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Makalidung's Post: How *Stern v. Marshall* is Shaking a Bankruptcy Court Jurisdiction to Its Core

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> [Makalíduñg] set [the world] up on posts . . . , with one in the center. At the central post he has his abode, . . . and whenever he feels displeasure toward men, he shakes the post, thereby producing an earthquake . . . . It is believed that, should the trembling continue, the world would be destroyed . . . .[1]

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1. H. Otley Beyer, *Origin Myths Among the Mountain Peoples of the Philippines*, 8 PHIL. J. SCI. 88-89 (Apr. 1913).

I. INTRODUCTION

The recent decision of the United States Supreme Court in *Stern v. Marshall*[2] is simply another earthquake concerning the constitutionality of bankruptcy court jurisdiction. When applied against the backdrop of prior Supreme Court decisions, *Stern* serves to reawaken uncertainty surrounding the constitutionality of the 1984 amendments to the Bankruptcy Code.[3] While the majority opinion in *Stern* may convince some jurists and commentators that the bankruptcy world as we know it is coming to an end, this article posits that the bankruptcy courts will enjoy continued viability and identifies simple solutions to address the issues raised by *Stern*.

Over the past twenty years, three posts of Makalíduñg have supported the constitutionality of a bankruptcy court's ability to adjudicate "core" proceedings[4] with finality. Drawn from prior Supreme Court decisions and theories advanced in academia, these three posts consist of the "public rights" exception to the Article III requirement,[5] the "consent" (or "waiver") doctrine,[6] and the "adjunct" justification.[7] At a minimum, the Supreme Court's recent holding in *Stern* shook each of these posts to their foundations. Taken to its farthest extreme, *Stern* could arguably topple the constitutionality of bankruptcy court jurisdiction in all but the most select, core matters. Upon stepping back, however, the author of this article believes that the constitutional issue raised by *Stern* is capable of simple resolution. In sum, *Stern* is not a sign

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2. 131 S. Ct. 2594 (2011).

3. The "Bankruptcy Code" refers to bankruptcy statutes enacted by Congress that replace the Bankruptcy Act of 1898. These bankruptcy statutes are codified at various places in Title 11 and Title 28 of the United States Code. Included in the Bankruptcy Code is the Bankruptcy Reform Act of 1978 and the Bankruptcy Amendments and Federal Judgeship Act of 1984. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1339 (2010)), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

4. "Core" proceedings are defined as proceedings "arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1) (2010). A non-inclusive list of "core" proceedings is provided in 28 U.S.C. § 157(b)(2). *See infra* text accompanying notes 58-63.

5. The "public rights" exception is the theory that a congressionally created tribunal may finally adjudicate matters that are closely intertwined with a federal regulatory scheme or program. *See infra* Part II.A.

6. The "consent" doctrine is the theory that parties may consent to have matter finally adjudicated by a non-Article III tribunal. *See infra* Part II.C.

7. The "adjunct" justification is the theory that the exercise of "judicial power" by a non-Article III tribunal is appropriate, when that tribunal is acting as an adjunct or arm of an Article III court. *See infra* Part II.B.

that the sky is falling; it is just another earthquake from which a successful recovery effort may be had.

Part I of this article will examine how bankruptcy court jurisdiction has evolved to this point, and will also attempt to highlight the constitutional issues that give rise to the debate in *Stern*. Part II will explain the current jurisdictional scheme in bankruptcy and the three posts that both courts and academics have relied upon in justifying the ability of bankruptcy courts to adjudicate core proceedings in bankruptcy with finality. Part III will describe the Supreme Court decision in *Stern* and explain why the fusion of its holding with prior Supreme Court decisions in this area has greatly captivated the bankruptcy bar. Finally, Part IV will offer concrete solutions to the jurisdictional quandary facing the bankruptcy courts.

II. EVOLUTION OF BANKRUPTCY COURT JURISDICTION

Not all courts in the Federal System are created equal. Federal district courts derive their power from Article III of the United States Constitution, which states:

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[8]

Federal judges who enjoy lifetime tenure *and* statutory protection against salary diminution are referred to as "Article III judges."[9] According to Article III, the "judicial power of the United States" may *only* be vested in Article III judges.[10] Bankruptcy judges are Article I judges.[11] They do not enjoy the protections of Article III as they serve fourteen year terms and are subject to removal for "incompetence, misconduct, neglect of duty, or physical or mental

8. U.S. CONST. art. III, § 1.
9. Celotex v. Edwards, 514 U.S. 300, 320 (1995).
10. *See* U.S. CONST. art. III, § 1.
11. "Article I courts" are "[t]ribunals inferior to the supreme Court" created by Congress pursuant to the power delegated to it by Article I, Section 8 of the United States Constitution. U.S. CONST. art. I, § 8, cl. 9.

disability . . . ."[12] According to the Supreme Court, it would violate separation of powers principles if other branches of the federal government were permitted to create court systems apart from those existing under Article III.[13]

The issue in *Stern* was whether the bankruptcy court was constitutionally permitted to enter a *final* judgment in a core proceeding regarding a state-law counterclaim.[14] Thus, in light of the separation of powers issue implicated in Article III, *Stern* primarily concerns the ability of bankruptcy courts to finally *adjudicate* certain matters—not the bankruptcy courts' subject matter jurisdiction.[15]

In other words, under the current iteration of the Bankruptcy Code, bankruptcy courts have the ability to enter "dispositive judgments" in certain matters.[16] The Supreme Court has held that the ability to enter "dispositive judgments" is, in fact, the exercise of judicial power.[17] Therefore, it would appear that with regard to certain matters, Article I bankruptcy courts are exercising the "judicial power of the United States"[18] in contravention of Article III. It is this exercise of "judicial power" by non-Article III bankruptcy judges which is at the heart of the debate in *Stern*. To understand the impact of the *Stern* holding (either real or imagined) as well as the depth of this latent constitutional issue, some background regarding the origins of bankruptcy court jurisdiction is essential.

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12. *See* 28 U.S.C. §§ 152(a)(1), (e) (2010).

13. *See* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 52, 58-62 (1982) (plurality opinion).

14. Stern v. Marshall, 131 S. Ct. 2594, 2608 (2011).

15. *Stern*, 131 S. Ct. at 2607. *See also* Oxford Expositions, L.L.C. v. Questex Media Grp., L.L.C. (*In re* Oxford Expositions, LLC), Bankr. No. 10-16218-DWH, Adv. No. 11-01095-DWH, 2011 WL 4054872, at *7 (Bankr. N.D. Miss. Sept. 12, 2011) ("There are some students of bankruptcy lore who are concerned that *Stern* impacts the subject matter jurisdiction of the bankruptcy courts. This court does not believe that is the case at all."); *In re* Olde Prairie Block Owner, L.L.C., No. 10 B 22668, 2011 WL 3792406, at *7 (Bankr. N.D. Ill. Aug. 25, 2011) ("*Stern* addressed only what a Bankruptcy Judge may do once a case is referred to it, not whether that judge has jurisdiction to hear the case at all."); Fairchild Liquidating Trust v. N.Y. (*In re* Fairchild Corp.), 452 B.R. 525, 530 n.14 (Bankr. D. Del. 2011) ("*Stern v. Marshall* is not a case about subject matter jurisdiction. Rather it addresses the power of the bankruptcy court to enter final orders, assuming that subject matter jurisdiction exists.").

16. *See* 28 U.S.C. § 157(a). Certain bankruptcy court judgments are "dispositive" because Article II district courts maintain only the traditional scope of appellate review over these bankruptcy court decisions. FED. R. BANK. P. 8013. As a result, factual findings of the bankruptcy courts may only be set aside if they are found to be "clearly erroneous." *Id.*

17. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219-20 (1995).

18. U.S. CONST. art. III, § 1.

A. *Bankruptcy Origins*

Under the Bankruptcy Act of 1898,[19] federal district courts had original jurisdiction over bankruptcy actions, but that jurisdiction was exercised through automatic referral of certain proceedings to referees[20] in bankruptcy.[21] The scope of a referee's jurisdiction under the Bankruptcy Act of 1898 depended in large measure upon whether an action constituted a "summary" proceeding as opposed to a "plenary" proceeding.[22] "Summary jurisdiction" referred to proceedings relating to the administration of the bankruptcy estate.[23] For example, matters relating to the disposition of any property in the actual or constructive possession of the debtor at the time the debtor's petition for relief was filed could be heard by the referee sitting in bankruptcy.[24] "Plenary" matters were those matters concerning property in the possession of a third party that had not consented to the bankruptcy court's jurisdiction.[25] Under the Bankruptcy Act of 1898, the referees in bankruptcy (and sub-

19. Bankruptcy Act of 1898, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1339 (2010)). The Bankruptcy Act of 1898 was the first "permanent" bankruptcy legislation in the United States. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 765 (2000). There were three prior bankruptcy acts, all of which were passed in response to financial crises and repealed shortly after their passage: 1) Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (*amended* 1801 & 1802 *and repealed* 1803); 2) Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (*repealed* 1843); 3) Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (*amended* 1868, 1870, 172, 1873, 1874 & 1876 *and repealed* 1878).

20. Prior to 1973, bankruptcy judges were not known as "judges." *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 n.2 (1982) (plurality opinion). Rather, they were known as "referees in bankruptcy." *Id.* The Federal Rules of Bankruptcy Procedure, originally promulgated by the Supreme Court in 1973, re-designated bankruptcy referees as "bankruptcy judges." Vern Countryman, *The Bankruptcy Judges: Jurisdiction by Neglect*, 92 COM. L.J. 1, 1 n.1 (1987).

21. John C. McCoid, II, *Symposium on Jury Trials in Bankruptcy Courts: Right to Jury Trial in Bankruptcy:* Granfinanciera, S.A. v. Nordberg, 65 AM. BANKR. L.J. 15, 36 (1991). *See also* Brubaker, *supra* note 20, at 767-69 (2000).

22. Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 531-32, 532 n.13 (1998) (juxtaposing jurisdiction over "summary" and "plenary" matters under the Bankruptcy Act of 1898).

23. Katchen v. Landy, 382 U.S. 323, 327 (1966) (decided under the Bankruptcy Act of 1898). Examples of matters "relating to the administration" of the bankruptcy estate would be allowance of claims, distribution of assets, and discharge of indebtedness. *See* Bankruptcy Act of 1898, § 2, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1339 (2010)).

24. *Katchen*, 382 U.S. at 327. In addition, if the non-bankrupt litigant consented, either actually or constructively, to the exercise of jurisdiction of the bankruptcy court, "summary jurisdiction" would attach. *See* Bankruptcy Act of 1898, §§ 38-39, 30 Stat. 544, 552 (1898), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1339 (2010)).

25. Block-Lieb, *supra* note 23, at 532.

sequently the federal courts) were denied jurisdiction over these plenary matters.[26] As a result, plenary matters were typically litigated in state court.[27] Litigation of plenary matters would only occur in a federal court if diversity or federal question jurisdiction was present.[28]

Under the Bankruptcy Act of 1898, "the courts had generally drawn the line between equity and law along the same border that divided 'summary' from 'plenary' jurisdiction."[29] While it was clear that bankruptcy courts could only exercise summary jurisdiction,[30] the distinction between summary jurisdiction and plenary jurisdiction was not always so clear.[31] As a result, wasteful litigation often ensued, creating a significant delay in the administration of bankruptcy cases.[32] The inefficiency of this bifurcated jurisdictional scheme was sought to be avoided in what was to become the new Bankruptcy Code.[33]

The Bankruptcy Act of 1898 was ultimately repealed by the Bankruptcy Reform Act of 1978 ("1978 Act").[34] The effect of the repeal was that Congress conferred on district courts original and exclusive jurisdiction over "all cases under title 11."[35] Further,

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26. Brubaker, *supra* note 20, at 765.

27. *See* Block-Lieb, *supra* note 23, at 532.

28. *See id.*

29. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 799 (6th ed. 2009).

30. *Id.* at 799-800.

31. For example, preference actions, which are actions to avoid the transfer of a debtor's interest in property to a third party, would typically constitute a "plenary" matter, as the transferred property would be located in the hands of a third-party transferee. However, in *Katchen*, the Court found that because the third-party creditor in possession of the property in question had filed a claim in the case, the Court concluded that the preference action was converted into one in which the bankruptcy referee had "summary" jurisdiction. *Katchen*, 382 U.S. at 330-31. By filing a claim, the creditor had converted the legal nature of the preference action into an equitable one. *Id.*

32. Block-Lieb, *supra* note 23, at 532. *See also* Countryman, *supra* note 21, at 2.

33. Countryman, *supra* note 21, at 3. A primary purpose behind the repeal was judicial economy. One commentator observed that:

> One of the principal objectives of the Bankruptcy Reform Act of 1978 . . . was to eliminate the "possession" and "consent" limitations on the bankruptcy judge's power to determine disputes that arise in bankruptcy cases. Further, the 1978 [Act] gave the new bankruptcy judges jurisdiction over those plenary matters that previously had to be brought in the state courts. Thus, the 1978 [Act] envisioned the creation of a bankruptcy court that could provide a single forum with pervasive jurisdiction over all matters that might affect the administration of the bankruptcy case.

G. Ray Warner, *Rotten to the "Core": An Essay on Juries, Jurisdiction, and* Granfinanciera, 59 U. MO. KAN. CITY L. REV. 991, 992-93 (1991) (footnotes omitted) (citations omitted).

34. Bankruptcy Act of 1898, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1339 (2010)).

35. 28 U.S.C. § 1471(a) (2010) (repealed 1984).

Congress granted bankruptcy courts the authority to exercise "all" bankruptcy jurisdiction granted to the district courts.[36] Therefore, Congress' initial grant of jurisdiction to bankruptcy courts encompassed not only matters "arising under" the Bankruptcy Code, but all those matters "arising in" and "related to" the Bankruptcy Code. A review of legislative history reveals that the apparent purpose behind such a broad grant of jurisdiction was to "greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money and energy of the bankruptcy system and of those involved in the administration of debtors' affairs."[37]

It also appears from a review of the history surrounding passage of the 1978 Act that bankruptcy judges were originally intended to be designated as Article III judges.[38] However, the Senate version of the bill that ultimately passed[39] left bankruptcy judges without Article III status.[40] Despite the absence of Article III status, bankruptcy judges were now permitted to exercise jurisdiction over all matters so long as the suit "arose under" or was "related to" a case under the 1978 Act.[41] Thus arose the current constitutional issue concerning the exercise of "judicial power" by non-Article III bankruptcy courts.[42]

The 1978 Act was only in place for four years until its jurisdictional provision, the former 28 U.S.C. § 1471, was deemed unconstitutional by the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[43] In *Marathon*, a debtor seeking to reorganize under Chapter 11 of the Bankruptcy Code filed suit against Marathon Pipe Line Co., an entity that had not filed a claim against the estate, alleging several state law causes of ac-

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36. *Id.* § 1471(b) (repealed 1984).

37. H.R. REP. NO. 95-595, at 34 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6007.

38. Block-Lieb, *supra* note 23, at 532 n.17. The house bill, as originally drafted, contemplated a broad grant of jurisdiction to bankruptcy courts as Article III courts. *Id.* (citing H.R. 8200, 95th Cong. (1977); *see also* H.R. REP. NO. 95-595).

39. For a detailed discussion regarding the political pressure and negotiations surrounding the passage of the 1978 Act, see The Honorable Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978* (pts. 1-4), 81 AM BANKR. L.J. 1, 165, 341, 515 (2007); (pt. 5), 82 AM. BANKR. L.J. 175 (2008).

40. *See* S. REP. NO. 95-989, at 14-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5801-5805.

41. 28 U.S.C. § 1480 (1976 ed. & Supp. III), *repealed by* Bankruptcy Amendments and Federal Judgment Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

42. The Honorable Howard Schwartzberg, *The Retreat from Pervasive Jurisdiction in Bankruptcy Court*, 7 EMORY BANKR. DEV. J. 1, 5 (1990) (highlighting the "constitutional flaw" created by Congress' failure to bestow Article III status on bankruptcy judges).

43. 458 U.S. 50, 87 (1982) (plurality opinion).

tion including breach of contract, coercion, and misrepresentation.[44] Marathon filed a motion to dismiss the counts, alleging that the 1978 Act unconstitutionally conferred Article III judicial power on bankruptcy judges, who lacked the requisite life-time tenure and protections against salary diminution.[45]

The bankruptcy court denied Marathon's motion; however, the district court reversed and held that Congress' broad delegation of authority to bankruptcy judges was unconstitutional.[46] On direct appeal, the Supreme Court affirmed, finding the jurisdictional grant of power accorded to the bankruptcy courts by the 1978 Act to be unconstitutional.[47] Specifically, a plurality of the Supreme Court determined that the 1978 Act impermissibly vested the "judicial power of the United States" in the bankruptcy courts, because bankruptcy judges lacked the lifetime tenure and salary protections required by Article III of the United States Constitution.[48] In so doing, the plurality rejected the 1978 Act's broad grant of power to the Article I bankruptcy courts over matters typically left to Article III courts.[49]

While the plurality in *Marathon* found that Congress had gone beyond what was allowed by the Constitution, it did identify three exceptions that would allow non-Article III tribunals to exercise the "judicial power of the United States."[50] The first exception cited by the Supreme Court allows Congress to create "legislative courts" for the District of Columbia and the United States territories.[51] Court martials are also exempt, as Congress and the Executive branch (the Commander-in-Chief) have extraordinary leeway in military affairs.[52] Finally, the plurality identified the "public rights" exception.[53]

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44. *Marathon*, 458 U.S. at 56.

45. *Id.* The United States intervened for the purpose of defending the constitutionality of the statute. *Id.*

46. Marathon Pipe Line Co. v. N. Pipeline Constr. Co., 12 B.R. 946, 947 (D. Minn. 1981), *aff'd*, 458 U.S. 50, 87 (1982).

47. *Marathon*, 458 U.S. at 88.

48. *Id.* at 60-61.

49. *See, e.g.*, H.R. REP. NO. 95-595, at 39 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6000 ("Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context.").

50. *Marathon*, 458 U.S. at 64-70; *see also In re* Clay, 35 F.3d 190, 192 (5th Cir. 1994).

51. *Marathon*, 458 U.S. at 64-65.

52. *Id.* at 67-70.

53. *Id.* at 67.

The "public rights" exception to the exercise of Article III jurisdiction by non-Article III courts is at the center of the *Stern* decision. It was also at the center of the Supreme Court's decision in *Marathon*.[54] The plurality in *Marathon* recognized that Congress had the authority to create tribunals with the ability to adjudicate cases involving public rights, despite the provisions of Article III.[55] The plurality defined "public rights" as encompassing only those matters arising between the United States government "and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments . . . ."[56] Conversely, "private rights" were defined as involving a dispute between two private parties under state law.[57] The plurality reasoned that as an Article I court, the bankruptcy court could not be vested with original and exclusive jurisdiction over suits involving private rights that would otherwise need to be tried by an Article III court.[58] Consequently, the plurality declined to uphold the constitutionality of the jurisdictional provision of the 1978 Act under the public rights exception, because the dispute in *Marathon* was between two private parties concerning liability under state law.[59]

The plurality in *Marathon* also rejected the suggestion that the 1978 Act properly delegated certain judicial functions to the bankruptcy court as an "adjunct" of the district court. Citing two prior decisions,[60] the plurality explained that when Congress creates a substantive federal right it maintains the discretion to determine the way in which that right will be adjudicated, including the right to delegate judicial functions to an adjunct, non-Article III tribunal.[61] The exercise of authority by the adjunct will be valid so long as it does not grant the "essential attributes" of judicial power to the non-Article III body.[62] Because the 1978 Act provided bank-

54. *Id.* at 67-72.
55. *Id.*
56. *Marathon*, 458 U.S. at 67-68 (citations omitted).
57. *Id.* at 69-70.
58. *Id.* at 77.
59. *Id.* at 67-68.
60. The two decisions are: Crowell v. Benson, 285 U.S. 22, 60-63 (1932) (upholding the constitutionality of a statutory grant of authority to a federal administrative agency to make factual findings in cases involving work-related injuries occurring in the navigable waterways of the United States) and United States v. Raddatz, 447 U.S. 667, 683-84 (1980) (validating provisions of the 1978 Federal Magistrates Act that permitted the reference of certain pretrial criminal motions to a magistrate judge for an initial determination).
61. *Marathon*, 458 U.S. at 78-86.
62. *Id.* at 81.

ruptcy courts with jurisdiction over traditional matters in bankruptcy as well as *all* related civil proceedings, the plurality struck down the jurisdictional provision of the 1978 Act.[63]

B. Post-Marathon

In response to the Supreme Court's decision in *Marathon*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("1984 Amendments").[64] The 1984 Amendments vested the district courts with "original and exclusive jurisdiction of all cases under title 11"[65] and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[66] The district courts then had the option to refer any or all of these proceedings to the bankruptcy court in their given district.[67] Even after a bankruptcy matter was referred to the bankruptcy court, the district court maintained the power under the 1984 Amendments to withdraw the matter from the bankruptcy courts (i.e. to essentially take the case or proceedings back) upon a motion and "cause shown" by any party or *sua sponte*.[68] Unlike the 1978 Act, which provided that the bankruptcy courts would operate independently of the federal district courts, the 1984 Amendments unequivocally provided that the bankruptcy courts were to operate as a "unit of the district court."[69]

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63. *Id.* at 84-85.

64. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). Despite the Supreme Court twice staying the effect of its *Marathon* holding, Congress was unable to pass legislation to address the issue of bankruptcy court jurisdiction, and the *Marathon* decision went into effect on Christmas Eve of 1982. WARREN & WESTBROOK, *supra* note 30, at 802. In the interim, bankruptcy courts continued to operate under an "Emergency Rule" adopted by the district courts. *Id.* The statutory scheme regarding bankruptcy jurisdiction in the 1984 Amendments closely reflected the Emergency Rule fashioned by the Administrative Office of the Courts in an attempt to accommodate the plurality decision in *Marathon*. 130 CONG. REC. H1847 (daily ed. Mar. 21, 1984) (statement of Rep. Thomas Kindness of Ohio) (stating that the 1984 Amendments were "essentially a legislative enactment of the emergency bankruptcy rule, the model rule that has been in effect, under which the bankruptcy courts have been operating").

65. 28 U.S.C. § 1334(a) (2010).

66. *Id.* § 1334(b).

67. *Id.* §§ 151, 157(d).

68. *Id.* § 157(d) ("Upon a motion of any party, district courts shall withdraw the reference of matters to the bankruptcy courts if a resolution of the proceeding at issue requires consideration of bankruptcy law issues and laws regulating interstate commerce.").

69. *Id.* § 151. The text of § 151 states that:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district.

The extent to which a bankruptcy court could exercise its authority over actions referred by the district court depended upon whether the matter was a "core" or a "non-core" proceeding.[70] The 1984 Amendments set out a non-exclusive list of items categorized as "core" proceedings;[71] but remained silent as to what constitutes a "non-core" (or "related to") proceeding.[72]

Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

70. 28 U.S.C. § 157(b)(1)-(2).

71. *Id.* § 157(b)(2). Section 157(b)(2) states in its entirety that:

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

Id. Section 157(b)(2)(P) was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L. No. 109-8, 119 Stat. 23, § 802 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). Hon. William L. Norton, Jr., Commentary, 28 U.S.C. § 157, Norton Bankruptcy Code, NORTON BANKRUPTCY LAW AND PRACTICE (Thompson Reuters 2011).

72. *See* 28 U.S.C. § 157(c). This § uses the term "related to" and "non-core" synonymously. The United States Court of Appeals for the Third Circuit embraces the broadest definition of this "related to" jurisdiction, defining such a proceeding as follows:

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, op-

The 1984 Amendments further provided that if a matter is deemed to be a core proceeding, the bankruptcy judge may enter a final judgment on the matter, subject only to traditional appellate review.[73] However, in non-core proceedings, the bankruptcy judge may only hear the proceeding and submit proposed findings of fact and conclusions of law to the district court which, in-turn, shall review de novo any "matters to which any party has timely and specifically objected."[74] This provision also allows the bankruptcy courts to enter a final order in an "otherwise related" case,[75] but only upon the consent of all parties.[76]

Despite the Congressional attempts in the 1984 Amendments to create an ironclad system for bankruptcy court adjudication of proceedings "arising in," "arising under," and "related to" title 11, it does not appear as though the attempt successfully addressed the full body of concerns raised by the Supreme Court in *Marathon*.[77]

C. *Constitutionality Questioned*

The first crack in the constitutionality of the jurisdictional scheme created by the 1984 Amendments appeared in *Granfinanciera, S.A. v. Nordberg*.[78] While not directly addressing the issue of whether non-Article III judges were constitutionally permitted to finally adjudicate "core" proceedings, the opinion was the only point at which the Supreme Court weighed-in on the constitutionality of the 1984 Amendments, prior to its decision in *Stern*.[79]

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tions, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (citations omitted).

73. *See* 28 U.S.C. §§ 157(b)(1), 158; *see also* FED. R. BANKR. P. 8013 (providing that a bankruptcy judge's findings of fact should not be set aside unless "clearly erroneous").

74. 28 U.S.C. § 157(c)(1). *See also* FED. R. BANKR. P. 9033.

75. *See id.* § 157(c).

76. *Id.* § 157(c)(2). The Federal Rules of Bankruptcy Procedure, adopted in 1987, require parties to state in their pleadings whether they concede to the entry of a final order or judgment by the bankruptcy judge. FED. R. BANKR. P. 7008(a), 7012(b). However, nothing in the statue or in the rule defines "consent" or provides any direction as to whether such consent can be implied.

77. *See generally* Jeffrey T. Ferriell, *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 AM. BANKR. L.J. 109 (1989) (questioning the constitutionality of the 1984 Amendments prior to *Granfinanciera*).

78. 492 U.S. 33 (1989).

79. It could be argued that the latent constitutional issues underlying the grant of jurisdiction embodied by the 1984 Amendments were also questioned in the dissent penned by Justice Stevens in Celotex v. Edwards, 514 U.S. 300 (1995). In his dissent, Justice Stevens voiced his disapproval of the majority holding which acknowledged a bankruptcy

The facts of *Granfinanciera* are relatively straightforward. In 1983, Chase & Sanborn Corporation ("Chase") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.[80] Shortly thereafter, Paul Nordberg was appointed as the Chapter 11 trustee.[81] In 1985, Nordberg filed a fraudulent transfer action in district court against two of Chase's creditors,[82] seeking to recover monetary transfers of $1.7 million that occurred within one year of the bankruptcy filing.[83] The district court referred the proceeding to the bankruptcy court.[84] In response to the complaint, the two creditors, which had not filed proofs of claim in the bankruptcy case, denied any liability and requested a "trial by jury on all issues so triable."[85]

The bankruptcy court reasoned that because the fraudulent conveyance action was a core proceeding, the parties did not have a right to a jury trial, and the court denied the creditors' request.[86] Following a bench trial, judgment was entered in favor of the trustee and against the creditors.[87] The creditors appealed.[88] Both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit affirmed.[89]

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court's ability to enter an injunction staying judgment creditors from enforcing a supersedeas bond issue prepetition pursuant to 11 U.S.C. § 105. *See Celotex*, 514 U.S. at 313-14 (Stevens, J., dissenting). Justice Stevens, joined by Justice Ginsberg, clearly alluded to the constitutional concerns not entirely addressed by the 1984 Amendments. *Id.* at 322-23. Justice Stevens stated that "[t]he constitutional concerns that animate the current jurisdictional provisions of the Bankruptcy Code and that deny non-Article III tribunals the power to determine private controversies apply with equal force to the entry of an injunction interfering with the exercise of the admitted jurisdiction of an Article III tribunal." *Id.*

80. *Granfinanciera*, 492 U.S. at 36.

81. *Id.*

82. *Id.* The creditors, Granfinanciera, S.A. and Medex, Ltd., were subsequently nationalized by the Columbian government. *See id.* at 36-38.

83. *Id.* at 36.

84. *Id.*

85. *Granfinanciera*, 492 U.S. at 36-37.

86. *Id.* at 37. The rationale the bankruptcy judge used to support the decision was to equate a core proceeding with one that would have previously fallen within the bankruptcy court's plenary jurisdiction under the Bankruptcy Act of 1898. Thus, according to the bankruptcy court, the legal dispute between the parties was converted into one that was equitable in nature. *See id.* ("The Bankruptcy Judge denied [the creditors'] request for a jury trial, deeming a suit to recover a fraudulent transfer 'a core action that originally, under the English common law . . . was a non-jury issue.'").

87. *Id.* In particular, the bankruptcy court dismissed with prejudice the trustee's actual fraud claim, but awarded the trustee judgment on its constructive fraud claim. *Id.*

88. *Id.*

89. *Id.*

Certiorari was granted so that the Supreme Court could address the issue of "whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer."[90] Upon consideration, a divided Supreme Court held that such a party was indeed entitled to a trial by jury, "notwithstanding Congress' designation of fraudulent conveyance actions as 'core proceedings' in 28 U.S.C. § 157(b)(2)(H) (1982 ed., Supp. V)."[91]

In an opinion written by Justice Brennan (the author of the Court's plurality in *Marathon*), the majority in *Granfinanciera* used a three-part test to determine whether the bankruptcy court's adjudication of the trustee's suit would violate the creditors' Seventh Amendment right to a jury trial.[92] Justice Brennan wrote:

> The form of our analysis is familiar. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature . . . [Third] [i]f, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder."[93]

As to its application of the first two parts of this test, the majority cited to the Supreme Court's decision in *Schoenthal v. Irving Trust Co.*[94] and concluded that prior to the merger of law and equity, actions to recover fraudulent conveyances[95] of a specific sum of money were often tried in courts of law rather than courts of equity.[96] The majority also concluded that the relief sought by the

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90. *Granfinanciera* 492 U.S. at 36.

91. *Id.* Therefore, the Supreme Court reversed and remanded the Eleventh Circuit's decision. *Id.* at 38.

92. *Id.* at 42.

93. *Id.* (footnotes omitted) (citations omitted). It is important to recognize that the first two parts of this analysis derive from *Tull v. United States.*, 481 U.S. 412, 417-18 (1987).

94. 287 U.S. 92 (1932).

95. *Granfinanciera*, 492 U.S. at 43 (quoting *Schoenthal*, 287 U.S at 94). Also, actions to recover preferential transfers were brought at law. *Id.*

96. *Id.*

trustee (i.e., a money judgment)[97] was inherently legal in nature.[98] Thus, the majority concluded that the creditors did indeed have a Seventh Amendment right to jury trial.[99]

After completing the Seventh Amendment evaluation, the Court moved to the third prong of its analysis to determine whether Congress improperly assigned the fraudulent conveyance action to a non-Article III court that does not use a jury as a fact-finder.[100] Relying on *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,[101] the Supreme Court stated:

> In *Atlas Roofing*, we noted that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that [the right to a] jury trial is to be 'preserved' in 'suits at common law.'" We emphasized, however, that Congress' power to block application of the Seventh Amendment to a cause of action has limits. Congress may only deny trials by jury in actions at law, we said, in cases where "public rights" are litigated: "Our prior cases support administrative factfinding in only those situations involving 'public rights,' *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated."[102]

The majority also noted that a cause of action may involve a public right if Congress has created a right "so closely integrated into a

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97. *See id.* at 49 n.7.

98. *Id.* at 49.

99. *Id.* at 50.

100. *Granfinanciera*, 492 U.S. at 50 ("The sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them.").

101. 430 U.S. 442 (1977).

102. *Granfinanciera*, 492 U.S. at 51 (footnotes omitted) (citations omitted). It must be noted that the majority's reliance on the "administrative agency" line of reasoning in *Atlas* has been questioned. *See* Warner, *supra* note 34, at 1001-09, 1014-16 (footnote omitted) (explaining that what the Supreme Court was considering in *Granfinanciera* was actually "what *powers* are included in the judicial power", *not* "what *matters* are within the judicial power" and, therefore, the majority should have applied the reasoning in *U.S. v. Raddatz*, 447 U.S. 667 (1980), not the line of reasoning used in *Atlas*).

public regulatory scheme as to be a matter appropriate for agency resolution."[103]

With regard to the matter before it, the majority found that fraudulent conveyance actions "are quintessentially suits at common law" [104] and, as a result, were not "so closely integrated to a public regulatory scheme"[105] as to justify a public rights exception to the requirement that the actions must be heard by an Article III court.[106] Therefore, the majority concluded that because the fraudulent conveyance actions implicated private rights, the adjudication of the suits without affording the parties the opportunity to have a jury trial was violative of the Seventh Amendment.[107] While the decision clearly indicated that parties asserting "private rights" had a right to a jury trial, the question of whether bankruptcy judges would be permitted to preside over such jury trials was left unanswered.[108]

Despite the seemingly narrow scope of the issue in *Granfinanciera*, the majority intimated that the appropriate analysis for evaluating whether a party was entitled to a jury trial right would be the same as the analysis for evaluating whether a non-Article III court could hear and enter a final decision on a given proceeding.[109] Specifically, the majority stated:

> [T]he question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as fact finders requires the same answer as the

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103. *Granfinanciera*, 492 U.S. at 54 (quoting Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 593-94 (1985)).

104. *Id.* at 56.

105. *Id.*

106. *Id.* at 54-56.

107. *Id.*

108. *Granfinanciera*, 492 U.S. at 64. Specifically, the majority stated that:

> We do not decide today whether the current jury trial provision—28 U.S.C. § 1411—permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions.

Id. (footnote omitted) (citation omitted).

109. *Id.* at 53. Certain academics have expressed doubts as to whether the test for Seventh Amendment and Article III rights will be the same in all instances. *See* Warner, *supra* note 34, at 1001-09 (asserting that, based on the language in the *Granfinanciera* decision, there may actually exist two interrelated tests for evaluating a jury trial right and the right to have a matter finally adjudicated by an Article III tribunal).

> question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.[110]

Several commentators agree that the majority's *Granfinanciera* decision requires application of the same test when determining a litigant's rights to a jury trial and that litigant's right to be heard by an Article III court.[111]

Following *Granfinanciera*, it seemed evident that if a matter concerned a private right, the parties were entitled to a jury trial and to have the matter adjudicated by an Article III tribunal. By negative implication, this meant that bankruptcy courts, as non-Article III courts, were not permitted to finally adjudicate matters involving private rights. Applying the public rights versus private rights dichotomy, *Granfinanciera* thus stands for the proposition that bankruptcy courts may not finally adjudicate certain matters that do not fall under the public rights exception to the exercise of judicial power by non-Article III courts.

The potential implications of the majority holding in *Granfinanciera* were recognized by Justices White, O'Connor, and Blackmun

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110. *Granfinanciera*, 492 U.S. at 53.

111. *See, e.g.*, S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 168-69 (1991) (recognizing that the majority in *Granfinanciera* "expressly equated" the analysis regarding jury trial rights with the analysis concerning the rights to adjudication by an Article III tribunal); Richard Lieb, *Can a Bankruptcy Judge Constitutionally Hear and Determine a "Core" Proceeding?*, 6 NORTON BANKR. L. ADV. 1 (1997) (citing *Granfinanciera*, 492 U.S. at 53) ("[T]he test for whether a determination by an Article III court is necessary for [a fraudulent conveyance] action is the same as the test to determine whether a party has a Seventh Amendment right to a jury trial.").

While the 1994 Amendments appeared to resolve the issue of jury trials, there was never any analysis concerning the constitutionality of the grant of jurisdiction over these matters. In 1994, Congress passed the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 ("Reform Act"). Section 112 of the Reform Act shows that Congress attempted to resolve a split between the circuits regarding whether the 1984 Amendments provided bankruptcy judges with the express or implied authority to preside over jury trials in "core" proceedings. Specifically, § 112 amended 28 U.S.C. § 157 (2010), by adding subsection (e), which states that:

> If the right to a jury trial applies in a proceeding that may be heard . . . by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specifically designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

Id. § 157(e). Although this new subsection seems to eliminate any questions concerning the statutory authority of bankruptcy judges to preside over jury trials, it does not resolve the nascent Article III problem, i.e., that only judges who enjoy lifetime tenure and protection against salary diminution may exercise the "judicial power" of the United States. In fact, the subsection appears only to set the stage for the Supreme Court to revisit its prior decision in *Marathon*, to determine whether § 112 itself impermissibly vests Article III judicial power in a court whose judges lack both lifetime tenure and protection against salary diminution.

in their dissents. Specifically, Justice Blackmun stated that "it must be acknowledged that Congress has legislated treacherously close to the constitutional line . . . [although] I cannot say that Congress has crossed the constitutional line on the facts of this case. . . . [T]he Court today throws Congress into still another round of bankruptcy court reform, without compelling reason."[112] However, this legislative reform never actually occurred, and, as a result, lingering questions remained regarding the constitutionality of the jurisdictional scheme contained in the 1984 Amendments.

III. THE POST-*GRANFINANCIERA* ANALYSIS—MAKALÍDUÑG'S THREE POSTS

In the more than twenty years that elapsed between *Granfinanciera* and the recent opinion in *Stern*, courts have largely managed to avoid the nascent jurisdictional issue arising out of bankruptcy court adjudication of certain core matters.[113] The constitutional issue did not, however, escape academia, which produced a litany of articles concerning this "latent" defect.[114]

As stated by implication in *Granfinanciera*, and later recognized by *Stern*, just because a matter is classified as a core proceeding under 28 U.S.C. § 157(b)(2), does not mean that final adjudication by a non-Article III bankruptcy judge is constitutional.[115] The problem is the ability of non-Article III bankruptcy courts to make findings of fact with regard to core matters that are subject only to a "clearly erroneous" standard of review by Article III judges[116]. However, this is not a problem as to *all* matters currently designated as core. As articulated in *Stern*, the bankruptcy courts' abil-

112. *Granfinanciera*, 492 U.S. at 94-95 (Blackmun, J., dissenting).

113. *See, e.g.*, Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), Bankr. No. 05-00690, Adv. No. 07-80037, 2011 WL 3610050, at *1 (Bankr. W.D. Mich. Aug. 17, 2011) (Judge Hughes stated that for over twenty-five years, he and his colleagues have operated under the understanding that they were capable of entering final judgments). This follows the prescribed rule that courts should not address a constitutional question unless there are no alternate grounds upon which a case can be decided. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936).

114. *See, e.g.*, William L. Norton, Jr., *Constitutionality of 1984 Jurisdictional Structure*, 1 NORTON BANKR. L. & PRAC., 3d § 4:41 (2011); Lieb, *supra* note 112 (recognizing the constitutional infirmity in the jurisdictional scheme under the 1984 Amendments); Gibson, *supra* note 112, at 169; Warner, *supra* note 34, at 1009. *See also In re Teleservices*, 2011 WL 3610050, at *3 (same).

115. Stern v. Marshall, 131 S. Ct. 2594, 2608 (2011). *See also Granfinanciera*, 492 U.S. at 56 n.11.

116. FED. R. BANKR. P. 8013.

ity to make final determinations is only unconstitutional with regard to matters "which, from [their] nature, [are] the subject of a suit at the common law, or in equity, or admiralty."[117] These types of matters are commonly known as Article III cases and controversies. Conversely, the adjudication of matters that concern narrow rights created by a legislative body are not Article III cases and controversies, and they fall outside the "judicial power of the United States."[118] Therefore, adjudication of such other matters does not offend the separation of powers doctrine as embodied in the protections of Article III.[119]

While the Supreme Court has not made any specific determination with regard to whether bankruptcy judges may constitutionally enter a final judgment on a case or controversy under Article III, there are three primary ways in which courts and academics have attempted to justify this exercise of "judicial power" by non-Article III bankruptcy courts in the time since *Granfinanciera*. These three posts supporting a bankruptcy court's ability to "hear and determine" Article III cases and controversies are: the traditional "public rights" exception, the "consent" (or waiver) doctrine, and the "adjunct" justification.[120]

A. Public Rights Exception

The "public rights" exception provides that non-Article III tribunals may hear cases and controversies involving public rights.[121] The public rights exception exists, because there are matters that can be determined by the Executive or Legislative branches of government that do not necessarily require a "judicial" determina-

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117. *Stern*, 131 S. Ct. at 2609 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856)).

118. *See Granfinanciera*, 492 U.S. at 56-57. *See also* U.S. CONST. art. III, § 1.

119. *Stern*, at 2620. *Contra* Lieb, *supra* note 112 (concluding that pursuant to the Supreme Court's decision in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), the entry of any dispositive judgment constituted the exercise of "judicial power").

120. It is important to note that these three posts of Makalíduñg, discussed throughout this article, are different from the three exceptions to the exercise of "judicial power" by non-Article III bankruptcy courts as described by the Supreme Court in *Marathon*. *See supra* text accompanying notes 51-54. Two of the three exceptions, the creation of legislative courts in the District of Columbia and in the U.S. Territories, as well as the creation of court martials, are so narrowly defined that they could not possibly be applied to the Bankruptcy Code. As a result, only the "public rights" exception from the *Marathon* decision applies with regard to the exercise of bankruptcy court jurisdiction. *See* Lieb, *supra* note 112.

121. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (plurality opinion) (quoting *Murray's Lessee*, 59 U.S. at 284).

tion.[122] The determining factors relevant to an analysis of the public rights exception are the nature of the right asserted and/or the party against whom it is being asserted.[123]

What constitutes a public right has been the subject of extensive debate and often incongruous tests by the Supreme Court.[124] Conventionally, the public rights exception was a narrow one, which only applied where rights were asserted "between the government and others."[125] Beginning with the plurality opinion in *Marathon*, however, the Supreme Court appeared to slightly broaden the scope of the public rights exception by stating that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . may well be a 'public right' . . . ."[126] Following *Marathon*, the Court has echoed this slightly expanded notion of public rights.[127] Specifically, two Supreme Court opinions that were issued between the release of *Marathon* and *Granfinanciera* indicated a more flexible approach to defining public rights in reference to the adjudication power of two other non-Article III courts.[128]

In *Thomas v. Union Carbide Agricultural Products Co.*,[129] the Supreme Court narrowly construed the *Marathon* decision. Specifically, the *Thomas* Court concluded that an untenured arbitration panel's final adjudication of disputes over the amount of compensation to be paid for information used in connection with registration of pesticides under the Federal Insecticide, Fungicide, & Rodenticide Act ("FIFRA"), did not violate the requirements of Ar-

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122. *Marathon*, 458 U.S. at 67-68.

123. *Stern*, 131 S. Ct. at 2620.

124. *Id.* at 2611. The majority in *Stern* acknowledged that the Supreme Court's "discussion of the public rights exception . . . has not been entirely consistent . . . ." *Id.*

125. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-68 (1982) (plurality opinion) (citations omitted). As is clear from his concurring opinion in *Stern*, Justice Scalia continues to adhere to this narrow application of the "public rights" exception. *Stern*, 131 S. Ct. at 2620 (Scalia, J., concurring). Justice Scalia stated that he "agree[s] with the Court's interpretations of our Article III precedents . . . . I adhere to my view, however, that . . . 'a matter of public rights . . . must at a minimum arise between the government and others.'" *Id.*. (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65 (1989) (Scalia, J., concurring in part and concurring in judgment)).

126. *Marathon*, 458 U.S. at 71.

127. *See* Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 593-94 (1985) (holding that a public right is found when "Congress . . . has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with little involvement by the Article III judiciary." *Id.* at 593-94. *See also Granfinanciera*, 492 U.S. at 54 (same).

128. *See* Gibson, *supra* note 112, at 171. *See also* Block-Lieb, *supra* note 23, at 553.

129. 473 U.S. at 596-600.

ticle III.[130] The Court in *Thomas* conceptualized the public rights exception to include so called "private rights" that were "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[131] Justice Brennan even recognized in his concurrence that any dispute which "arises in the context of a federal regulatory scheme that virtually occupies the field" could be adjudicated by a non-Article III tribunal under the public rights exception.[132] The reasoning supporting this conclusion appears to be that the governing legislation not only provides the rule of decision that governs the dispute, but also an adjudicative body to resolve it.[133]

Subsequently, in *Commodity Futures Trading Commission v. Schor*, the Supreme Court abandoned the rigid test for application of the public rights exception outlined in *Marathon.* [134] Rather, the Court stated that a '"practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'"[135] In focusing on substance, the Court explained that a number of factors should be weighed, including: the extent to which "essential attributes of judicial power are reserved to Article III courts," the extent of the non-Article III tribunal's powers, the origins and importance of the right to be adjudicated, and the motivations behind Congress' departure from Article III in the given instance.[136] Applying these factors, the Court upheld the constitutionality of regulations which enabled the Congressionally created Commodity Futures Trading Commission (CFTC)[137] to finally adjudicate counterclaims arising out of the same transactional facts as reparations claims.[138] More to the point regarding *Stern*, the *Schor* Court concluded that even though the counterclaims in question were "private rights" based on state law, Article III was not offended because the CFTC's ability to adjudicate such

130. *Id.* at 602.
131. *Id.* at 593-94.
132. *Id.* at 600 (Brennan, J., concurring).
133. *See id.*
134. 478 U.S. 833, 853-54 (1986).
135. *Schor,* 478 U.S. at 847-48 (quoting *Thomas*, 473 U.S. at 587).
136. *Id.* at 851.
137. In *Schor*, an individual filed a complaint against his commodity broker, alleging violations of the Commodity Exchange Act, and after the broker filed a state law counterclaim, the complainant challenged the CFTC's jurisdiction. *Id.* at 837-38. The CFTC is named as a party in the Supreme Court action, because it filed the petition for certiorari following the court of appeals dismissal of the petitioner's counterclaim. *Id.* at 840.
138. *Id.* at 837.

a narrow class of common-law rights would not violate the separation of powers principles.[139]

Because the Supreme Court has broadly applied the public rights exception with regard to other non-Article III tribunals, it is important to examine this exception in the bankruptcy context. While it may be difficult to cast the panoply of core matters embodied in the Bankruptcy Code as each involving a "public right," this analysis has been applied to individual matters in bankruptcy each time the Supreme Court has evaluated the constitutionality of the bankruptcy court jurisdictional scheme.[140] Ultimately the existence of this rationale has been recognized as legitimate by the Supreme Court,[141] yet its scope has never been clearly defined.

B. Adjunct Justification

The second post supporting the ability of bankruptcy courts to finally adjudicate certain matters is the categorization of the bankruptcy courts as functioning "adjuncts" of the district courts. Under the "adjunct justification," the ability of the bankruptcy courts to exercise "judicial power" is excused by their function as a "unit," or true "adjunct," of the district courts, which are vested with original jurisdiction over all matters in bankruptcy.[142]

The adjunct justification has frequently been used as a companion justification for the ability of bankruptcy courts to enter final judgments with regard to core matters in bankruptcy.[143] As an

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139. *Id.* at 854-55.

140. *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2611-13 (2011); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54 (1989); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-64 (1982) (plurality opinion).

141. *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 454-55 (1977) (treating an adversary proceeding to invoke tariff protections against a competitor as a matter of public right); *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929) (same); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 600 (1985) (Brennan, J., concurring) (recognizing the majority holding which characterized a FIFRA compensation scheme as involving a matter of public right).

142. *See* Brief of Petitioner at 58-59 *Stern*, 131 S. Ct. 2594 (No. 10–179), 2010 WL 4688124 at *58-59.

143. *See, e.g.*, Amber Arakaki, *Rethinking Granfinanciera: May the Bankruptcy Court Retain Pre-trial Jurisdiction After Finding a Valid Jury Trial Right?*, 36 HASTINGS CONST. L.Q. 131, 154 (2008-2009) (asserting that by providing the Article III district courts with the option to both refer and withdraw matters from the bankruptcy courts "the validity of bankruptcy jurisdiction may arguably withstand an Article III challenge"); Norton, *supra* note 115 ("[I]t is more likely that district court control established by the 1984 Bankruptcy Amendments, at least in theory, over bankruptcy judges, through the devices of referral or nonreferral, withdrawal and exclusive district court power (absent consent) to enter the 'final' order in 'related' proceedings, may be sufficient involvement of the Article III district court to uphold the 1984 system.").

example, several of the briefs filed in *Stern* cite the adjunct justification as supporting the constitutionality of the bankruptcy court's entry of a final determination with regard to the counterclaim asserted in that case..[144]

The supporting rationale behind the "adjunct" justification is that several features of the jurisdictional scheme adopted by the 1984 Amendments allegedly vest the Article III judiciary with sufficient control over the bankruptcy courts so as not to offend the separation of powers requirements of the Constitution.[145] For example, bankruptcy courts are now cast as "units" of the district courts, and the district courts maintain original jurisdiction over all matters in bankruptcy.[146] Bankruptcy courts may only exercise jurisdiction over core and non-core matters that are "referred" to them by the district courts.[147] Section 157(d) of title 28 permits (and in some instances requires) Article III district courts to withdraw "any case or proceeding" referred to the bankruptcy courts.[148] Finally, bankruptcy judges are appointed and may be removed by members of the Article III judiciary,[149] which ensures that control

144. *See* Brief of Petitioner, *supra* note 143 (explaining that procedural changes of the 1984 Amendments, including Article III courts' exclusive discretion to refer and withdraw cases, two levels of review by Article III courts, and appointment by Article III judges, supports the constitutionality of bankruptcy court jurisdiction over core matters); Brief for the United States as Amicus Curiae Supporting Petitioner at 30-32, *Stern*, 131 S. Ct. 2594 (No. 05-1631), 2010 WL 4717271 at *30-32 (explaining that the "substantial structural differences" between the 1978 Act and the 1984 Amendments, including bankruptcy judge appointment by Article III judges, discretionary referral of bankruptcy matters, and the exercise of appellate jurisdiction over bankruptcy matters by Article III judges, satisfied the constitutional issues identified in *Marathon*); Brief in Support of Petitioner for Amici Curiae Professors Richard Aaron et al. at 8-9, *Stern*, 131 S. Ct. 2594 (No. 05-1631), 2010 WL 4688123 at *8-9 (asserting that the present jurisdictional scheme constitutionally "vests control over the bankruptcy courts in the Article III judiciary").

145. *See* Ferriell, *supra* note 78, at 175-76.

146. Section 151 of title 28 states in pertinent part that "[i]n each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court . . . ." 28 U.S.C. § 151 (2010). *See also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 81-82 (1982) (plurality opinion).

147. 28 U.S.C. § 157(a).

148. *Id.* § 157(d). The mandatory and permissive abstention provisions of 28 U.S.C. § 1334(c) may also help to support the adjunct justification for the constitutionality of bankruptcy court jurisdiction under the 1984 Amendments. Section 1334(c)(1) permits the district courts to abstain from hearing (and thereby referring) any matter relating to a bankruptcy case or arising under the Bankruptcy Code, out of respect for state law or courts. *Id.* § 1334(c)(1). Section 1334(c)(2) requires district courts to abstain from hearing any matters which could not have been commenced in federal court absent "related to" subject matter jurisdiction under title 11, where the action is already pending and can be timely adjudicated in state court. *Id.* § 1334(c)(2).

149. *Id.* § 152(a), (e).

of the bankruptcy system rests with the Article III judiciary and remains independent from the other branches of government.[150]

Also central to the "adjunct" justification are the similarities between the jurisdictional scheme for bankruptcy judges under the 1984 Amendments and those adopted for magistrate judges under the 1968 Federal Magistrate's Act ("Magistrate's Act").[151] Under the Magistrate's Act, non-Article III magistrates are permitted to conduct hearings and submit proposed findings of fact and recommendations for disposition to the district court, in a manner similar to bankruptcy courts in non-core proceedings.[152] Objections to magistrate's reports must be timely made in order to obtain de novo review by an Article III district judge; however, if no objection is timely asserted, the magistrate's findings will become final.[153]

Contrary to its findings with regard to the jurisdictional scheme in bankruptcy, the United States Supreme Court found the Magistrate's Act to be constitutional in *United States v. Raddatz*.[154] The Supreme Court held that the Magistrate's Act satisfied Article III, because the ultimate decision making authority remained with an Article III judge.[155] In support, Justice Blackmun (in his concurrence), pointed out that the Article III district judges maintained the essential attributes of judicial power under the Magistrate's Act, because they maintained discretion over whether referral to a magistrate was proper, were free to reject the magistrate's recommendations, and could rehear evidence that was presented to the magistrate.[156] Further, district courts controlled the magistrates by having the authority to appoint them, to remove them from office, and to delegate duties to them.[157]

While the authority exercised by magistrate judges under the Magistrate's Act is more akin to that exercised by bankruptcy judges in non-core proceedings, this adjunct justification has been applied with regard to core matters as well.[158] This analysis sup-

150. *See* Ferriell, *supra* note 78, at 184.

151. Federal Magistrate's Act, 28 U.S.C. §§ 631-639 (2006) (significantly amended in 1976, 1979, 1994, and 1999).

152. *Id.* § 636(b).

153. *Id.* § 636(c).

154. 447 U.S. 667, 683-84 (1980).

155. *Raddatz,* 447 U.S. at 683-84.

156. *Id.* at 683-86.

157. *Id.* at 685.

158. *See, e.g.*, Duck v. Munn (*In re* Mankin), 823 F.2d 1296, 1309-10 (9th Cir. 1987) (concluding that to the extent a fraudulent conveyance action, a core matter pursuant to 28 U.S.C. § 157(b)(2)(H) (2010)), based on state law was not considered a public right, final

ports the view that bankruptcy courts are legitimate adjuncts of district courts and that the jurisdictional provisions of the 1984 Amendments to the Bankruptcy Code are constitutional.

C. Consent Doctrine

The final post supporting the constitutionality of the jurisdictional scheme in bankruptcy is the "consent" doctrine, which is the theory that parties may waive their right to be heard by an Article III tribunal, and therefore, non-Article III bankruptcy courts may properly enter final determinations with regard to parties that have waived such rights.[159] Emerging at least in part from language contained in the plurality opinion in *Marathon*,[160] the consent doctrine reflects common principles under the Bankruptcy Act of 1898, where parties could consent to the "summary jurisdiction" of the bankruptcy court.[161] Support for the consent doctrine is also codified in 28 U.S.C. § 157(c)(2), which allows bankruptcy judges to "hear and determine" as well as "enter appropriate orders and judgments" with regard to non-core proceedings upon the consent of the parties.[162]

The majority decision in *Granfinanciera* also appears to support the point that (at least in certain instances), when a creditor files a claim[163] in a bankruptcy case, the creditor has subjected itself to

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adjudication by the bankruptcy court did not offend separation of powers principles, because control over the employment of bankruptcy judges was placed exclusively in the hands of Article III judges); Land-O-Sun Dairies, Inc. v. Fla. Supermarkets, Inc. (*In re* Finevest Foods, Inc.), 143 B.R. 964, 966-71 (Bankr. M.D. Fla. 1992) (holding that the power to finally adjudicate matters, in this instance what appeared to be a core proceeding in the form of a complaint to recover money or property, delegated to bankruptcy judges as "adjuncts" of the district court is constitutional). *But see* L.T. Ruth Coal. Co. v. Big Sandy Coal & Coke Co. (*In re* L.T. Ruth Coal Co.), 66 B.R. 753, 784-91 (Bankr. E.D. Ky. 1986) (questioning whether a bankruptcy court was constitutionally permitted to "hear and determine" a motion to assume a lease (a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M)), based on a rejection of the adjunct justification).

159. *See* Ferriell, *supra* note 78, at 186-89.

160. Norton, *supra* note 115 ("[A] majority of the Justices [in *Marathon*] stated their belief that the consent of the parties was sufficient to enable a non-Article III judge to adjudicate traditional common law matters that would fall within the judicial power of the United States.").

161. Ferriell, *supra* note 78, at 187.

162. 28 U.S.C. § 157(c)(2).

163. The term "claim" is a defined term in the Bankruptcy Code and means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to

the "equitable power" of the bankruptcy court, and, therefore, waived its right to be heard by an Article III tribunal.[164] In fact, less than two years after *Granfinanciera*, the Court reaffirmed this position in *Langenkamp v. Culp*.[165] Citing *Granfinanciera*, the Court stated that "by filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power."[166]

While the analysis in both *Granfinanciera* and *Langenkamp* was couched in terms of a jury trial right and not Article III judicial power, the Supreme Court has on several occasions equated the analysis between the two.[167] As a consequence, many courts have concluded that by waiving a right to a jury trial through filing a claim, creditors were also waiving their rights to be heard by an Article III tribunal.[168] The holdings in *Granfinanciera* and *Langenkamp* make clear that parties may consent to be heard by a non-Article III tribunal, through knowingly and voluntarily waiving their right to be heard by an Article III court.[169]

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judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5) (2010).

164. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989). "[B]y submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though . . . the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate." *Id.* (quoting Katchen v. Landy, 382 U.S. 323, 335 (1966)). The Supreme Court has also recognized that consent may be inferred from a party's conduct in the context of matters adjudicated by non-Article III magistrate judges. *See* Roell v. Withrow, 538 U.S. 580, 591 (2003) (holding that several petitioners' general appearances before a magistrate judge, after being informed of their right to be heard by an Article III judge, supplies the necessary consent for the exercise of a magistrate judge's "civil jurisdiction" under 28 U.S.C. § 636(c)(1)).

165. 498 U.S. 42, 44-45 (1990) (per curiam).

166. *Langenkamp*, 498 U.S. at 44 (citations omitted).

167. *See supra* text accompanying notes 110-112.

168. *See, e.g.*, Travellers Int'l AG v. Robinson, 982 F.2d 96, 98-99 (3d Cir. 1992) (citing *Langenkamp* for the proposition that by filing a claim with the bankruptcy court, a creditor not only waived its right to a jury trial, but also its right to be heard by an Article III judge, because it has submitted itself to the equitable jurisdiction of the bankruptcy court); Roberds, Inc. v. Palliser Furniture, 291 B.R. 102, 107-08 (S.D. Ohio 2003) (concluding that because a defendant invoked the equitable jurisdiction of the bankruptcy court by filing a counterclaim, it was no longer entitled to a jury trial nor should the reference to the bankruptcy court be withdrawn).

169. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849-50 (1986) (explaining in dicta that a party's decision to forgo a proceeding in state or federal court in favor of an expedited proceeding in front of a federal agency, "with full knowledge" that the government agency would exercise jurisdiction over that party's claim, constituted an "effective waiver" of that party's right to appear before an Article III tribunal).

It is undisputed that such a "waiver" cannot actually confer subject matter jurisdiction on a court.[170] Recall, however, that *Stern* does not involve subject matter jurisdiction, but rather only concerns the power of the bankruptcy courts to finally adjudicate certain matters.[171] Therefore, while the consent doctrine does not expand the subject matter jurisdiction of the bankruptcy courts, it does provide constitutional support to the exercise of judicial power by non-Article III courts in instances where parties have waived their rights to adjudication by an Article III tribunal.[172]

Since the decisions in *Granfinanciera* and *Langenkamp* were entered, various courts of appeals have applied versions of this consent doctrine to legitimize the ability of bankruptcy courts to finally adjudicate core matters in instances where creditors have filed a proof of claim.[173] In addition, the amici who filed in *Stern* insisted that the Supreme Court established precedent through prior decisions that support the notion that by filing a proof of claim, a creditor would subject itself to the equitable power of the bankruptcy court.[174]

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170. *See* People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880) ("[T]he mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case."). *See also* Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951) (holding that an extension of federal jurisdiction through consent of the parties is not appropriate).

171. *See supra* note 16. In bankruptcy, subject matter jurisdiction over all bankruptcy matters vests with the federal district courts. *See* 28 U.S.C. § 1334(b) (2010).

172. Alec P. Ostrow, *Constitutionality of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 109 (1994) (explaining that the constitutionality of bankruptcy court jurisdiction can be expanded by consent, forfeiture, or procedural default). *See* Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 543 (9th Cir. 1984) (holding that once structural protections are in place, a party's consent to adjudication by a non-Article III magistrate judge is akin to a waiver of forum or personal jurisdiction, not subject matter jurisdiction).

173. *See, e.g.*, Shubert v. Lucent Techs. Inc. (*In re* Winstar Commc'ns., Inc.), 554 F.3d 382, 406-07 (3d Cir. 2009) (holding that by filing a proof of claim, a creditor was not entitled to a jury trial on the estate's breach of contract action against the creditor); Bankr. Servs. v. Ernst & Young (*In re* CBI Holding Co.), 529 F.3d 432, 466-67 (2d Cir. 2008) (holding that by filing a proof of claim, the creditor in question "loses its jury trial only with respect to claims whose resolution affects the allowance or disallowance of the creditor's proof of claim or is otherwise so integral to restructuring the debtor-creditor relationship") (quoting Germain v. Conn. Nat'l Bank, 988 F.2d 1323, 1327 (2d Cir. 1993)); *In re* Peachtree Lane Assocs., Ltd., 150 F.3d 788, 798-99 (7th Cir. 1998) (holding that by demonstrating their intent to file a proof of claim through a request to enlarge the claims bar date, a creditor was no longer entitled to a jury trial).

174. *See* Brief for National Ass'n. of Bankruptcy Trustees as Amicus Curiae Supporting Petitioner at 10 Stern v. Marshall, 131 S. Ct. 2594 (2011) (No. 10-179), 2010 WL 4717272 at *10 (citing *Granfinanciera* and *Langenkamp* as examples of the Supreme Court affirming its rationale that creditors subject themselves to equitable discretion of bankruptcy courts concerning final adjudication of preference and fraudulent conveyance actions).

D. Relevance to Stern

The public rights exception, consent doctrine, and adjunct justification each serve as a post supporting the constitutionality of the bankruptcy courts' final adjudication of Article III cases and controversies. The Supreme Court in *Stern* assessed each post supporting the bankruptcy courts' ability to finally adjudicate core matters and shook much of the conventional wisdom supporting each one.[175] In addition to explicitly holding the portion of 28 U.S.C. § 157(b)(2)(C) authorizing non-Article III bankruptcy courts to "hear and determine" state law counterclaims unconstitutional, the Court reminded us of its uncertainty regarding the ability of the bankruptcy courts to finally adjudicate any proceeding typically left to Article III courts for determination.[176]

Following *Stern* and its dicta, the question as to whether bankruptcy courts maintain the ability to "hear and determine" any matter involving the adjustment of debtor-creditor relations is likely to be a source of conflict and debate amongst bankruptcy courts and Article III courts alike. Despite this heightened level of uncertainty, the scope of the decision is narrow, and there are simple solutions to address this narrow constitutional question. *Stern* is certainly an earthquake, but not the end of the world.

IV. *STERN V. MARSHALL*

A. The Decision

In *Stern v. Marshall*, the Supreme Court held in a 5-4 ruling that a bankruptcy court lacked the constitutional authority to enter a final judgment on a debtor's state law counterclaim against a creditor.[177] The counterclaim in question was for tortious interference that Vickie Lynn Marshall (more commonly known as Anna Nicole Smith) ("Vickie") asserted against E. Pierce Marshall ("Pierce"), who was the son of her deceased husband, Texas multimillionaire, J. Howard Marshall, III ("J. Howard").[178] Prior to J. Howard's death, Vickie filed suit in a Texas state court, alleging

175. *Stern*, 131 S. Ct. at 2611.
176. *Id.* at 2604.
177. *Id.* at 2609.
178. *Id.* at 2601. J. Howard was not only a wealthy oil company executive, he was also a lawyer and former professor at Yale Law School. Marshall v. Marshall (*In re* Marshall), 275 B.R. 5, 11 (C.D. Cal. 2002), *vacated* , 392 F.3d 1118, *rev'd*, 126 S. Ct. 1735.

that Pierce fraudulently induced J. Howard to sign a living trust that excluded her.[179]

After J. Howard's death, Vickie filed for bankruptcy in the Central District of California.[180] Pierce was a creditor of Vickie's estate because he filed a claim in Vickie's bankruptcy case alleging that Vickie defamed him by inducing her lawyers to tell the media that he had engaged in fraudulent conduct in controlling the disposition of his father's assets.[181] Pierce also filed an adversary proceeding seeking to have his claim for defamation deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(6).[182] Vickie counterclaimed, once again asserting her tortious interference claim, among others.[183]

The bankruptcy court ultimately concluded that Pierce tortiously interfered with Vickie's expectation of an intervivos gift and awarded her over $400 million in compensatory damages, as well as $25 million in punitive damages.[184] Various appeals were filed.[185] In post-trial proceedings, Pierce objected, arguing that the bankruptcy court lacked jurisdiction to enter a final judgment on Vickie's counterclaim, because it was not a core proceeding as defined by 28 U.S.C. § 157(b)(2)(C).[186]

The bankruptcy court rejected this argument, but the district court reversed, citing *Marathon* for the proposition that "it would be unconstitutional to hold that any and all counterclaims are core."[187] In its rationale, the district court reasoned that Vickie's counterclaim was non-core because it was only "somewhat related" to Pierce's claim.[188]

On appeal, the United States Court of Appeals for the Ninth Circuit held that the bankruptcy court lacked authority to enter a final judgment on Vickie's counterclaim because it was not a core

179. *Stern*, 131 S. Ct. at 2601.
180. *Id.*
181. *Id.*
182. *Marshall*, 275 B.R. at 9 n.4. Pursuant to 11 U.S.C. § 523(a)(6) debts that are for "willful and malicious injury by the debtor to another entity" are not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(6) (2010).
183. *Stern*, 131 S. Ct. at 2601. Vickie alleged that the counterclaim was compulsory under FED. R. BANKR. P. 7013. Marshall v. Stern (*In re* Marshall), 600 F.3d 1037, 1057 (9th Cir. 2010), *aff'd*, 131 S. Ct. 2594.
184. *Marshall*, 275 B.R. at 8-10.
185. *Stern*, 131 S. Ct. at 2601-03. In the interim, the Texas state court conducted a jury trial on the merits of Vickie's tortious interference action and found in favor of Pierce. *Marshall*, 600 F.3d at 1039.
186. *Stern*, 131 S. Ct. at 2601.
187. *Id.* at 2602.
188. *Id.*

proceeding. [189] After finding that the bankruptcy court lacked jurisdiction to enter a final judgment on this non-core matter, the Court of Appeals determined that the judgment entered by the Texas probate court in favor of Pierce was the earliest final judgment on the merits and, therefore, should have been given preclusive effect.[190]

Despite the passing of both Vickie and Pierce, the case continued, and the Supreme Court granted certiorari.[191] The Supreme Court ultimately held that while the bankruptcy court had statutory authority to enter a final judgment on Vickie's counterclaim as a core proceeding, Article III of the United States Constitution prevented it from doing so.[192] Specifically, the Court reasoned that through § 157(b)(2)(C), Congress had inappropriately conferred "judicial power" on non-Article III bankruptcy courts, to the extent that the bankruptcy court in question was empowered to enter a final judgment on Vickie's counterclaim.[193]

The Court began its analysis with a review of the existing statutory scheme under the 1984 Amendments[194] and continued by finding that Vickie's counterclaim was a "core" proceeding under the "plain text" of 28 U.S.C. § 157(b)(2)(C).[195] After concluding that final adjudication of the matter was within the statutory power of the bankruptcy court, the Court began its critical analysis concerning why Congress' grant of authority to the bankruptcy

189. *Marshall*, 600 F.3d at 1064. In its analysis the Court of Appeals agreed with the district court, in that allowing a bankruptcy court to enter a final judgment on all "core" proceedings would run afoul of the Supreme Court's holding in *Marathon*. *Id.* at 1057. As a result, the Court of Appeals engaged in a "nexus" analysis, holding that a counterclaim is only properly a core proceeding if it is "so closely related to [a creditor's] proof of claim that the resolution of that counterclaim is necessary to resolve the allowance or disallowance of the counterclaim itself." *Id.* at 1058.

190. *Id.* at 1064-65.

191. *Stern*, 131 S. Ct. at 2603.

192. *Id.* at 2608.

193. *Id.* at 2620.

194. *Id.* at 2603-04.

195. *Id.* at 2604. In reaching this conclusion, the Court rejected Pierce's reading of § 157(b)(1), which he argued allows a bankruptcy judge to enter a final judgment in a "core" proceeding only if that proceeding also "aris[es] in" or "aris[es] under" Title 11. *Id.* The Court reasoned (constitutional issues aside) that Congress would not create a type of proceeding in the statutes that could be simultaneously "core" and yet only "related to" the bankruptcy case. *Id.* at 2604-05. The Court also rejected Pierce's argument that as a "personal injury tort," his defamation claim should be tried in a district court pursuant to 28 U.S.C. § 157(b)(5). *Id.* at 2606. Finding that § 157(b)(5) was not a jurisdictional decree, the Court agreed with Vickie in concluding the Pierce consented to the bankruptcy court's resolution of his defamation claim, because he did not object for two years following its filing. *Id.* at 2607-08.

courts under § 157(b)(2)(C) to enter a final judgment subject to ordinary appellate review was unconstitutional.[196]

At the outset, the Court noted that Article III requires "judicial power" to only be vested in judges that "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[197] Citing *Marathon*, the Court reiterated that the separation of powers guaranteed by Article III is essential to preserving the system of checks and balances in the federal government.[198] The Court also posited that the purpose of Article III would be frustrated if other branches of the Federal Government were permitted to confer "judicial power"[199] on non-Article III tribunals.[200]

After providing a brief history of its prior holding in *Marathon*, and the subsequent 1984 Amendments, the Court concluded that, with respect to core matters, the bankruptcy courts "exercise the same powers they wielded under the Bankruptcy Act of 1978."[201] The Court then went on to reject all of Vickie's arguments[202] in support of the constitutionality of the bankruptcy court's final adjudication of her core counterclaim under § 157(b)(2)(C).[203] In the course of rejecting these arguments, the Court directly challenged the three posts used to support the constitutionality of the bankruptcy court's ability to "hear and determine" Article III cases and controversies.[204] Makalíduñg was shaking the world.[205]

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196. *Stern*, 131 S. Ct. at 2608.

197. *Id.* at 2608. (quoting U.S. CONST. art. III, § 1).

198. *Id.* at 2608-09.

199. It is important to note that some debate exists with regard to what exactly constitutes an exercise of "judicial power." *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219-220 (1995) (holding that when a tribunal enters a "dispositive judgment," it is exercising the "judicial power of the United States" as stated in Article III). However, the majority in *Stern* held that the act of the bankruptcy court in entering a final judgment on Vickie's counterclaim clearly constituted an exercise of judicial power under any definition. *Stern*, 131 S. Ct. at 2611.

200. *Stern*, 131 S. Ct. at 2609.

201. *Id.* at 2610. Specifically, the Court was concerned with the bankruptcy courts' ability to enter dispositive judgments, which would only be reviewable by Article III courts under the traditional standard of review. *Id.* at 2610-11.

202. In so doing, the Court also rejected the arguments made by the several amici filed on behalf of Vickie concerning the constitutionality of 28 U.S.C. § 157(b)(2)(C) and "core" jurisdiction generally. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 145; Brief for National Ass'n. of Bankruptcy Trustees as Amicus Curiae Supporting Petitioner, *supra* note 175; Brief in Support of Petitioner for Amici Curiae Professors Richard Aaron et al., *supra* note 145.

203. *Stern*, 131 S. Ct. at 2611.

204. *Id.* at 2611-15 (discussing the public rights exception); *id.* at 2615-18 (discussing the consent doctrine); *id.* at 2618-20 (discussing the adjunct justification).

B. Stern*'s Impact on Makalíduñg's Posts of Constitutionality*

With regard to the three posts supporting the exercise of judicial power by non-Article III tribunals, there are two critical components to the Court's holding in *Stern*. First, the Court completely minimized the importance of the core/non-core classification. Despite finding that the matter before the bankruptcy court was a core proceeding, which by statute the bankruptcy court could "determine" on a final basis subject to ordinary appellate review, the Court held that the bankruptcy court lacked the constitutional authority to "hear and determine" the matter.[206]

Second, the Court challenged all three posts supporting the bankruptcy courts' ability to exercise "judicial power" through the final adjudication of matters in bankruptcy.[207] Initially, the Court appeared to revert to a narrow construction of the traditional public rights exception.[208] The Court also created confusion by appearing to reject and simultaneously embrace the non-traditional consent doctrine.[209] Finally, the Court flatly rejected Vickie's argument that the bankruptcy court properly exercised its jurisdiction as an "adjunct" of the district court under the unique facts of the case.[210]

Regarding the "public rights" exception to the Article III requirement, the court found that it did not exist with regard to Vickie's counterclaim.[211] While the Court acknowledged that its "discussion of the public rights exception . . . has not been entirely consistent," it found that the particular case before it did not fall

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205. It is important to note that there already exists a significant amount of disagreement among the courts as to the scope of the *Stern* decision. *Compare* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), Bankr. No. 05-00690, Adv. No. 07-80037, 2011 WL 3610050, at *2-3 (Bankr. W.D. Mich. Aug. 17, 2011) (critiquing *Stern* for providing little to no guidance on what core matter may be appropriately determined by the bankruptcy courts), *and In re* Bearing Point, Inc., 453 B.R. 486, 496-98 (Bankr. S.D.N.Y. 2011) (highlighting the difficulties with regard to the consent doctrine and core matters in a post-*Stern* environment), *with In re* Safety Harbor Resort and Spa, No. 8:10-bk-25886, 2011 Bankr. LEXIS 3238, at *1 (Bankr. M.D. Fla.) ("The Supreme Court's holding in Stern was very narrow."), *and* Brook v. Ford Motor Credit Co. (*In re* Peacock), Bankr. No. 8:09-bk-28719-CPM, Adv. No. 10-ap-01199-CPM, 2011 WL 3874461, at *1 (Bankr. M.D. Fla. Sept. 2, 2011) ("The narrow holding in *Stern* . . . does not impact a bankruptcy court's ability to enter a final judgment in any other type of core proceeding authorized under 28 U.S.C. § 157(b)(2).").

206. *Stern*, 131 S. Ct. at 2620.

207. *Id.* at 2611.

208. *See generally id.* at 2611-14.

209. *Id.* at 2606-08.

210. *Id.* at 2618-19.

211. *Stern*, 131 S. Ct. at 2614.

"within any of the various formulations" of the exception.[212] The holding specifically concludes that state law counterclaims may not be properly adjudicated on a final basis by bankruptcy judges who do not enjoy the protections of lifetime tenure and are immune from salary diminution.[213] However, the implications of the Court's public rights rationale are much broader.

In *Stern*, the Court retreated from the more flexible element driven tests espoused in *Thomas* and *Schor* and reaffirmed the more strict interpretation of what constitutes a public right, as given in *Marathon* and *Granfinanciera*.[214] In fact, the Court maintained that it had always limited application of the public rights exception where the "claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority."[215]

Further, the Court expressly refused to make any determination with regard to which core matters, if any, fall under the public rights exception, and, therefore, can be constitutionally adjudicated by bankruptcy courts.[216] One of the major concerns in the post-*Granfinanciera* era was the open question regarding which, if any, core proceedings qualify as public rights.[217] As opposed to clarifying whether the restructuring of debtor-creditor relations, which is at the heart of all core proceedings in bankruptcy, the Court once again left open the question of whether *any* core proceeding in bankruptcy could be considered a "public right."[218] Referencing its statement in *Granfinanciera*, the *Stern* Court stated that "[w]e noted that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right' . . . . Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here."[219] Unfortunately, this "same approach" is a complete avoidance of the issue altogether and serves to exacerbate the lack of clarity

212. *Id.* at 2611.
213. *Id.* at 2601.
214. *Id.*
215. *Id.* at 2613.
216. *Stern*, 131 S. Ct. at 2610.
217. *See* Ostrow, *supra* note 173, at 112-19 (analyzing the constitutionality of bankruptcy court adjudication with regard to each existing "core" proceeding).
218. *Stern*, 131 S. Ct. at 2614 n.7.
219. *Id.* (internal citations omitted).

regarding the issue of what core matters may actually fall within the public rights exception.[220]

Stern also further muddied the waters concerning the viability of the consent doctrine as an independent post supporting the constitutionality of bankruptcy court adjudication of Article III cases and controversies.[221] In the second part of its analysis, the Court rejected Vickie's contention that Pierce's filing of a claim and initiation of an action to have that claim deemed non-dischargeable conferred on the bankruptcy court the ability to make a final determination with regard to her counterclaim.[222] However, the Court also appeared to simultaneously endorse the ability of bankruptcy courts to finally adjudicate non-core matters if the parties consented.[223]

Although the Court did not directly address whether parties could consent to final adjudication by a non-Article III bankruptcy judge in a statutorily defined core proceeding, the Court insisted that Pierce's decision to file a proof of claim should not "make any difference with respect to the characterization of Vickie's counterclaim."[224] Distinguishing its prior decisions in *Katchen v. Landy*[225] and *Langenkamp v. Culp*,[226] the Court noted that, as opposed to the preference actions in those proceedings,[227] resolution of Vick-

220. *Id.*

221. Despite the traditional acceptance of the consent doctrine under the 1898 Act and its widespread application in bankruptcy, the Supreme Court in *Schor* had previously indicated that this post may not be entirely sound. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-53 (1986). Specifically, the Court stated that consent, apart from other assurances of independence found in Article III, would not permit a non-Article III tribunal to hear and determine a dispute that was within the "judicial power" of the United States. *Id.*

222. *Stern*, 131 S. Ct. at 2615-18.

223. *See id.* at 2608. This apparent contradiction arises in the context of an argument presented by Pierce, who alleged that the bankruptcy court did not have jurisdiction over Vickie's counterclaim, because Pierce's original defamation claim was only triable in the district court pursuant to 28 U.S.C. § 157(b)(5). *Id.* at 2606. In rejecting Pierce's argument, the Court concluded that Pierce had waived his ability to request that the defamation claim be litigated in the district court, because he had waited more than two years to voice his objection, and he has previously stated that he would "be happy" to litigate the claim in the bankruptcy court. *Id.* at 2607-08. While not addressed directly by the Court, this certainly begs the question of whether parties could consent to have a core matter finally adjudicated by the bankruptcy court, similar to the way in which parties may consent to have a non-core matter heard by the bankruptcy court pursuant to 28 U.S.C. § 157(c)(2). *See supra* text accompanying notes 75-77.

224. *Id.* at 2616.

225. 382 U.S. 323 (1966).

226. 498 U.S. 42 (1990) (per curiam).

227. Section 547 of the Bankruptcy Code permits a trustee (or debtor in possession) under certain circumstances to avoid "any transfer of an interest of the debtor in property" that was made while the debtor was "insolvent" within 90 days of the date of the filing of

ie's counterclaim was not necessary to adjudication of Pierce's proof of claim, nor was it "derived from or dependent upon bankruptcy law."[228] Therefore, the Court seems to imply that the absence of some nexus between the matter to be considered and the claims adjudication process will be determinative regarding a party's implied "consent" to participate in those cases where express consent is lacking.[229] In *Granfinanciera* (and the subsequent *Langenkamp* decision), the fact that the parties did or did not file a claim appeared to be material. However, following *Stern* it appears as though the Court disregarded the consent doctrine as an independent means of excusing the exercise of "judicial power" by non-Article III bankruptcy courts. It is notable that commentators already disagree as to whether the *Stern* rationale actually rejects the consent doctrine with regard to core proceedings.[230]

Finally, the Court summarily rejected the characterization of the bankruptcy courts as "adjuncts" of the district courts.[231] Citing *Marathon*, the Court rejected the attempt in the 1984 Amendments to draft around the Article III issue by granting original jurisdiction over all bankruptcy matters to the district courts, with an automatic reference to the bankruptcy courts.[232] Concluding that the 1984 Amendments did not effectively remove the "essential attributes" of judicial power from the bankruptcy courts, the Court stated that "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the

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the debtor's bankruptcy petition. If such a transfer was made for the "benefit" of a creditor, on account of an "antecedent debt" and allowed the creditor to receive more than their fair share of the debtor's estate. *See* 11 U.S.C. § 547(b) (2010).

228. *Stern*, 131 S. Ct. at 2617-18.

229. *Id.*

230. *Compare* Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 No. 8 BANKR. L. LETTER 1 (Aug. 2011) (hypothesizing that, based on the Supreme Court's reasoning in *Stern*, a bankruptcy court's ability to finally adjudicate core proceedings based on the consent of the litigants will be upheld), *with* Adam Lewis, Alexandra Steinberg Barrage, Vincent J. Novak & Dina Kushner, *Stern v. Marshall: A Jurisdictional Game Changer?*, PRATT'S J. BANKR. L., September 8, 2011 (concluding that the *Stern* opinion casts "significant doubt" on the jurisdiction of bankruptcy courts by consent). As of the date of this writing, the fifth circuit may soon address this issue as it applies to the jurisdiction of U.S. Magistrates in Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., No. 10-20640 (5th Cir. Oct. 20, 2011). Steve Sather, *Fifth Circuit to Consider Impact of* Stern v. Marshall *on U.S. Magistrates*, A TEXAS LAWYER'S BANKRUPTCY BLOG (September 21, 2011), http://stevesathersbankruptcynews.blogspot.com.

231. *Stern*, 131 S. Ct. at 2611.

232. *See id.* at 2618-19.

bankruptcy judge[s], not the district court."[233] As a result, the Court held that the bankruptcy court was not permitted to hide behind its role as a "unit" of the district court in order to justify its exercise of judicial power. [234]

As a result of the *Stern* holding, both courts and litigants are left to question whether bankruptcy courts may, in fact, finally determine Article III cases and controversies, or any matters concerning rights that were not created by the Bankruptcy Code.[235] As discussed previously,[236] *Stern* diminishes the importance of the core / non-core characterization and instead focuses on the constitutional issue that arises when non-Article III tribunals finally adjudicate "any matter which, from its nature, is the subject of a suit at common law, or in equity or admiralty."[237] The uncertainty in the wake of *Stern* that is caused by this narrow analysis is illustrated by a review of fraudulent conveyance actions.

Actions to recover fraudulent conveyances are core proceedings under 28 U.S.C. § 157(b)(2)(H).[238] Prior to the majority opinion in *Granfinanciera*, courts nearly universally held that bankruptcy courts had jurisdiction to "hear and determine" fraudulent conveyance actions.[239] However, *Granfinanciera* changed the analysis

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233. *Id.* at 2619 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 81 (1982) (plurality opinion)).

234. *Id. at* 2611.

235. *See* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), Bankr. No. 05-00690, Adv. No. 07-80037, 2011 WL 3610050, at *3 (Bankr. W.D. Mich. Aug. 17, 2011)

236. *See supra* text accompanying note 207.

237. *Stern*, 131 S. Ct. at 2597 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856)).

238. Subsection 157(b)(2)(H) of the Bankruptcy Code states that bankruptcy judges may "hear and determine" as well as "enter appropriate judgments" with regard to "proceedings to determine, avoid, or recover fraudulent conveyances . . . ." 28 U.S.C. § 157(b)(2)(H) (2010).

239. *See, e.g.*, Huffman v. Perkinson (*In re* Harbour), 840 F.2d 1165, 1175 (4th Cir. 1988) (concluding that Congress intended for bankruptcy courts to maintain jurisdiction over actions to avoid fraudulent transfers (and preferences)); Carlton v. Baww, Inc., 751 F.2d 781, 788 (5th Cir. 1985) (holding that under the 1984 Amendments, fraudulent conveyance proceedings may be finally adjudicated before bankruptcy judges); Addison v. O'Leary, 68 B.R. 487, 489-90 (E.D. Vir. 1986) (holding that fraudulent and voluntary conveyance actions had a strong enough constitutional nexus to the bankruptcy court function of adjusting creditor-debtor relations to be characterized as a "public right" and, therefore, were properly categorized as core proceedings over which the bankruptcy court had proper subject-matter jurisdiction). Prior to *Granfinanciera*, some courts held that bankruptcy court jurisdiction extended not only to fraudulent conveyance proceedings arising from the bankruptcy code itself pursuant to 11 U.S.C. § 548 (2010), but also to those arising indirectly through the application of state law pursuant to 11 U.S.C. § 544. *See, e.g.*, Duck v. Munn (*In re* Mankin), 823 F.2d 1296, 1300-01 (9th Cir. 1987) (holding that the exercise of bankruptcy court jurisdiction over a trustee's fraudulent conveyance action pursuant to § 544(b) was a core proceeding that did not violate Article III).

by holding that parties to fraudulent conveyance actions are entitled to a jury trial, and, by inference, adjudication by an Article III court is required where the parties have not consented to have the matter finally adjudicated by a bankruptcy court.[240] Unfortunately, *Stern*'s rejection of the adjunct justification and lack of clarity concerning the viability of the consent doctrine make it appear as though the bankruptcy courts' ability to finally "determine" fraudulent conveyance actions may be without a constitutional basis, despite its Congressional designation as a "core" matter.[241]

The impact of this conclusion is yet to be seen. However, Part IV of this article will explain why *Stern* is only an earthquake and not the end of the bankruptcy world, and will offer solutions for avoiding the delays and issues of finality that may arise as a result of attempts to wrestle with the Court's holding in *Stern*.

In the closing passages of the *Stern* opinion, Chief Justice Roberts opined that the Court was ruling on a narrow question and was therefore not concerned that its decision would "create significant delays and impose additional costs on the bankruptcy process."[242] It is not the purpose of this article to question the Supreme Court's decision; however, on the latter point this author must disagree. When litigants and courts fuse the *Stern* decision with *Marathon* and *Granfinanciera*, there will most certainly be an impact on the efficiency and economy of bankruptcy litigation, even if the full extent of that impact is yet unknown. Indeed, bankruptcy courts have already begun to split over the scope of

240. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989). While not clearly stated in the opinion, this proposition is the logical conclusion that may be drawn from the majority's equating of the analysis between the right to a jury trial and the right to adjudication in the presence of an Article III tribunal. *Id.* at 53-54. "The question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as fact finders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal . . . ." *Id.*

241. *See* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), Bankr. No. 05-00690, Adv. No. 07-80037, 2011 WL 3610050, at *14-16 (Bankr. W.D. Mich. Aug. 17, 2011) (finding that bankruptcy court did not have jurisdiction to finally adjudicate fraudulent conveyance actions). *See also* Sanders v. Muhs (*In re* Muhs), Bankr. No. 09-10564, Adv. No. 10-01008, 2011 WL 3421546, at *1 (Bankr. S.D. Tex. Aug. 2, 2011) ("Following *Stern*, it is unclear whether the adjudication of a fraudulent transfer claim against a creditor who has filed a proof of claim falls within the public rights exception."). *But see In re* Safety Harbor Resort and Spa, No. 8:10-bk-25886, 2011 Bankr. LEXIS 3238, at *1 (Bankr. M.D. Fla.) (concluding that bankruptcy courts should not invalidate the jurisdictional statute with regard to other core proceedings based on speculation or dicta in the Supreme Court opinion of *Stern*).

242. *Stern*, 131 S. Ct. at 2619 (citations omitted).

Stern's impact,[243] and it will likely be years before the issues are resolved.

Despite the uncertainty regarding the constitutionality of the current jurisdictional scheme in bankruptcy as exacerbated by *Stern*, there is no indication that the bankruptcy world is coming to an end. In addition to the consent doctrine, which, it appears to this author is alive and well, there are solutions which can alleviate the concerns generated by the *Stern* decision. *Stern* may have shaken Makalíduñg's posts, but the sky is not falling and the bankruptcy world will not be destroyed.

V. RESOLVING THE IMPACT OF *STERN*

The constitutional issue created by the 1984 Amendments and exacerbated by the Supreme Court's holding in *Stern* is now a familiar theme. However, this author believes that there are three primary methods of militating against overreaction to *Stern* and for addressing the constitutional defect in the existing jurisdictional scheme in bankruptcy, which the *Stern* opinion highlights. The first is to encourage parties to side-step the adjudication issue altogether by consenting to final adjudication of given core proceedings by the bankruptcy court. The second and third methods, are, in fact, solutions which the bankruptcy bar would be dependent on outside forces to initiate: 1) conferring Article III status on bankruptcy judges; and 2) modification of the scope of review that currently exists in the Federal Rules of Bankruptcy Procedure.[244] In sum, there is no reason that bankruptcy court adjudication of a narrow category of "core" matters impacted by *Stern* need come to a standstill.

With regard to the first method, I believe that parties may avoid the constitutional issue altogether by negotiating to consent to bankruptcy court adjudication. Under the Bankruptcy Code, parties may consent to have a non-core matter finally adjudicated by the bankruptcy court pursuant to 28 U.S.C. § 157(c)(2).[245] It appears, from an analysis of the exercise of "judicial power" by other non-Article III tribunals, that consent could even be effective with regard to core matters as well.

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243. *See supra* note 206 and accompanying text.

244. This author will also suggest language that bankruptcy judges could incorporate into certain orders, to ensure that they do not run afoul of *Stern*, if and/or until one of the aforementioned "solutions" is effectuated.

245. 28 U.S.C. § 157(c)(2) (2010).

When evaluating whether a party can actually consent to final adjudication by a non-Article III court, there are two protections at issue: 1) personal Article III protections in the form of the due process right of a litigant to have its matter heard by an Article III judge; and 2) a structural protection that insures the autonomy of the judiciary as required by the separation of powers doctrine.[246] The Supreme Court has continuously upheld the right of litigants to waive their personal protections of Article III by consenting to adjudication by a non-Article III tribunal.[247] However, the Supreme Court has simultaneously held that a litigant does not have the ability to waive the structural protections of Article III.[248] The rationale employed with regard to the latter holding is that the separation of powers principles implicated in the structural protections are beyond the ability of individual parties to waive or protect.[249]

At first blush, this appears to create an insurmountable constitutional hurdle with regard to the ability of non-Article III courts to adjudicate Article III cases and controversies. Nevertheless, the Supreme Court has held that consent is sufficient to confer constitutional authority to adjudicate certain matters in instances where structural protections are not implicated.[250] In fact, this conclusion hinges on the structural protections described in the adjunct justification.[251]

In *Peretz v. United States*,[252] the Supreme Court held that there was no constitutional defect when a district court judge delegates the duty of conducting voir dire in a felony proceeding to a magistrate judge, following consent of the parties, because no structural rights were implicated.[253] In so concluding, the Court recognized that under the Magistrate's Act, Article III judges maintained a substantial amount of control over both the magistrate

246. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984).

247. *See, e.g.*, *Peretz*, 501 U.S. at 936 ("Litigants may waive their personal right to have an Article III judge preside over a civil trial."); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-49 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.").

248. *Schor*, 478 U.S. at 850.

249. *See id.* at 851. *See also Peretz*, 501 U.S. at 937-39.

250. *See Peretz*, 501 U.S. at 937-39; *Schor*, 478 U.S. at 851-52.

251. *See supra* text accompanying notes 143-158.

252. 501 U.S. 923 (1991).

253. *Peretz*, 501 U.S. at 923.

judges and the matters delegated to them.[254] Specifically, the Court noted that district court judges were responsible for appointing magistrate judges, removing them from office, and maintaining plenary authority over what matters were delegated to the magistrate judges once they were appointed.[255] The Court also noted that district court judges had exclusive authority to determine whether to refer matters to magistrate judges and were free to accept or reject the magistrate judges' recommendations.[256] Citing *Raddatz*, the Court held that because the entire process of magistrate adjudication "takes place under the district court's total control and jurisdiction," there was no danger that the structural protections of Article III would be violated.[257] In essence, the Supreme Court held that where sufficient structural protections are already in place, as the result of statutory language, consent is sufficient to allow final adjudication by a non-Article III tribunal.[258] This author believes that the Supreme Court would now come to the same conclusion with regard to a party's ability to consent to the entry of a dispositive judgment by a bankruptcy court in both non-core matters under 28 U.S.C. § 157(c)(2) and "core" matters alike.[259] This means that parties would be able to

254. *Id.* at 937-38.

255. *Id.* at 937-39.

256. *See id.*

257. *Id.* at 937.

258. *Peretz*, 501 U.S. at 937-38.

259. It appears as though Professor Ralph Brubaker agrees. *See* Ralph Brubaker, *Article III's Bleak House (Part II): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 No. 9 BANKR. L. LETTER 1 (Sept. 2011) ("I believe it would be precipitous and unwarranted . . . to conclude that Judicial Code § 157(c)(2) is unconstitutional. Moreover, I believe the same is true with respect to litigant consent to final judgment from a bankruptcy judge in those statutory core proceedings in which (in light of *Stern v. Marshall*) it is otherwise . . . unconstitutional for the bankruptcy judge to enter final judgment.").

Consent may also preserve the ability of bankruptcy courts to finally adjudicate core matters that constitute cases and controversies under Article III, such as the state law counterclaim in *Stern*. As recently articulated by Judge Schmetterer in *In re Olde Prairie Block Owner, L.L.C*, No. 10 B 22668, 2011 WL 3792406, at *3 (Bankr. N.D. Ill. Aug. 25, 2011), if it is concluded that a state-law counterclaim (as in *Stern*) or other core matter falling within Article III may not be finally adjudicated by a bankruptcy court, the matter must be treated as non-core. *Id.* at *6. *See also* Paloian v. American Express Co. (*In re* Canopy Financial Inc.), Bankr. No. 09 B 44943, Adv. No. 11 A 581, 2011 WL 3911082, at *6 (N.D. Ill. Sept. 1, 2011). This holding is both logical and essential as the only alternative would be that cases and controversies under Article III, which are designated as "core," would fall into a procedural black hole where bankruptcy courts would not be permitted to take any action with regard to these proceedings. Once designated as a non-core proceeding, the parties may consent to have the matter finally adjudicated by the bankruptcy court pursuant to 28 U.S.C. § 157(c)(2). *See e.g., In re Olde Prairie*, 2011 WL 3792406, at *7; Oxford Expositions, L.L.C. v. Questex Media Grp., L.L.C. (*In re* Oxford Expositions, LLC),

consent to final adjudication of core matters in much the same way as they are permitted to do with regard to non-core matters under 28 U.S.C. § 157(c)(2).

Similar to the controls by Article III judges under the Magistrate's Act, the current statutory scheme in bankruptcy provides sufficient "control" over Article III cases and controversies, so as not to offend the structural protections of Article III.[260] For example, bankruptcy judges are appointed and subject to removal by Article III judges.[261] The salaries of bankruptcy judges are pegged to the salaries of district court judges, and clerks of the bankruptcy courts are financially accountable to the judiciary.[262] Article III judges also have the ability to withdraw the reference to the bankruptcy courts upon a motion of any party-in-interest, or sua sponte for "cause shown."[263] Such motions to withdraw the reference must be heard by the district court.[264] Not only is withdrawal of the reference an option for the district courts, such a withdrawal has actually occurred en masse on two separate occasions in the District of Delaware, in response to a large influx of corporate reorganization cases in that state.[265]

Even specific matters "heard" by the bankruptcy courts are subject to control by Article III judges. Following an appeal of a core matter, an Article III judge will review the bankruptcy court's conclusions of law de novo and will set aside any findings of fact that are "clearly erroneous."[266] While this standard of review for factual findings is more stringent than the de novo standard, the

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Bankr. No. 10-16218-DWH, Adv. No. 11-01095-DWH, 2011 WL 4054872, at *8 (Bankr. N.D. Miss. Sept. 12, 2011); *In re Safety Harbor*, 2011 WL 3849639, at *1.

260. Please note that the Supreme Court has rejected similar statutory protections as justification supporting the constitutionality of non-Article III final adjudication absent consent of the parties. *See Peretz*, 501 U.S. at 936 n. 11 (citing Gomez v. United States, 490 U.S. 858, 875-876, 876 n. 30 (1989)).

261. *See* 28 U.S.C. § 152(a), (e) (2010).

262. *Id.* §§ 153(a), 156(f).

263. *Id.* § 157(d) (2010). Upon a motion of any party, district courts shall withdraw the reference of matters to the bankruptcy courts if a resolution of the proceeding at issue requires consideration of bankruptcy law issues and laws regulating interstate commerce. *Id.*

264. FED. R. BANKR. P. 5011(a).

265. *See* Order of C.J. Joseph Farnan, D. Del., Jan. 23, 1997, *available at* http://www.ded.uscourts.gov/StandingOrdersMain.htm. *See also* Order of C.J. Sue L. Robinson, D. Del., Apr. 6, 2001. Some commentators insist that the withdrawal of the references occurred in response to accusations that bankruptcy judges in Delaware were enabling corporate debtors to engage in forum shopping. *See, e.g.*, G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 5302 n.140 (2010).

266. *See* FED. R. BANKR. P. 8013.

Supreme Court has held that such a requirement does not run afoul of the Article III requirement.[267] Even though this determination was made in a different context, such a distinction is not an affront to Article III when the parties have consented to have the matter adjudicated by a non-Article III judge.

As shown above, following a waiver of the personal protections contained in Article III (under the consent doctrine), the bankruptcy courts are subject to such a significant degree of control by the Article III judges that structural protections are not implicated. Therefore, if parties waive the "personal" protections of Article III, the way is clear to Article I bankruptcy courts to finally adjudicate the matter at hand. This combination of the consent doctrine and "adjunct justification" posts appears to support final adjudication of Article III cases and controversies following the 1984 Amendments. In addition, this construction appears to have survived the Supreme Court's holding in *Stern*.

Alternatively, instead of relying on obtaining consent, which may not be possible, there are two primary "solutions"[268] to the constitutional issue that will ensure the continued, final adjudication by bankruptcy courts, while completely avoiding any Article III conflicts or concerns. 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.[269] By granting Article III status to bankruptcy judges, not only will the constitutional issues be completely resolved, independent decision-making will be ensured in its highest form.

Of course, some circles have eschewed elevating bankruptcy judges to Article III status. But the reasons are unconvincing. The fact is that bankruptcy judges are competent, hardworking, public servants who are appointed based on merit. Bankruptcy judges are selected by Article III judges on the various courts of

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267. *See* Crowell v. Benson, 285 U.S. 22, 51 (1932) ("[T]here is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges.").

268. There are certainly other possible solutions as well. For instance, while not incorporated as a primary solution, litigants and courts would certainly benefit from a recalibration of the narrow "public rights" analysis espoused in *Stern*, to reflect the more element-driven approaches articulated in *Thomas* and *Schor*.

269. *See, e.g.*, Lieb, *supra* note 112; Block-Lieb, *supra* note 23, at 563-566; G. Eric Brunstad, Jr., Mike Sigal & William H. Schorling, *Review of the Proposal of the National Bankrutpcy Review Commission Pertaining to Business Bankruptcies: Part One*, 53 BUS. LAW. 1381, 1440-41 (1998).

appeals after considering recommendations made by the Judicial Conference.[270] The recommendations of the Judicial Conference are governed by input from a merit selection committee, which is tasked with choosing qualified candidates based on the applicants' "character, experience, ability, and commitment to equal justice . . . ." among other things.[271] As a result, there should be no reason for concern with regard to the independence or ability of bankruptcy judges to adjudicate the matters before them.

In addition, any concern that bestowing Article III status on bankruptcy judges would be cost prohibitive is without merit. The cost of making this adjustment is essentially zero. There is no requirement that all Article III judges be compensated at the same rate; rather they must only enjoy "[c]ompensation, which shall not be diminished during their Continuance in Office."[272] While bankruptcy judges would be granted lifetime tenure and protection from salary diminution, they do not necessarily have to be compensated in any greater amount than they that which already command. In fact, Article III judges in the district courts, various courts of appeals, and the Supreme Court are all compensated at different rates, yet they are all Article III judges.[273]

Additionally, concerns about what to do with an excess or glut of bankruptcy judges in the event that bankruptcy filings dissipate appears to be unfounded. Bankruptcy filings have risen every year since the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[274] Indeed, bankruptcy filings have increased more than 250% from 617,600 filings in 2006[275] to 1,596,081 filings in 2010.[276] The critical amount of va-

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270. 28 U.S.C. § 152(a)(1) (2010).

271. Admin. Offices of the U.S. Courts, *Establishment of Panel*, REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES, § 3.01 (2006).

272. Gibson, *supra* note 112, at 178.

273. Regional adjustment figures excluded, in 2010 district judges were paid $174,000; circuit court judges were paid $184,500; and associate justices of the Supreme Court were paid $213,900. Admin. Offices of the U.S. Courts, *Judicial Salaries Since 1968*, U.S.COURTS.GOV, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalaryschart.pdf (last visited Nov. 24, 2011).

274. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L. No. 109-8, 119 Stat. 23, § 802 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

275. Admin. Offices of the U.S. Courts, *Table F, U.S. Bankruptcy Courts: Bankruptcy Cases Commenced, Terminated and Pending During the Twelve Month Periods Ended Dec. 31, 2006 and 2007*, U.S.COURTS.GOV, http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx. This year was selected as it

cancies in all federal courts, including the bankruptcy courts, also cannot be ignored. Recent statistics show that as of 2010 there were fourteen vacancies on the bankruptcy bench and over eight percent of the filled bankruptcy judgeships were occupied by recalled judges.[277] Vacancies at the district court level have also increased dramatically over the past two years, with eighty-eight vacancies as of the close of 2010.[278] Certainly, the existing vacancies could be (and should be) filled according to need, and given the low numbers of judges currently on the court, it is unlikely that there will be a "glut" of lifetime appointees burdening the federal judiciary with excessive costs.

The final solution would be to modify the Bankruptcy Rules to alter the scope of district court review by simply requiring bankruptcy judges to make reports and recommendations as to all matters constituting "cases and controversies" under Article III of the Constitution. The only material difference between the Magistrates' Act, which the Supreme Court held to be constitutional in *Raddatz* and *Peretz*,[279] and the current jurisdictional scheme in bankruptcy, is that bankruptcy judges have the ability to finally adjudicate the merits of "cases and controversies" designated as core, while magistrate judges do not. In other words, the constitutional issue recognized by *Stern* is not one of jurisdiction, but rather scope of review.[280] As a result, there is a simple solution, namely, changing the district courts' scope of review concerning any Article III "case or controversy" adjudicated by the bankruptcy courts.

This could be accomplished simply by altering *Federal Rule of Bankruptcy Procedure* 8013.[281] Rule 8013 currently states in per-

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was the first full year of filing following the passage and effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on October 17, 2005. *Id.*

276. Admin. Offices of the U.S. Courts, *Table F-2, U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2010*, U.S.COURTS.GOV, http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx. This calculation does not include adversary proceedings. *Id.*

277. *See* Admin. Offices of the U.S. Courts, *Judicial Business of the United States Courts: 2010 Annual Report of the Director*, U.S.COURTS.GOV, 40 tbl.12, http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx.

278. *See id.* at 39 tbl.11.

279. *See supra* text accompanying notes 250-59.

280. Stern v. Marshall, 131 S. Ct. 2594, 2607 (2011).

281. It could also be suggested that this rule change is not necessary. It is possible that once an appellate court has determined that the bankruptcy court did not have the constitutional authority to finally adjudicate a particular core proceeding, the appellate court should automatically engage in *de novo* review of the bankruptcy court's findings of fact

tinent part that "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."[282] By altering this scope of review with regard to any case or controversy under Article III, the constitutional issue would be resolved. Simply, if the district courts maintained a de novo scope of review over all bankruptcy court decisions as to Article III cases and controversies, the Constitutional defect is avoided.[283] The proof is in the Supreme Court's holdings in *Raddatz* and *Peretz* referenced above.[284]

The benefits of exercising this simple fix are many and varied. For instance, by altering *Federal Rule of Bankruptcy Procedure* 8013 to provide Article III district courts with de novo review over bankruptcy court findings of fact and conclusions of law, when litigants do not consent to final adjudication in the bankruptcy court, the district court will be free to accept or reject these findings and conclusions of bankruptcy judges in their entirety.

This solution also addresses issues of delay and finality that may arise in the wake of *Stern*. By reducing bankruptcy court determinations to "proposed" findings and conclusions, there will be a clear process to review an appeal for litigants that contest or endorse such findings and conclusions. The scope of review will, therefore, be the same as when a bankruptcy court makes a report and recommendation under *Federal Rule of Bankruptcy Procedure* 9033. Rule 9033 states that the district judge shall review de novo "any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made" within fourteen days of service of the proposed findings of fact and conclusions of law.[285] Therefore, within fourteen days of service of

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and conclusions of law. This point is indirectly supported by Paloian v. American Express Co. (*In re* Canopy Financial, Inc.), in which the district court concluded that in cases where the bankruptcy courts lack the constitutional authority to enter a final judgment, they may still "hear" the claim in question and submit proposed findings of fact and conclusions of law. Bankr. No. 09 B 44943, Adv. No. 11 A 581, 2011 WL 3911082, *5 (N.D. Ill. Sept. 1, 2011).

282. FED. R. BANKR. P. 8013.

283. There is also merit to the theory that holds that in instances where an Article III judge has determined that bankruptcy courts may not enter a final order, the matter in question would automatically be subject to de novo review as to the factual findings of the bankruptcy court, because the matter would by default be treated as "non-core." *See In re* Olde Prairie Block Owner, L.L.C., No. 10 B 22668, 2011 WL 3792406, at *6 (Bankr. N.D. Ill. Aug. 25, 2011). *See also In re Canopy Financial*, 2011 WL 3911082, at *4.

284. *See supra* text accompanying notes 250-59.

285. FED. R. BANKR. P. 9033. This scope of review is nearly identical to the scope of review exercised by district courts over the proposed findings and recommendations of

the bankruptcy court's proposed findings of fact and conclusions of law, the bankruptcy court determination will either be final or be subject to de novo review by an Article III court.[286]

Finally, this solution is incredibly simple and cost effective. No status or pay changes will need to accompany this alteration of the rules (however, admittedly, the workload for the district court judges may increase). Also, no act of Congress will be required, as with any rule change, the only action necessary will be at the hands of the Supreme Court.[287]

In the time that elapses prior to the suggested rule change, courts may simply add to relevant orders a statement similar to the following: *"to the extent this matter is determined to be an action at law, this opinion and order shall be considered only proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c)(1), subject to de novo review by the district court and/or Bankruptcy Appellate Panel."* Indeed this "interim solution" has already been incorporated into at least two memoranda and orders entered following *Stern*.[288] Incorporating such language will not only continue to provide some effect to bankruptcy court decisions, it will also ensure that the ability to challenge the power of bankruptcy courts to finally adjudicate certain matters will remain with the Article III district courts and will not be subject to the whim of certain litigants that may have the necessary time and money to pursue ancillary litigation regarding the ability of the bankruptcy courts to finally adjudicate the matters before them.

VI. CONCLUSION

In closing, there is no question that issuance of the *Stern* opinion substantially shook the bankruptcy world. As a result, all eyes of the bankruptcy bar have turned toward the posts supporting the jurisdictional scheme under the 1984 Amendments. Despite the palpable fear of collapse and certain aftershocks that will create issues of delay and finality, *Stern* has not destroyed the

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magistrate judges under 28 U.S.C. § 636(b) (2010). *See* Leonard v. Dorsey & Whitney L.L.P., 553 F.3d 609, 619-20 (8th Cir. 2009).

286. This does not apply in the first, sixth, eighth, ninth, and tenth circuits where Bankruptcy Appellate Panels ("BAPs") have been established.

287. 28 U.S.C. § 2075.

288. *See, e.g.*, Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp., Inc.), Bankr. No. 05-00690, Adv. No. 07-80037, 2011 WL 3610050, at *14-15 (Bankr. W.D. Mich. Aug. 17, 2011); Springel v. Prosser (*In re* Innovative Commc'n Corp.), Bankr. No. 07-30012, Adv. No. 08-3004, 2011 WL 3439291, at *3 (Bankr. D.V.I. Aug. 5, 2011).

bankruptcy world. Rather, all that *Stern* has done is modified the standard of review that district courts will employ when certain orders of bankruptcy courts concerning Article III cases and controversies are appealed. Additionally, there are simple solutions that may be implemented by Congress, such as bestowing Article III status on bankruptcy judges, or the Supreme Court, by editing the scope of review in *Federal Rule of Bankruptcy Procedure* 8013. The bankruptcy bar can even foster its own solution by promoting consent to final adjudication by the bankruptcy court, which will likely ensure that bankruptcy courts may continue to enter dispositive judgments in core matters. In sum, the issue is narrow and the solutions are straightforward. Makalíduñg's posts may be shaking, but the bankruptcy world will not be destroyed.