings. But summary jurisdiction was limited. A referee could exercise summary jurisdiction only if (1) the dispute involved property actually or constructively possessed by the bankrupt; (2) there was consent by litigants to the exercise of summary jurisdiction; or (3) the nondebtor litigant had filed a claim. All other jurisdiction was plenary and required suit in district court, in conformity with the requirements for ordinary civil litigation.¹⁵ The disallowance of a creditor’s claim against the estate was a classic summary proceeding.¹⁶ An action brought by the trustee against a third party that had not filed a claim, however, was likely to require a plenary proceeding.¹⁷

Judged against that historical background, the plurality considered the 1978 Act to be unusually aggressive in its allocation of authority to bankruptcy judges. The plurality opinion repeatedly described the 1978 Act’s allocation of power to bankruptcy courts as expansive—a “broad grant” going beyond the prior system put in place under the 1898 Act.¹⁸ The Court took particular note of the elimination of the distinction between summary and plenary jurisdiction effected by the 1978 Act. The elimination of the distinction had “empower[ed] bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under Title 11.”¹⁹ That “wide variety” of cases, however, included some matters that were not so far out of the range of disputes one might expect to follow the filing of a bankruptcy case: suits to recover ac-

¹³*Id.* at 54.

¹⁴The 1898 Act allotted referees in bankruptcy the ability to exercise the powers granted to district courts sitting in bankruptcy, except as otherwise provided.

¹⁵See Ralph Brubaker, *Article III’s Bleak House (Part I): The Statutory Limits of Bankruptcy Judges’ Core Jurisdiction*, BANKR. L. LETTER, Aug. 2011, at 1, 7.

¹⁶For a detailed discussion of the distinctions between summary and plenary jurisdiction under the 1898 Act, see Ralph Brubaker, A “Summary” Statutory and Constitutional Theory of Bankruptcy Judges’ Core Jurisdiction After *Stern v. Marshall*, 86 AM. BANKR. L.J. 121 (2012).

¹⁷See *id.* at 130. There was a good deal of gray in between. For example, if property alleged to belong to the debtor was in the hands of a third party, the trustee could proceed summarily to recover it so long as the holder asserted no more than a “colorable” right to the property. See *May v. Henderson*, 268 U.S. 111, 115–16 (1925). If, however, the holder asserted a “real and substantial” right to the property, a plenary proceeding was necessary. See *Harrison v. Chamberlin*, 271 U.S. 191, 194 (1926).

¹⁸*Northern Pipeline*, 458 U.S. at 87.

¹⁹*Id.* at 54.

counts, disputes about exempt property, avoidance actions involving preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy.²⁰

History also did not give sufficient justification for an exception in bankruptcy to the usual Article III requirements, and the plurality saw no reason to create a new exception. The categorical view of non-Article III adjudication flowed easily from this attention to history. The plurality explicitly described the so-called “public rights” doctrine, which might excuse the need for Article III adjudication, as “grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are ‘inherently . . . judicial.’”²¹ Indeed, the plurality saw no need to give precise definition to the public rights exception because the dispute at stake in *Northern Pipeline* appeared so clearly to fall beyond the previously recognized group of exceptions to Article III.²² Summing up, the plurality viewed Article III as being limited only when “certain exceptional powers” had been bestowed on Congress by the Constitution or “historical consensus.”²³ Lacking a showing of such an exceptional grant of power or a historical consensus to the contrary, the plurality declined to create a new category of non-Article III adjudication.²⁴ As one commentator aptly put it, “it seems that the most objectionable aspect of the 1978 Reform Act, in the eyes of the Court, was that it simply went beyond the 1898 Act in the jurisdictional authority entrusted to a non-Article III arbiter.”²⁵

The *Stern* Court appears to embrace this historically bounded view of which disputes properly belong in an Article III forum and which may be assigned to non-Article III adjudicators. Splicing together the plurality and concurring opinions, Chief Justice Roberts takes the teaching of *Northern Pipeline* to be that historic practices define the categories of exceptions to Article III. Matters that were “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789” ordinarily belong in an Article III forum, because those matters—“mundane as well as . . . glamor-

²⁰Beyond those disputes, the plurality noted that the new bankruptcy courts were vested with essentially “all the powers of a court of equity, law, and admiralty.” *Id.* at 55. The plurality additionally noted the “expansive” venue and personal jurisdiction provisions of the 1978 Act. *Id.* at 54 n.4.

²¹*Id.* at 68 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

²²The plurality opinion recognized three historical exceptions to Article III: (1) territorial courts; (2) military courts; and (3) courts adjudicating public rights. *See id.* at 64-70. It also acknowledged that a non-Article III adjudicator could act as an adjunct of an Article III court in certain circumstances, but rejected labeling this an “exception” to Article III. *Id.* at 77 n.29.

²³*Id.* at 70.

²⁴*Id.* at 71.

²⁵Ralph Brubaker, *Article III's Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges' Core Jurisdiction*, BANKR. L. LETTER, Sept. 2011, at 1, 4.

ous”—are entrusted to the Article III courts.²⁶ By contrast, the Court is unwilling to assign to bankruptcy judges disputes that do not plainly fall within a previously recognized category of exceptions to Article III.

The Court also adopts the view expressed by the *Northern Pipeline* plurality as to the appropriate breadth of power exercised by bankruptcy courts by taking note of the limits on the power of a referee in bankruptcy under pre-Code caselaw.²⁷ Finding that the dispute before the Court—a common law claim for tortious interference—was no different from matters historically assigned to the Article III courts,²⁸ the Court rejects the assignment of the proceeding to a non-Article III adjudicator. Justice Scalia states the point even more clearly in his concurring opinion. In his view, unless there is some historical showing of bankruptcy adjudication as a firmly grounded exception to Article III, all exercises of federal judicial power require an Article III forum.²⁹

B. EXPERTISE

An assessment of the expertise of different adjudicators is the second argument that can be used to understand *Stern*. More precisely, the Court turns to an expertise argument that had been deployed in Article III cases to uphold non-Article III adjudication, but inverts the argument to defeat non-Article III adjudication. The Court’s Article III cases before³⁰ and after³¹ *Northern Pipeline* have taken account of the potential expertise a non-Article III adjudicator brings to bear in resolving particular disputes, and *Stern* follows along the same path. Although the plurality opinion in *Northern Pipeline* did not engage in an assessment of bankruptcy courts’ expertise, an inquiry of that kind became prominent in *Thomas v. Union Carbide Agricultural Products Co.* and *Commodity Futures Trading Commission v. Schor*—the Court’s immediate post-*Northern Pipeline* Article III cases. That strand

²⁶*Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011).

²⁷*Id.* at 2616–17 (discussing *Katchen v. Landy*, 382 U.S. 323 (1966)).

²⁸This understanding of what disputes are naturally at home in the Article III courts rests on a happenstance of jurisdictional history. Common law claims weighed heavily on the dockets of the lower federal courts for much of their early existence because Congress did not grant them general federal question jurisdiction until after the Civil War. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 n.44 (1928). But the first Judiciary Act, enacted in 1789, provided for jurisdiction based on diversity of citizenship. See *id.* at 503 (“The passage of the First Judiciary Act started the federal courts on their way with a fairly broad grant of diversity jurisdiction.”). If Congress had made the opposite jurisdictional choice in 1789—to provide a broad grant of federal question jurisdiction but a narrow grant of diversity jurisdiction—perhaps the association between common law claims and Article III courts would not seem so obvious.

²⁹*Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) (“[I]n my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary.”).

³⁰See *Crowell v. Benson*, 285 U.S. 22 (1932).

³¹See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

of argument carried through to *Granfinanciera, S.A. v. Nordberg*, in which Justice Blackmun drew upon the language of expertise, in dissent, to object to the Court's upholding of a Seventh Amendment challenge to a bankruptcy judge's power to decide a fraudulent conveyance action.³² Non-Article III adjudication by an expert decisionmaker, the argument goes, allows for the efficient and effective operation of a regulatory regime.

Expertise arguments are commonplace in administrative law³³ and, not surprisingly, considerations of the expertise of a decisionmaker entered the Court's Article III cases with the rise of the administrative state.³⁴ From *Crowell v. Benson* through *Schor*, the Court has frequently noted Congress's legitimate interest in assigning disputes to an expert decisionmaker charged with administering a regulatory scheme. The argument from expertise is usually deployed to demonstrate that, on balance, it is sensible to permit a non-Article III adjudicator to decide a dispute that could have been decided by the tenured judiciary. Even if claims are not, in substance, susceptible of the expertise of a non-Article III adjudicator, the Court has upheld their resolution outside the tenured judiciary if Congress legitimately desired to create a forum whose effectiveness would be undermined without the power to decide those claims.³⁵

Stern also looks to the decisionmaker's expertise in handling various kinds

³²*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 94 (1989) (Blackmun, J., dissenting) ("Congress' conclusion that the proper functioning of the bankruptcy system requires that expert judges handle these claims, and that the claims be given higher priority than they would receive on a crowded district court's civil jury docket is entitled to our respect." (citation omitted)).

³³The Supreme Court has rested much of the modern approach to administrative law on the ground that agencies are experts in the fields for which they are delegated responsibility. See *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). This is not to say that arguments from expertise are always helpful in administrative law. Judge Easterbrook, for example, has called for a skeptical assessment of arguments based on the purported expertise of administrative agencies. See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3 n.6 (2004) ("References to 'expertise' in administrative law are either rhetorical ploys or reflect ignorance about how commissions actually are chosen and operate."). Expertise can be taken to mean a number of concepts, including the familiarity that arises from specialization, or the superior knowledge that comes from training and particular credentials.

³⁴See *Crowell*, 285 U.S. at 46 (noting that adjudication before an agency was part of a "prompt, continuous, expert, and inexpensive method" of determining questions pertinent to a regulatory regime). As Professor Thomas Merrill has explained, the frustrating quality of the Court's Article III doctrine can be explained in large part by its origins in cases concerning review of administrative agency decisions. Well before *Crowell*, the judiciary had adapted to early administrative agencies by permitting initial adjudication in the agency with judicial review of the record thereafter. Once an Article III attack was leveled against agency factfinding, the Court had already accepted this approach to divide the domain of the tenured judiciary from that of untenured adjudicators. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 943-44 (2011) (observing that the cursory nature of *Crowell's* treatment of the Article III problem can be traced to the adoption of appellate review theory in other administrative law contexts long before the New Deal era).

³⁵See *Schor*, 478 U.S. at 855-56.

of disputes as a dividing line between Article III and non-Article III forums. In so doing, the Court accepts that its prior cases support the assignment of particularized, narrow disputes to expert non-Article III adjudicators, even when such disputes involve only private litigants and not a government entity. The disputes that can be taken out of an Article III forum, however, are only those “limited” matters deemed essential to achieving the objectives of a federal regulatory regime.³⁶ That is how the Court reads cases from *Crowell* through *Schor*.³⁷ In each case, the assignment of decisionmaking authority outside the tenured judiciary was limited, and it served to ensure an “expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination” by a non-Article III adjudicator assigned to the task.³⁸

Compared to that standard, the common law counterclaim brought by the bankruptcy estate in *Stern* would fall beyond the bounds of non-Article III adjudication. As an initial matter, the Court deems the estate’s counterclaim to be unmoored from a federal statutory or regulatory scheme (hence the observation that the counterclaim was not derived from, or dependent upon, bankruptcy law).³⁹ Relatedly, in the Court’s view, there was an insufficient showing that the non-Article III adjudicator had “obvious expertise” in the dispute being assigned to that forum.⁴⁰ Because the counterclaim was indistinguishable from other state law claims between private parties, there was no reason to believe that a bankruptcy court could bring significant expertise to the proceeding. Rather than a case in which a narrow regulatory regime needed the power to entertain a private law claim in order to function, *Stern*, in the Court’s telling, involves a claim that was not closely tied to the expertise of the bankruptcy courts. Instead, in the Court’s view, the case involved “the most prototypical exercise of judicial power.”⁴¹

Accordingly, the Court finds the argument from expertise pointing to

³⁶*Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011). The Court took care to note the limits on non-Article III adjudicators in prior cases. *Id.* at 2613 n.6 (noting that in *Crowell v. Benson* “the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court”).

³⁷*Id.* at 2612–15.

³⁸*Id.* at 2615 (quoting *Crowell*, 285 U.S. at 46) (internal quotation marks omitted).

³⁹Repeatedly in the opinion, the majority observes that the counterclaim did not derive from the Bankruptcy Code. *Id.* at 2611 (“Here Vickie’s claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor’s proof of claim in bankruptcy.”); *id.* at 2614 (“It is not ‘completely dependent upon’ adjudication of a claim created by federal law” (quoting *Schor*, 478 U.S. at 856)); *id.* at 2618 (“Vickie’s claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.”).

⁴⁰*Id.* at 2613 (quoting *Schor*, 478 U.S. at 844) (internal quotation marks omitted).

⁴¹*Id.* at 2615.

adjudication of the estate's counterclaim by the tenured judiciary. In Chief Justice Roberts's words, "[t]he 'experts' in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay."⁴² The dispute was not one that "stem[med] from the bankruptcy itself or would necessarily be resolved in the claims allowance process."⁴³ If the non-Article III adjudicator brought no expertise to the dispute, and resolution of the dispute did not tie into the proper functioning of the regulatory scheme (the bankruptcy process), then the proper adjudicator for the counterclaim was a district judge and not a bankruptcy judge.

C. SEPARATION OF POWERS

The Court's repeated emphasis on maintaining the separation of powers provides the third explanatory argument in *Stern*. In one sense, separation of powers is *Stern*'s ultimate argument—the argument that gives meaning to the others. It is also the ultimate argument in a more literal sense. Chief Justice Roberts's opinion for the Court ends with an emphatic statement about the separation of powers and the judiciary's obligation to guard it. Although describing the Court's holding as narrow, the opinion nevertheless portrays the decision as essential to our system of constitutional government: "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush."⁴⁴ In other words, giving any ground on the line of scrimmage dividing Article III and non-Article III adjudication would inevitably compromise the ability of the judiciary to defend itself and its role in government.

The Chief Justice cannot be blamed for the hyperbole in that peroration. The Court's Article III cases are shot through with similarly apocalyptic warnings about the need to treat as serious breaches even seemingly trivial encroachments into the domain of the tenured judiciary. Justice Brennan's plurality opinion in *Northern Pipeline* spoke of the "constitutional system of checks and balances" as one "designed to guard against encroachment or aggrandizement by Congress at the expense of the other branches of government."⁴⁵ Even in its decision upholding non-Article III adjudication in *Schor*, the Court repeated the importance of separation of powers as a means of protecting "the role of the independent judiciary within the constitutional

⁴²*Id.*

⁴³*Id.* at 2618.

⁴⁴*Id.* at 2620.

⁴⁵*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (citation and internal quotation marks omitted).

scheme of tripartite government.”⁴⁶

The argument from separation of powers is central to understanding why the proper treatment of Article III has bedeviled the Court. The argument goes beyond enforcing structural protections of the judiciary for the sake of the judiciary. Maintaining the Article III judiciary is linked to ensuring impartial adjudication of disputes and maintaining judicial integrity and legitimacy.⁴⁷ More than a view of the platonic ideal of government form, the argument from separation of powers has been grounded by the Court in a concern about individual liberty. Erosion of the domain of the judiciary ultimately would allow political pressures to distort the judicial process to the detriment of litigants.⁴⁸

In *Northern Pipeline*, the specter of encroachment on the judiciary by the political branches stemmed from the appointment process for the new bankruptcy courts. The 1978 Act created bankruptcy courts to be staffed by non-Article III judges who, nevertheless, were appointed in the manner provided by Article II of the Constitution. That is, they were to be nominated by the President and confirmed by the Senate, but for a term of fourteen years.⁴⁹ The Article II nomination and confirmation process is a political one.⁵⁰ Few Article III judges arrive on the bench through that gateway without some connection to one or more political patrons. Judicial appointment through Article II, however, is counterbalanced by the tenure and compensation protections of Article III. Once on the bench, Article III judges no longer owe their patrons anything in order to continue in office. That counterbalance was missing in the bankruptcy court structure invalidated by *Northern Pipeline*.⁵¹

Despite the very different bankruptcy court structure in place today, *Stern* equates the features of the pre- and post-*Northern Pipeline* bankruptcy courts.⁵² The Court does not treat as significant the post-*Northern Pipeline*

⁴⁶*Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citation and internal quotation marks omitted).

⁴⁷Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 937-43 (1988) (describing Article III values as: (1) the separation of powers, (2) fairness to litigants, and (3) judicial integrity, or the legitimacy and respect commanded by the courts).

⁴⁸*Schor*, 478 U.S. at 848 (“Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § 1’s guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests.”).

⁴⁹28 U.S.C. §§ 152, 153(a) (Supp. IV 1976).

⁵⁰See David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033 (2008).

⁵¹See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53-54 (1982) (describing the appointment process for bankruptcy judges under the 1978 Act).

⁵²*Stern v. Marshall*, 131 S. Ct. 2594, 2610-11 (2011).

differences in the appointment process for bankruptcy judges or the current relationship between the powers of the bankruptcy courts and the district courts. The *Stern* Court's failure to notice these differences is striking. Nevertheless, given the Court's determination that the bankruptcy courts confronted by *Northern Pipeline* were in essence the same as the bankruptcy courts in place today, it is not surprising that the majority opinion deploys the same type of argument about the need to enforce boundaries among the branches and to guard the essential attributes of the federal judiciary.

Reaching back to the Founding Era, the *Stern* Court gives a brief history of the colonial experience with a judiciary that was unable to resist encroachment by the Crown.⁵³ The lesson from the colonial era led to Article III's creation of a tenured judiciary with compensation that cannot be diminished. Those features, in turn, served "to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses."⁵⁴ In the Court's telling, separation-of-powers principles "protect each branch of government from incursion by the others," but ultimately the "structural principles secured by the separation of powers protect the individual as well."⁵⁵ Thus, both the structural and individual aspects of the separation of powers argument were relevant to assessing the proper limits of the bankruptcy courts' core power.

III. THE TROUBLE WITH *STERN*'S UNDERSTANDING OF CORE JURISDICTION

The three arguments that shape the *Stern* Court's understanding of the constitutional core of the bankruptcy power are not novel. Each one finds a home in the Court's Article III cases. Ordinarily, that would make the Court's reasoning and conclusion in *Stern* unremarkable. Who could object to a holding built on arguments derived from prior cases? The difficulty lies in how those arguments can—and cannot—be usefully deployed in future cases. History, expertise, and the separation of powers are more difficult to reconcile than *Stern* lets on. In the decision itself, it is doubtful whether the three arguments lead to the conclusion that a final adjudication by the bankruptcy court was unconstitutional. More importantly, the three arguments may serve to confuse and not clarify the Article III inquiry in post-*Stern* cases.

A. THE UNCERTAIN LESSONS OF HISTORY

After *Stern*, it is perhaps inevitable that courts and commentators will

⁵³*Id.* at 2609.

⁵⁴*Id.*

⁵⁵*Id.* (citation and internal quotation marks omitted).

turn to history as a guide in assessing the limits of power that bankruptcy judges may exercise. If pre-Code understandings of what disputes could and could not be finally determined by bankruptcy referees inform the Article III calculus, then it will be natural to look for historical analogues when sifting core from non-core proceedings. The Court in *Stern*, as the plurality in *Northern Pipeline* had done, takes instruction from prior treatment of summary and plenary jurisdiction under the 1898 Act. In *Stern*, for example, the Court draws on a pre-Code case, *Katchen v. Landy*, as justification for declining to treat the estate's counterclaim as a core proceeding.⁵⁶ The Court reasons that *Katchen* had permitted summary jurisdiction over a preference action, but only because the claims allowance process depended on resolution of the preference action.⁵⁷ Expanding on that reasoning, the Court concludes that the counterclaim in *Stern* could not be treated as a core proceeding because "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim."⁵⁸ In short, a case decided under the 1898 Act had provided definitive guidance on the limits of a modern bankruptcy court's power to hear and finally determine a dispute.

Since *Stern*, litigants and Courts have begun revisiting pre-Code practices for guideposts to assess the reach of core jurisdiction under the Code.⁵⁹ This archaeological approach emphasizes the division between summary and plenary jurisdiction under the 1898 Act. Some courts have used that distinction in order to inform their treatment of core jurisdiction.⁶⁰ If referees in bankruptcy could exercise summary jurisdiction, the reasoning goes, then surely a bankruptcy judge today may treat a proceeding as core and enter a final order or judgment.

There are two difficulties with this turn to history. One problem with litigating the limits on bankruptcy court power today based on yesterday's

⁵⁶*Id.* at 2616-17.

⁵⁷*Id.* at 2616 ("Although the creditor in *Katchen* objected that the preference issue should be resolved through a 'plenary suit' in an Article III court, this Court concluded that summary adjudication in bankruptcy was appropriate, because it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue.")

⁵⁸*Id.* at 2617.

⁵⁹See, e.g., *Yellow Sign, Inc. v. Freeway Foods of Greensboro, Inc.* (*In re Freeway Foods of Greensboro, Inc.*), No. 11-2008, 2012 WL 112192, at *6-7 (Bankr. M.D.N.C. Jan. 13, 2012); *West v. Freedom Medical, Inc.* (*In re Apex Long Term Acute Care-Katy, L.P.*), No. 11-3213, 2011 WL 6826838, at *8-9 (Bankr. S.D. Tex. Dec. 28, 2011).

⁶⁰See, e.g., *Adams Nat'l Bank v. GB Herndon & Assocs.* (*In re GB Herndon & Assocs.*), 459 B.R. 148, 160-63 (Bankr. D. Colo. 2011) (finding, based on historical practice, that the bankruptcy court can finally adjudicate the proceeding given the parties' consent and collecting other cases that have held similarly); *West*, 2011 WL 6826838, at *9 (finding that "[t]he historical understanding of the plenary/summary distinction informs, but does not dictate" analysis of whether a bankruptcy judge may finally adjudicate a proceeding as integral to the claims resolution process).

limits on referees in bankruptcy is anachronism. The division between summary and plenary proceedings carved out by the 1898 Act was a distinction born out of concern about overempowering the federal courts as against the state courts. It was not designed to mark the boundary between adjudication in Article III and non-Article III forums. By a process of accretion the summary/plenary distinction happened to take on that role in the first decades after the statute was enacted, but that was not its original purpose. The other problem is one of clarity. The drafters of the Code abandoned the 1898 Act's categories of summary and plenary jurisdiction because the distinction was hazy and spawned wasteful jurisdictional litigation. In other words, it is odd to seek guidance about an Article III problem today from historical doctrines that were not well designed to address the problem and that were themselves a source of confusion in their own time.

The "now-infamous summary/plenary jurisdictional dichotomy" entered bankruptcy parlance with the first permanent federal bankruptcy statute, the 1898 Act.⁶¹ The distinction between summary and plenary proceedings was an attempt by Congress to ease the considerable disquiet about federal court power that had undermined previous attempts at a lasting, uniform federal bankruptcy law.⁶² Before the 1898 Act, Congress had enacted three bankruptcy laws, but none of them endured. Each was repealed due to one perceived flaw or another. The Bankruptcy Act of 1867 in particular had been doomed by federalism concerns. It was criticized as an overreach of national power that upset the balance between federal and state courts.⁶³ Congress responded to the fear about the bankruptcy power that would be vested in the federal courts by cabining the reach of summary jurisdiction.⁶⁴ Summary proceedings adhered to an *in rem* model of bankruptcy jurisdiction and permitted the federal courts to adjudicate "all disputes incident to administration of property in the actual or constructive possession of the court."⁶⁵ Summary proceedings, which could be pursued more informally than an ordinary civil suit, included the process of adjudicating creditors' claims against the bankruptcy estate. Federal jurisdiction over plenary proceedings, however, such as *in personam* suits brought by the bankruptcy trustee, was more limited, and generally required an independent basis for federal jurisdiction.⁶⁶ Otherwise, the proceeding had to be resolved in state court.

⁶¹Brubaker, *supra* note 15, at 7.

⁶²*Id.*

⁶³See CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 114 (1935).

⁶⁴See Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 *EMORY BANKR. DEV. J.* 261, 266-69 (1999) ("The 1898 Act, therefore, responded to this animosity toward a general federal jurisdiction over 'all matters and proceedings in bankruptcy' by narrowing the compass of federal bankruptcy jurisdiction.").

⁶⁵Brubaker, *supra* note 15, at 7.

⁶⁶*Id.*

The division between summary and plenary jurisdiction therefore answered *federalism* concerns and not Article III concerns. The limitations placed on the exercise of summary jurisdiction in bankruptcy cases were meant to restrict the federal courts generally and did not address non-Article III adjudication in bankruptcy. Opponents of expanded federal court power sought statutory checks on federal bankruptcy jurisdiction, and they were successful in preventing the new federal bankruptcy regime from granting federal courts the power to rule on matters that were not deemed necessary to the resolution of the bankruptcy case.⁶⁷ The limits on federal court power were so extreme that Congress had to ease them in order to prevent inefficiency and discontent when it became clear that too many plenary suits were being diverted to the state courts under the 1898 Act.⁶⁸

To be sure, referees in bankruptcy were statutorily empowered, with some exceptions, to resolve disputes within the district court's bankruptcy jurisdiction.⁶⁹ But the summary/plenary distinction was not included in the 1898 Act due to anxiety about the non-Article III status of referees in bankruptcy. Indeed, in the early years of the 1898 Act, there was disagreement as to whether referees could exercise plenary jurisdiction to the same extent as the district courts. A leading treatise from that era described cases in which referees had exercised plenary jurisdiction.⁷⁰ It was not until 1920 that the Supreme Court established that referees were more strictly limited in their ability to entertain plenary proceedings.⁷¹

As the Supreme Court began to treat the summary/plenary distinction as the dividing line between the power of the referee in bankruptcy and that of the district court, however, disagreement remained about where to draw that line. The Court acknowledged in *Katchen* that Congress "often left the exact scope of summary proceedings in bankruptcy undefined."⁷² The lack of clarity meant that deciding whether a dispute was a summary or plenary proceeding often generated wasteful litigation. Some parts of the boundary line were relatively clear. For example, it was accepted that the consent of litigants was sufficient to permit a referee to exercise plenary jurisdiction.⁷³ So

⁶⁷W.M. MILLER COLLIER, *THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898*, at 469, 470 n.8a (Frank B. Gilbert ed., 1914).

⁶⁸*Id.* at 475 (describing 1903 amendment to 1898 Act).

⁶⁹Bankruptcy Act of 1898, Pub. L. No. 55-171, ch. 541, § 38a, 30 Stat. 544, 555 (repealed 1978).

⁷⁰See COLLIER, *supra* note 67, at 595 nn.40-41 (listing some cases in which referees successfully exercised plenary jurisdiction).

⁷¹See *Weidhorn v. Levy*, 253 U.S. 268, 272-74 (1920) (noting conflicting practice and district court decisions on the question before concluding that a referee did not have the power to resolve a plenary suit in equity to recover a fraudulent conveyance).

⁷²*Katchen v. Landy*, 382 U.S. 323, 328 (1966).

⁷³The Supreme Court had long suggested, by negative implication, that litigant consent would permit a referee's exercise of plenary jurisdiction, but the Court did not squarely decide the question until *MacDonald v. Plymouth Cnty. Trust Co.*, 286 U.S. 263, 266-68 (1932) ("While under the provisions of the

long as the parties to the dispute agreed, the referee had the power to hear and finally determine their dispute as if it were a summary proceeding. Later amendments to the 1898 Act also made clear that consent could be inferred from a party's failure to make a timely objection to the referee's adjudication of a dispute.⁷⁴

In other respects, however, the boundary between summary and plenary proceedings was unclear. Were counterclaims against creditors filing claims on the estate summary or plenary proceedings? The cases tracked over the map on that question. Some courts adhered to a "consent by filing" doctrine authorizing summary jurisdiction over the merits of "any counterclaim for affirmative judgment which the trustee may properly assert in response to the claim."⁷⁵ Some took a more limited view that permitted summary jurisdiction only if the counterclaim and the claim were transactionally related.⁷⁶ Others limited summary jurisdiction in such circumstances to equitable counterclaims.⁷⁷ Still others extended summary jurisdiction only so far as would allow a referee to determine the amount of the allowable claim over and above the counterclaim, but would leave the parties to a plenary suit to determine the preclusive effect of the referee's decision.⁷⁸ The Court's decision in *Katchen* provided guidance on the question, but it did not settle all disagreement.

What was the proper forum for fraudulent conveyance actions under the 1898 Act? Although the Act permitted a trustee to bring a fraudulent conveyance action against a transferee in state court or in "a court of bankruptcy"—language that could have been read to mean the referee—the provision was interpreted to mean a plenary suit before a district judge and not simply a summary proceeding before the referee.⁷⁹ Unless the trustee had actual or constructive possession of fraudulently conveyed property, it

Bankruptcy Act the exercise of his jurisdiction by the referee is ordinarily restricted to those matters which may be dealt with summarily by the method of procedure available to referees in bankruptcy, the restriction may be removed, as it was here, by the consent of the parties to a summary trial of the issue presented."); Note, *Jurisdiction of Referees in Bankruptcy in Plenary Actions*, 42 *YALE L.J.* 262, 264–65 (1932) (observing that *MacDonald* tracked the views of the great majority of the lower federal courts, which had followed "the implications of those Supreme Court decisions which had previously held that the referee may not try the issues in a plenary suit 'without consent'" (citations omitted)).

⁷⁴Congress made this understanding express in 1952. Act of July 7, 1952, ch. 579, 66 Stat. 420 (amending 1898 Act § 2a(7)).

⁷⁵See *Inter-State Nat. Bank of Kansas City v. Luther*, 221 F.2d 382, 389 (10th Cir. 1955) (internal quotation marks and citation omitted).

⁷⁶See Leslie R. Masterson, *Waiving the Right to a Jury: Claims, Counterclaims, and Informal Claims*, 85 *AM. BANKR. L.J.* 91, 97 (2011).

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹1898 Act § 67e; see also 2 J. MOORE ET AL., *COLLIER ON BANKRUPTCY* ¶ 23.15, at 605, 622–23 (14th ed. rev. 1973).

was arguable whether a summary proceeding could be brought against the transferee, even if the transferee had filed a claim in the bankruptcy.⁸⁰

Katchen settled some of the confusion by approving summary jurisdiction over an avoidance action against a transferee who had filed a proof of claim in bankruptcy, but the Court's decision did not fully define the area. Sure enough, the filing of a proof of claim by the creditor justified, in part, the exercise of summary jurisdiction. But the Court in *Katchen* described the dispute as one in which resolution of the avoidance action was necessary, "by the very terms of the Act," in order to resolve the trustee's objection to the claim.⁸¹ The Court also took care to note that the full scope of the provision of the Act in question (§ 57g, which prohibited allowance of a claim if the creditor received and retained a preference or other voidable transfer) was not entirely settled.⁸² By tying its reasoning to the terms of the Act and leaving the full scope of the relevant provision open, *Katchen* provided ambiguous guidance in future cases.⁸³

One reason for casting aside the summary/plenary distinction in the Code was the desire to leave behind this history of jurisdictional litigation the distinction had spawned. The National Bankruptcy Review Commission, authorized by Congress to undertake a sweeping review of bankruptcy law, included in its 1973 report a recommendation to abolish "summary" and "plenary" from the bankruptcy lexicon. Instead, the Commission advocated an expansion of bankruptcy jurisdiction.⁸⁴ These proposals led to the adoption of the jurisdictional provisions of the new Code in 1978. The end goal, of course, was to provide a bankruptcy court that could hear and decide a broad array of disputes in order to limit the diversion of resources in litigating over

⁸⁰Uncertainty about the ability of a trustee to recover a fraudulent conveyance in a summary proceeding even when the transferee had filed a proof of claim may have led to the development of equitable subordination doctrine, which served as a jury-rigged work around for the limited scope of summary jurisdiction. Because equitable subordination fell squarely within summary jurisdiction over the claims allowance process, a trustee could recast a fraudulent conveyance action as a request for equitable subordination in order to remain before the referee. See Robert Charles Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 528 (1977) (explaining equitable subordination as "a functional substitute for fraudulent conveyance law" and suggesting that trustees may have resorted to equitable subordination to seek relief against a transferee without the need to launch a plenary suit).

⁸¹*Katchen v. Landy*, 382 U.S. 323, 330 (1966) ("Unavoidably and by the very terms of the Act, when a bankruptcy trustee presents a § 57g objection to a claim, the claim can neither be allowed nor disallowed until the preference matter is adjudicated.").

⁸²*Id.* at 330 n.5 ("The exact reach of § 57g is not entirely settled, and that question is not involved here." (citation omitted)).

⁸³*Katchen* was not an Article III case, although it did involve a Seventh Amendment challenge to the powers of a bankruptcy referee. Nevertheless, the dissent in *Northern Pipeline* and the majority in *Schor* infused *Katchen* with great significance for Article III purposes, and the majority in *Stern* follows that path.

⁸⁴REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137 (1973).

the forum for the dispute. The bankruptcy process is especially sensitive to wasteful litigation, and none is more wasteful than jurisdictional litigation.

A generation beyond the days of summary and plenary jurisdiction, how confident should courts be that their assessment of the distinction will be accurate? It is safe to say that they should not be too confident. Great caution should be taken to ensure that courts after *Stern* do not put too much weight on old distinctions which were confusing in their own day and with which few practitioners and judges remain familiar. The world of bankruptcy jurisdiction before 1978 was not static, as the Court noted in *Northern Pipeline*.⁸⁵ It was also different in kind from the world of bankruptcy jurisdiction we inhabit today. Looking back to old jurisdictional divisions for guidance poses the danger of mistake and misdirection. This is not to say that courts seeking to follow *Stern*'s guidance should ignore the historical division of labor in bankruptcy adjudication between an Article III and non-Article III forum. But they must be aware of the risk that the wrong lessons will be transported into modern practice.

B. THE TROUBLE WITH EXPERTISE

As between the Article III courts and the bankruptcy courts, the majority in *Stern* concludes that the Article III courts are the “‘experts’ in the federal system” at resolving the kind of state common law claim in dispute in *Stern*.⁸⁶ That assessment—whether or not a non-Article III adjudicator could bring particular expertise to a claim that would otherwise be resolved by an Article III judge—is part of the inquiry developed in *Thomas* and *Schor*. Therefore, the Court’s determination that a non-Article III bankruptcy judge brings no superior skills to bear in adjudicating a common law claim, unsurprisingly, weighed against permitting final adjudication of the claim in bankruptcy court.

As an application of *Thomas* and *Schor*, however, the treatment of expertise in *Stern* presents at least two curiosities that the Court does not address. The first problem is the mismatch between expertise as described in prior Article III cases and expertise as judged in *Stern*. The *Stern* majority focuses the question of expertise tightly on the substantive nature of the claim—Article III judges routinely decide common law claims in the federal courts, and therefore there is nothing to be gained from adjudication before a bankruptcy judge, in the Court’s reasoning. Prior Article III cases, however, do not speak of expertise solely in that way. Instead, those cases place great weight on the *procedural* as well as substantive expertise that the non-Article

⁸⁵*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 n.31 (1982) (noting “years of gradual expansion of the power and authority of the bankruptcy referee”).

⁸⁶*Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011).

III adjudicator may bring to the resolution of a claim that would otherwise be decided in an Article III court. In *Schor*, for example, as in *Stern*, a state law counterclaim was at stake. The non-Article III adjudicator in *Schor*—an agency—had no substantive expertise in deciding garden-variety common law claims. Indeed, the *Schor* Court acknowledged the presumption that such private law claims should be decided by Article III courts.⁸⁷ But the Court emphasized the non-Article III forum's relative expertise in resolving the claim as a procedural matter. The agency in *Schor* could assess the common law claim in light of, and in connection with, the larger dispute out of which it grew. In so doing, the agency provided "an inexpensive and expeditious alternative forum" for resolution of the entire controversy before it, which was essential to the effectiveness of the overall regulatory scheme entrusted to the agency.⁸⁸

Understood as a procedural as well as substantive inquiry, the question whether the bankruptcy forum had superior expertise was not assessed by the *Stern* Court. To be sure, the Court states that the resolution of the creditor's claim—taken to be the central task of the bankruptcy forum—could occur without adjudication of the estate's counterclaim. It was therefore not necessary to decide the counterclaim in order to resolve the underlying claim. That was not, however, the question asked by the Court in *Schor*. Deciding the underlying claim in *Schor* without resolving the common law counterclaim would squander the practical benefits of creating the specialized forum. The *Schor* Court recognized that the failure to permit the agency to resolve closely connected matters that should logically be litigated together would degrade the effectiveness of the forum.⁸⁹ If pieces of the dispute were pulled out of the forum, "the purposes of the . . . procedure would have been confounded."⁹⁰

Stern stands in tension with that teaching, because there was little doubt the estate's counterclaim should have been resolved together with the creditor's claim. The counterclaim was compulsory—that is, it arose out of the same transaction or occurrence.⁹¹ We ordinarily try to resolve transaction-

⁸⁷Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986) ("The counterclaim asserted in this litigation is a 'private' right for which state law provides the rule of decision. It is therefore a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts.").

⁸⁸*Id.* at 855. The Court's approach in *Schor*—tying an assessment of expertise to the forum's procedural effectiveness—echoes the doctrines of pendent and ancillary jurisdiction. Under those doctrines, the benefits of resolving an entire case or controversy in a single forum justify the adjudication of claims that would otherwise lie beyond a federal court's power. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (permitting a federal court to exercise pendent jurisdiction when federal and state claims have a "common nucleus of operative fact" and would "ordinarily be expected to [be tried] all in one judicial proceeding").

⁸⁹*Schor*, 478 U.S. at 855-56.

⁹⁰*Id.* at 856.

⁹¹FED. R. BANKR. P. 7013.

ally related claims together, “depending not so much on the immediateness of their connection as upon their logical relationship.”⁹² Deciding whether claims are logically related is not always a trivial inquiry, but a substantial overlap of factual circumstances is usually sufficient to justify common resolution in a single forum. The gains from doing so satisfy the functional thrust of much of modern federal procedure. The *Stern* Court nevertheless deems the connection to the creditor’s claim insufficiently close to empower the bankruptcy judge to enter a final judgment on the counterclaim.

Bankruptcy is, at bottom, a procedural system. For the most part, the rights and obligations at stake are determined by nonbankruptcy law.⁹³ The bankruptcy process provides a central forum that brings various parties in interest together to resolve disputes touching on the debtor. It also provides an adjudicator who can assess a piece of the case and see it as part of a larger whole. Ideally, the aggregation of disputes touching on the debtor permits the judge to appreciate overlapping factual and legal issues that will inform the eventual resolution of the debtor’s bankruptcy. Not only does that permit more efficient resolution of the particular dispute, it also permits more efficient—and accurate—resolution of the larger bankruptcy case.⁹⁴

The second problem with the Court’s treatment of expertise is that it is odd even when taken as an inquiry into the substantive nature of the claim at stake. I read *Stern* with two hats—as an academic who studies both bankruptcy and civil procedure. For the proceduralist in me, the most intriguing part of the *Stern* opinion is the Court’s assertion that Article III courts are “experts” at resolving state common law claims like the one at stake in the case.⁹⁵ That statement would come as a surprise to my civil procedure students, who learn that the Court in *Erie Railroad Co. v. Tompkins* disclaimed any expertise by the federal judiciary in common law disputes.⁹⁶ The central point of *Erie* and its progeny is that the federal judiciary brings no special insights to the adjudication of rights and obligations governed by state common law. More broadly, *Erie* stands for the proposition that federal courts, as a general rule, have no substantive interest in state law disputes like the one at stake in *Stern*.⁹⁷ Those claims are assumed to belong in their natural forum—state court, where they would be adjudicated by judges who likely

⁹²Moore v. N.Y. Cotton Exch., 270 U.S. 593, 610 (1926).

⁹³See Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857 (1982).

⁹⁴See Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3 (2012).

⁹⁵*Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011).

⁹⁶304 U.S. 64 (1938).

⁹⁷See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407 (1964).

do not have life tenure.⁹⁸ For that reason, when federal judges decide state law disputes that land before them by reason of diversity jurisdiction, they do so only as providers of a neutral forum.⁹⁹ The forum's value, and not the substance of the claim, provides the federal interest.

No doubt, the Court did not mean to question the *Erie* Doctrine in *Stern*. While *Erie* involved the conflict between adjudication in state and federal court, *Stern* involves the choice of adjudicators within the federal system. As between the Article III courts and the bankruptcy courts, however, an assessment of expertise on the substance of state law claims does not always point toward the Article III courts. Bankruptcy courts are much more familiar than the Article III courts with many state law claims routinely litigated in bankruptcy. It is no slander against the Article III judiciary to acknowledge that, on average, district judges are much less familiar than bankruptcy judges with state fraudulent conveyance law. Most bankruptcy judges are also more comfortable than most district judges with the intricacies of creating and maintaining security interests under state law. These kinds of disputes find a natural home in bankruptcy court, because they often involve the confluence of debt, insolvency, and competition among creditors. Even in areas of the law that have less obvious connections to bankruptcy, such as general contract law, bankruptcy courts see a steady diet of disputes—perhaps as significant (if not more so) than the docket of the district courts, where civil matters must compete with criminal cases for judicial attention. As one commentator has observed, bankruptcy judges probably decide state law questions more frequently than any other adjudicators in the federal courts.¹⁰⁰ If subject matter expertise turns on familiarity, it is hard to say that district judges are necessarily better placed to resolve state common law claims than bankruptcy judges.

C. THE PARADOX OF SEPARATION OF POWERS: COURTS V. AGENCIES

Stern's ultimate paradox is its treatment of the separation of powers argument. The paradox lies in the Court's distinction between adjudication of a common law claim by a bankruptcy judge and adjudication of a common law claim by an administrative agency. The teaching of *Stern*, apparently, is that the federal judiciary faces *more* danger of encroachment by the political branches when the non-Article III adjudicator is a bankruptcy court than

⁹⁸See Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 SUP. CT. REV. (forthcoming 2012).

⁹⁹See Friendly, *supra* note 28, at 492–93 (giving historical support for this view of diversity jurisdiction).

¹⁰⁰Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 636 (2004).

when it is an administrative agency.¹⁰¹ The Court's observation, "[w]e deal here not with an agency but with a court," expresses unease, and not comfort, about the nature of the forum hearing the estate's counterclaim.¹⁰²

One would expect the opposite to be true. The essential Article III concern is the preservation of the judiciary's independence from the political branches. That independence would be undermined, as the Court recognizes, if Congress could carve out pieces of the judicial power to be apportioned outside the federal judiciary.¹⁰³ By that measure, adjudication of private rights by administrative agencies should be more—and not less—alarming. Agencies are subject to the direct or indirect influence of the political branches, and even so-called "independent" agencies are not fully insulated from politics.¹⁰⁴ Bankruptcy judges, on the other hand, reside within the federal judicial system. True, they are not Article III judges, but they are selected by Article III judges through a process wholly internal to the judiciary. Bankruptcy judges also serve for relatively long terms of fourteen years and are paid at levels that are comparable to, albeit lower than, the compensation of the Article III judiciary. The effect has been to mesh the bankruptcy bench with the tenured federal judiciary.¹⁰⁵ To use a familial analogy, the difference between assigning a private law dispute to a bankruptcy court and assigning it to an agency is like the difference between giving the car keys to a first cousin who lives next door and giving the car keys to a distant relation visiting from another country. The latter and not the former should give greater pause.

Prior caselaw recognized the concern about administrative agency adjudication of private law claims in two ways. First, the Court asked how large a slice of judicial power was being sent to the agency and, second, the Court asked whether the political branches were attempting to accumulate exces-

¹⁰¹The possible divergence between the treatment of adjudication in bankruptcy courts and in administrative agencies was noted after *Granfinanciera, S.A. v. Nordberg*. See S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 145 (1991) (noting "the possibility of an article III double standard: a categorical approach for bankruptcy courts and a flexible, balancing approach for administrative agency adjudication").

¹⁰²*Stern*, 131 S. Ct. at 2615.

¹⁰³*Id.* at 2609 ("Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III.").

¹⁰⁴See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, ___, 129 S. Ct. 1800, 1815 (2009) ("The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.").

¹⁰⁵See Judith Resnik, "Uncle Sam Modernizes His Justice": *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 640-42 (2002).

sive power by a process of “encroachment or aggrandizement.”¹⁰⁶ *Schor* marked the path most clearly. In *Schor*, the Court took pains to note the narrowness of the disputes being assigned outside the Article III courts.¹⁰⁷ It also found no indication that the political branches were taking power for themselves from the tenured judiciary.¹⁰⁸

The *Stern* majority has perhaps overlearned the lesson of *Schor*. *Schor* can be read as a case in which the Court recognized the separation-of-powers danger of assigning adjudicatory power to an administrative agency while deeming those dangers to be offset by other considerations—principally the narrowness of the power exercised by the agency and the great benefits to the regulatory regime gained by resolving the private law dispute in the agency forum. The case can also be read less flexibly as a formal checklist of factors equally applicable in all circumstances, and that is the approach taken in *Stern*. The *Stern* majority takes the formal approach and assesses narrowness of forum as an end in itself. Because bankruptcy courts hear disputes covering a wide range of subject matter, their power raises greater Article III suspicion in the view of the *Stern* Court. To put it differently, the Article III problem is that bankruptcy judges are a little *too much* like the tenured bench. As the Court phrases the point, because a bankruptcy court is not an agency with a limited remit, it has “substantive jurisdiction reaching any area of the *corpus juris*.”¹⁰⁹ That is true enough, but it is difficult to see a meaningful separation-of-powers problem when that broad substantive jurisdiction

¹⁰⁶Commodity Futures Trading Comm’n v. *Schor*, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting) (internal quotation marks omitted).

¹⁰⁷*Id.* at 856 (majority opinion) (stating that “the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*”).

¹⁰⁸*Id.* (“[T]his case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.”).

¹⁰⁹*Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011). The Court also emphasized a bankruptcy court’s ability to enter a decision with preclusive effect. *Id.* (“What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime.”). Relying on *Crowell*, the Court noted the limited ability of an agency to enter a binding order without further judicial review. *Id.* at 2619 (“[W]hereas 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,’ a bankruptcy court resolving a counterclaim under 28 U.S.C. § 157(b)(2)(C) has the power to enter ‘appropriate orders and judgments’—including final judgments—subject to review only if a party chooses to appeal . . .” (citations omitted)). The role of a reviewing court may have been significant in the agency scheme approved in *Crowell*, but that role has not always been crucial. In *Thomas*, for instance, the non-Article III scheme in question included binding arbitration, and the arbitrator’s decision could be overturned only for “fraud, misconduct, or misrepresentation.” 473 U.S. 568, 592 (1985). Indeed, the Court has recognized (albeit inconsistently) the preclusive effect of agency fact-finding without the need for further judicial review. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (“When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.”).

is being exercised by a decisionmaker selected by the tenured judiciary on merit and sheltered under the umbrella of the federal courts. For a generation, bankruptcy judges have been integrated into the federal judiciary in ways that have enhanced the quality of, and public confidence in, bankruptcy adjudication.¹¹⁰ Now, it appears, that undertaking has been held to diminish and not enhance the third branch.

In addition to the preference for agency adjudication over court adjudication, *Stern* presents another separation-of-powers puzzle. The Court pays scant attention to the tenured judiciary's authority over bankruptcy judges. There is a glancing mention of this consideration in the Court's finding that the tenured judiciary's appointment of bankruptcy judges does not resolve all Article III concerns.¹¹¹ But the appointment process is only one aspect of the relationship between bankruptcy judges and the Article III courts. There is also the power of the tenured judiciary not to refer bankruptcy cases and proceedings to the bankruptcy bench in the first instance or to withdraw the reference later. Even if withdrawal of the reference is infrequent, it remains as a failsafe to protect the tenured judiciary.

The Court mentions but does not discuss withdrawal of the reference in *Stern*. The possibility is described in an introductory description of bankruptcy jurisdiction and the bankruptcy courts.¹¹² It garners another mention as part of the procedural history of the case.¹¹³ The Court also notes withdrawal of the reference in the closing portions of the opinion, but only to observe that the Judicial Code contemplates that some disputes in bankruptcy will be adjudicated outside the bankruptcy courts (and therefore the Court's decision should not disrupt the overall bankruptcy process).¹¹⁴

Because *Stern* takes such a formal approach to Article III concerns,¹¹⁵ the reserved power of the district courts to withdraw the reference and sit as courts of bankruptcy themselves should have been a crucial consideration.¹¹⁶ In a similar context—an Article III challenge to the authority of magistrate judges in criminal jury cases—the Court has given great weight to the extent of the tenured judiciary's control over a non-Article III adjudicator's du-

¹¹⁰See Resnik, *supra* note 105, at 637–42, 671 (discussing the “blur from the public perspective” between Article III and non-Article III judges and the high quality of bankruptcy judges).

¹¹¹*Stern*, 131 S. Ct. at 2619 (“It does not affect our analysis that, as Vickie notes, bankruptcy judges under the current Act are appointed by the Article III courts, rather than the President.”).

¹¹²*Id.* at 2603.

¹¹³*Id.* at 2607.

¹¹⁴*Id.* at 2620.

¹¹⁵See generally Chemerinsky, *supra* note 98.

¹¹⁶A more functional approach to Article III—an approach I find persuasive—would downplay the importance of the district court's power to withdraw the reference. Because that power is not frequently exercised, a functionalist must turn to other aspects of the bankruptcy system (and, in particular, to the nature of the bankruptcy appointment process and the quality of the bankruptcy bench) for assurance that the Article III values of the federal courts are preserved by adjudication in the bankruptcy courts.

ties.¹¹⁷ There is no obvious reason for the *Stern* Court's lack of discussion about the extent of control over the bankruptcy bench inherent in the tenured judiciary's ability to withdraw the reference. Perhaps the Court viewed that power as more theoretical than practical because it is infrequently exercised (although that would be out of step with the formalism of the rest of the *Stern* opinion). Perhaps the Court hewed so closely to the reasoning of *Northern Pipeline* that it did not appreciate the significance of an aspect of the bankruptcy court system absent from that case (because it did not yet exist). Whatever the reason, courts and litigants may find themselves left with little guidance after *Stern* on at least one issue that implicates the power of the district courts to withdraw the reference—consent.¹¹⁸

IV. TESTING *STERN*

In *Stern*'s aftermath, dormant questions about the limits of bankruptcy court power have been revived. How much guidance in resolving those questions can we glean from history, expertise, and the separation of powers? The answer, I fear, is “too much” rather than “not much.” Sometimes those arguments may converge toward a single answer. But they may also diverge, creating the risk of inconsistent application of Article III principles. To explain the point, I take two questions that have come to the fore after *Stern*: whether litigant consent to final adjudication before a bankruptcy judge is sufficient to defeat an Article III challenge, and whether bankruptcy courts may treat fraudulent conveyance actions as core proceedings without running afoul of Article III.

A. CONSENT

Stern has drawn attention to the place of consent in bankruptcy litigation. The accepted practice before *Stern* was that the parties could consent to final adjudication of a proceeding by a bankruptcy judge, even if they had the right to demand an Article III forum. The Federal Rules of Bankruptcy Procedure provide for (indeed, require) litigants to state whether or not they so consent.¹¹⁹ The question prompted by *Stern* is whether and to what extent the consent of litigants may authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's powers as limited by Article III.¹²⁰ The answer to that question shows a tension between arguments drawn from history and the separation of

¹¹⁷See *Peretz v. United States*, 501 U.S. 923, 937 (1991).

¹¹⁸See *infra* Part IV.A.

¹¹⁹See, e.g., FED. R. BANKR. P. 7008, 7012.

¹²⁰The issue has been raised directly in bankruptcy court, and also in district court on motions to withdraw the reference. See, e.g., *Mercury Companies v. FNF Sec. Acquisition, Inc.*, 460 B.R. 778, 780 (D. Colo. 2011) (rejecting the argument by defendants in a fraudulent conveyance action that “one cannot

powers.¹²¹

Judged from the perspective of history, the consent question is a fairly straightforward one. If it is accepted that a bankruptcy judge today may hear and decide a proceeding under circumstances that would have allowed a referee in bankruptcy under the 1898 Act to do so, then litigant consent permits final adjudication. Bankruptcy practice before the Code allowed litigants to consent to the exercise of summary jurisdiction by a referee in bankruptcy, even if their dispute would otherwise have required a plenary proceeding.¹²² Although the nature of consent—and, particularly, the extent of consent from filing a proof of claim—remained contested,¹²³ a referee could hear and decide a dispute as a summary proceeding if a litigant failed to make a timely objection.¹²⁴ History provides little support, then, for the modern litigant who consents to a bankruptcy court's authority to hear and decide a dispute but later objects on Article III grounds to the court's authority to do so. History also suggests that Article III is no barrier to a bankruptcy court's determination that a litigant's failure to make a timely objection to final adjudication by the bankruptcy court amounts to consent by waiver or forfeiture.¹²⁵

If separation-of-powers concerns are considered, however, the picture becomes more complex. Article III is both a structural protection and a preservative of individual liberty. Litigants may waive or forfeit their liberty interests, but they cannot purport to take away the structural protections Article III provides to the judiciary. The Court has drawn a distinction between these two aspects of Article III in cases outside the bankruptcy context. In *Schor*, the Court found that there had been consent by waiver to adjudication of a common law counterclaim outside an Article III forum, because “as a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.”¹²⁶ The Court nevertheless went on to consider whether assignment of decisionmaking power to a non-Article III adjudicator

consent to the Bankruptcy Court’s jurisdiction where the Bankruptcy Court does not have the authority to resolve claims before it”).

¹²¹The argument from expertise provides no guidance when assessing the propriety of consent.

¹²²See *supra* note 73 and accompanying text.

¹²³See *supra* notes 75-78 and accompanying text.

¹²⁴See *supra* note 74 and accompanying text.

¹²⁵Whether consent by waiver or forfeiture comports with the Federal Rules of Bankruptcy Procedure is, of course, a separate matter.

¹²⁶*Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848-49 (1986). The majority in *Schor* took guidance on this point from the opinions of Justice Rehnquist (concurring in the judgment) and Justice White (dissenting) in *Northern Pipeline*, and not from the plurality.

“impermissibly threatens the institutional integrity of the Judicial Branch.”¹²⁷ A finding that litigants have consented to full adjudication of a claim before a bankruptcy judge, then, does not end the inquiry. There must be some showing that the role of the tenured judiciary will not be undermined.

In prior cases, the Court has assessed the structural component of the inquiry in different ways. In *Schor*, the narrowness of the disputes assigned to the agency for adjudication served to satisfy the Court that the role of the tenured judiciary was preserved.¹²⁸ That approach to the structural component of Article III would militate against giving effect to litigant consent, because the *Stern* Court has already noted (with disapproval) the breadth of subject matter on the bankruptcy courts’ docket.¹²⁹ But there is another approach to the inquiry. The Court has also looked to the relationship between the Article III courts and non-Article III adjudicators in a series of cases involving the powers of magistrates. The structural component of Article III has been satisfied in those cases due to the level of control exercised by the district courts over the duties of magistrate judges. In *Peretz v. United States*, which involved an Article III challenge to a magistrate judge’s authority to oversee voir dire in a criminal case, the Court highlighted the retained power of the district court to assign or withdraw a magistrate’s duties in each case as an answer to structural Article III concerns.¹³⁰ Because the “ultimate decision” whether to invoke the magistrate’s assistance is made by the district court, subject to veto by the parties,” the Court found no danger that a magistrate judge would serve “the purpose of emasculating constitutional courts.”¹³¹

Taking the magistrate cases as the guide suggests that no structural concerns would remain to block final adjudication in bankruptcy court once the litigants consent. Like the magistrate judge in *Peretz*, a bankruptcy judge receives cases and proceedings by reference. And, as in *Peretz*, that reference may be withdrawn by the district court.¹³² If the test is not whether the bankruptcy judge hears a narrow range of subject matter but rather whether the Article III courts retain the “ultimate decision” over the bankruptcy judge’s docket, consent should be a sufficient basis for the bankruptcy judge’s authority to enter final judgment without constitutional concerns.

The *Stern* Court, however, does not consider the district courts’ power to withdraw the reference from bankruptcy judges.¹³³ That omission is per-

¹²⁷*Id.* at 851.

¹²⁸*Id.* at 851–53.

¹²⁹See *supra* text accompanying notes 108–09.

¹³⁰501 U.S. 923, 937 (1991).

¹³¹*Id.* (internal quotation marks and citation omitted).

¹³²28 U.S.C. § 157(d) (2006); FED. R. BANKR. P. 5011.

¹³³See *supra* notes 114–116 and accompanying text.

haps understandable in light of the procedural history of the case. The creditor had plainly objected to final adjudication of the estate's counterclaim by the bankruptcy judge.¹³⁴ Because the Court concluded that the creditor's filing of a proof of claim did not amount to waiver by consent, the Court did not have the opportunity to confront directly the consequences of litigant consent. Indeed, in response to Justice Breyer's dissent, the majority accepts that the case involves the exercise of power by a bankruptcy court "*without consent* of the litigants."¹³⁵ And so we are left with strong suggestions from the caselaw but no definitive answer from *Stern* itself.¹³⁶

B. FRAUDULENT CONVEYANCE ACTIONS

The power of bankruptcy judges to hear and finally decide fraudulent conveyance actions exposes the tension between arguments from history and expertise. Historically, fraudulent conveyance actions were heard as plenary proceedings under the 1898 Act—except when, as in *Katchen*, the transferee had filed a proof of claim in the bankruptcy case. But if expertise is the criterion, fraudulent conveyance actions are at home in bankruptcy court.

The treatment of fraudulent conveyance actions in bankruptcy underscores the limitations of arguments from history. The 1898 Act did not itself provide a cause of action for recovery of fraudulently conveyed property. A claim filed by a transferee withholding a voidable transfer could be disallowed, but a state law fraudulent conveyance action was the vehicle for recovering from the transferee. Summary proceedings on the state law fraudulent conveyance action required consent or the creditor's filing of a proof of claim. The Code, of course, now provides a fraudulent conveyance cause of action.¹³⁷ Because the statutory schemes are so different in this

¹³⁴As recounted by the bankruptcy court, it concluded, over the creditor's objection, that the estate's counterclaim was a core proceeding in which the bankruptcy court could enter final judgment. *Marshall v. Marshall* (*In re Marshall*), 257 B.R. 35, 39–40 (Bankr. C.D. Cal. 2000).

¹³⁵The portion of the Court's opinion reads in full:

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

Stern v. Marshall, 131 S. Ct. 2594, 2615 (2011) (alteration in original) (emphasis added) (citation omitted).

¹³⁶The connection between consent in the magistrate and bankruptcy contexts is underscored by the Fifth Circuit's sua sponte decision to request briefing on the effect of *Stern* on the ability of litigants to consent to a magistrate judge's decisionmaking authority in civil cases. *Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, No. 10-20640 (5th Cir. Sept. 9, 2011) (order requesting briefing on the effect of *Stern*). Ultimately, the court found that *Stern* does not clearly overrule prior circuit caselaw permitting parties to consent to a magistrate's entry of final judgment on a state law claim. See *Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, No. 10-20640, 2012 WL 688520 (5th Cir. Mar. 5, 2012).

¹³⁷11 U.S.C. § 548 (2006). Section 544 of the Bankruptcy Code works as a choice of law provision

respect, looking back to pre-Code practice provides limited guidance.¹³⁸ Today, in contrast to that era, a fraudulent conveyance action in bankruptcy can be said to “flow from a federal statutory scheme” in a way that was not true under the 1898 Act.¹³⁹ The Court’s decision in *Granfinanciera* treated the historical practices under the 1898 Act as highly instructive, regardless of the significant differences introduced by the Code with respect to the treatment of fraudulent conveyance actions.¹⁴⁰ History—at least the Court’s version of it—is not, however, one sided. In a different context, the Court has labeled avoidance actions as “a core aspect of the administration of bankrupt estates since at least the 18th century.”¹⁴¹ If so, perhaps the historical lessons taken from the 1898 Act will be supplemented—or trumped—by the pre-history of earlier bankruptcy adjudication. And even under the 1898 Act, a referee’s power in an avoidance action was not absolutely limited.¹⁴²

Judging from an assessment of expertise, on the other hand, fraudulent conveyance actions plainly belong in bankruptcy court. As a substantive matter, much of the caselaw development in fraudulent conveyance doctrine occurs in bankruptcy court. Probably no other court in the federal system (or the state systems) can handle fraudulent conveyance actions with the skill and confidence of the bankruptcy courts. As a matter of procedural expertise—the ability to appreciate the connection between a proceeding to recover a fraudulent conveyance and the larger case—the argument in favor of adjudication of such actions in bankruptcy court is even stronger. Fraudulent conveyance actions often require proof of the debtor’s conduct, intentions, and financial condition—questions that the bankruptcy court usually will be

permitting the trustee to pursue a state law fraudulent conveyance action. Arguably, a state law fraudulent conveyance action brought under § 544 can also be said to stem from the Code. See *In re Refco Inc.*, 461 B.R. 181, 187 (S.D.N.Y. 2011) (concluding that a bankruptcy court may enter final judgment in a fraudulent conveyance action brought under § 544). But see *Springel v. Prosser (In re Innovative Comm’n Corp.)*, No. 08-3004, 2011 WL 3439291, at *3-4 (Bankr. D.V.I. Aug. 5, 2011) (distinguishing between § 548 and § 544 for purposes of determining a bankruptcy court’s power to enter final judgment in a fraudulent conveyance action).

¹³⁸Justice White made a similar argument in his dissent in *Granfinanciera*. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 73 (1989) (White, J., dissenting) (“While in *Katchen*’s day, it was only in special circumstances that adjudicating a preference was committed to bankruptcy proceedings, today, Congress has expressly designated adjudication of a preference or a fraudulent transfer a ‘core’ bankruptcy proceeding. The portion of *Katchen* on which the Court relies . . . is therefore a relic of history.”).

¹³⁹*Stern*, 131 S. Ct. at 2614.

¹⁴⁰There is, of course, a distinction between the Seventh Amendment issue that was in contest in *Granfinanciera* and the limits of Article III. Most courts after *Granfinanciera* adhered to the view that a bankruptcy court, even if it could not hold a jury trial, may enter a final judgment in a fraudulent conveyance action on a motion to dismiss or on summary judgment. See *In re Refco*, 461 B.R. at 190-91 (collecting cases).

¹⁴¹*Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 (2006) (describing actions to recover voidable preferences).

¹⁴²See *supra* note 17.

able to resolve more nimbly due to their overlap with related issues likely to be litigated in the forum. A fraudulent conveyance action brought under an actual fraud theory, for instance, requires a showing that the debtor intended to defraud.¹⁴³ Under a constructive fraud theory, the debtor's financial condition at the time of the transfer—such as a showing of insolvency or undercapitalization—may be the central issue.¹⁴⁴ Those questions lie close to the heart of the issues likely before the bankruptcy forum in related matters and proceedings. Splitting them off to another forum would degrade the efficiency and effectiveness of the bankruptcy process.

V. CONCLUSION

Stern can be understood as a combination of multiple arguments that do not always align.¹⁴⁵ Perhaps for that reason, the decision itself wisely counsels caution in its application. It is too easy to take a portion of the Court's reasoning and apply it without appreciating that another portion of the Court's reasoning may require very different considerations. An argument from history that may seem to militate against the power of a bankruptcy judge to hear and finally determine a dispute could run counter to arguments from expertise or the separation of powers that militate in favor. The Court's description of its decision as "narrow"¹⁴⁶ serves as implicit recognition of the danger of broad pronouncements and hasty judgments in the Article III field. As the lower courts attempt to apply *Stern*, that admonition should be heeded.

¹⁴³UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1) (2007).

¹⁴⁴*Id.* §§ 4(a)(2), 5(a).

¹⁴⁵Justice Scalia chides the Court's Article III doctrine for generating too many different analytical factors. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) ("The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence . . .").

¹⁴⁶*Id.* at 2620 (majority opinion) (internal quotation marks and citation omitted).

