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## Restructuring the Bankruptcy System: A Strategic Response to *Stern V. Marshall*

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# Restructuring the Bankruptcy System: A Strategic Response to *Stern v. Marshall*

by

Brook E. Gotberg\*

## ABSTRACT

*The Supreme Court's ruling in Stern v. Marshall has signaled a need to alter the bankruptcy courts' jurisdictional structure. In Stern, the Supreme Court ruled that bankruptcy judges, who lack the life tenure and salary protections provided by Article III, cannot issue final rulings in bankruptcy proceedings previously believed to be within their core jurisdiction. In response to the constitutional challenge raised by Stern, and in recognition that bankruptcy court's jurisdictional limits represent a long-standing problem, many argue for a long-term solution: the restructuring of the system to create specialized Article III bankruptcy courts.*

*This article evaluates this proposal in light of classic principles of system restructuring, namely, that any proposed restructure should stem from the underlying goals or strategy for that system. The creation of a specialized Article III bankruptcy court is consistent with the view of bankruptcy as a method of distribution, but not with bankruptcy as a procedural mechanism to deal with collective default. In recognition of this tension, the article promotes an alternative solution to the Stern problem, one that harmonizes other strategic approaches and promotes uniformity in bankruptcy. This solution would replace bankruptcy courts with an administrative agency subject to the review of non-specialized district courts.*

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\*Fellow, J. Reuben Clark Law School. My thanks to Susan Block-Lieb, Lynn LoPucki, Elizabeth Warren, Colin Marks, Fred Gedicks, and Eric Jensen for their insights and support. Also thanks to Kyler McCarty and Gary Hill for their assistance in research and citations. All errors are my own.

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## I. INTRODUCTION

Through its recent decision *Stern v. Marshall*,<sup>1</sup> the Supreme Court has chiseled a crack in the constitutional foundation of the bankruptcy system that may result in a wholesale erosion of bankruptcy judges’ jurisdictional

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<sup>1</sup>*Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), *reh’g denied*, 132 S. Ct. 56, 180 L. Ed. 2d 924 (2011).

authority.<sup>2</sup> In *Stern*, the Court concluded that although bankruptcy judges had the statutory authority to enter final judgments on a debtor's counterclaim pursuant to 11 U.S.C. § 157(b)(2)(C), the very grant of this authority violated Article III of the Constitution.<sup>3</sup> As the Court explained, bankruptcy judges who lack the Article III protections of lifetime tenure and salary protection cannot exercise the "judicial Power of the United States," which the Court held is necessarily invoked when a federal court acts to resolve claims under state law.<sup>4</sup> Based on its striking similarity to a thirty-year old Supreme Court decision, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* ("Marathon"),<sup>5</sup> the ruling seemed a long overdue criticism of Congress' failed efforts to resolve constitutional concerns about bankruptcy courts when such concerns first arose in 1978. The decision in *Stern* also served to reinforce arguments, many of which predated *Marathon*, that the only sensible way to organize a federal bankruptcy system driven by litigation was to appoint bankruptcy judges with lifetime tenure under Article III. These arguments for an Article III bankruptcy court have thus far dominated the academic literature; generally speaking, proposed restructuring solutions presuppose that a system of specialized bankruptcy judges is necessary and desirable.<sup>6</sup>

Arguments for an Article III bankruptcy court arose most prominently during the late 1970s, when the Bankruptcy Reform Act of 1978, which created the Bankruptcy Code in use today, was being drafted. As part of a shift towards greater responsibility for bankruptcy judges, formerly termed

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<sup>2</sup>See Jonathan Azoff & Thomas Szaniawski, *Stern v. Marshall and the Limits of Consent*, 30 AM. BANKR. INST. J. 28 (2011) ("Early reactions from the bankruptcy bar suggest that the decision's effects - at least initially - may be widespread and controversial."); Michael St. Patrick Baxter, et al., *The Scope and Implications of Stern v. Marshall*, 131 S. Ct. 2594 (2011), 4 (Oct. 26, 2011) (unpublished report), available at <http://ssrn.com/abstract=1979503> (noting that the Court's rationale for its decision permits a broader reading that calls into question the constitutional validity of the bankruptcy court's jurisdiction over a range of core proceedings); Eric G. Behrens, *Stern v. Marshall: The Supreme Court's Continuing Erosion of Bankruptcy Court Jurisdiction and Article I Courts*, 85 AM. BANKR. L.J. 387, 388 (2011) ("the practical impact of these decisions is . . . to invalidate powers that bankruptcy judges and their predecessors have exercised since 1800"); Susan Block-Lieb, *What Congress Had To Say: Legislative History as a Rehearsal of Congressional Response to Stern v. Marshall*, 86 AM. BANKR. L.J. 55, 57 (2012) ("The Supreme Court's decision in *Stern* has been even more shocking to the bankruptcy bar than its earlier decision in *Northern Pipeline*."); Richard Lieb, *The Supreme Court*, in *Stern v. Marshall*, by *Applying Article III of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders*, 20 J. BANKR. L. & PRAC. 4 Art. 1 (Sept. 2011); Mark S. Scarberry, *The Supreme Court's Decision in Stern v. Marshall: Analysis & Implications* (Pepperdine Univ. Legal Stud., Research Paper No. 14, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1888685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888685) ("[T]he entire bankruptcy court system remains somewhat vulnerable.").

<sup>3</sup>*Stern*, 131 S. Ct. at 2608.

<sup>4</sup>*Id.* at 2609.

<sup>5</sup>*N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>6</sup>See Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 389 (2012), discussed *infra*.

“referees” of the district court, a significant contingent of academics and bankruptcy professionals pushed for the appointment of bankruptcy judges with life tenure and salary protection. Arguments focused on the growing number of bankruptcy cases, the inability of the federal judicial system to effectively review them all, and the advantage that specially trained bankruptcy judges could bring to the system by way of swift and efficient adjudication. Regrettably for advocates of this Article III solution, the specialization of the bankruptcy courts proved to be an insurmountable obstacle to obtaining Article III status for bankruptcy judges, as many, including the general federal bench, indicated their strong opposition to such a specialized trial court in the federal system.<sup>7</sup> Instead, the Bankruptcy Code gave bankruptcy judges all the authority of district court judges in bankruptcy, but without Article III status.

The constitutional status of bankruptcy court judges and their authority over bankruptcy cases has been a subject of debate ever since. After the Bankruptcy Code was challenged by the Supreme Court’s ruling in *Marathon*, and sporadically in the intervening years between *Marathon* and *Stern*, individuals writing on the topic continued to recommend appointment of bankruptcy judges under Article III.<sup>8</sup> In 1997 the National Bankruptcy Review Commission<sup>9</sup> also recommended bankruptcy courts be established under Article III as a way of creating a “constitutionally sound structure” that would “eliminate costly litigation over bankruptcy court authority.”<sup>10</sup>

In spite of these recommendations, appointment of bankruptcy judges to Article III has proved to be a non-starter in Congress, despite its strong support among many bankruptcy scholars. This reluctance to take up the issue probably reflects some simple inertia, but it also demonstrates legitimate opposition to an Article III bankruptcy bench.

Opposition to Article III bankruptcy courts can be explained on ideological grounds. Proponents and opponents of the Article III solution have differing opinions regarding bankruptcy’s place in the federal system,

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<sup>7</sup>See Prepared Statement of Spencer M. Williams, *Northern Pipeline Co. v. Marathon Pipe Line Co. Decision*: Hearing Before the Subcomm. on Courts of the S. Comm. on the Judiciary, 98th Cong. 36-37 (1983) (“[W]hile specialization may have a place in many *State trial court* systems and even, in rare instances, in the Federal appellate area or the administrative law area, we believe it should remain as much an ‘exception to the rule’ in our *Federal trial court* system in the future as it has been in the past.” (emphasis in original)).

<sup>8</sup>See, e.g., Susan Block-Lieb, *The Costs of A Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 566 (1998); G. Eric Brunstad, Jr. et. al., *Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One*, 53 BUS. LAW. 1381, 1440 (1998); George W. Kuney, *Stern v. Marshall: A Likely Return to the Bankruptcy Act’s Summary/Plenary Distinction in Article III Terms*, 21 J. BANKR. L. & PRAC. 1, 9-10 (2012).

<sup>9</sup>Established pursuant to the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, and operating until November 19, 1997.

<sup>10</sup>NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 721 (1997).

particularly the advisability of a distinct system of policies, rules, and treatment for debtors, creditors, and third parties. This disagreement regarding the ideological basis for bankruptcy law translates into a disagreement over the ideal structure for the bankruptcy system. Those who view bankruptcy as more of a minimalist procedural structure intended to mirror nonbankruptcy law except as necessary to deal with collective default, often termed<sup>11</sup> “proceduralists,”<sup>12</sup> are particularly disinclined to support a specialized Article III bankruptcy court by virtue of their ideology. They stand in direct opposition to those who view bankruptcy as a mode of implementing distributional policy, referred to as “traditionalists,”<sup>13</sup> whose ideology favors an Article III bankruptcy court.

More specifically, specialized bankruptcy courts work to the advantage of traditionalists, who see bankruptcy as an opportunity to establish distributive policy distinct to cases of insolvency. This policy would take into consideration factors that are otherwise ignored in the course of debt collection, such as the impact that debt and collection have on third parties. Particularly in the case of business reorganization, traditionalists promote the influence of a bankruptcy judge, a third-party arbiter with a specialized knowledge of bankruptcy procedure, who can assist a struggling debtor in its efforts to regroup and emerge from bankruptcy a profitable venture, thereby saving the jobs of employees and preventing the death of factory towns.

On the other hand, specialized bankruptcy courts do nothing for proceduralists, who view bankruptcy as a procedural mechanism for debt recovery in the face of collective default. In their view, there should be no

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<sup>11</sup>As Douglas Baird has acknowledged, “Sorting legal scholars into distinct camps is a dangerous business. Successful academics have views that are too complex and too modulated to be rigidly categorized.” Douglas G. Baird, *Bankruptcy’s Uncontested Axioms*, 108 YALE L.J. 573, 576 (1998). Ascribing uniform views to scholars within distinct camps is even more dangerous; I do so merely for purposes of simplicity in analysis, recognizing that generalizations may quickly break down when one examines the specifics of any particular argument.

<sup>12</sup>See, e.g., *id.*; Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987); Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121 (2004); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857 (1982); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004).

<sup>13</sup>See, e.g., KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* 19 (1997) (advocating consideration of the community in considering bankruptcy policy); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 722 (1991); JANIS SARRA, *CREDITOR RIGHTS AND THE PUBLIC INTEREST: RESTRUCTURING INSOLVENT CORPORATIONS* 3 (2003); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397 (1994). They may also be termed “practicalists.” See also Adam J. Levitin, *Toward A Federal Common Law of Bankruptcy: Judicial Lawmaking in A Statutory Regime*, 80 AM. BANKR. L.J. 1, 4 (2006).

difference in treatment of creditors (or more broadly, “rightsholders”)<sup>14</sup> whether in or out of bankruptcy, except as necessary to deal with the fact that there are multiple creditors simultaneously looking for relief. Apart from facilitating a “creditors’ bargain,” whereby the collective interest of creditors can be maximized, bankruptcy should play no role in altering the course of nonbankruptcy law. A specialized judge, especially one imbued with authority to exercise independent judgment on the disposition of a firm and the rights of creditors, is counter to this interest.

Consideration of underlying strategic goals for bankruptcy, such as those expressed by both the traditionalists and the proceduralists, is essential when considering a holistic restructuring of the bankruptcy system, as advocated in the wake of *Stern*. Thus far, the academic literature has been largely focused on the historical account of bankruptcy courts and bankruptcy judges, drawing conclusions based on that historical description that Article III status is or is not required.<sup>15</sup> There has been some analysis approaching the topic from a strategic viewpoint on the proceduralist side, but usually for the purposes of suggesting alterations to substantive bankruptcy law,<sup>16</sup> or to reinforce the proceduralist view that issues of debt collection should not be seen as “bankruptcy” issues.<sup>17</sup> This paper is the first to apply strategic principles for the direct purpose of facilitating a workable restructure of the bankruptcy system.

In accomplishing this, the article first analyzes the strategic principles of distributional policy and consistency between bankruptcy and non-bankruptcy law set forth by traditionalists and proceduralists, and considers how those strategic principles would translate into proposals for structural reform. It then sets forth an independent strategic principal, that of uniformity in bankruptcy, that it argues should be the strategic basis for restructuring the bankruptcy system. The article proposes a solution responsive to the goal of uniformity: the creation of an executive agency to administer the bulk of bankruptcy filings, with a predetermined category of cases channeled directly to standard, non-specialized federal district courts.<sup>18</sup> Together, the agency

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<sup>14</sup>Mooney, *supra* note 12, at 934 .

<sup>15</sup>See, e.g., Block-Lieb, *supra* note 2, at 117; Joan N. Feeney, *Statement to the House of Representatives Judiciary Committee on the Impact of Stern v. Marshall*, 86 AM. BANKR. L.J. 357, 400 (2012); Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 572 (1998).

<sup>16</sup>See Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 147 (1986); Mooney, *supra* note 13, at 1011-12 (2004).

<sup>17</sup>See Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 174 (1987); Hynes, *supra* note 12, at 124 (“The central question addressed by this Article is why we offer substantially more, or at least different, debt relief in our bankruptcy system than we offer under non-bankruptcy law.”)

<sup>18</sup>Currently, all Article III federal district courts are generalist courts, with jurisdiction over cases and controversies as laid out in 28 U.S.C. § 1330 *et seq.* The only exception is the Court of International

and the district courts would manage the caseload currently carried by the bankruptcy courts. Recognizing the strategic concerns of the traditionalist and proceduralist camps, this solution draws important considerations from both while simultaneously pursuing uniformity in the bankruptcy system and putting bankruptcy procedure in greater conformity with the larger federal system.

Using an administrative agency would encourage the resolution of the vast majority of bankruptcy cases according to carefully drafted regulations, permitting their swift resolution without the need for court involvement. For most consumer filings, regulations could provide for streamlined proceedings that would maximize speed and efficiency of process. Cases involving more complex issues that required the exercise of federal “judicial power” would be heard by federal district court judges, as part of their normal and varied docket. Such a solution would resolve uncertainty regarding the inappropriate exercise of “judicial power” by non-Article III courts, incorporating instead the constitutionally established standards for administrative law.<sup>19</sup> In addition, this structure would promote efficiency in the resolution of bankruptcy disputes by shortening the appeals process. Moving the first tier of decision-making in most routine issues out of the courts and into administrative offices could also reduce procedural costs.<sup>20</sup>

This article makes the case for this solution as follows: Part II explains the constitutional problem presented by non-Article III bankruptcy judges’ exercise of broad jurisdiction over bankruptcy cases. It first provides a description of the Supreme Court’s ruling in *Stern* and its impact on the bankruptcy jurisdictional scheme. Next, it gives a historical explanation of how and why bankruptcy courts were granted the statutory authority they

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Trade, established by the Customs Court Act of 1980, 28 U.S.C. § 1581 *et seq.*, which has exclusive jurisdiction over civil actions commenced in connection with tariff and trade acts. For the purposes of this paper, all references to federal district courts or judges refer to non-specialized courts or judges.

<sup>19</sup>In other words, binding precedent would move away from *Marathon* towards *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985) and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 841 (1986). This claim presupposes that *Stern*’s effect on bankruptcy proceedings is not merely a foreshadowing of cases that would also restrict the ability of executive and administrative agencies to act within their currently delineated boundaries. If and how the Supreme Court is likely to re-interpret the constitutional boundaries surrounding an agency’s authority in light of its position in *Stern* is an interesting consideration outside the scope of this article. For an insightful critique of the position the Supreme Court appears to take on administrative agencies in *Stern*, see Troy A. McKenzie, *Getting to the Core of Stern v. Marshall: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L.J. 23, 45 (2012).

<sup>20</sup>See John F. Duffy, *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*, 2 WASH. U. J.L. & POLY 109, 158 and n. 191 (2000). The extent of cost reduction is uncertain because, as noted by Duffy, administrative and judicial procedures may nearly overlap in some contexts, particularly if the administrative processes are extremely formal, or the court is particularly specialized. *Id.* A thorough cost analysis would need to be conducted to determine whether cost savings would actually accrue.



currently enjoy. Finally, it suggests alternative reactions to *Stern*, concluding that however unpalatable the need for dramatic change, a structural response is warranted.

Part III presents the existing scholarship on proposed solutions to this problem. Reflecting the long lifetime of constitutional concerns surrounding bankruptcy jurisdiction, many of these articles date back several decades,<sup>21</sup> but are nevertheless relevant to the current bankruptcy structure. More recently, several authors have written in direct response to *Stern*.<sup>22</sup>

Part IV explains the basic principles of restructuring an organization, and applies them to the bankruptcy system. It then identifies the ideological beliefs of two groups of bankruptcy scholars, the traditionalists and proceduralists, and suggests how each group might approach restructuring from a strategic vantage point.

Part V explains why an alternative strategic goal for the bankruptcy system is desirable, and how establishing a two-part jurisdictional scheme involving an administrative agency and federal district judges is a superior solution to what has been proposed by the traditionalists and intimated by proceduralist scholarship. It further demonstrates that this solution, in addition to its other advantages, works as a compromise between the two most prominent and conflicting ideological approaches to bankruptcy. Part VI concludes.

## II. THE IMPACT OF *STERN* ON THE BANKRUPTCY SYSTEM

Under the current structure of the bankruptcy system, a bankruptcy judge is the appointed arbiter of all bankruptcy cases, and it is primarily his or her responsibility to interpret the Bankruptcy Code. He or she may hear all bankruptcy cases and proceedings “arising under” the Bankruptcy Code, “arising in” the Bankruptcy Code, or “related to” a case by virtue of the district court’s referral of these cases and proceedings, as laid out in 28 U.S.C. § 157(a). However, the bankruptcy judge may only enter final judgment on “core proceedings arising under . . . or arising in” the bankruptcy case.<sup>23</sup> These core proceedings are listed, albeit nonexclusively, in 28 U.S.C.

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<sup>21</sup>See, e.g., Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297, 298 (1981).

<sup>22</sup>See Block-Lieb, *supra* note 2, at 118; Richard Levin, *The Transition to Article III Bankruptcy Courts*, American Bankruptcy Institute Joint Session 335 (Sept. 19-20, 2012); Christopher S. Lockman, *Makalidung's Post: How Stern v. Marshall Is Shaking Bankruptcy Court Jurisdiction to Its Core*, 50 DUQ. L. REV. 125, 166 (2012).

<sup>23</sup>As noted below, there is some disagreement as to whether this restriction on entering a final judgment can be classified as a lack of subject-matter jurisdiction, even when the judge has the statutory authority to hear the matter and to enter proposed findings of fact and conclusions of law. The tentative consensus appears to be that some form of jurisdiction exists over “non-core” proceedings, but the distinction between lack of jurisdiction to enter a final order and lack of subject-matter jurisdiction is unclear.

§ 157(b)(2).<sup>24</sup> The bankruptcy judge may also hear non-core proceedings that are related to the bankruptcy case, but may only submit proposed findings of fact and conclusions of law to the referring district court, which must enter the final order or judgment.<sup>25</sup> The referring district court has the authority to withdraw the reference for any case or proceeding for cause, and must withdraw the reference on timely motion of a party if the proceeding requires analysis of other federal laws affecting interstate commerce.<sup>26</sup>

#### A. THE *Stern* Decision

In 2011 the Supreme Court issued its ruling in *Stern*, holding that 28 U.S.C. § 157(b)(2)(C), which gave bankruptcy judges power to issue final

See Erwin Chemerinsky, *Formalism Without A Foundation: Stern v Marshall*, 2011 SUP. CT. REV. 183, 210-11 (2011).

<sup>24</sup>The text of 28 U.S.C. § 157(b)(2) (2012) is reproduced below:

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

<sup>25</sup>28 U.S.C. §157(b) and (c).

<sup>26</sup>28 U.S.C. § 157(d). Such withdrawal is extremely rare. To demonstrate, in 2010 and 2011 the total number of bankruptcy cases filed in the U.S. Bankruptcy Courts was 1,569,355 and 1,467,221, respectively. ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 280 tbl.F (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf> (hereinafter cited as "2011 ANNUAL REPORT"). The total number of bankruptcy cases commenced in the U.S. District Courts for these years was 519 and 602, respectively. *Id.* at 47 tbl. C-2.

rulings on “counterclaims by the estate against persons filing claims against the estate,” extended an unconstitutional grant of authority to bankruptcy judges. Based on the reasoning used by the Court, many are concerned this ruling will have far-reaching consequences for the remainder of §157,<sup>27</sup> and even beyond bankruptcy, for magistrates and other Article I courts.<sup>28</sup>

*Stern* involved a dispute between the estate of Vickie Lynn Marshall, better known as *Playboy* Playmate Anna Nicole Smith (“Smith”), and her stepson, Pierce Marshall (“Pierce”), regarding the estate of her late husband, J. Howard Marshall (“J. Howard”). The dispute began in Texas probate court. Smith took the position that her aged husband, a Texas billionaire who had married the 26-year-old Smith when he was 89, had promised to provide for her after his death. Although he lavished gifts on her during their 13-month marriage, she was given nothing under the will.<sup>29</sup> Smith disputed the will, and argued that Pierce, J. Howard’s son by another marriage, was to blame for her exclusion. She claimed that Pierce had exercised undue influence on his aged father to prevent him from fulfilling his promise to provide for Smith, by surrounding him with hired guards and effectively imprisoning him against his wishes.<sup>30</sup>

While the probate case was pending, Smith filed for bankruptcy in the Central District of California. Pierce filed a proof of claim against her, claiming defamation based on statements that Smith’s attorneys had made to the press in connection with the dispute over J. Howard’s estate. In objecting to Pierce’s proof of claim, Smith argued truth as a defense, and filed a counterclaim, also in bankruptcy court, for tortious interference with an inter vivos gift.<sup>31</sup> The bankruptcy court heard and issued rulings on both the objection to the proof of claim and the counterclaim. Subsequently, the Texas probate court upheld J. Howard’s estate plan as valid.<sup>32</sup> Pierce appealed the court’s ruling on Smith’s counterclaim, and the case ultimately went to the Supreme Court.<sup>33</sup>

During the course of the proceedings, both Pierce and Smith passed away,

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<sup>27</sup>Evidence suggests these concerns are warranted. See *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012) and discussion *infra* 130.

<sup>28</sup>See Chemerinsky, *supra* note 23, at 207-12.

<sup>29</sup>*Marshall v. Marshall*, 547 U.S. 293, 300 (2006).

<sup>30</sup>*Id.* at 301.

<sup>31</sup>*Stern*, 131 S. Ct. at 2601.

<sup>32</sup>*Marshall*, 547 U.S. at 294.

<sup>33</sup>The procedural history is much more complicated than what is presented here. In fact, the case was reviewed by the Supreme Court not once, but twice—a phenomenal result when one considers the rarity of bankruptcy appeals. As one study found, the Supreme Court hears an average of three or four bankruptcy cases per year. Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 132 (1997). Given the number of bankruptcy filings per year, this makes the chances of any given bankruptcy case making it to the Supreme Court significantly lower than the chances of an individual being struck by lightning in his or her lifetime.

and the case continued to be litigated by their respective estates. Howard Stern, as Smith's executor, became the lead party name.<sup>34</sup>

In *Stern*, the Supreme Court ruled that under the language of § 157, both the objection to Pierce's proof of claim and Smith's counterclaim constituted "core proceedings," either arising under or arising in Smith's bankruptcy case, and accordingly the bankruptcy court was authorized under the statute to enter a final judgment in the proceeding.<sup>35</sup> In so ruling, the Court rejected the statutory argument adopted by the Ninth Circuit and pressed by Pierce, that a compulsory counterclaim such as Smith's might constitute a "core proceeding" only if the proceeding also arises in the bankruptcy case or arises under the Bankruptcy Code, and in this case it did not.<sup>36</sup> The Court also rejected Pierce's argument that the bankruptcy court could not hear a matter of personal injury tort pursuant to § 157(b)(5),<sup>37</sup> noting that the allocation of authority to enter final judgment between the bankruptcy court and the district court "does not implicate questions of subject matter jurisdiction."<sup>38</sup>

However, the Court concluded that the statutory grant of authority was nonetheless constitutionally impermissible under a separation of powers argument. The Court noted that Article III of the United States Constitution mandates that "[t]he judicial Power of the United States" be vested in courts in which the judges have life tenure and salary protection.<sup>39</sup> While recognizing that the three branches of government "are not hermetically sealed from one another," the Court nevertheless objected to a bankruptcy judge's final ruling on Smith's state law claim as offensive to the system of checks and balances established in Article III.<sup>40</sup> Even acknowledging exceptions to the requirement of Article III judicial determinations, such as cases falling under the "public rights" doctrine, the Court determined that this action did not fall under such an exception. The Court noted that, unlike earlier cases in which bankruptcy court jurisdiction had been upheld,<sup>41</sup> ruling on Smith's counterclaim was not necessary for a determination of Pierce's proof of claim, and therefore not "integral to the restructuring of the debtor-creditor relationship."<sup>42</sup> The Court also rejected arguments that Pierce's proof of claim in

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<sup>34</sup>*Stern*, 131 S. Ct. at 2594.

<sup>35</sup>*Id.* at 2604.

<sup>36</sup>*Id.* at 2604; see *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037, 1059 (9th Cir. 2010), cert. granted in part, 131 S. Ct. 63, 177 L. Ed. 2d 1152 (2010).

<sup>37</sup>Section 157(b)(5) states: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 11 U.S.C. § 157(b)(5) (2012).

<sup>38</sup>*Stern*, 131 S. Ct. at 2607.

<sup>39</sup>*Id.* at 2608.

<sup>40</sup>*Id.* at 2609.

<sup>41</sup>See, e.g., *Katchen v. Landy*, 382 U.S. 323, 334 (1966).

<sup>42</sup>*Stern*, 131 S. Ct. at 2617 (quoting *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990)).

Smith's bankruptcy case signified consent to the bankruptcy court's jurisdiction over the counterclaim<sup>43</sup> and that bankruptcy courts could proceed to final ruling as "adjuncts" of the district court.<sup>44</sup>

The Court concluded Congress had overstepped its bounds in giving the bankruptcy court statutory authority to enter final judgment on a state law counterclaim that required findings of fact and conclusions of law independent from a ruling on the underlying proof of claim.<sup>45</sup> Under that reasoning, it further concluded that because the bankruptcy court had lacked constitutional authority to enter final judgment on Smith's counterclaim, the ruling of the Texas probate court had been issued first, and precluded later consideration in the bankruptcy proceedings.

## B. HISTORICAL CONTEXT

The ruling, for many, was a "constitutional bombshell on the bankruptcy system,"<sup>46</sup> but not altogether unforeseeable. Prior to 1978, jurisdiction in bankruptcy cases was split between "summary jurisdiction," under which the matter could be heard by a referee, the precursor to a bankruptcy judge, and "plenary jurisdiction." Summary jurisdiction was essentially *in rem*,<sup>47</sup> dealing only with property in the uncontested custody of the debtor at the time the bankruptcy was filed.<sup>48</sup> Summary proceedings generally included the allowance or disallowance of claims, determination of exemptions, consideration of the discharge, and turnover motions, among other things.<sup>49</sup> Disputes outside of summary jurisdiction, termed plenary proceedings, had to be brought outside the bankruptcy court, unless the parties otherwise consented to bankruptcy court jurisdiction.<sup>50</sup>

Unfortunately, the scope of summary jurisdiction was imprecise:<sup>51</sup> for ex-

<sup>43</sup>*Id.* at 2614.

<sup>44</sup>*Id.* at 2618.

<sup>45</sup>*Id.* at 2620. For an in-depth discussion of *Stern's* factual background and holding, see Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 BANKR. L. LETTER NO. 8, at 1 (Aug. 2011); Ralph Brubaker, *Article III's Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges' Core Jurisdiction*, 31 BANKR. L. LETTER NO. 9, at 1 (Sept. 2011).

<sup>46</sup>Stephen Sather, *Thoughts About the Impact of Stern v. Marshall*, BANKR. L. BLOG LEXISNEXIS COM. TYS. (June 29, 2011), <http://www.lexisnexis.com/community/bankruptcylaw/blogs/bankruptcylawblog/archive/2011/06/29/thoughts-about-the-impact-of-stern-v-marshall.aspx>.

<sup>47</sup>See Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 AM. BANKR. L.J. 121, 128 (2012).

<sup>48</sup>Property in the control of one holding it under an adverse claim that was "merely colorable" also fell within the referee's summary jurisdiction. This standard invited litigation. See Vern Countryman, *Emergency Rule Compounds Emergency*, 57 AM. BANKR. L.J. 1, 3 (1983).

<sup>49</sup>Bankruptcy Act § 2a (originally codified at 11 U.S.C. § 11a (1964)).

<sup>50</sup>See Martin Gendel, *Jurisdiction Problems in Bankruptcy Court*, 44 J. NAT'L CONF. REF. BANKR. 61, 61 (1970).

<sup>51</sup>McKenzie, *supra* note 19, at 40.

ample, in *Katchen v. Landy* the Supreme Court ruled that summary jurisdiction encompassed proceedings necessary to rule on a proof of claim, even if such proceedings were usually categorized as plenary, as were recovery of fraudulent conveyances or preferences.<sup>52</sup> This uncertainty created fertile ground for litigation over jurisdiction. As a consequence, bankruptcy scholars chafed against the summary/plenary distinction, which they saw as inefficient.<sup>53</sup> The primary complaint was that the system encouraged delay,<sup>54</sup> but costs were also an issue,<sup>55</sup> as was the perceived opportunity to forum shop.<sup>56</sup>

The Bankruptcy Code was largely intended to fix the problems presented by the summary/plenary distinction. The Commission on the Bankruptcy Law of the United States, appointed in 1973, recommended establishing an administrative branch to manage the referee's administrative duties,<sup>57</sup> and a bankruptcy court to handle all litigable controversies.<sup>58</sup> The Commission also recommended "[a] comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case," which would "foster the development of a more uniform, cohesive body of substantive and procedural law."<sup>59</sup> Interestingly, the Commission did not recommend that these bankruptcy judges be appointed under Article III, although constitutional concerns arose quickly in congressional discussion of the proposed jurisdictional expansion.<sup>60</sup> Ultimately, Congress opted for a system of bankruptcy judges who would not enjoy life tenure, and therefore be outside of Article III. Such a decision was not without controversy, and

<sup>52</sup>*Katchen v. Landy*, 382 U.S. 323, 330-31 (1966).

<sup>53</sup>Gendel, *supra* note 50, at 62.

<sup>54</sup>See Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 6 (1985); Gendel, *supra* note 50, at 62; Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 25 (1995).

<sup>55</sup>Gendel, *supra* note 50.

<sup>56</sup>See *id.* at 62-63.

<sup>57</sup>The separation of judicial and administrative functions was viewed as necessary to combat a common criticism that had arisen regarding the "bankruptcy ring," which referred to a small group of bankruptcy professionals who traded appointments in various cases, controlling from inside the practice of bankruptcy law in a given geographic area. See Linda Coco, *Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge's Non-Article III Status*, 16 MICH. J. RACE & L. 181, 213-14 (2011).

<sup>58</sup>In making this assertion, the Commission rejected the conclusion of the Brookings Institution that an administrative hearing and appeals procedure would suffice. COMM'N ON BANKR. LAWS, REPORT ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 87 (1973).

<sup>59</sup>*Id.* at 90.

<sup>60</sup>In language that now smacks of irony, the Commission confidently noted that "[t]he constitutionality of a grant of a jurisdiction in such comprehensive terms should not be subject to any serious doubt." *Id.* at 91. The Commission appears to have overlooked any problems with regards to the constitutional status of non-Article III bankruptcy judges. In defending its statement, the Commission notes that the jurisdictional grants to courts of bankruptcy in the 1841 and 1867 Acts, courts that were seated with federal district judges, were nearly as extensive. *Id.*

the majority of academics consulted doubted the system's constitutionality.<sup>61</sup>

The test for the Bankruptcy Code's grant of authority to bankruptcy judges came soon after its enactment, in *Marathon*, a case involving the bankruptcy court's exercise of jurisdiction over a debtor's state law counterclaim against a creditor.<sup>62</sup> In a splintered decision, thereafter strongly criticized by the academic community,<sup>63</sup> the Supreme Court struck down the system established by the Bankruptcy Code on the grounds that "the Bankruptcy Act of 1978 [ ] has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct."<sup>64</sup> The Court stayed its judgment for a few months to permit Congress the opportunity to reconstitute the bankruptcy courts.<sup>65</sup>

Congress failed to act within the allotted time, although it held multiple hearings in an attempt to find an alternative to creating Article III bankruptcy courts, without much success.<sup>66</sup> Anticipating congressional inaction, the Judicial Conference of the United States drafted and promulgated to all district courts an "Emergency Rule,"<sup>67</sup> which bifurcated the bankruptcy court's jurisdictional authority between "core" bankruptcy matters, perceived not to be subject to the *Marathon* ruling and accordingly within the power of bankruptcy judges to issue final rulings, and "non-core" matters, which would be heard in the district court.<sup>68</sup> Criticized by many as unworkable and unconstitutional,<sup>69</sup> the courts nevertheless upheld the Emergency Rule as

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<sup>61</sup>Block-Lieb, *supra* note 2, at 69-70; see Krattenmaker, *supra* note 21. Krattenmaker was one of the experts consulted by Congress.

<sup>62</sup>N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

<sup>63</sup>See, e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 917-19 (1988); Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 770 (2010); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 598-99 (1985).

<sup>64</sup>*Marathon*, 458 U.S. at 87.

<sup>65</sup>*Id.* at 88 (staying judgment until October 4, 1982); *United States v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982) (extending stay on motion of the Solicitor General to December 24, 1982); *United States v. Marathon Pipe Line Co.*, 459 U.S. 1094 (1982) (denying the Solicitor General's application to further extend the stay on December 23, 1982).

<sup>66</sup>See, e.g., *Hearing on H.R. 6109 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. (1982) (hereinafter cited as "*Hearing on H.R. 6109*"); see also Block-Lieb, *supra* note 2, at 94.

<sup>67</sup>Reproduced in *Northern Pipeline Co. v. Marathon Pipe Line Co. Decision: Hearing Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 98th Cong. 435 (1983).

<sup>68</sup>CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 50 (2009).

<sup>69</sup>Countryman, *Emergency*, *supra* note 48, at 3; Prepared Statement of Jonathan C. Rose, *Northern Pipeline Co. v. Marathon Pipe Line Co. Decision: Hearing Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 98th Cong. 19-20 (1983). Countryman, on behalf of the National Bankruptcy Conference, criticized the Emergency Rule as invalid because district judges had no authority to promulgate the Rule, nor did they have jurisdiction over bankruptcy proceedings. Bankruptcy jurisdiction was instead vested entirely (and unconstitutionally) in bankruptcy courts to the exclusion of district courts. The

constitutional.<sup>70</sup> Eventually, Congress passed the Bankruptcy Amendments and Federal Judgeship Bill (BAFJA),<sup>71</sup> which essentially codified the Emergency Rule's approach.

Most academics writing on the topic during the last thirty five years have argued that the compromise of bankruptcy jurisdiction reached by Congress in 1978 is inherently flawed, or at least constitutionally suspect.<sup>72</sup> Congress' compromise on Article III status in 1978, and again in 1984, successfully enabled it to move beyond questions of jurisdiction in order to pass substantive reforms regarding the treatment of debtors in bankruptcy, but at the expense of future uncertainty regarding a bankruptcy judge's constitutional ability to make final determinations. The trouble has arisen primarily in the context of a debtor's counterclaims against a creditor, but there are many other instances in which a bankruptcy court's entry of final judgment could be questioned under *Stern's* reasoning.<sup>73</sup>

Despite the warnings, both during the legislative process and after *Marathon*, Congress has still failed to apply a meaningful fix to the system. The BAJCA "band-aid" of 1984 did not resolve the underlying *Marathon* issue, although the Supreme Court did manage to avoid confronting the issue again for nearly thirty years.<sup>74</sup> This extended respite is more likely due to the inherit limitations on bankruptcy appeals<sup>75</sup> than a period of constitutional conformity, as demonstrated not only by *Stern*, but also by the existence of many bankruptcy practices that appear, on their face, to violate the *Stern* reasoning.<sup>76</sup> Without additional guidance from the Supreme Court regarding other "core proceedings" not covered in the *Stern* holding, but nonetheless listed in the same statute and arguably controlled by Article III "judicial

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National Bankruptcy Conference also criticized the Emergency Rule as unworkable in that it would invite further litigation.

<sup>70</sup>The fact that the Emergency Rule worked was surprising to many. See Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 494 (1997) ("Like a character in a Road Runner cartoon, the bankruptcy courts had run off the cliff - but had not fallen.")

<sup>71</sup>Pub. L. No. 98-353, 98 Stat. 333 (1984).

<sup>72</sup>See e.g., Countryman, *supra* note 54, at 1; Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 676 (1985).

<sup>73</sup>For example, efforts by the estate to recover funds from a claimant or a third party, including avoidance powers by the trustee and fraudulent conveyance actions, are core proceedings that some have argued are outside a bankruptcy judge's constitutional ability to enter a final judgment. See *Exec. Benefits Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d at 556 (9th Cir. 2012); see also Chemerinsky, *supra* note 23, at 207. ("[A]fter *Stern v. Marshall* was decided, I received a phone call from a bankruptcy judge who said that he issued between 80,000 and 90,000 orders a year, and he estimated that about 25 percent of them involve a state law claim that might be implicated by the decisions.")

<sup>74</sup>See LoPucki, *supra* note 70, at 494 (noting that district courts and courts of appeals had unanimously upheld the Emergency Rule as constitutional).

<sup>75</sup>See McKenzie, *supra* note 63, at 793.

<sup>76</sup>Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 8 (2012).



power,” bankruptcy courts will probably, and rightly in the minds of many,<sup>77</sup> continue to act much as they always have.<sup>78</sup> As commentators have recognized, given the scope of these practices and the sheer number of bankruptcy filings in the United States, bankruptcy courts may be issuing hundreds of final orders every week that violate the constitutional parameters outlined in *Stern*.<sup>79</sup>

### C. POSSIBLE RESPONSES

There can be two responses to the concerns raised by *Stern*. On the one hand, some commentators have been inclined to minimize concerns about *Stern*, suggesting that “initial reactions were overblown.”<sup>80</sup> These individuals see the *Stern* decision as limited in scope; a complication that may be resolved by amending the Federal Rules of Bankruptcy Procedure or the Standing Order of Referral from district courts to bankruptcy courts. On the other hand, many commentators believe that a structural solution is required, given the breadth of the *Stern* decision and its potential impact not just in bankruptcy but in all Article I courts.

#### 1. *The Impact of Stern Should Not Be Overstated*

In the Court’s *Stern* opinion, Justice Roberts, in an apparent effort to downplay the constitutional nature of the decision, expresses the belief that the question decided is a “narrow” one,<sup>81</sup> implying that the decision must also be narrow. If obtaining constitutional conformity is only a matter of preventing bankruptcy courts from entering final judgment on counterclaims, then the problem should arise infrequently and be easily resolved. The Supreme Court indicated that bankruptcy courts would not be barred from hearing counterclaims or from proposing findings of fact and conclusions of law so long as it is the district court that ultimately enters the final decision.<sup>82</sup> When viewed in this light, *Stern* requires no great shakeup of the system, and applies to only a limited number of cases. We need only read counterclaims out of § 157(b)(2)’s list of core proceedings, and into § 157(c)(1)’s list of “related” proceedings.<sup>83</sup> Under § 157(c)(2), the bankruptcy court may still hear

<sup>77</sup>See, e.g., *id.* at 20.

<sup>78</sup>See Roberta A. Colton and Stephanie C. Lieb, *Is Bankruptcy Jurisdiction in Flux Because of Anna Nicole Smith?*, 86 FLA. BUS. J. 36, 40 (Jan. 2012) (citing Tampa Bankruptcy Judge Michael G. Williamson’s view that bankruptcy courts should function “without too much of a hitch” even in light of *Stern*).

<sup>79</sup>See Chemerinsky, *supra* note 23, at 207; Baird, *supra* note 76, at 17.

<sup>80</sup>Karen Cordry, *Stern v. Marshall: Much Ado About Something*, NORTON BANKR. L. ADVISER 1, 1 (Dec. 2011).

<sup>81</sup>*Stern v. Marshall*, 131 S. Ct. at 2594, 2620, 180 L. Ed. 2d 475 (2011).

<sup>82</sup>*Id.*

<sup>83</sup>Justice Roberts’ opinion seems to direct this course of action, noting that “[w]e do not think the removal of counterclaims such as Vickie’s from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute[.]” *Id.*

the case, subject to review by the district court judge under § 158, and the parties may consent to a final determination by the bankruptcy judge.

Even supposing that the ramifications of *Stern* are inescapable outside the limited context of §157(b)(2)(C), we might nevertheless reason, as Andrew Jackson is purported to have done in response to a Supreme Court decision regarding the government of Indian territory,<sup>84</sup> that Justice Roberts has made his decision – now let him enforce it.<sup>85</sup> Given the costs of appeal, the weight given to the bankruptcy court’s findings on appeal<sup>86</sup> and the multiple layers of appeal required before a ruling is considered precedential by all involved,<sup>87</sup> another case detailing the alleged constitutional overreach of the bankruptcy courts might not reach the Supreme Court for another thirty years.

Acknowledging that lower courts share the duty to uphold constitutional limits on Article I courts, and may rule in a way that challenges existing bankruptcy court practices,<sup>88</sup> there is an argument to be made that the constitutional violation observed in *Stern* is simply not worth addressing on a structural level in light of the costs of restructuring. As noted above, the exercise of authority challenged by a broad reading of *Stern* has been exhibited for the past thirty years. Bankruptcy judges and litigants have established patterns and practices based on the assumption that a bankruptcy judge’s ability to hear and make a final ruling on “core proceedings” increases the efficient resolution of a bankruptcy case. A rework of the system would not only threaten these known patterns, it would also require the development of new practices that are likely to be less efficient than what is currently in place, creating a “constitutionally required game of jurisdictional ping-pong between courts” that will lead to “inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.”<sup>89</sup> Taking these costs into account, we might conclude that even if Justice Roberts was correct, the ramifications of his ruling are simply impracticable.<sup>90</sup> Rather than grapple with what appear to be constitutional deficiencies in the

<sup>84</sup>*Worcester v. State of Ga.*, 31 U.S. 515 (1832) (state criminal statutes are preempted to the extent they deal with Indian territory).

<sup>85</sup>See *Coleman v. U.S. Bureau of Indian Affairs*, 715 F.2d 1156, 1158 (7th Cir. 1983) (citing II CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 219 (1922)).

<sup>86</sup>See FED. R. BANKR. P. 8013 (according the findings of a bankruptcy judge the same weight given the findings of a district judge under Fed. R. Civ. P. 52). Under Federal Rule of Civil Procedure 52, a trial court’s findings of fact “must not be set aside unless clearly erroneous.” FED. R. CIV. P. 52.

<sup>87</sup>See Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063 (1994).

<sup>88</sup>See discussion *infra* note 119 and accompanying text.

<sup>89</sup>*Stern v. Marshall*, 131 S. Ct. 2594, 2630, 180 L. Ed. 2d 475 (2011) (Stevens, J., dissenting). See *id.* at 2599 (majority opinion) (noting “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” (citing *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

<sup>90</sup>Perhaps in anticipation of such a response, the majority defends its ruling as follows:

structure of the bankruptcy system, the bankruptcy community should work around *Stern* as best they can. Most bankruptcy courts appear to have done just that.

Of particular note in this regard, the Advisory Committee on Bankruptcy Rules has proposed rulemaking responses to *Stern* that would require more precise pleading as to whether a proceeding is core or non-core, and an explicit statement of consent as to all non-core proceedings.<sup>91</sup> In the alternative, the Committee has also suggested changing the default rule to require that a party make a timely demand that final rulings be entered by a district judge, or waive their right to final judgments in an Article III forum.<sup>92</sup> Finally, several federal district courts, including the Southern District of New York and the District of Delaware, have provided that the district court may treat any of the bankruptcy judge's orders as proposed findings of fact and conclusion of law, in the event that the district court finds the bankruptcy judge lacked authority to enter the final judgment.<sup>93</sup> It is hoped that these suggestions will permit a uniform response to *Stern* that may pre-empt much of the anticipated litigation in this area.

## 2. *Stern's Far-Reaching Implications*

On the other hand, it may be error to downplay the importance of the *Stern* ruling, or suppose that anything less than structural reform is adequate. Chief Justice Roberts' statement that the ruling is a narrow one may suggest nothing more than his own pragmatic approach: while one might infer that Roberts will respond practically to whatever further challenges arise, relying on such a response from other members of the *Stern* majority, notably Justices Scalia and Thomas, would be unwise. At minimum, this introduces uncertainty as to the court's response in future cases to the proposed procedural solutions described above.

It is worth noting, for example, that there is nothing in the language of

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If our decision today does not change all that much, then why the fuss? Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy? The short but emphatic answer is yes. A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. . . . 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.

*Id.* at 2620; *see id.* 2629 (Stevens, J., dissenting) (concluding that any intrusion on the Judicial Branch in this case must be termed *de minimis*).

<sup>91</sup>Memorandum to Advisory Comm. on Bankr. Rules from Subcomm. on Bus. Issues Regarding Rulemaking Responses to *Stern v. Marshall* (Mar. 14, 2012), in 18TH ANNUAL ROCKY MOUNTAIN BANKRUPTCY CONFERENCE 359, 359-360 (2013).

<sup>92</sup>*Id.* at 360.

<sup>93</sup>*Id.* at 370.

§ 157 that explicitly permits bankruptcy courts to deal with unconstitutionally categorized “core” proceedings as if they were “non-core” proceedings. Rather, § 157(b)(1) permits bankruptcy judges to “hear and determine . . . all core proceedings” as defined in subsection (2), and § 157(c)(1) permits bankruptcy judges to “hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11 . . . .” The *Stern* majority explicitly found that counterclaims such as Smith’s were core proceedings as provided in the statute.<sup>94</sup> As a technical matter, the statute does not provide for core proceedings that lack constitutional validity.

It may be that the Court’s suggestion that its decision merely strikes the counterclaims of § 157(b)(2)(C), placing them in the “catchall” category of § 157(c)(1), sufficiently overcoming statutory deficiencies. It has also been credibly suggested that district court judges have sufficient power under 28 U.S.C. § 151 to grant bankruptcy judges the authority to treat these unconstitutionally core proceedings as non-core proceedings, rendering concerns on this score unnecessary.<sup>95</sup> However, it may also be that under the current statutory structure the bankruptcy court lacks subject-matter jurisdiction over the proceedings, nullifying any action taken in that regard.<sup>96</sup> It is well-known that a party cannot consent to lack of subject-matter jurisdiction.<sup>97</sup>

One response to the challenge of subject matter jurisdiction may be to attempt an analogy between bankruptcy court judges and magistrate judges. Supreme Court precedent appears to have established that constitutional concerns in the context of magistrate judge rulings may be alleviated or even resolved on the basis of litigant consent and the close supervision of Article III district courts, which the Court has held retain the ultimate authority to make decisions.<sup>98</sup> These rulings suggest that concerns of subject matter juris-

<sup>94</sup>*Stern*, 131 S. Ct. at 2604 (majority opinion).

<sup>95</sup>Statement of Judge Eugene R. Wedoff, Bankr. Judge for the N. Dist. of Ill. and a member of the Advisory Comm. on Bankr. Rules, Rock Drills and Chipping Hammers: Cutting Through the Jurisdictional Challenges of *Stern v. Marshall* (January 25, 2013).

<sup>96</sup>The debate regarding whether a party’s consent is sufficient to waive the constitutional concerns raised in *Stern* hinges on whether the Supreme Court’s ruling implicated subject-matter jurisdiction, despite its protestations to the contrary, or not. For conflicting opinions, compare Brubaker, *Article III’s Bleak House (Part II)*, *supra* note 45 (determining based on the Court’s reliance on historical precedent and dismissive reference to subject-matter jurisdiction that consent does constitute a valid waiver of *Stern* concerns), with Chemerinsky, *supra* note 23, at 211 (arguing there is no apparent basis for distinguishing between lack of subject-matter jurisdiction and inability to enter a final judgment).

<sup>97</sup>See *Union Pac. R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 80-81 (2009).

<sup>98</sup>See *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 272 (1993); *U.S. v. Raddatz*, 447 U.S. 667, 680-81 (1980) (“Congress made clear that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court.”); *Peretz v. United States*, 501 U.S. 923, 936 (1991) (“There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent.”).

diction do not arise in such a context. However, the analogy between the Supreme Court's rulings regarding magistrate judges and bankruptcy judges is undercut by the ruling of *Stern*; the Supreme Court explicitly rejected the argument that bankruptcy courts acted as adjuncts of the district courts, stating definitively that "a court exercising such broad powers is no mere adjunct of anyone."<sup>99</sup> In *Stern*, at least, the Supreme Court does not appear to grant the bankruptcy court authority to issue rulings by virtue of its relationship with the district court, even if a magistrate judge does enjoy such authority.<sup>100</sup>

The concerns raised thus far are also not limited to counterclaims brought by the estate against a creditor. There are logical ramifications to the *Stern* ruling in other proceedings. Most prominently, the argument has been made that a bankruptcy court's final ruling in a fraudulent conveyance action, which has been determined to be a "private," rather than a "public" action,<sup>101</sup> is similarly unconstitutional.<sup>102</sup> The expanded application of *Stern* to other core proceedings suggests that it will affect ever-larger numbers of cases, and result in ever-larger delays and inefficiencies, an unmitigated disaster in a system that relies on speed and efficiency to effectively operate.<sup>103</sup>

The Ninth Circuit recently concluded that *Stern* does in fact go beyond its "narrow ruling," affecting the bankruptcy court's ability to enter final judgments in fraudulent conveyance actions. The case, *Bellingham Insurance*,<sup>104</sup> involved the transfer of assets from one insurance company ("BIA"), financially insolvent and burdened by debt, to a new insurance company ("EBIA"), both companies owned and operated by the same married couple. After BIA filed for bankruptcy, the chapter 7 trustee brought an action against EBIA to recover the transferred assets. Although EBIA initially requested a jury trial, per the terms of *Granfinanciera, S.A. v. Nordberg*,<sup>105</sup> which ruled that the constitutional right to a jury trial was preserved in fraudulent conveyance actions against parties who had not filed claims

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<sup>99</sup>*Stern*, 131 S. Ct. at 2611.

<sup>100</sup>Chemerinsky has questioned the apparent lack of consistency between the constitutionality of magistrate judges activities and the ruling in *Stern*. He concludes, based on the similarities between the judicial responsibilities of magistrate judges and bankruptcy judges, that *Stern* may have far-reaching implications for magistrate judges as well. Chemerinsky, *supra* note 23, at 211-12. One need not go this far, however, to conclude that whatever constitutional latitude enjoyed under the Magistrate Judge Act is unlikely to be extended to the Bankruptcy Code.

<sup>101</sup>*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 (1989).

<sup>102</sup>Brubaker, *Article III's Bleak House (Part II)*, *supra* note 45.

<sup>103</sup>See Memorandum to Advisory Comm. *supra* note 91, at 371 (evaluating the need for responsive rulemaking and determining that the decision in *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011), established sufficient cause to justify a rulemaking response).

<sup>104</sup>*Exec. Benefits Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012).

<sup>105</sup>*Granfinanciera*, 492 U.S. at 36.

against the estate, it then requested the district court to stay withdrawal of the reference to permit the bankruptcy court to issue summary judgment. After summary judgment was unfavorable, EBIA abandoned its motion to withdraw the reference and appealed the bankruptcy court's final order. Before the case reached the Ninth Circuit, *Stern* was decided, at which point EBIA raised jurisdiction as an appealable issue.

The Ninth Circuit interpreted the interaction between *Stern* and *Granfinanciera* to compel the conclusion that fraudulent conveyance actions against parties who have not filed claims in the underlying bankruptcy cannot "be consigned to the bankruptcy courts without doing violence to the constitutional separation of powers."<sup>106</sup> Grappling with the distinction between "public" and "private" rights addressed in both *Stern* and *Granfinanciera*, the Ninth Circuit effectively abandoned the "core" and "non-core" distinction adopted by Congress after *Marathon*. Instead, the panel concluded that the determining factor for whether or not an Article III court was needed in cases involving preferences,<sup>107</sup> fraudulent conveyances,<sup>108</sup> and the counterclaims of the estate against a creditor,<sup>109</sup> is whether the claim against a creditor "necessarily had to be resolved in the course of the claims-allowance process."<sup>110</sup> Where it was not, a final order could only be entered by the Article III court. In a footnote, the panel left open the possibility that additional "core" proceedings could fall in the future, noting that the Supreme Court had never decided whether "even the 'restructuring of debtor-creditor relations' was in fact a 'public right,'" permitting final review of a non-Article III bankruptcy court.<sup>111</sup>

The Ninth Circuit panel nevertheless upheld the bankruptcy court's ruling on the fraudulent transfer issue, however, by finding that EBIA had consented to the bankruptcy court's jurisdiction by explicitly requesting the district court to leave the case in the bankruptcy court until summary judgment, and then failing to raise the jurisdictional issue until appearing before the Ninth Circuit.<sup>112</sup> In so finding, the Ninth Circuit quotes *Stern*'s somewhat ambiguous assertion that § 157 "does not implicate questions of subject matter jurisdiction." However, the panel also notes the Supreme Court's language in *Commodity Futures Trading Commission v. Schor*,<sup>113</sup> in which the Court upheld the authority of the Commodity Futures Trading Commission

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<sup>106</sup>*In re Bellingham Ins. Agency, Inc.*, 702 F.3d at 562.

<sup>107</sup>*Katchen v. Landy*, 382 U.S. 323 (1966) (addressing the issue of a bankruptcy court's jurisdiction to order surrender of voidable preferences).

<sup>108</sup>*Granfinanciera*, 492 U.S. at 55.

<sup>109</sup>*Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).

<sup>110</sup>*In re Bellingham Ins. Agency, Inc.*, 702 F.3d at 564.

<sup>111</sup>*Id.* at 561, n.6.

<sup>112</sup>*Id.* at 566.

<sup>113</sup>*Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

(“CFTC”) to exercise jurisdiction over common-law counterclaims, asserting that “notions of consent and waiver cannot be dispositive” when Article III issues of checks and balances are at issue.<sup>114</sup> The Ninth Circuit’s apparent attempt to limit the impact of its ruling by allowing for litigant consent in this area is problematic for the reasons given above, including the difficulty in distinguishing between lack of subject-matter jurisdiction, which cannot be waived by consent, and lack of power to issue a final judgment, which the Ninth Circuit ruled can be so waived.<sup>115</sup> The Ninth Circuit’s conclusion also conflicts with that of the Sixth Circuit in *Waldman v. Stone*,<sup>116</sup> which ruled that the creditor Waldman’s objection to the bankruptcy court’s constitutional authority to enter final judgment “implicates not only his personal rights, but also the structural principle advanced by Article III. And that principle is not Waldman’s to waive.”<sup>117</sup>

*Bellingham* and *Waldman* are only two of a plenitude of cases struggling to respond to constitutional challenges against a bankruptcy court’s ability to issue final orders in core proceedings.<sup>118</sup> It is reasonable to expect that a growing number of Circuits will be called upon to consider similar challenges. Even if subject-matter jurisdiction is not implicated, as indicated by Chief Justice Roberts in the statutory analysis portion of the *Stern* ruling,<sup>119</sup> the ruling of *Stern* may nevertheless compel more substantive action, especially in light of the historical background and the inescapable conclusion that this problem has gone on for far too long. Although it may be possible to preserve the benefits of the current bankruptcy system for some period of time, given the current Court’s ruling on the constitutionality of that system and the

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<sup>114</sup>See *id.* at 851.

<sup>115</sup>See Chemerinsky, *supra* note 23, at 211.

<sup>116</sup>698 F.3d 910, 918 (6th Cir. 2012).

<sup>117</sup>*Id.*

<sup>118</sup>See, e.g., *Gecker v. Flynn*, 467 B.R. 128, 132 (N.D. Ill. 2012) (although some of the state law counterclaims could be resolved in the process of ruling on the creditors’ proofs of claim, not all counterclaims appeared to be amenable, justifying withdrawal of the reference); *Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A.*, 480 B.R. 179, 190 (S.D.N.Y. 2012) (although unlikely that all factual and legal issues presented would be resolved in the course of ruling on creditor’s claims, withdrawal of the reference was not warranted at the pretrial stage); *Picard v. Estate of Madoff*, 464 B.R. 578, 585-86 (S.D.N.Y. 2011) (bankruptcy court retains authority to determine common law counterclaims by the trustee of the estate against creditors to the extent it must do so to determine allowance or disallowance of creditors’ claims).

<sup>119</sup>Others have taken comfort in the *Stern* opinion’s dismissal of subject-matter jurisdiction early in the opinion, citing it as evidence that the Supreme Court is likely to permit bankruptcy courts to hear cases on the basis of consent, even if Article III is implicated. See Brubaker, *Article III’s Bleak House (Part II)*, *supra* note 45. However, considering that the reference to subject-matter jurisdiction was in response to an unrelated statutory argument by Pierce, it is unclear how much weight it should bear in this context. *Stern v. Marshall*, 131 S. Ct. 2594, 2606, 180 L. Ed. 2d 475 (2011). The argument that Pierce’s consent should overcome the constitutional issue was explicitly rejected, *id.* at 2614, and the distinction, if any exists, between a bankruptcy court’s inability to enter final judgment and lack of subject-matter jurisdiction was left unexplained. The issue merits further exploration.

historical view that suggests such a ruling is far from an anomaly, it is apparent that some form of restructuring is warranted.<sup>120</sup>

### III. ARGUMENTS FOR AND AGAINST ARTICLE III BANKRUPTCY COURTS

#### A. FOR: A HISTORICAL ARGUMENT

Most who advocate for a substantive response to the constitutional challenge laid out in *Stern* have recommended the same clear choice: to simply give bankruptcy judges life tenure.<sup>121</sup> Indeed, many proponents of this view believe that the fact that this was not done in the first instance is an unfortunate historical error, and Congress should take the opportunity to fix it. Doing so will require Congress to address difficult issues regarding the appointments process, but will ultimately resolve all constitutional concerns surrounding bankruptcy courts.

When the Bankruptcy Code was in the drafting process, the general feeling was that departure from the system of summary and plenary jurisdiction was necessary as a matter of efficiency.<sup>122</sup> Quick resolution of claims was necessary to preserve value, particularly in operating businesses. In order to promote speed and efficiency in this regard, it was necessary to create a one-stop-shop for all proceedings arising in, arising under, or related to the bankruptcy filing. In light of these considerations, the logical approach was the promotion of bankruptcy jurists to a position of independence and authority commensurate with the broadened responsibility.<sup>123</sup> As recognized by witnesses before the House of Representatives and by Representatives Peter Rodino and M. Caldwell Butler, life tenure and salary protection, the require-

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<sup>120</sup>It is worth acknowledging at this juncture that, having been a participant in the current bankruptcy structure, I appreciate its significant positive attributes. Further, I have great respect and appreciation for bankruptcy judges, who are the primary drivers of the current system's positive attributes, and are likely to be the individuals most significantly affected by any proposed restructuring. However, based on the above analysis, the current structure cannot stand as a constitutional matter. Supposing this to be the case, the task at hand becomes one of establishing a system which can withstand constitutional muster, while also fulfilling the most important goals of bankruptcy, and bearing in mind other important considerations. The remainder of the article is dedicated to this task.

<sup>121</sup>Feeney, *supra* note 15, at 401 ("Article III status for bankruptcy judges is the only truly effective solution to the problems created by *Marathon*, the allocation of authority under BAFJA, and *Stern*." (emphasis added)).

<sup>122</sup>See COMM'N ON BANKR. LAWS, *supra* note 58, at 2-4, 90 (recommending "a comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case," which would "foster the development of a more uniform, cohesive body of substantive and procedural law").

<sup>123</sup>Block-Lieb, *supra* note 2, at 69-70; see Lawrence P. King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE L. REV. 99, 100 (1983); Krattenmaker, *supra* note 21; Resnik, *supra* note 63, at 615 (noting that bankruptcy courts are where major social policy issues such as asbestos, toxic waste cleanups, and labor relations play out, and suggesting that Article III status is an important ingredient in just adjudication).



ments introduced by Article III, were necessary elements.<sup>124</sup>

Given these premises, it is remarkable that life tenure was sacrificed in the course of legislative compromise,<sup>125</sup> with no clear reason for its removal. The only identifiable explanations are that Article III federal judges opposed granting bankruptcy judges Article III status because of a perceived dilution of prestige that would result,<sup>126</sup> an argument whose validity is subject to debate,<sup>127</sup> and some members of the Senate opposed the creation of more lifetime judicial appointments.<sup>128</sup> The Judicial Conference also expressed opposition to the creation of "specialized courts," but this argument was dismissed by many as "contrary to all the trends of modern judicial administration";<sup>129</sup> specialized Article III courts exist for patents and international trade, and there are non-Article III courts in the areas of bankruptcy, tax, and military court martials. Proponents of a specialized Article III bankruptcy court argue that specialized courts provide obvious advantages for litigants in terms of speed and efficiency.<sup>130</sup> Accordingly, advocates of Article III status for bankruptcy judges have largely concluded that the true basis for the judicial opposition is simply discriminatory self-interest without a justifiable basis.<sup>131</sup>

After Congress had removed provisions for an Article III court, at least

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<sup>124</sup>Hearing on H.R. 6109, *supra* note 66, at 2.

<sup>125</sup>Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part Three: On the Hill*, 81 AM. BANKR. L.J. 341, 345-47 (2007) (noting that many were astonished by the movement of Representatives within the House to "sell out" to the federal judges and remove the Article III provision).

<sup>126</sup>Block-Lieb, *supra* note 2, at 89-91; McKenzie, *supra* note 63, at 760; Mund, *supra* note 126, at 346; Peter Rodino & Alan A. Parker, *The Simplest Solution*, 7 BANKR. DEV. J. 329, 336 (1990); Countryman, *supra* note 55, at 9; Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 954 (1979).

<sup>127</sup>See Linz Audain, *The Economics of Law-Related Labor v. Judicial Careers, Judicial Selection, and an Agency Cost Model of the Judicial Function*, 42 AM. U. L. REV. 115, 120 (1992) (observing that the high level of prestige associated with a federal judgeship has remained stable over the past seventy-five years). *But see* Robert Bork, *Dealing with the Overload in Article III Courts*, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976), in 70 F.R.D. 231, 234 (1976). Then Solicitor General Bork argued that, with the growth of the welfare states, the burden on the courts to deal with increase in caseload grew too great, and the burden could not simply be alleviated by increasing the number of federal judgeships because "[l]arge numbers dilute prestige, a major attraction of a career on the bench, and make it harder to recruit first-rate lawyers." *Id.*

<sup>128</sup>Mund, *supra* note 125, at 357.

<sup>129</sup>Rodino & Parker, *supra* note 126, at 333. In addition, there is some question as to whether the Judicial Conference's input, publishing a report through its administrative arm, was at all appropriate. Block-Lieb, *supra* note 2, at 71-72.

<sup>130</sup>Jeffrey J. Rachlinski et. al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1229 (2006). However, as this study found, there is some correlation between bankruptcy judges' political views and outcomes, suggesting that specialization may also serve to politicize the bench. *Id.* at 1231. In other respects, the results indicated only that bankruptcy judges were no more influenced by factors such as anchoring and framing than other general judges.

<sup>131</sup>For an excellent argument that denial of Article III status is based on the cultural context of debt

in part due to the political expediency of passing the bill before the 95th Congress adjourned,<sup>132</sup> the arguably inevitable finding of unconstitutionality<sup>133</sup> came in the form of the fractured *Marathon* ruling. At this point Congress had another opportunity to self-correct; in the words of one participant in the legislative hearings, “[i]t was clear from the beginning [ ] that multiple alternatives were nonexistent. . . . Witness after witness testified that there were no alternatives . . . . [C]onferring Article III status to bankruptcy courts was the only solution.”<sup>134</sup> In spite of this testimony, Congress “steadfastly refused to grant bankruptcy courts Article III status.”<sup>135</sup> When Congress adopted BAFJA instead, proponents of the Article III solution derided the jurisdictional amendment as “invalid . . . and . . . unworkable,”<sup>136</sup> with the propensity to add to theoretical confusion and provide new opportunities for delay in the form of jurisdictional objections to bankruptcy proceedings.<sup>137</sup> Congress’ effort to give bankruptcy courts “as much (but no more) final adjudicatory powers as are constitutionally permissible” outside of Article III,<sup>138</sup> requires careful line drawing and invites constitutional challenges.

The ongoing constitutional uncertainty regarding the limits of the bankruptcy courts’ authority hung “like the sword of Damocles,” pending a final resolution by the Supreme Court.<sup>139</sup> These concerns would ultimately be played out in *Stern*, confirming the worst fears of many advocates of the Article III solution.<sup>140</sup> In the meantime, however, the system also promoted a sense of injustice through its treatment of bankruptcy judges as less-than-equal members of the judiciary,<sup>141</sup> and some argued that lack of life tenure led

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and the history of bankruptcy legal practice by minorities in “bankruptcy rings,” see *Coco*, *supra* note 57, at 184.

<sup>132</sup>Klee, *supra* note 126, at 955.

<sup>133</sup>James F. Martin, *The Bankruptcy Amendments and Federal Judgeship Act of 1984: A Step Backward in Reducing Jurisdictional Delay*, 19 J. MARSHALL L. REV. 219, 222 (1985) (“This attempt to place form over substance was not destined to withstand constitutional attack.”).

<sup>134</sup>King, *supra* note 123, at 108-09; see also *Hearing on H.R. 6109*, *supra* note 66, at 89 (statement of Dean Gandy indicating that every lawyer organization representing attorneys who practice before the bankruptcy court has unanimously taken the position that Article III status must be given to the bankruptcy courts); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co. Decision*: Hearing Before the Subcomm. on Courts of the S. Comm. on the Judiciary, 98th Cong. 248 (1983) (Lawrence King speaking on behalf of the National Bankruptcy Conference noting that an Article III court is the only real alternative for dealing with *Marathon*)(hereinafter cited as “Hearing Before the Subcomm.”); *Bankruptcy Court Act of 1983: Hearing on H.R. 3 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 98th Cong. (1983) (hereinafter cited as “Hearing on H.R. 3”).

<sup>135</sup>Martin, *supra* note 133, at 219.

<sup>136</sup>King, *supra* note 123, at 116.

<sup>137</sup>Martin, *supra* note 133, at 219.

<sup>138</sup>Brubaker, *supra* note 47, at 135.

<sup>139</sup>Block-Lieb, *supra* note 8, at 545.

<sup>140</sup>See e.g., Block-Lieb, *supra* note 2, at 117 (noting that it is “only a matter of time” before another constitutional crisis arises on the order of *Marathon*).

<sup>141</sup>See Jennifer M. D’Angelo, *If You Can’t Beat Them, Join Them: Inclusive Joinder and the Filtering of*

to other harmful effects. Most notably, Lynn LoPucki has argued that each individual bankruptcy judge's need for favorable reception in the bankruptcy community to ensure reappointment has created an incentive for bankruptcy judges to compete for large chapter 11 cases, to the point that the courts have become corrupted.<sup>142</sup> In addition, the National Bankruptcy Review Commission expressed concerns that the lack of Article III status made it more difficult to attract the most qualified candidates to the bankruptcy bench.<sup>143</sup>

In the post-*Stern* era, proponents of the Article III plan continue to argue for, in effect, a return to 1978, and the righting of a historic error.<sup>144</sup> In a recent statement to the House Judiciary Committee, the Honorable Joan N. Feeney, Bankruptcy Judge for the District of Massachusetts, spoke on behalf of the National Conference of Bankruptcy Judges regarding options for responding to *Stern*. First, she suggested that Congress could rely on case law and procedural rulemaking, but noted that this would lead to a lack of uniformity. Second, she noted that Congress could amend § 157 to remove counterclaims from the list of core proceedings, or require bankruptcy judges to submit a report and recommendation rather than a final order, or permit bankruptcy judges to issue final orders when parties consent. Each of these resolutions would fail to finally resolve the issue, and would “only add permanence and legitimacy to the current problem.”<sup>145</sup> Judge Feeney then argued for the Article III solution, explaining the conclusions of the House Committee back in 1977, referencing the “growing number of voices” calling for the solution since BAFJA in 1984, and finally quoting the 1997 report of the NBRC: “Article III status is not a panacea, but it is a miracle cure for the majority of jurisdictional ills that currently afflict the bankruptcy court.”<sup>146</sup> Such an assessment of the need for reform in the bankruptcy system “rings as

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*Article III Status Into the Bankruptcy Courts*, 22 EMORY BANKR. DEV. J. 603 (2005-2006) (“the interests of fairness and justice favor the promotion of bankruptcy judges to Article III status”).

<sup>142</sup>LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 20-21 (Univ. of Michigan Press 2005); Lynn M. LoPucki, *Where Do You Get Off? A Reply to Courting Failure's Critics*, 54 BUFF. L. REV. 511, 517-18 (2006) (defending use of word choice). This argument has proved extremely provocative, with many questioning LoPucki's conclusion and his means of presentation. See, e.g., Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 427-28 (2006); Douglas G. Baird & Robert K. Rasmussen, *Beyond Recidivism*, 54 BUFF. L. REV. 343, 344-45 (2006); Charles J. Tabb, *Courting Controversy*, 54 BUFF. L. REV. 467, 470-71, 479-81 (2006). As demonstrated by the critics, LoPucki's conclusions do not reflect the personal experience of many practitioners.

<sup>143</sup>Brunstad, *supra* note 8, at 1440.

<sup>144</sup>See, e.g., Lockman, *supra* note 22, at 166 (“The first, and most obvious, solution is to confer Article III status on bankruptcy judges. This “solution” has been offered dozens of times by various members of the bankruptcy bar, as well as academics alike.”).

<sup>145</sup>Feeney, *supra* note 15, at 359.

<sup>146</sup>*Id.* at 400 (quoting NAT'L BANKR. REV. COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 742 (1997)).

true today in the wake of *Stern v. Marshall* as it did fifteen years ago.”<sup>147</sup>

#### B. AGAINST: AN UNNECESSARY COMPLICATION

There are some who have argued against making bankruptcy judges Article III judges. These arguments, generally made after *Marathon* but before *Stern*, have been based on the premise that alteration of the bankruptcy system is not constitutionally required. Presumably, the proponents of these arguments have consequently been compelled to reconsider their conclusions. For example, before *Stern*, Troy McKenzie argued that the bankruptcy court was constitutional as constructed by virtue of the fact that bankruptcy judges exhibit “Article III values,” including autonomy and independence from political pressure by virtue of their appointment process.<sup>148</sup> After *Stern*, McKenzie criticized the court’s decision on the grounds that its arguments regarding historical justification, expertise, and separation of powers fail to provide meaningful guidance and may even be misleading, leaving the law even more unsettled and uncertain.<sup>149</sup>

Erwin Chemerinsky also argued, pre-*Stern*, that subsequent case law demonstrated that the ruling in *Marathon* was a mistake, and bankruptcy courts are compatible with both due process and the separation of powers doctrine.<sup>150</sup> In fact, he argued, the public nature of bankruptcy judges’ decisions, the merit-basis for their selection, and their specialization all indicated that Article III independence was not necessary for bankruptcy judges to be constitutional decision-makers.<sup>151</sup> Post-*Stern*, Chemerinsky has complained that

[t]he only way to understand *Stern v. Marshall* is to see it as a very formalistic application of legal rules that have developed over more than a century and a half concerning when Congress can vest judicial matters in non-Article III judges. On examination, these rules make little sense and so application of them in a formalistic way likewise is inherently unsatisfying.<sup>152</sup>

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<sup>147</sup>Feeney, *supra* note 15, at 400 (emphasis added).

<sup>148</sup>McKenzie, *supra* note 63, at 793. For thinking along similar lines post-*Stern*, see Jolene Tanner, *Stern v. Marshall: The Earthquake That Hit the Bankruptcy Courts and the Aftershocks That Followed*, 45 LOY. L.A. L. REV. 587, 611 (2012) (arguing that if bankruptcy judges were appointed under Article III the appointment process would become more politicized and less efficient).

<sup>149</sup>McKenzie, *supra* note 19, at 27.

<sup>150</sup>Erwin Chemerinsky, *Ending the Marathon: It Is Time To Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 311-12 (1991) (“Perhaps . . . Congress should convert these courts into Article III tribunals[;] . . . my point is only that the Constitution is not offended by broad jurisdiction in Article I bankruptcy courts.”).

<sup>151</sup>Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 127 (1997).

<sup>152</sup>Chemerinsky, *supra* note 23, at 185.

He has also argued that Article III status is the most obvious solution to the problem the Supreme Court has created in *Stern*.<sup>153</sup>

Others have gone further, arguing not only that Article III status was unnecessary for bankruptcy judges to be constitutional, but also that it was undesirable. For example, in his pre-*Stern* article, Thomas Plank expressed skepticism regarding the benefits of appointing bankruptcy judges under Article III, and argued instead that Article I bankruptcy judges fill an important role in preserving constitutional limits by forcing Congress to ensure that bankruptcy laws fell within its power under the Bankruptcy Clause.<sup>154</sup> Citing occasions in which solvent debtors have used bankruptcy as a means to thwart state judgments, he argued “[m]aking bankruptcy judges Article III judges removes an important constraint on Congress’s temptation to exceed its bankruptcy power.”<sup>155</sup>

Richard Fallon has also argued for continued use of non-Article III courts on policy grounds. In his 1988 work regarding Article III’s relationship to legislative courts and administrative agencies, he lists “values supporting delegation to non-Article III bodies.”<sup>156</sup> These include the ability to tap specialized expertise, the efficient management of governmental functions; and “flexibility in adapting a scheme of administration and adjudication to changing needs and political priorities.”<sup>157</sup> Weighing these values against “Article III values” of separation-of-powers, due process, and judicial integrity,<sup>158</sup> he concludes that both may be satisfied by a system in which non-Article III tribunals are subject to strong appellate review.<sup>159</sup> Fallon’s recognition of the benefits of “flexibility” inherent in non-Article III tribunals is a nod to the reality demonstrated by the history of bankruptcy law that the purposes of any legal scheme may change over time, in response to changing preferences, strategies, and goals. Establishing bankruptcy judges under Article III with life tenure would significantly damage this flexibility.

In a recent ABI Joint Session Douglas Baird raised what appears to be the only written statement thus far that defends the merits of the *Stern* decision and disapproves of an Article III solution.<sup>160</sup> Pointing out that authorizing

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<sup>153</sup>Erwin Chemerinsky, *Non-Article III Courts: Problems of Principle and Practice*, Remarks at the 2013 Annual Meeting of the Association of American Law Schools (Jan. 6, 2013).

<sup>154</sup>Plank, *supra* note 15, at 629.

<sup>155</sup>*Id.* To my knowledge, Plank has not published a relevant article following the *Stern* decision.

<sup>156</sup>Fallon, *supra* note 63, at 935.

<sup>157</sup>*Id.* at 936-37.

<sup>158</sup>*Id.* at 937-43.

<sup>159</sup>*Id.* at 943.

<sup>160</sup>After this article was drafted, but prior to publication, Rafael Pardo and Kathryn Watts published an excellent piece that reached substantially the same conclusions as this article, albeit with a much diminished emphasis on the *Stern* ruling. In their work, Pardo and Watts argue that shifting from the current bankruptcy structure toward an administrative model with a regulatory agency would bring greater expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility to policymak-

the recovery of a debt by one citizen against another citizen is the very business that Article III courts are about, he suggests that “those who downplay the connection between traditional common law causes of action and the exercise of the judicial power fail to understand what is at stake.”<sup>161</sup> He nods to the argument that “[t]he easiest way to put *Marathon* and *Stern* behind us is to make bankruptcy judges ordinary Article III judges,” but also notes that “this course is not necessarily one that is good for the bankruptcy system.”<sup>162</sup> In particular, Baird voices concerns over the political infeasibility of the move, the transitional problems that would inevitably arise, and the likelihood that a specialized and well-qualified bench of Article I bankruptcy judges would be replaced by a more politically connected bench of Article III bankruptcy judges.<sup>163</sup>

### C. NEED FOR A BROADER PERSPECTIVE

Separate from its status as the majority position, the argument for Article III status is compelling in its own right, particularly given the historical development of the bankruptcy system. Bankruptcy commissioners,<sup>164</sup> turned referees, turned judges, have steadily developed over time in authority and responsibility, to the point that they now are the near-exclusive arbiters over a stunning number of cases; the number of bankruptcy filings processed each year by the bankruptcy system dwarfs all other categories in the federal system.<sup>165</sup> Legislative history strongly suggests that Congress recognized the need for an independent bankruptcy judge with broad jurisdictional power, but simply could not push such a system through the political resistance.

But seen in another light, this narrative seems to be captured by Hume’s Guillotine, suggesting that because the system is by and large structured in a way that anticipates a bankruptcy judge with authority and discretion commensurate with Article III status, this is the way that it *ought* to be.<sup>166</sup> There are valid arguments for establishing the system in this way; such or-

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ing, in addition to alleviating some of the constitutional issues in the current system. See Pardo & Watts, *supra* note 6, at 384. Their recommendations are discussed in greater detail *infra* p. 171.

<sup>161</sup>Douglas G. Baird, *The Powers and Jurisdiction of the Bankruptcy Court: Reconsidering an Article III Bankruptcy Court*, 38TH ANNUAL AM. BANKR. INST. WORKSHOP ON BANKR. AND BUSINESS REORGANIZATION 305 (2012).

<sup>162</sup>*Id.* at 309.

<sup>163</sup>*Id.*

<sup>164</sup>This was the term given to assistants appointed by judges to administer the estate in the Bankruptcy Act of 1800. Ch. 9, § 2, 2 Stat. 19 (1800) (repealed 1803). These individuals were also termed “assignees” in the 1841 Bankruptcy Act, ch. 9, § 3, 5 Stat. 440 (1841) (repealed 1843), and “registers” in the Bankruptcy Act of 1867, ch. 176, § 3, 14 Stat. 517 (1867) (repealed 1878).

<sup>165</sup>In 2011 there were 1,467,221 bankruptcy filings, compared with 289,252 federal civil cases and 78,440 federal criminal cases. 2011 ANNUAL REPORT, *supra* note 26, at tbl.12.

<sup>166</sup>See 2 DAVID HUME, A TREATISE OF HUMAN NATURE pt. 1, § 2, at 469 (L.A. Selby-Bigge ed., Oxford: Clarendon Press, 1896) (1888).

ganization satisfies the view of bankruptcy as a federal system with its own policy goals. However, it conflicts with the strategic goals of those who view bankruptcy as a purely procedural mechanism, and recognition of this conflict is strikingly absent from the dialogue.<sup>167</sup>

#### IV. A STRATEGIC APPROACH TO THE BANKRUPTCY SYSTEM

As demonstrated above, most authors, in recommending the Article III solution to the problem raised in *Stern*, approach the issue of bankruptcy jurisdiction from a historical perspective. Noting the concerns raised by the summary/plenary distinction, the progression of bankruptcy judges and their increase in authority, and the political reasons for establishing bankruptcy courts under Article I rather than Article III, proponents of the Article III solution make a strong case that the rational response to the predictable complications of the current system is to simply return to what was initially intended.

However, taking a step back from the history of the bankruptcy courts and looking strategically at the bankruptcy system reveals that the Article III solution fails to consider important strategic objections. For example, it presupposes that specialization and significant judicial involvement in bankruptcy cases is desirable, even though other legal areas, such as employment law or environmental law, operate without specialized courts. This paper goes beyond these presuppositions and considers the problem from a fresh perspective, by analyzing bankruptcy as a system<sup>168</sup> and applying scholarly principles of business and organization restructuring to that system. This section will review three basic principles of restructuring, and then apply those principles using the two primary ideologies at play in bankruptcy scholarship today.

##### A. BASIC PRINCIPLES OF RESTRUCTURING

###### 1. *Step One: Perceived Strategic Opportunity*

Before a dramatic change in organization should be attempted, there must be a presenting problem and a perceived opportunity.<sup>169</sup> Identifying each can help ensure the motives for restructuring and opportunities to be pursued are

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<sup>167</sup>Even the 1973 Commission's initial recommendation for an Article III court lacks a strong strategic rationale. Under the subtitle "The Need for a Bankruptcy Court," the report relies largely on the fact that bankruptcy has "traditionally . . . been administered by the courts" and rejects the *Brookings Report's* recommendation for administrative courts primarily on separation-of-powers arguments. *COMM'N ON BANKR. LAWS*, *supra* note 58, at 87-88.

<sup>168</sup>See LoPucki, *supra* note 70, at 481.

<sup>169</sup>CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 69 (1996).

correct.<sup>170</sup> A different approach to restructuring is warranted depending on the underlying motives for restructuring. For example, if the push for restructuring came from a desire to increase the pay or prestige of bankruptcy judges,<sup>171</sup> we would consider a different strategic path than if the driving force was the need to manage a dramatic increase in filings.

The presenting problem is what creates the need for change, sufficient to shake off organizational inertia and invest in the inevitable costs and disruption that will result. In this case, the presenting problem has arguably been in place for over thirty years, beginning with the decision in *Marathon* that challenged the jurisdictional structure established in 1978. However, the Supreme Court's ruling in *Stern* represents a more pressing problem because time has not yet dulled its effects.

In order for participants to buy into the costs of change, there must also be a perceived opportunity for improvement within the system, such as preventing future conflicts or otherwise improving the organization.<sup>172</sup> Much of the drive behind calls for restructuring the current bankruptcy system comes from the perceived opportunity to simplify the administrative process and reduce costs, avoiding the "jurisdictional ping-pong" between bankruptcy and district courts. In addition to these problems, there is a growing concern regarding the potential expansion of *Stern's* reasoning into additional areas within bankruptcy judges' core jurisdiction, leading to even greater delays and uncertainty.<sup>173</sup>

## 2. Step Two: Strategic Direction

Having identified the fallout of *Stern* and concerns regarding its future implications as the motivation for restructuring the bankruptcy system, the next step is to engage in an assessment of the organization, identifying its goal or mission.<sup>174</sup> This step is crucial; organizers must come to a clear realization

<sup>170</sup>BENGT KARLOF & FREDRIK HELIN LOVINGSSON, REORGANIZATION 132-133 (2005). The authors suggest that businesses considering reorganization should first consider the motives for the proposed change and diagnosis of the problem. See STUART C. GILSON, CREATING VALUE THROUGH CORPORATE RESTRUCTURING: CASE STUDIES IN BANKRUPTCIES, BUYOUTS, AND BREAKUPS 6 (2001) ("Restructuring is more likely to be successful when managers first understand the fundamental business/strategic problem or opportunity that their company faces.").

<sup>171</sup>Evidence suggests that this is not the motivation for any organized drive for restructuring of the bankruptcy system. In fact, an informal study performed in 2005 indicated that most bankruptcy judges were generally satisfied with their level of prestige, and observed a positive trend during the course of their tenure towards greater equality with federal district judges. Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 B.C. L. REV. 105, 118 (2005). In my personal experience, bankruptcy judges apply for their positions based on a keen interest in bankruptcy law, and are relatively unconcerned with prestige.

<sup>172</sup>COSTANTINO & MERCHANT, *supra* note 169, at 70.

<sup>173</sup>See discussion *infra* Part III.

<sup>174</sup>COSTANTINO & MERCHANT, *supra* note 169, at 97; KARLOF & LOVINGSSON, *supra* note 170, at 67. Karlöf and Lövingsson go on to note: "We have come across situations where organization seemed to



of the organization's strategy and refine that strategy if necessary, before making changes.<sup>175</sup> Reformers already familiar with their subject and impatient to reach a solution may be tempted to skip this step, particularly in periods of crisis or when the window of opportunity for change is perceived to be narrow. However, even in these situations, analysis regarding the system's overall strategy is essential and may conserve effort: coming to a firm conclusion regarding the ideological basis or business model may even lead managers to conclude that restructuring would not resolve the underlying problem. This realization can help managers avoid the expense and disruption of unnecessary restructuring.<sup>176</sup> One study concluded that most business reorganizations fall flat precisely because the reorganizers failed to take into account business strategy before embarking on major structural changes.<sup>177</sup> The observations of Karlöf and Lövingsson regarding businesses are applicable broadly: "A business should be organized according to its orientation, which is why any organizational change should involve decisions on the organization's vision, strategies and business mission."<sup>178</sup>

Identifying a single comprehensive goal or mission for the bankruptcy system is elusive, in large part because of the complexities of insolvency law and the different consequences for its implementation, both on individuals and on businesses. Although many have considered this question, there is little consensus.<sup>179</sup> In its report to Congress, the 1973 Commission on the Bankruptcy Laws of the United States<sup>180</sup> conducted its own analysis of the philosophical basis for the bankruptcy act, concluding that "[t]he primary function of the bankruptcy system is to continue the law-based orderliness of the open credit economy," even when debtors cannot or will not pay their debts.<sup>181</sup> To this effect, the 1973 Commission listed four principal goals, including (1) open access for both debtors and creditors to the bankruptcy

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be the goal, rather than the means to a goal. Although it may be a truism to say that an organization is started or reorganized in order to further its aims, this is forgotten more often than we would care to remember." *Id.*

<sup>175</sup>Alan Brache, *Company Reorganization: Does the Medication Treat the Disease?*, USA TODAY, May 1, 2001, at 30.

<sup>176</sup>KARLOF & LOVINGSSON, *supra* note 170, at 135.

<sup>177</sup>Marcia W. Blenko, Michael C. Mankins, & Paul Rogers, *The Decision-Driven Organization*, HARVARD BUS. REV. 54 (June 2010) at 56 ("A recent Bain & Company study of 57 reorgs between 2000 and 2006 found that fewer than one-third produced any meaningful improvement in performance. Most had no effect, and some actually destroyed value.")

<sup>178</sup>KARLOF & LOVINGSSON, *supra* note 170, at 133.

<sup>179</sup>See Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 336-38 (1993) (noting that complaints about the bankruptcy system are rooted in debates over underlying premises).

<sup>180</sup>See COMM'N ON BANKR. LAWS, *supra* note 59, at 1 (The Commission was established in 1970 by Public Law 91-354 (84 Stat. 468) to "study, analyze, evaluate, and recommend changes" to the Bankruptcy Act in place at that time.)

<sup>181</sup>*Id.* at 71.

process; (2) fair and equitable treatment of creditors' claims; (3) rehabilitation for debtors; and (4) efficient and economical case administration. This simple list provides significant room for disagreement, particularly in implementation. For example, in regard to fair and equitable treatment of creditors' claims, the 1973 Commission suggested that both distributive standards, taking into account the legal status of claims, and allocative standards, reflecting the social and economic consequences of the burden of loss, should play a role.<sup>182</sup> These two principles seem to be in direct conflict; shifting the burden of loss to the party "better able to bear it," as the 1973 Commission suggests, must interfere with a creditors legal rights any time that creditor is better able to bear the burden of loss than another party.

This dispute is one at the heart of the disagreements between proceduralists and traditionalists. Although there are clearly other philosophical approaches to debt and bankruptcy that could be used to create a comprehensive strategy, these two have largely shaped discussions in bankruptcy scholarship.<sup>183</sup> The principle ideologies underlying either group arise most commonly in discussions of corporate reorganization, but they also come into play in the context of consumer bankruptcy,<sup>184</sup> and are applicable to the bankruptcy system at large. There are varying opinions within the two camps, but the most widely read champions of these two competing viewpoints are Elizabeth Warren, a traditionalist, and Douglas Baird, a proceduralist. For the sake of discussion, this paper will treat them as representatives of each camp, and restrict analysis to their core concerns.<sup>185</sup>

Warren, in representing the "traditional" view, describes bankruptcy as "an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors."<sup>186</sup> She sees bankruptcy as a system of collection similar to what exists at the state level, with the important distinction that bankruptcy takes into account (or should take into account) the distributional effect of one creditor's collection on other creditors and other actors, such as employees, suppliers, and the surrounding community.<sup>187</sup> She notes, "Congress intended bankruptcy law to address concerns broader than the immediate problems of debtors and their identified creditors; they indicate clear recognition of the larger implications of a debtor's widespread default and the consequences of permitting a few credi-

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<sup>182</sup>*Id.* at 77.

<sup>183</sup>See, e.g., Levitin, *supra* note 13, at 4-5; Mooney, *supra* note 13, at 945-46.

<sup>184</sup>See Hynes, *supra* note 12, at 123.

<sup>185</sup>For purposes of simplicity, I evaluate restructuring of the bankruptcy system under just these two viewpoints. Although there may be additional philosophical approaches worth pursuing, perhaps in another work, they have not reached the level of broad acceptance and relevance attained by the proceduralist and traditionalist camps.

<sup>186</sup>Warren, *supra* note 13, at 777.

<sup>187</sup>*Id.* at 787-88.

tors to force a business to close.”<sup>188</sup> Overall, the traditional approach, as expressed by Warren, is one of introducing a new distributional scheme through the federal system, one supervised by a bankruptcy judge with discretion to act in the best interests of that distributional scheme.<sup>189</sup>

In contrast, the proceduralist point of view, as expressed by Baird, is that applying a special set of distributional concerns in the case of bankruptcy is difficult to justify, and may result in inappropriate “forum shopping” by debtors.<sup>190</sup> Baird expresses uncertainty as to why a distinct bankruptcy law exists at all in light of the costs inherent in maintaining two separate avenues of debt collection.<sup>191</sup> He particularly objects to providing bankruptcy judges with broad discretion to address distributional problems, noting that “[j]udges ordinarily do not play tennis without a net,” and criticizing a bankruptcy system in which “judges have a general mandate to do equity, but not too much equity.”<sup>192</sup> His assertion, instead, is that “a single set of rules should distribute losses that flow from a business failure.”<sup>193</sup> Others scholars approaching the topic with a similar philosophy have recommended that bankruptcy serve as an extension of civil procedure, with the simple goal of providing procedural protection to the interests of rightsholders in the event of collective default. This goal primarily involves permitting preservation of the estate, through the automatic stay, so that a maximum distribution under the terms of applicable non-bankruptcy law may be achieved.<sup>194</sup>

### 3. *Step Three: Restructuring Plan*

Once the vision, strategies, and mission are identified, then the process of developing a plan for restructuring can begin in earnest. There are different approaches to this process, but all involve a critical analysis of the needs of the organization. A persuasive line of reasoning embraced by leading scholars in the field of business reorganization recommends a decision-driven approach to restructuring. As they explain, “an organization’s performance is really no more and no less than the sum of the decisions it makes and executes. . . . [R]edesigning the org chart is almost always counterproductive if leaders fail to think through what the critical decisions are for the business, whom should be responsible for them, and how the new structure will help people

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<sup>188</sup>*Id.* at 788.

<sup>189</sup>*Id.* at 805.

<sup>190</sup>Baird, *supra* note 12, at 819.

<sup>191</sup>*Id.* at 824.

<sup>192</sup>*Id.* at 832, 834.

<sup>193</sup>*Id.* at 822. See also Baird, *supra* note 11 (describing proceduralist beliefs as “(1) the preservation of firms is not an independent good in itself; (2) ex ante effects are important; and (3) the judge, after controlling for the biases and weaknesses of the parties and resolving the legal disputes, must allow the parties to make their own decisions and thereby choose their own destinies”).

<sup>194</sup>See Mooney, *supra* note 12, at 933-34.

make and execute them better.”<sup>195</sup> Others recommend looking at crucial business processes critical to successful implementation of the organization’s strategy, and defining the organizational structure accordingly.<sup>196</sup>

As an initial matter, proceduralists and traditionalists disagree about what types of decisions ought to be made in the bankruptcy system. Whereas traditionalists believe that bankruptcy law should permit decisions on a case-by-case basis as to who should bear the costs of a firm’s failure,<sup>197</sup> proceduralists believe such decisions should be made at the policy level, and should be consistent, to the extent possible, both inside and outside of bankruptcy.<sup>198</sup> To the extent the structure of the bankruptcy system permits or disallows decision-making in response to a particular case or set of claimants, it will be more or less acceptable to either group.

As an extension of this disagreement about decisions, the two groups also express different opinions as to the decision-makers. The bankruptcy system as it currently stands largely revolves around one set of decision-makers: the bankruptcy judges. It is the judges who make most of the important decisions, particularly decisions that respond to the factual situation of any given debtor or creditor. Not surprisingly, then, it is the authority, discretion, and flexibility<sup>199</sup> of bankruptcy judges that provokes particular disagreement between proceduralists and traditionalists. Thus, an issue at the heart of restructuring is also a flashpoint of disagreement regarding the strategic mission for the bankruptcy system. Under the strategic approach to restructuring, traditionalists will generally favor the Article III solution to amending the bankruptcy system in response to *Stern*, but such a solution runs counterintuitive to proceduralist thought.

## B. TRADITIONALIST REVISIONS

For traditionalists, giving bankruptcy judges lifetime tenure would resolve the constitutional conflict identified in *Stern* while preserving the status quo in a way that is consistent with their general strategy: a specialized system that distributes losses to those best able to bear them. Traditionalists favor the current system because judges with specialized training and experi-

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<sup>195</sup>Blenko, Mankins & Rogers, *supra* note 177. Bain & Company identifies six lessons necessary for companies launching a decision-driven restructuring, as follows: (1) Identify your organization’s key decisions, including major strategic decisions as well as operating decisions; (2) determine where in the organization those decisions need to be made; (3) structure the company around its sources of value; (4) figure out the level of authority your decision makers need, and give it to them; (5) adjust other parts of your organization system as necessary; and (6) equip your managers to make decisions quickly and well. BAIN & CO., *Organizational Design & Restructuring*, BAIN & CO., [www.bain.com/consulting-services/organization/organizational-design.aspx](http://www.bain.com/consulting-services/organization/organizational-design.aspx) (last visited Jan. 21, 2013).

<sup>196</sup>Brache, *supra* note 175, at 30.

<sup>197</sup>See Warren, *supra* note 13, at 785-86.

<sup>198</sup>See Baird, *supra* note 12, at 822.

<sup>199</sup>See Levitin, *supra* note 13, at 5.

ence in the area of bankruptcy are able to make quick and correct decisions, taking into account the totality of the situation and applying federal common law, with its underlying policy rationale. Delays necessitated by the need to research particular issues are minimized, as the specialized bankruptcy judge is likely to have previous experience on any given issue. Thus the system is at once accomplishing its mission, facilitating decision-making, and minimizing costs.

Further, a bankruptcy judge appointed under Article III and thereby able to wield the “judicial power of the United States” would have the authority and power necessary to hear and rule on all issues arising in the state court connected with the bankruptcy, including all potential claims and assets in the distribution calculation. Decisions regarding the fate of businesses could always take into account all relevant issues if bankruptcy judges had full authority to issue final orders in proceedings “related to” the case without the need for party consent. Further, Article III status would increase the bankruptcy judges’ equitable authority, giving judges wider latitude to respond to the specifics of any given situation.<sup>200</sup> In this way, power to make the desired decisions would be in the hands of the desired decision-makers, leading to a more efficient system, with better decisions made in a shorter period of time.<sup>201</sup>

Concerns tangential to the strategic success of this structure can be resolved. Administrative costs are unlikely to increase significantly with Article III appointment, and such appointment may even result in a net reduction of costs, once the efficiency costs of the jurisdictional ping-pong currently required by the “core” and “non-core” categorizations are removed.<sup>202</sup> There is nothing in the Constitution that would require an increase in bankruptcy judges’ salaries or staff,<sup>203</sup> nor an improvement in their chambers. Bankruptcy judges are unlikely to serve significantly longer terms than they cur-

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<sup>200</sup>Alan M. Ahart, *The Limited Scope of Implied Powers of A Bankruptcy Judge: A Statutory Court of Bankruptcy, Not A Court of Equity*, 79 AM. BANKR. L.J. 1, 12 (2005).

<sup>201</sup>BAIN & CO., *Organizational Design & Restructuring*, *supra* note 195.

<sup>202</sup>Costs are an important concern in the current political climate. In fact, beyond simply managing costs, there is currently a push to reduce costs introduced by the bankruptcy system, with Congress approving only “temporary judgeships” even in busy judicial districts. Bruce Moyer, *Lapses in Bankruptcy Judgeships Threaten Turmoil*, FEDERAL BAR ASSOCIATION (June 2012), available at <http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2012/June-2012-Lapses-in-Bankruptcy-Judgeships-Threaten-Turmoil.aspx>. Republican Senators have opposed extending permanent judgeships on the argument that courts must use resources more efficiently. However, this argument may be driven more from concerns about the strategic direction of the bankruptcy courts, and their federal jurisdiction, than “efficiency” costs. As has been explained above, a system of Article I bankruptcy judges detracts from judicial efficiency in both the need for reports and recommendations and the appeals process. A system of temporary judgeships, which places districts at risk of losing judgeships in the event that a judge leaves or retires, introduces greater uncertainty, and correspondingly, more inefficiency.

<sup>203</sup>NAT’L BANKR. REV. COMM’N, *supra* note 10, at 723.

rently do—fourteen years was chosen as the correct term in 1978 because it was considered at that time to be the actuarial equivalent of a lifetime appointment.<sup>204</sup> Arguably, life expectancy has increased since that determination was made,<sup>205</sup> but it is also the case that the vast majority of bankruptcy judges who seek reappointment are successful.<sup>206</sup> Retirement costs are unlikely to increase significantly, as bankruptcy judges who have served full terms are currently entitled to a lifetime annuity equal to the salary being received at the time they leave office.<sup>207</sup>

However, political costs must also be accounted for, and may be responsible for some of the resistance to Article III appointment. The United States currently boasts over 350 bankruptcy judges.<sup>208</sup> Bankruptcy, although a specialty area, deals with multiple constitutional and political issues. Permitting one administration to preside over the lifetime appointment of over 350 judges would place an inordinate amount of power in the hands of that administration.<sup>209</sup> However, there are multiple solutions to this problem, many of which were raised in congressional hearings after *Marathon*.<sup>210</sup> Lifetime appointments could be spread over a period of sixteen years, permitting judges who are currently at the beginning of their fourteen year terms to serve through the end, and appointing Article III judges as terms are completed. Alternatively, a system could be derived whereby each Senator would sponsor a group of would-be appointees for his or her state, with an agreement that neither party would attempt to block the other party's appointees.<sup>211</sup>

Congress might instead appoint a single Article III bankruptcy judge in each of the 94 judicial districts, who would refer cases to all other Article I bankruptcy judges within the district.<sup>212</sup> When needed, this Article III

<sup>204</sup>Block-Lieb, *supra* note 2, at 91.

<sup>205</sup>ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *OECD Health Data 2012*, (June 28, 2012), <http://www.oecd.org/els/healthpoliciesanddata/oecdhealthdata2012-frequentlyrequesteddata.htm> (last visited May 16, 2013) (reporting an average life expectancy for individuals in the United States as 71.5 years in 1978, compared with 78.7 years in 2010).

<sup>206</sup>LOPUCKI, *supra* note 142, at 21 (citing a 2001 study by Stan Bernstein, *The Reappointment of Bankruptcy Judges: A Preliminary Analysis of the Present Process*, that found less than 10% of judges who applied for reappointment from 1998 to 2002 were not reappointed).

<sup>207</sup>28 U.S.C. § 377(a) (2012).

<sup>208</sup>2011 ANNUAL REPORT, *supra* note 26, at tbl.12.

<sup>209</sup>This concern was one factor for the initial failure of Congress to pass legislation appointing bankruptcy judges under Article III. See Mund, *Part Three*, *supra* note 125, at 357.

<sup>210</sup>Hearing on H.R. 6109, *supra* note 66; Hearing Before the Subcomm., *supra* note 134; Hearing on H.R. 3, *supra* note 134.

<sup>211</sup>See also NAT'L BANKR. REV. COMM'N, *supra* note 10, at 718 (recommending a transition period whereby sitting bankruptcy judges will be permitted to finish their terms, with Article III judges appointed as vacancies are created through attrition).

<sup>212</sup>This idea was first presented to me by Kenneth Klee, who extended his permission to include it in this article. The suggestion has also been made by Richard Levin, *The Transition to Article III Bank-*

bankruptcy judge could supply the judicial power needed to issue a final ruling on another bankruptcy judge's report and recommendation. Further, the Article III bankruptcy judge could be responsible for larger and more complicated filings, analogous to the treatment of multi-district litigation.<sup>213</sup> This solution would permit most bankruptcy judges to continue as they had, but would still introduce the authority and power necessary within the bankruptcy system for the system to process important decisions quickly and efficiently.

Complaints regarding the authority of these judges, now afforded all the power in law and equity granted by Article III,<sup>214</sup> would be dismissed by traditionalist thinkers, but are at the heart of proceduralist objections to such a scheme.

### C. PROCEDURALIST REVISIONS

From the proceduralist perspective, the solution to *Stern* is much more complicated. To begin with, it is not at all certain that the desired fix can be made simply by adjusting or tweaking the current bankruptcy system. Academics and professionals ensconced in the bankruptcy system tend to develop a bias towards its use and look for solutions to many debtor/creditor issues in the context of bankruptcy as we know it today. However, there is little to suggest that this must, or even should be, where to look for answers in the strategic approach to restructuring.<sup>215</sup>

Proceduralists see little persuasive reason to treat individual rights differently inside federal bankruptcy than they would be treated under state law,<sup>216</sup> and prefer instead a minimalist approach to bankruptcy. Under this approach, controlling non-bankruptcy law, whether it is individual state law, comprehensive federal law, or a uniform code adopted by all states, should also be applicable in bankruptcy insofar as it does not inhibit collective action. Important decisions regarding debtor and creditor rights should be

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*ruptcy Courts*, 38TH ANNUAL AM. BANKR. INST. WORKSHOP ON BANKR. AND BUSINESS REORGANIZATION, AM. BANKR. INST. 336 (2012) and by Kuney, *supra* note 8. On a panel at the 2013 Annual Meeting of the Association of American Law Schools, Thomas H. Lee also expressed the opinion that at least a small group of bankruptcy judges should be appointed under Article III to deal with multi-district litigation and other complex cases. Thomas H. Lee, Remarks at the 2013 Annual Meeting of the Association of American Law Schools, *Non-Article III Courts: Problems of Principle and Practice* (Jan. 6, 2013).

<sup>213</sup>See 28 U.S.C. § 1407 (2012) (authorizing the transfer of multi-district litigation to a single district for the convenience of parties and to promote the just and efficient conduct of the proceedings).

<sup>214</sup>Ahart, *supra* note 200, at 12.

<sup>215</sup>Costs of dramatically altering or even doing away with the current system must be acknowledged, of course, including the costs imposed individuals within the current system, most prominently, bankruptcy judges.

<sup>216</sup>Baird, *supra* note 11, at 588; Baird, *supra* note 12, at 823; Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 100 (1984).

made in the legislature, rather than the courts, and should be consistent.<sup>217</sup>

Proceduralist theory is generally agnostic as to what law should control, so long as the same law applies in and out of bankruptcy. Acknowledging that the federal Congress could hypothetically broaden its regulatory power to all matters involving commerce,<sup>218</sup> it is more likely that states will continue to control the legal landscape in most areas linked to debt and collection. Accordingly, for proceduralists *Stern* should present an opportunity to revise the system in a way that reduces federal influence and limits substantive differences between the law applied in state collection proceedings and in bankruptcy.<sup>219</sup>

### 1. *Repeal of Bankruptcy Law*

In this vein, the most dramatic approach to the proceduralist agenda may be to do away with federal bankruptcy law altogether, relying solely on state law.<sup>220</sup> As demonstrated historically, Congress may repeal bankruptcy laws at will; Congressional authority to enact laws of bankruptcy does not require that such a law be in place at any given time.<sup>221</sup> However, doing away with federal bankruptcy would undoubtedly be criticized as an overreaction to the *Stern* problem, even within the proceduralist camp,<sup>222</sup> in no small part because it would limit the discharge, particularly for consumer debtors. Because of constitutional limitations, states cannot discharge a debtor, a conclusion reached long ago in a series of Supreme Court cases including *Golden v. Prince*,<sup>223</sup> *Sturges v. Crowninshield*,<sup>224</sup> *Ogden v. Saunders*,<sup>225</sup> and *Hanover National Bank v. Moyses*.<sup>226</sup> Accordingly, any “fresh start” would

<sup>217</sup>See Baird, *supra* note 12, at 822 (“Legal rights should turn as little as possible on the forum in which one person or another seeks to vindicate them.”).

<sup>218</sup>Congress has broad authority “[t]o regulate Commerce . . . among the several States.” See U.S. CONST., art. 1, § 8, cl. 3; Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1362 (2006) (arguing that the Supreme Court in *Gonzales v. Raich* gave Congress “almost as expansive an account of federal power under the Commerce Clause as could be imagined”).

<sup>219</sup>True consistency might not be accomplished through mere structural reform. To the extent there are two separate forums for debt collection and bankruptcy, many concerns regarding inconsistent treatment between creditors in and out of bankruptcy would need to be managed by amending substantive bankruptcy law.

<sup>220</sup>See Barry E. Adler, *A World Without Debt*, 72 WASH. U. L.Q. 811, 811 (1994); Hynes, *supra* note 12.

<sup>221</sup>See generally Tabb, *supra* note 54, at 14-23.

<sup>222</sup>Baird, *supra* note 17, at 174 (“The reason for engaging in this thought experiment is not that it is either wise or at all likely that we abandon bankruptcy law. I think neither is the case.”).

<sup>223</sup>10 F. Cas. 542, 546 (C.C.D. Pa. 1814).

<sup>224</sup>17 U.S. 122 (1819).

<sup>225</sup>25 U.S. 213, 264 (1827). For an interesting discussion of this case and what it has to say regarding the nature of contracts, see Robert E. Shapiro, *Back to the Future: Ogden v. Saunders*, 27 LITIGATION 73 (2001).

<sup>226</sup>186 U.S. 181, 188 (1902) (“So long as there is no national bankrupt act, each state has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair



require the consent of all creditors. While this is theoretically common in cases of business reorganization today, a significant number of reorganizations would be rendered impossible due to the refusal of key creditors to consent to a reduction of their claims. One way of mitigating the damage caused by the lack of discharge to personal debtors might be to expand laws regarding exemptions or restrict the ability to garnish future wages.<sup>227</sup>

Another concern is that transferring all insolvency cases to the state courts would result in the termination of thousands of federal bankruptcy employees and the simultaneous increase of the state courts' burden in dealing with insolvent debtors. Proceedings surrounding debt collection in the state courts could multiply, provoking a significant increase in workload and possibly requiring the appointment of new state court judges and staff. However, it is unclear how dramatic this increase would be.<sup>228</sup> Presumably a significant portion of unsecured creditors would consider it a waste of time and effort to pursue debtors plagued by collective default – most debtors in chapter 7 have no non-exempt assets for distribution in any scenario – and so would take no action outside ordinary efforts of dunning or transferring the debt to collection agencies. Without empirical evidence on this point, the best that can be said is that some administrative costs for insolvency would be effectively transferred from the federal government to the states, but it is unclear whether those costs would be significant.

Although extreme, the suggestion that we might do away with federal bankruptcy laws has been defended in the context of corporate bankruptcies,<sup>229</sup> and has some historical basis. Bankruptcy has only become a stable element within the federal system within the last hundred years.<sup>230</sup> At least in cases where a discharge is not required, state remedies and private negotiation may prove to be sufficient, particularly in light of modern trends towards pre-negotiated or “pre-packaged” bankruptcies.<sup>231</sup>

## 2. Return to Summary/Plenary Jurisdiction

A less dramatic proposal might be to simply reduce the authority and discretion of a bankruptcy judge to levels that are both clearly constitutional

the obligation of existing contracts; but a state cannot by such a law discharge one of its own citizens from his contracts with citizens of other states . . . .” (quoting *Brown v. Smart*, 145 U.S. 454, 457 (1892))).

<sup>227</sup>See Baird, *supra* note 17, at 178.

<sup>228</sup>Most consumer bankruptcy filings cause only a temporary delay in foreclosure proceedings as a consequence of the automatic stay. Other cases involving garnishment and wage execution may be resolved in the course of bankruptcy, but the number of these actions is comparatively small. Additional empirical research is necessary on this point.

<sup>229</sup>See David A. Skeel, Jr., *Rethinking the Link Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471, 475 (1994).

<sup>230</sup>See generally Tabb, *supra* note 54, at 14-23.

<sup>231</sup>Lisa G. Beckerman et. al, *Need For Speed: Prepackaged and Prenegotiated Bankruptcy Plans*, 17TH ANNUAL NORTHEAST BANKR. CONF., AM. BANKR. INST. (July 8, 2010).

and consistent with proceduralist strategy for bankruptcy. Instead of a judicial official, endowed with discretion to alter creditors' rights in ways that would not be permitted outside of bankruptcy, proceduralists might prefer an administrator<sup>232</sup> with limited authority to supervise the liquidation of firms and the negotiation between debtors and creditors. Corporate reorganizations and other bankruptcy filings<sup>233</sup> could either be managed pursuant to state law,<sup>234</sup> or by district court judges.<sup>235</sup>

With regards to the jurisdictional authority of the bankruptcy administrator, a return to the summary/plenary jurisdictional distinction is probably the least complicated option consistent with proceduralists' strategic goals. This framework would permit summary proceedings, such as adjudication of creditor's claims against the estate<sup>236</sup> and issuance of the discharge, to be determined by the bankruptcy administrator. All other proceedings would be heard by state court judges or Article III federal judges. The primary advantage of the summary/plenary jurisdictional model is that its constitutionality has been clearly established.<sup>237</sup>

For this proposal to be workable, it would have to overcome the weaknesses demonstrated by the original summary/plenary jurisdictional scheme, in place from 1898 to 1978. As explained above, the primary concern with this model was the uncertainty surrounding what could be decided by the bankruptcy referee and what could not. Accordingly, the jurisdictional boundaries of the bankruptcy administrator would have to be clearly delineated, incorporating precedential line-drawing to the extent relevant. The delay inherent in the summary/plenary model, which necessarily divides more

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<sup>232</sup>The most likely candidate for an administrative program is the current United States Trustee Program, a component of the United States Department of Justice, which currently operates in all districts except Alabama and North Carolina, see Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(d)(3)(A), (E), 100 Stat. 3038, 3121-22 (amended 1990 and 2000), or the Bankruptcy Administrators Program, a functionary of the Judicial Conference of the United States, which operates in the two states mentioned above.

<sup>233</sup>Presumably, municipal bankruptcies under chapter 9 and cross-border cases under chapter 15 would be heard by the district court. Farm and fisherman bankruptcies under chapter 12 could be heard by either the administrator or the district court, depending on the dollar amount at issue.

<sup>234</sup>See Skeel, *supra* note 229, at 475.

<sup>235</sup>The desirability of a federal system of corporate reorganization is a subject of debate among those who express proceduralist leanings. See Baird, *supra* note 16, at 127-128 ("[T]he entire law of corporate reorganizations is hard to justify under any set of facts and virtually impossible when the debtor is a publicly held corporation"); James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 69 (1991); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L. J. 1043, 1078 (1992) (proposing the repeal of chapter 11 and the use of federal law cancelling residual claims in the event of default); David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WIS. L. REV. 465, 468-69 (1993). Further exploration of this issue is beyond the scope of this article.

<sup>236</sup>See Brubaker, *supra* note 47, at 128.

<sup>237</sup>See *id.* at 122.

complex cases, with the administrator acting on some proceedings, and the courts on others, is unlikely to be resolved, but could be ameliorated in two ways. First, parties could consent to plenary actions being determined by the administrator, as was the case under the 1898 Act.<sup>238</sup> Second, district courts could allow for “fast-track” pleading in bankruptcy cases, whereby movants could place a case directly in the district court, skipping over the administrator altogether, upon a showing that complicated plenary issues would inevitably arise, and the case otherwise warranted federal review.

Generally speaking, the *en masse* dismissal of bankruptcy judges in favor of authority transferred to bankruptcy administrators would require a dramatic shift in how bankruptcy cases are handled, similar to the shift that took place with the enactment of the 1978 Bankruptcy Code. State courts would again be called upon to bear much of the burden of insolvency proceedings, and would suddenly become responsible for a high volume of adversary proceedings; at the very least, state courts would determine all state matters currently listed as “non-core,” to the extent parties did not consent to have them heard before the administrator. Further, based on current case law, state courts would also likely hear counterclaims by the estate against a creditor who had filed a proof of claim, and all fraudulent conveyance actions.<sup>239</sup> Bankruptcy administrators, on the other hand, would likely spend the bulk of their time ruling on motions for relief from the automatic stay, discharges, sales, and other matters concerning administration of the estate property.<sup>240</sup> In these matters, administrators would be guided by carefully drafted regulations that did not permit or encourage variations from case to case.

Either proceduralist solution proposed here—the disavowal of federal bankruptcy law altogether or a return to the summary/plenary distinction<sup>241</sup> — would discourage case-by-case decisions regarding asset distribution, and in any event would place decision-making largely in the hands of state court

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<sup>238</sup>This presupposes that consent is a valid workaround to issues of Article III jurisdiction, a matter still subject to debate. See *supra* note 96.

<sup>239</sup>For purposes of avoiding litigation over jurisdiction, it would likely be preferable to draw a clear line at the nature of the proceeding, without taking into consideration, for example, whether resolution of the proceeding was “integral to the restructuring of the debtor-creditor relationship,” *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990), or qualified as a public right. Efficiency in some case administration might thus be sacrificed for a clearer jurisdictional standard. For example, there could be cases where one party might benefit from all proceedings being heard in the same forum, but the other party would not consent to the administrator’s jurisdiction. However, the system as a whole would benefit from clear line-drawing, as an inoculation against costly litigation over jurisdiction. This model is also more consistent with the proceduralist approach, which strategically prefers a greater percentage of matters being heard before state courts, outside of bankruptcy.

<sup>240</sup>It is unlikely that these motions could be handled outside of the bankruptcy court because of the complications inherent in permitting two different courts to each exercise jurisdiction over the same *res*.

<sup>241</sup>There is at least some speculation that this is the direction in which the Supreme Court has signaled it will head. See Brubaker, *supra* note 47, at 122.

judges, thereby limiting the impact of bankruptcy law on creditor rights. Either solution would also likely reduce the ability to reorganize firms without creditor consent. Without bankruptcy courts, debtors would lose access to the one-stop-shop, the delay itself a likely death sentence to any contested reorganization, and the availability of informed, impartial decision-makers who are trained to make decisions consistent with the distributional goals of bankruptcy.<sup>242</sup> Although many might find such consequences highly objectionable, for proceduralists, these changes are neutral if not favorable; the more important consideration is the consistency of position, power, and treatment of creditors in and outside of bankruptcy.

## V. THE STRATEGIC APPROACH TO “UNIFORM” BANKRUPTCY LAW

### A. OBJECTIONS TO TRADITIONALIST AND PROCEDURALIST SOLUTIONS

As suggested above, both the strategic approach of the traditionalists and that of the proceduralists would be repugnant to the other camp. Traditionalists would strongly object to reducing the authority or propensity of courts sitting in bankruptcy to consider all the facts surrounding a debtor's failure. From their perspective, many of the important policy benefits of bankruptcy would be lost in a system where states issued rulings related to collective default. On the other hand, proceduralists would object to promoting bankruptcy judges to Article III status, because doing so would perpetuate and even exacerbate concerns already in place that bankruptcy practice needlessly and harmfully creates a double standard for firms that fail: rightsholders may expect one kind of treatment inside bankruptcy, and quite another outside bankruptcy. This leads to forum shopping concerns and the creation of policy outside the public sphere at large, stemming instead from bankruptcy practitioners.<sup>243</sup> At their core, traditionalists' distributional goals are hampered by a proceduralist system, and proceduralists' goals of consistency are undermined by a traditionalist system.

There are other concerns with the implementation of either approach. Should decision making in insolvency be passed off to state courts entirely through a proceduralist solution, extra steps would be required to maintain some form of discharge, whether it be by limiting creditors' access to debtors' assets, shortening the statute of limitations for collection, or something else. Under the summary/plenary model, there could also be cause for concern if state courts were called to rule on claims that crossed state boundaries, namely the risk of bias against out-of-state creditors in favor of local debtors

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<sup>242</sup>See Warren, *supra* note 13, at 805.

<sup>243</sup>Mooney, *supra* note 12, at 1000-01.

or creditors. Congress would have to carefully draft venue provisions to reduce such concerns.<sup>244</sup>

On the other hand, appointing specialized bankruptcy judges to lifetime positions under a traditionalist plan would solidify the current bankruptcy structure for at least one lifetime. The costs of restructuring the bankruptcy system, already high, would prove even higher and likely insurmountable, even in the event that public opinion regarding bankruptcy, the structure of credit, or any number of other relevant factors changed. An Article III bankruptcy court would likely be a permanent anomaly within the federal system.<sup>245</sup> Bankruptcy law is not so distinctive as to require such unique status in the federal system; if a specialized Article III bankruptcy court is justified, why not a specialized trial court for environmental law, commercial law, patent law, or any other highly technical field?<sup>246</sup> Unless such other specialized courts are warranted,<sup>247</sup> in the interests of consistency in the federal system, bankruptcy courts should not be distinct, specialized bodies.

#### B. UNIFORMITY AS A STRATEGIC GOAL

A specialized bankruptcy court is not required under a third strategic approach advocated here. In drafting the Constitution, the Founding Fathers identified an overarching strategic goal for bankruptcy; that of uniformity.<sup>248</sup> In succinct language characteristic of the Constitution's concise drafting, the Founding Fathers assigned only a single modifier to Congress' authority to pass laws of bankruptcy: the requirement that these laws be uniform.<sup>249</sup> Yet, this admonition has been largely forgotten in the formation of modern bankruptcy law.<sup>250</sup> Instead, academics and commentators have brought to bankruptcy their own well-reasoned approaches and recommendations. While these have their place, they should not operate to the exclusion of the strategic goal encompassed in the Constitution.

Adopting uniformity as a strategic goal for the purposes of proposing a

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<sup>244</sup>Such provisions could have the secondary benefit of reducing concerns regarding competition among bankruptcy courts for large cases. See LOPUCKI, *supra* note 142, at 252.

<sup>245</sup>As noted above, *supra* note 18, there are currently only two specialized Article III courts in the federal system. The International Court of Trade is a specialized trial court, and the Federal Circuit, dealing exclusively with patent cases is, a specialized court of appeals.

<sup>246</sup>These specialized courts exist to some extent in various states, but in the federal system, bankruptcy law stands out as an area with its own distinct court, albeit joined by the Tax Court and the Court of Claims.

<sup>247</sup>Such a consideration, while deserving of more in-depth treatment, is outside the scope of this paper.

<sup>248</sup>See U.S. CONST., art. 1, § 8 cl.4.

<sup>249</sup>U.S. CONST., art. 1, § 8.

<sup>250</sup>See Victor D. López, *State Homestead Exemptions and Bankruptcy Law: Is it Time for Congress to Close the Loophole?*, 7 RUTGERS BUS. L.J. 143, 166 (2010); Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 22 (1983).

plan to restructure the system is also appropriate because of its broad application to all facets of bankruptcy law. As noted above, the ideological approaches identified in this article, the traditionalist and the proceduralist views, stem largely from considerations of corporate bankruptcy.<sup>251</sup> Most authors, in adopting these viewpoints, acknowledge that an alternate approach may be warranted for consumer bankruptcies,<sup>252</sup> which make up the overwhelming majority of cases filed within the system itself.<sup>253</sup> In contrast, the strategic goal of uniformity is appropriate in both the consumer and the corporate context. For individual consumers, uniformity helps to ensure equal treatment under the law, another protection guaranteed to individuals by the Constitution.<sup>254</sup> For businesses, uniformity denotes predictability, simpler transactions, and reduced costs.<sup>255</sup>

A bankruptcy system supporting uniformity as a strategic goal would ensure that most decisions are made at the policy level within the federal system, in the course of drafting statutes and regulations, which will be applied uniformly across cases. To the extent that factual inquiries must be made, decisions should be made at a federal level by individuals with uniform responsibilities and incentives. These individuals' factual determinations must be subject to effective and speedy review that would limit the development of individualized, non-uniform practices. Where possible, these individuals should be informed by uniform standards that discourage discretionary departure.

### 1. *Administrative Agency of Bankruptcy*

Prior to *Stern*, it was at least plausible that bankruptcy judges, subject to closely written laws and discouraged from the exercise of equitable authority,<sup>256</sup> could successfully meet these criteria. However, as has been observed by others, in practice, this is not the case.<sup>257</sup> Instead, a better method of achieving uniformity would be to establish a system of federal bankruptcy administrators, acting within a bankruptcy agency subject to the Administrative Procedure Act ("APA") and guided by close regulation, subject to the

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<sup>251</sup>See, e.g., Mooney, *supra* note 12, at 934 ("This Article focuses primarily, but not exclusively, on business bankruptcy.").

<sup>252</sup>See Warren, *supra* note 13, at 776-77.

<sup>253</sup>For example, in 2011, there were 49,895 business bankruptcy filings compared with 1,417,326 nonbusiness filings; business filings comprised only 3% of the total bankruptcy filings. 2011 ANNUAL REPORT, *supra* note 26, at 283 tbl.F-2.

<sup>254</sup>U.S. CONST., amend. XIV, § 1.

<sup>255</sup>See Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 18-19 (1992).

<sup>256</sup>Ahart, *supra* note 200, at 2.

<sup>257</sup>See Pardo & Watts, *supra* note 6, at 401-02 (noting that many of the Bankruptcy Code's provisions are open textured and ambiguous, providing courts with discretion to flesh out details and engage in policymaking).

judicial review of Article III federal judges when necessary. Actions outside of the agency's authority would be reviewed by the appropriate court, whether federal or state. For reasons of efficiency, explained in greater depth below,<sup>258</sup> certain categories of cases, most probably chapter 11 business reorganizations where the asset amount in controversy was above a certain threshold, would be administered in the first instance by federal district courts.

Although strikingly different from how the bankruptcy system is structured today, use of an executive agency to administer bankruptcy law is not at all far-fetched. Similar proposals were made at several points in the congressional discussion before and after *Marathon*, although they have since been largely forgotten or ignored in the academic literature. For example, in its 1971 report to Congress, the Brookings Institution recommended essentially this approach, arguing for the establishment of an administrative agency to handle all cases except reorganizations of corporations.<sup>259</sup> The bankruptcy system, it argued forcefully, would have shorter deadlines, more streamlined procedures, and be more effective in accomplishing its administrative functions were it located substantially outside the judicial branch.<sup>260</sup>

In a similar vein, in response to *Marathon*, the Judicial Conference proposed that Congress appoint bankruptcy administrators in each judicial district to approve routine court filings and grant uncontested motions, but without authority to resolve disputes among the parties. In addition, as Congress was already tasked with appointing additional district court judges to meet a rising case load, the Judicial Conference proposed that Congress appoint a larger number of district court judges to take on the anticipated increased caseload.<sup>261</sup> District court judges assured Congress that they would be capable of meeting the bankruptcy caseload even after bankruptcy judges had ceased bearing its weight.<sup>262</sup>

Very recently, Rafael Pardo and Kathryn Watts have reached a similar conclusion on the advisability of an administrative, rather than judicial, system of bankruptcy. With an emphasis on the constitutional and policy

<sup>258</sup>The line demarcating this divide between agency cases and court cases would also need to be carefully drawn and clearly delineated by Congress, so as to avoid costly and unnecessary jurisdictional disputes, as well as strategic litigation by non-debtor parties.

<sup>259</sup>DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 4 (The Brookings Inst. 1971).

<sup>260</sup>*Id.* at 200 ("The tone of disparagement running through this administrative analysis may surprise or irritate readers who are accustomed to the operating methods of the judiciary. The bankruptcy system, however, is in most cases not a genuine judicial enterprise. It is a large-scale example of routine administrative machinery.")

<sup>261</sup>See Statement of Jonathan C. Rose, *supra* note 69, at 12.

<sup>262</sup>See Prepared Statement of Spencer M. Williams, *supra* note 7, at 34-42 ("I represent more than 200 district court judges, and I assure you we are not reluctant to handle bankruptcy cases which in fact require a judge's attention. I assure you we can handle them expeditiously.")

ramifications of permitting courts to “fill in the gaps left by broad delegations of power” in the Bankruptcy Code,<sup>263</sup> they conclude that courts are ill-equipped to set bankruptcy policy, and that a shift to an administrative agency with substantive rulemaking powers would be preferable.<sup>264</sup>

## 2. Promoting Uniformity

This structure promotes the goal of uniformity for three primary reasons. First, most routine decisions, such as motions to lift the automatic stay, motions to avoid non-consensual liens, or disallowance of creditors’ claims, would be determined in the first instance by administrative officials following closely drafted and carefully monitored regulations. Relatively few of these types of proceedings raise novel issues, facilitating their disposition by administrative bodies acting in accordance with a set regulatory script. The bankruptcy agency could respond to cases that do present issues outside the current regulations with new rules, obtained through notice-and-comment rulemaking or adjudication,<sup>265</sup> ensuring that new circumstances receive uniform treatment across jurisdictions. In such cases of appellate review of new rules or policies, interpretation of ambiguous statutory provisions would receive Chevron deference, ensuring more uniform treatment.<sup>266</sup>

Second, replacing Article I bankruptcy judges with Article III district court judges in larger cases, often involving more complicated issues, would shorten the appeals process for bankruptcy cases and reduce uncertainty regarding the precedential authority of bankruptcy appeals.<sup>267</sup> Under the current structure, bankruptcy appeals are rare; few litigants conclude it is in their interests to attempt an appeal of the bankruptcy judge’s ruling and often the issue is precluded by mootness.<sup>268</sup> When cases are appealed they experience an extra level of review; appeals in the Fifth, Sixth, Eighth, Ninth, and Tenth Circuits may go to the Bankruptcy Appellate Panel (BAP), comprised of three bankruptcy judges, who will review the merits of the case.<sup>269</sup> In

<sup>263</sup>Pardo & Watts, *supra* note 6, at 388 (quoting Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008)).

<sup>264</sup>Pardo & Watts, *supra* note 6, at 389.

<sup>265</sup>See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984).

<sup>266</sup>See Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1291 (2008) (“[B]y committing ambiguous statutory provisions to executive interpretation, courts reduce the likelihood that circuit splits will cast a pall of uncertainty over unitary regulatory programs”).

<sup>267</sup>See Bussel, *supra* note 87, at 1071.

<sup>268</sup>The system of bankruptcy appeals and the nature of the underlying substance both provide a strong disincentive for litigants to do so, as explained by McKenzie, *supra* note 63, at 782-91. Factors that may discourage appeals include (1) the level of discretion afforded to bankruptcy judges’ rulings by the district court; (2) the costs of appeal, which must be borne either by the estate or the creditors; (3) the extra level of review between the trial court and the court of appeals; (4) uncertainty regarding the precedential merit of cases passed down from the district court and the bankruptcy appellate panel; and (5) the perceived aversion of district courts to hearing bankruptcy cases. *Id.*

<sup>269</sup>See 28 U.S.C. § 158 (2012). Litigants in these jurisdictions may file an election to transfer their



other circuits, appeals are heard by federal district judges.<sup>270</sup> Very few cases make it past this stage to the court of appeals,<sup>271</sup> and only a handful in a decade will make it all the way to the Supreme Court. Accordingly, it is frequently the case that a bankruptcy judge's decision is final for all intents and purposes. This dramatically limits precedential authority, resulting in a greater risk of inconsistent rulings across Circuits and even across districts.<sup>272</sup> Even cases which are appealed to the BAP or the district courts hold little precedential value, and what does exist is subject to uncertain weight.<sup>273</sup> Under the structure proposed here, appeals from administrative rulings in consumer cases and district court rulings in business cases could both be heard by the Circuit Court in a more direct and streamlined appellate process.

Third, elimination of a specialized bankruptcy court in favor of a uniform bankruptcy agency could eliminate or at least reduce specialized bankruptcy practices, where "local-local" rules can catch those unaccustomed to bankruptcy court practice.<sup>274</sup> Many bankruptcy courts have developed the practice of issuing judicial rules which are both non-uniform and have a significant effect on parties' substantive rights.<sup>275</sup> Trustees have engaged in similar practices.<sup>276</sup> With the development of a single agency overseeing bankruptcy filings in all fifty states and each individual district, these inconsistencies would cease to exist.

### 3. Satisfying *Stern*

This proposed structure resolves the concerns presented by *Stern* while simultaneously promoting consistency across federal legal regimes: use of an administrative agency is standard in many areas of federal law, such as environmental and employment actions. The authority of agencies to act in these

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case to be heard by the district court rather than the BAP, which is fairly common. In 2011 the opt-out rate was 37%. 2011 ANNUAL REPORT, *supra* note 26, at 117 tbl.B-11 & 171 tbl.C-7. Note that under the language of § 158(d)(2)(A) it is also theoretically possible for a circuit court of appeals to hear an appeal from the bankruptcy court in the first instance, if requirements of importance and lack of controlling precedent are met.

<sup>270</sup>See FED. R. BANKR. P. 8013.

<sup>271</sup>In 2010 and 2011, for example, district courts nationwide heard a total of 2,177 and 2,227 appeals, respectively, and BAP courts 845 and 1,085. 2011 ANNUAL REPORT, *supra* note 26, at 280 tbl.F. Of the 3,312 cases appealed in the first instance in 2011, only 683 of these made it to the courts of appeals. *Id.* at 99 tbl.B-6.

<sup>272</sup>See Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or an Ambulance*, 69 AM. BANKR. L.J. 525, 527 (1995); Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 657 (2002).

<sup>273</sup>See Bussel, *supra* note 87, at 1071.

<sup>274</sup>See Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws"*, 42 SETON HALL L. REV. 1081, 1089 (2012).

<sup>275</sup>See Pardo & Watts, *supra* note 6, at 437-38 (giving, as an example of conflicting local rules, the appropriate discount rate in Chapter 13 cases).

<sup>276</sup>See Austin, *supra* note 274, at 1106-12.

spheres is well established. As several have noted, the Supreme Court appears to have sanctioned an exercise of authority in administrative agencies that exceeds what is permissible for bankruptcy courts.<sup>277</sup>

There is no other obvious explanation for the disparity between the Supreme Court's ruling in *Stern* and its holding in *Schor*.<sup>278</sup> The dispute in *Schor* centered on the Commodity Exchange Act's grant of authority to the CFTC to entertain state law counterclaims in reparation proceedings. In that case, the petitioner challenged the CFTC's statutory authority, and on review to the D.C. Circuit, the Court of Appeals raised *sua sponte* the constitutional issue of whether the CFTC could issue binding orders in a traditional state action under the logic of *Marathon*.<sup>279</sup> The D.C. Circuit determined that the CFTC lacked subject-matter jurisdiction over the common law counterclaims brought against the petitioner, but avoided the constitutional issue by concluding that the statutory authority was not clearly expressed.<sup>280</sup>

In reversing the D.C. Circuit, the Supreme Court first concluded that the authority to adjudicate counterclaims was given to the CFTC, as evident on the face of the statute.<sup>281</sup> Further, with regards to the constitutional issue, the Court concluded that "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*" in cases where jurisdiction is "limited to that which is necessary to make the reparations procedure workable."<sup>282</sup> Finally, it noted that a contrary ruling would "defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."<sup>283</sup>

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<sup>277</sup>See, e.g., Baird, *supra* note 76, at 15 ("The kind of counterclaim that was found suspect in *Stern* is substantively no different from tort claims that are routinely folded into administrative proceedings in which the adjudicators do not have life-time tenure. More to the point, it is hard to distinguish the counterclaim in *Stern* from the counterclaim the Commodity Future Trading Commission was allowed to resolve in *Schor*. If bankruptcy had been located in an administrative agency, the Court in *Stern* would have started with a different set of questions."); Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 176 (1991) (suggesting that Supreme Court case law indicates "a belief that article III affords Congress greater flexibility to utilize administrative agencies than it does to utilize federal judges who look and act like their article III counterparts but who lack the constitutionally prescribed job protections"); McKenzie, *supra* note 19, at 44-45 ("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 when it is an administrative agency.").

<sup>278</sup>Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

<sup>279</sup>*Id.* at 838-39.

<sup>280</sup>*Id.* at 839.

<sup>281</sup>*Id.* at 841-42.

<sup>282</sup>*Id.* at 856.

<sup>283</sup>*Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

The Supreme Court's ruling in *Stern*, and its efforts to distinguish *Schor* and *Thomas v. Union Carbide Agricultural Products*,<sup>284</sup> which held that binding arbitration provisions in the context of environmental administrative law did not violate Article III, suggest that it is simply more comfortable with the exercise of adjudicatory authority in agencies than in bankruptcy courts.<sup>285</sup> The ability of agencies to issue final, binding rulings in private disputes has been consistently upheld, while the ability of bankruptcy courts to do so has been struck down, twice.<sup>286</sup> To the extent that these agencies act within constitutional boundaries, the bankruptcy agency would similarly be protected from constitutional challenges.

#### 4. *Anticipated Objections*

Like each of the solutions presented above, this solution is not without its weaknesses. From an ideological standpoint, both proceduralists and traditionalists are likely to be partially dissatisfied. From the proceduralist perspective, differences between creditor treatment at the state and federal level are still probable. On the one hand, extraneous judicial law making in bankruptcy may be discouraged through drafting more explicit regulations for use by bankruptcy administrators, and by restricting the types of cases that come before the federal judge. However, there is nothing in this structure to discourage Congress from using bankruptcy as a policy tool, particularly in the area of corporate reorganization, where debtors would still have immediate access to the courts.<sup>287</sup> Although doing away with specialized bankruptcy courts would reflect a symbolic step towards a minimalist framework for bankruptcy, the true test would come in practice.

As for traditionalists, this proposal satisfies the constitutional requirements identified in *Stern*, but diminishes the opportunities for a tailored response to individual cases. Bankruptcy administrators will ostensibly be restrained in their approach to consumer cases and no-asset corporate liquidations by agency regulation. Non-specialized district judges sitting in bankruptcy are likely to be more removed from bankruptcy cases, which will compete for attention with criminal and civil dockets. Perhaps more to the point, removing bankruptcy judges deprives the system of a wealth of specialized knowledge. Judges who are less comfortable finding their way around

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<sup>284</sup>473 U.S. 568 (1985).

<sup>285</sup>McKenzie, *supra* note 19, at 45 ("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.")

<sup>286</sup>*Stern v. Marshall*, 131 S. Ct. 2594, 2608, 180 L. Ed. 2d 475 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

<sup>287</sup>The exercise of equitable authority is also more justifiable in the district court than in current bankruptcy courts. See Ahart, *supra* note 200, at 2; see also Levitin, *supra* note 13, at 4 (citing a federal interest in uniformity as a justification for federal common lawmaking).

the Bankruptcy Code will be less able to assist a struggling business or rule on the equities of any given scenario. This may be beneficial from the perspective of proceduralists, who would rather the debtor and creditors negotiate amongst themselves without judicial interference, but it conflicts with traditionalist goals that depend on an independent arbiter to make distributional decisions.

i. Impact on System Operations

Perhaps the most immediate response to this proposal is concern that removing over three hundred judicial officers will destroy the system's operations; the caseload cannot be managed without the work currently performed by bankruptcy judges. Any challenge to this position would appear to undermine the considerable work that bankruptcy judges do on a daily basis. However, in a typical uncontested bankruptcy filing under chapter 7, which comprise the bulk of bankruptcy filings, the bankruptcy judge need not see the parties involved, review the schedules, or take any part in the discharge. This suggests that altering procedures, thereby making use of a bankruptcy administrator who could conduct hearings and make decisions in accordance with the APA, could result in even fewer cases requiring judicial oversight. In some cases, where there are assets worth fighting over and controversies that could potentially delay administration of those assets, resulting in a significant loss in value, the district courts could become involved to facilitate the efficient administration of cases. As a practical matter, virtually all of these cases will involve reorganization of businesses where there are significant assets and accordingly a significant risk of losing value. If there are enough of these cases to warrant additional federal judges, Congress could appoint the requisite number. Presumably, the number would be far fewer than what would be required if existing bankruptcy judges were simply given Article III status.

In most bankruptcy filings, particularly in the area of consumer bankruptcies, but also occasionally in business liquidations, the invocation of the automatic stay, along with the discharge, may be all that is required for effective management of the bankruptcy case. Both the stay and the discharge can be administered by an agency; disputes regarding either may be resolved in quasi-judicial hearings, common in other agency contexts.<sup>288</sup> Other proceedings tangentially necessary to resolve a bankruptcy case may be dealt with at the state court level, similar to the treatment of plenary actions described above. These proceedings may suffer from some delay, but as most cases involve little to no assets, the delay is unlikely to be of significant concern,

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<sup>288</sup>See generally Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (originally codified at 5 U.S.C. § 556 (1946)).

outside its immediate effect on the individuals involved.<sup>289</sup>

### ii. Delay and Loss of Value

However, it is generally accepted that speed is necessary in dealing with some bankruptcy proceedings, both for the debtor's sake and for the creditors', because assets depreciate and interest grows. As potential for loss of value increases, concerns regarding speed also increase. The greatest potential for loss of value is in larger business reorganizations, where quick action is necessary to preserve the value of the business as a going concern.<sup>290</sup> Examples of motions requiring speedy adjudication include "first-day" motions common in chapter 11 cases for appointment of professionals, use of cash collateral, and debtor-in-possession financing. The loss of a court dedicated to the bankruptcy docket could lengthen the expected timeline for disposition of such proceedings, or even for obtaining a hearing, with potentially disastrous results.

Recognizing these concerns, the concept of speed is not foreign to the district court, which must already grapple with expedited hearings and deadlines on the criminal docket. No doubt the federal bench could devise a means whereby time-sensitive bankruptcy issues could be heard on an expedited basis. A potential solution might be arranging a rotation under which the "on-call" judge must be prepared at all times to receive emergency motions in chapter 11 reorganizations. These emergency motions would be narrowly defined as motions dealing with assets above a certain floor,<sup>291</sup> in which delay could result in a dramatic loss of value. In practice, this would likely mean that only medium to large corporate reorganizations would warrant expedited treatment before the district judge. While consumer advocates might object to such a practice as undemocratic and discriminatory, it responds to the reality that cases involving larger sums usually affect more people, and accordingly warrant additional consideration.

### iii. Loss of Specialization

A primary objection to the solution proposed here, and the most unfortunate casualty of the *Stern* ruling, would be the loss of highly trained specialists in the review of bankruptcy cases; practitioners in particular would likely object to having district judges otherwise unaccustomed to bankruptcy replacing bankruptcy judges who brought years of practical experience to the bench. Recognizing this loss, and without discounting the benefits of bank-

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<sup>289</sup>Recognition of the impact of delay on individuals is nevertheless important, and the cost of bankruptcy warrants consideration in any proposed bankruptcy system. However, such considerations are outside the scope of this article.

<sup>290</sup>In most other proceedings, delay is to be expected as a matter of debt collection, and is unlikely to cause significant loss in value absent purposeful bad acts by the debtor.

<sup>291</sup>This floor could mimic the standards for diversity jurisdiction under 28 U.S.C. § 1332 (2012).

ruptcy judges' expertise to the current system, complexity and close statutory interpretation are familiar challenges to district court judges. These judges are frequently called upon to rule in areas such as environmental law, patent law, civil rights, and antitrust. Federal district courts, already tasked with such complicated areas, should quickly establish a working expertise in bankruptcy law as they have in other technical areas.

In some respects, this loss of specialization may be viewed as an overall advantage to the federal system. It can be easily argued that, given the importance of bankruptcy law and its obvious impact on the country's financial health, commerce, and constituents, a strong familiarity of bankruptcy law within the general federal bench is long overdue. If bankruptcy is no longer seen as an exclusively specialized area, more judges, attorneys, and law students are likely to acquire a working knowledge of its parameters.<sup>292</sup>

#### iv. Impact on Bankruptcy Judge Appointees and Private Trustees

The counterpoint to the loss of specialization is the reality that, in addition to destroying current relationships between practitioners and bankruptcy judges, this new structure would also significantly impact sitting bankruptcy judges. Through no fault of their own, but as a consequence of the Supreme Court's conclusions regarding the constitutionality of non-Article III bankruptcy judges issuing final rulings, under this proposed solution bankruptcy judges would likely be removed from their positions.<sup>293</sup> Such a removal, in addition to disrupting the lives of the individual judges, would also draw administrative costs, such as the need for equitable compensation for judges' unvested retirement benefits. Private trustees, appointed by the UST for the purpose of administering cases, particularly in chapter 7 and chapter 13, would also likely be dismissed to make way for agency administrators.

Bankruptcy judges and private trustees could likely find places within the new system, if they chose. Those who desired could likely obtain positions within the new bankruptcy agency, however, many bankruptcy judges in particular might blanch at the demotion, both real and perceived, of their author-

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<sup>292</sup>In full disclosure, this is a primary goal of mine in the context of the law school curriculum. Although some subjects touching on bankruptcy, such as secured transactions, are common courses for typical law students, I have been dismayed to discover that most seem loathe to approach the topic, even acknowledging its importance in the current economic climate.

<sup>293</sup>Unfortunately, this is the likely outcome of all proposed structural responses to *Stern*, although the traditionalist solution leaves open the possibility (albeit tenuous) that all currently sitting bankruptcy judges might be promoted to Article III status without question. A more likely scenario would be a drawn out process of political appointment, through which the less well-connected bankruptcy judges would likely be removed. This concern was acknowledged by the National Conference of Bankruptcy Judges early on. See Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1, 20 (2007).

ity and influence, particularly when there would be little hope of administering large asset cases or business reorganizations.<sup>294</sup> Some bankruptcy judges, having lost their positions in the specialized bankruptcy court, could find positions as newly appointed district court judges. Most individuals appointed to the federal bench have some specialization prior to their appointment; accordingly it should be no disadvantage to would-be appointees to be trained in what would become a significant portion of the docket - bankruptcy. This outcome would be highly preferable, as it would also preserve the expertise of former bankruptcy judges within the federal system.

Bankruptcy judges who wished to be appointed as district court judges would have to face the normal appointment process. Concerns regarding this process, which also arise for the traditionalists' Article III solution, include the recognition that it will inevitably introduce a political element to the bankruptcy appointments process that has not yet been encountered under the current system. Others have suggested that the current process of appointing bankruptcy judges may actually result in a higher quality of candidates than would the process of appointing district court judges, because the appointment of bankruptcy judges is based on merit, rather than political connections, and selection is made by circuit court judges, rather than Congress.<sup>295</sup> Appointment under Article III processes will sacrifice these advantages, to the extent they exist.<sup>296</sup>

Further, as was made clear during the congressional debate pre- and post-*Marathon*, the political ramifications of making hundreds of lifetime appointments are extensive. Negotiations will need to be made regarding the timeline for these appointments, and some patronage seems inevitable. Criticism of the appointments process and recommendations for its restructuring are outside the scope of this paper, although fertile ground for additional academic consideration.

Other questions regarding the particularities of the bankruptcy administrative system are likely to arise, and would need to respond to ongoing concerns regarding efficiency, cost, the potential for agency capture, and political realities. Despite those questions and the issues raised above, changing the bankruptcy system from one of specialized courts to one of a specialized agency is on balance the most preferable response to the *Stern* problem, where the system goal or strategy is to promote uniformity, rather than a distinct distributional policy or consistency with state law.

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<sup>294</sup>Many consider the business reorganizations to be the most interesting work in bankruptcy practice.

<sup>295</sup>See McKenzie, *supra* note 63, at 793; Plank, *supra* note 15, at 622.

<sup>296</sup>A move to appointment by the president rather than by circuit courts may be required anyway as a constitutional matter. For an argument that bankruptcy judges' method of selection violates the Appointments Clause, see Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 234 (2008).

## VI. CONCLUSION

Restructuring the bankruptcy system appears to be necessary in light of the jurisdictional crisis originating in the Bankruptcy Code and recently highlighted by *Stern*. Authors have argued for a particular form of restructuring for over thirty years: the appointment of specialized bankruptcy court judges under Article III. Although appointment of Article III bankruptcy judges may be the most obvious solution, being closely aligned with the current structure and a clear resolution of the *Stern* dispute, it responds to a particular set of widely-accepted strategic goals for bankruptcy, and stands in direct opposition to another widely-accepted strategy. Further, it presupposes that an Article III specialized court is needed for bankruptcy, despite the fact that other highly technical and influential areas do not have such specialized federal courts at the trial level.

Taking a step back and looking at the bankruptcy system from a fresh perspective permits a restructuring analysis that evaluates proposed solutions on the basis of their strategic impact. It demonstrates that multiple solutions are possible. It also points to a solution based on the strategic goal of uniformity, the goal most consistent with the constitutional basis for federal bankruptcy law. The solution is the creation of a bankruptcy agency, relying on carefully-written regulations, to administer no-asset cases and consumer bankruptcies. To the extent judicial action is needed, particularly in business reorganizations, federal judges would exercise jurisdiction directly, without the initial review of bankruptcy judges. In this way, long-standing concerns regarding the jurisdictional authority of bankruptcy judges would be resolved. Bankruptcy administration would thereafter maintain internal uniformity and external consistency within the federal administrative system.



