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The Article III Problem in Bankruptcy

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This Article reconsiders the implementation of Article III in the bankruptcy context. Recent rulings that limit the delegation of adjudicative power to non–Article III tribunals have generated uncertainty and profuse litigation. The Supreme Court's Article III cases in this domain lack any foundational account of why the power granted to bankruptcy judges implicates a constitutional problem. This Article identifies more precisely the Article III stakes in bankruptcy. Drawing on the well-tested creditors'-bargain theory of bankruptcy, this Article proposes a tractable, economically sophisticated constraint on congressional delegations. Our proposed account of bankruptcy courts' permissible domain minimizes Article III and federalism harms—the normative desiderata identified by the Court—while also enabling bankruptcy's core operations to continue unhindered. To illustrate its utility, the Article applies this account to a range of common bankruptcy disputes, demonstrating that most (but not all) of the Court's existing jurisprudence is sound in result, if not in reasoning.

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INTRODUCTION

Bankruptcy poses a challenge to Article III of the Constitution. Since the 1571 Statute of Elizabeth,[1] judges have delegated important decisions within the bankruptcy process to nonjudicial agents called commissioners.[2] Bankruptcy law today continues this English practice.[3] Non–Article III bankruptcy judges routinely handle many aspects of complex corporate, corporate-group, and individual bankruptcies, and in the process they must render many consequential rulings on state and federal law.[4] This adjudicative assignment, however, seems to contradict Article III of the Constitution. The text of that Article purports to constrain delegations of "[t]he judicial Power" to officials possessing the appointment, tenure, and salary accoutrements

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1 13 Eliz, ch 5 (1571), in 4 Statutes of the Realm 537, 537–38.

2 For a description of the role of commissioners, see W.J. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period*, 69 Trans Am Phil Socy 1, 29–30 (1979). See also Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am Bankr L J 567, 578–80 (1998).

3 See Douglas G. Baird, *Blue Collar Constitutional Law*, 86 Am Bankr L J 3, 15 (2012) ("The bankruptcy system drew on the fact that in eighteenth century England, the Chancellor was charged with administering bankruptcy matters.").

4 See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan L Rev 747, 773–78 (2010) ("Bankruptcy cases frequently raise a broad range of legal issues beyond the intricacies of bankruptcy-specific doctrine.").

of Article III judges.[5] Historically, Article III, § 1 has not been read literally to preclude *all* non–Article III tribunals[6] or to prevent Article III bodies from engaging in functions beyond the seeming remit of the judicial function.[7] But even a nonliteral reading of Article III raises the question whether the current bankruptcy system—and, in particular, its broad delegation to such tribunals—transgresses constitutional bounds.[8]

This tension has yielded a string of divided Supreme Court opinions on the appropriate bounds of bankruptcy courts' power.[9] In these rulings, the Supreme Court has employed formalist[10] doctrinal tools in order to draw up a "limiting principle"[11] to restrain congressional dilution of federal courts' authority. These efforts, however, cannot be ranked a success. Formalist reasoning has yielded an entangling briar patch of ambiguous rules and a sheaf of doctrinal puzzles. In brief, the Court first frontally addressed bankruptcy's Article III problem in 1982. In

5 US Const Art III, § 1 ("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.").

6 See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 Ind L J 233, 235 (1990) (explaining that such a narrow reading "has utterly failed to withstand the test of time").

7 See James E. Pfander and Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-contentious Jurisdiction*, 124 Yale L J 1346, 1349 (2015) (exploring Article III courts' power to engage in "non-adverse and ex parte proceedings").

8 Delegation of federal law adjudication to state courts raises no Article III issue. To the contrary, "[f]ederal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett v Rose*, 496 US 356, 367 (1990). See also *Testa v Katt*, 330 US 386, 389–91 (1947).

9 We refer here to the power of bankruptcy courts to adjudicate matters to final judgment. One might also refer to this as "jurisdiction" in a colloquial sense. We avoid this term as it implies specific constitutional questions that the Supreme Court has made clear do not apply here. See note 331 (discussing the former sense of jurisdiction). The question is not the power of bankruptcy courts to *hear* a dispute but the power of those courts *to enter final judgment* on that dispute. See *In re Refco Inc*, 461 Bankr 181, 184 (Bankr SDNY 2011) ("Note that this is not a question about the Court's subject matter jurisdiction; litigants and at least one court contending to the contrary misread *Stern* and ignore the expansive nature of the bankruptcy courts' subject matter jurisdiction.") (citations omitted).

10 See Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U Chi L Rev 530, 531 (1999) ("A norm is formalistic when it is opaque in the sense that we act on it without reference to the substantive goals that underlie it.").

11 *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50, 73 (1982) (Brennan) (plurality). See also *Commodity Futures Trading Commission v Schor*, 478 US 833, 866 (1986) (Brennan dissenting) (expressing concern over the risk of Congress placing federal courts on a "slippery slope" that would "seriously impair Article III's structural and individual protections").

Northern Pipeline Construction Co v Marathon Pipe Line Co,[12] a plurality of the Court invoked the "public rights" doctrine to remove certain contract actions from the bankruptcy courts' ambit.[13] Twenty years later, in *Stern v Marshall*,[14] the Court again invoked the public rights doctrine to limit the adjudicatory power of bankruptcy courts but added a second doctrinal element: whether the resolution of a legal issue is "integral to the restructuring of the debtor-creditor relationship."[15] *Stern* fostered a spate of new litigation—for example, over litigants' ability to consent to bankruptcy court adjudication.[16]

In the 2013 term, the Court evaded that question, declaring that Article III error could be cured by de novo review and entry of judgment by a district court.[17] In late 2014, the Court once more accepted a certiorari petition raising the consent question.[18] As initially framed in the petition for certiorari, the issues in *Wellness International Network, Ltd v Sharif*[19] had the potential both to open a new front in the *Northern Pipeline–Stern* jurisprudence regarding bankruptcy courts' permissible adjudicatory power and to inject new uncertainty into the federal bankruptcy process.[20] Ultimately, however, a divided Court issued a relatively narrow ruling.[21] The six-justice majority opinion penned by Justice Sonia Sotomayor declares that litigants' consent is sufficient to vest the bankruptcy courts with power to enter final judgment. By resting its holding solely on a theory of consent, the *Wellness International* majority avoided more fundamental questions about the substantive boundaries of a

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12 458 US 50 (1982).

13 Id at 67–70 (Brennan) (plurality).

14 131 S Ct 2594 (2011).

15 Id at 2616–17, quoting *Langenkamp v Culp*, 498 US 42, 44 (1990) (per curiam).

16 See Baird, 86 Am Bankr L J at 20 (cited in note 3) ("It is not obvious [after *Stern*], as a matter of first principle, that consent of the parties should be sufficient to empower bankruptcy judges to enter judgments or otherwise call on the forces of the state.").

17 See *Executive Benefits Insurance Agency v Arkison*, 134 S Ct 2165, 2170 n 4 (2014).

18 See generally *Wellness International Network, Ltd v Sharif*, 727 F3d 751 (7th Cir 2013), cert granted, 134 S Ct 2901 (2014).

19 727 F3d 751 (7th Cir 2013).

20 See *Wellness International Network, Ltd v Sharif*, 134 S Ct 2901, 2901 (2014) (accepting review in the same case to address whether state law questions entangled in a determination of the proper scope of a bankruptcy estate must be resolved by an Article III court).

21 See generally *Wellness International Network, Ltd v Sharif*, 2015 WL 2456619 (US).

bankruptcy court's adjudicatory power.[22] The result is a continuing measure of uncertainty about the fundamental premises of Article III's application to the bankruptcy context. Future litigants pursuing their own strategic advantages may forgo consent, thus circumventing the *Wellness International* solution and reopening the basic questions that are presently unresolved.[23] As a result, it is not possible to say with confidence that the Court's jurisprudence to date has generated institutional stability or litigation peace.[24]

This Article proposes a new formalist rule to serve as a limiting principle on Congress's power to allocate adjudicative responsibilities to bankruptcy judges. We choose to focus on the *Stern* Court's pronouncement that a bankruptcy judge may resolve only those matters for which that resolution is "integral to the restructuring of the debtor-creditor relationship."[25] Surprisingly, no opinion of the Court explains how to determine whether resolving an issue is "integral" to the restructuring at issue. To the contrary, the Court's most recent Article III pronouncements implicitly reject Congress's earlier effort to give content to the idea that there is a "core" set of matters that fall within the bankruptcy courts' ambit.[26] Having rejected this legislative gloss, though, the Court has yet to supply an alternative rule.

We fill this gap by offering a new normative account of the necessary scope of bankruptcy procedure. Our account identifies a limited number of claims that must fall within a bankruptcy procedure if such procedure is to fulfill its core mission. As a

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22 Id at *6 n 7 (stating that the opinion "does not address, and expresses no view on" the question whether the underlying claims were within the adjudicatory power of the bankruptcy court in the absence of consent). One dissenting opinion criticizes the majority's grounds for its decision, noting that the case could have been decided instead on the grounds that the underlying claims fell within the bankruptcy court's adjudicatory power. Id at *14, 18 (Roberts dissenting). This dissent went on to note that consent should never be sufficient to "compromise the structural separation of powers or agree to an exercise of judicial power outside Article III." Id at *19 (Roberts dissenting).

23 Consider, for example, the possibility that a creditor of an estate might refuse to consent to the bankruptcy court's adjudication of a claim that now arguably falls outside the authority of that tribunal (for example, a fraudulent transfer claim) under circumstances in which the delay involved in Article III litigation would derail efficient reorganization. The bankruptcy judge might feel compelled to adjudicate the claim, thus preserving the core Article III issue for appeal and creating new litigation.

24 See Tyson A. Crist, Stern v. Marshall*: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 Am Bankr L J 627, 627–29 (2012).

25 *Stern*, 131 S Ct at 2617, quoting *Langenkamp*, 498 US at 44.

26 Troy A. McKenzie, *Getting to the Core of* Stern v. Marshall*: History, Expertise, and the Separation of Powers*, 86 Am Bankr L J 23, 24 (2012). See also text accompanying notes 104–09.

result, our reconstruction of *Stern* yields clear limits on congressional authority to delegate adjudicative authority away from Article III courts and harmonizes with the structural aspirations of Article III jurisprudence. In addition, it coheres tightly with the peculiar textual position of bankruptcy as the sole enumerated congressional authority to influence state-created property and contract interests. Our reconstruction thus offers the intellectual coherence and litigation peace that has eluded the Court despite its repeated engagement with this question in the line of cases culminating in *Wellness International*.

The inspiration for our proposal is a widely accepted welfarist justification for bankruptcy called the creditors'-bargain theory, which was originally proposed by Professors Thomas Jackson and Douglas Baird.[27] Although that theory is often deployed to yield guidance as to the optimal rules within bankruptcy,[28] we invoke the creditors'-bargain theory here in order to explain the necessary metes and bounds of a bankruptcy. In effect, we use the theory to pick out those categories of claims with respect to which bankruptcy judges need to have authority to enter final judgments for the efficient functioning of the resolution system. In brief, we argue that if a species of legal issue to be decided does not alter the creditors' collective relationship, then its adjudication is not integral to the restructuring of the general debtor-creditor relationship. We further demonstrate that this welfarist account of bankruptcy generates a set of boundaries that is in rough harmony with the normative goals identified in Article III jurisprudence: federalism and the separation of powers.[29] The net result is a concededly novel (and

27 For the key works, see generally Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard 1986); Thomas H. Jackson, *Bankruptcy, Non-bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L J 857 (1982); Douglas G. Baird and Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U Chi L Rev 97 (1984); Thomas H. Jackson and Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va L Rev 155 (1989). In these works, Jackson, Baird, and Professor Robert E. Scott deploy the creditors'-bargain theory to generate guidance as to the *substance* of bankruptcy law—that is, the proper content of the Bankruptcy Code. Our project is distinct: we rely on the creditors'-bargain theory to inform the necessary procedural scope of bankruptcy—that is, the class of claims to which the bankruptcy courts' adjudicatory power must necessarily extend.

28 See note 27.

29 This is consistent with Justice William Brennan's normative ideal presented in *Northern Pipeline*, which suggested that Congress's creation of non–Article III adjudicative bodies could undermine the separation of powers. See Richard H. Fallon Jr, *Of*

nonoriginalist) doctrinal test that dovetails with and serves the Constitution's original structural aspirations.

Although we detail the creditors'-bargain theory in Part III, we briefly set forth its nub here as a way of intimating how it can be used, as a practical matter, to identify clear boundaries to a bankruptcy judge's power. Consider a group of secured creditors, unsecured general creditors, and equity holders, all contemplating a single debtor teetering on insolvency or a liquidity crunch. Each creditor and equity holder has an incentive to extract her assets before others do. But a race to withdraw assets is likely to have perverse consequences, such as the destruction of the debtor's going-concern value.[30] Moreover, the mere existence of the creditors' claims may prevent the debtor from financing wealth-maximizing projects that would benefit all creditors.[31] To attract new capital for those projects, old claims would have to be voluntarily subordinated. But no single creditor has the incentive to agree to that. And, collectively, the group has no power to address holdouts.[32]

Thus, these creditors, each possessing different information and a different stake in the debtor's assets, face a common-pool problem.[33] At its heart, bankruptcy can be understood as a strictly procedural solution to that collective action dilemma. To that end, bankruptcy imitates the hypothetical bargain that we expect creditors *would have* reached ex ante to avoid these problems and maximize their investments if such a bargain were costless. Instead of a source of new rights or liabilities, bankruptcy is best understood at its core as a *procedural* mechanism designed to maximize the net welfare of all parties by preventing impetuous and wasteful actions, by enabling coordination, and by preserving going-concern value. The necessary domain of

Legislative Courts, Administrative Agencies, and Article III, 101 Harv L Rev 915, 926–27 (1988).

30 For an explanation of the going-concern value and an exploration of its relevance in bankruptcy, see Douglas G. Baird and Robert K. Rasmussen, *Reply: Chapter 11 at Twilight*, 56 Stan L Rev 673, 685–89 (2003).

31 See Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?*, 70 NYU L Rev 993, 1007 (1995) ("[E]ach creditor has an incentive to act as quickly as possible to secure a priority for itself. Once that incentive is removed, creditors are in a position to act cooperatively to further the maximization of the estate for the benefit of all.").

32 This phenomenon is commonly referred to as the debt-overhang problem. See, for example, Kenneth Ayotte and David A. Skeel Jr, *Bankruptcy Law as a Liquidity Provider*, 80 U Chi L Rev 1557, 1570–72 (2013). See also note 277 and accompanying text.

33 See Jackson, *Logic and Limits* at 10–11 (cited in note 27).

the bankruptcy procedure is accordingly determined by asking which categories of claims a hypothetical ex ante agreement would have assigned to a central bankruptcy tribunal. It is this *procedural* dimension of the creditors'-bargain theory that we leverage to resolve bankruptcy's Article III problem.

An account of a bankruptcy judge's necessary power that is grounded in the creditors'-bargain theory harmonizes with federalism and separation of powers concerns. The creditors'-bargain theory both supports the long-standing principle that bankruptcy rules should depart from nonbankruptcy rules only if a specific bankruptcy justification demands it and provides a limited taxonomy of such justifications.[34] Bankruptcy law aspires to preserve state law entitlements and to leave unaffected both state and federal law adjudicative processes outside bankruptcy.[35] Absent bankruptcy, however, state-created rights would be inefficiently dissipated. The exclusive reason for a bankruptcy court to recalibrate privately ordered rights is to prevent such dissipation. Limitations on the power of the bankruptcy court are necessary to ensure that the specific operation of bankruptcy law does not distort the resolution of nonbankruptcy adjudicative processes. Accordingly, the preservation of a bankrupt's expected value in a period of distress is appropriate only when it minimizes the destruction of expected value of the same firm in other states of the world.

The creditors'-bargain theory, which props up this model of bankruptcy, is a normative theory that aims to minimize the distorting spillovers of the bankruptcy system onto private ordering of contract, property, and tort rights. As a correlative, the creditors'-bargain theory identifies the minimum set of claims that must be aggregated within the bankruptcy procedure if valuable state-created rights are not to be dissipated or destroyed. Drawing a perimeter around a bankruptcy judge's power using the creditors'-bargain theory as a guide, therefore, is a way to minimize spillover effects on the adjudication of state law questions and to ensure that, when state law questions are at

[34] See Jackson, 91 Yale L J at 858 (cited in note 27); Baird and Jackson, 51 U Chi L Rev at 101–02 (cited in note 27).

[35] See Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 Ariz St L J 793, 869 (2003).

stake without a strong justification for a bankruptcy tribunal's involvement, an Article III judge is placed at the helm.[36]

That our proposed limiting principle aligns with the normative ambitions articulated by the Court—preserving individual liberty and limiting distortions of state law[37]—is a powerful factor in its favor. To date, the Court has not cogently explained how the *Northern Pipeline–Stern–Wellness International* line of cases serves these goals. Indeed, a cynical reader of the Court's most recent pronouncements might conclude that the justices are doing their best to evade grappling with what has become a Gordian knot of ill-founded formalism.

The creditors'-bargain theory, by contrast, brings the normative justifications for Article III limits into alignment with the specific rules of decision that restrain Congress from delegating adjudication outside Article III.[38] A further incidental benefit of our proposal is that, unlike all other doctrinal solutions proposed to date, it is consistent with Chief Justice John Roberts's recent suggestion that the congressional power to enact "necessary and proper" laws[39] cannot encompass any unenumerated "great substantive and independent power," such as the power to create or destroy state-created rights that are not at risk of dissipation.[40] Finally, as we detail at length, our proposal generates a clear, normatively limiting principle for adjudicatory delegations in the bankruptcy context. These

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36 This core creditors'-bargain account has been supplemented by scholarship identifying other socially inefficient dynamics that are "tightly linked" to creditor coordination problems. Ayotte and Skeel, 80 U Chi L Rev at 1560 (cited in note 32) (describing liquidity problems as "tightly linked" to creditor-coordination problems). The efficiency justification for individual debtors' discharge rests on separate grounds. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv L Rev 1393, 1395 n 5 (1985) (explaining the historical development of discharge from debt). These modifications and extensions do not alter the basic resolving power of the creditors'-bargain theory as a heuristic for resolving the proper domain of non–Article III bankruptcy adjudication.

37 For an example of the liberty goal, see *Stern*, 131 S Ct at 2608–09 (invoking a threat to "liberty" as a warrant for the holding). For an invocation of the need to avoid distortions of state-created rights, see id at 2619 ("Congress . . . already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts.").

38 See US Const Art I, § 8, cl 4.

39 US Const Art I, § 8, cls 4, 18 (authorizing Congress "[t]o . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" and also "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States").

40 *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2593 (2012) ("NFIB") (quotation marks omitted). See also text accompanying note 295.

boundaries, as we demonstrate in Part IV, largely but not completely align with precedent. For example, we argue that voidable preference actions against creditors who have not filed a claim, as well as turnover actions relating to the property of an estate, should be resolved differently than they currently are.[41]

These small divergences from the existing structure of the doctrine aside, our account of what is integral to debtor-creditor restructuring fits tightly with the Constitution's text, the structural goals that the Court has identified, and the Court's repeatedly expressed desire for an effectual limiting principle.[42] Nevertheless, our account necessarily competes with other strands of doctrine within the *Northern Pipeline*–*Stern* dispositive opinions, as well as with the alternative approach proffered by dissenting justices. For example, there is a strand of reasoning in separation of powers doctrine that rejects formalism for a functionalist analysis of the consequences of institutional innovation.[43] Dissenting in *Stern* on functionalist grounds, Justice Stephen Breyer urged the Court, in this vein, to "determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III."[44] We do not, however, pursue the possibility of a functionalist solution here. A majority of the Court has firmly rejected such an approach to bankruptcy's central Article III problem. There is no reason to expect that majority to shift course and to resolve the core question of *Stern*

41 For a general discussion of voidable preferences, see notes 335–37 and accompanying text. For a general discussion of turnover actions, see text accompanying notes 324–25.

42 See text accompanying note 11.

43 See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?*, 72 Cornell L Rev 488, 491–92 (1987) (contrasting formalism and functionalism in separation of powers analysis and arguing that functionalism is a better fit). When dealing with federal administrative agencies, the Court has applied a functionalist analysis that imposes a relatively weak constraint on adjudicative delegations. See, for example, *Schor*, 478 US at 850–56 (concluding that the jurisdiction exercised by the Commodity Futures Trading Commission over certain common-law counterclaims does not violate separation of powers principles); *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 587 (1985) ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.").

44 *Stern*, 131 S Ct at 2625–26 (Breyer dissenting). Here, Breyer elaborates a pragmatist strand of Article III jurisprudence concerning the constitutionally permissible scope of administrative agency adjudication. See, for example, *Union Carbide*, 473 US at 589 (enforcing "a pragmatic understanding" of Article III); *Schor*, 478 US at 853.

in nakedly pragmatist terms.[45] Rather, we assume that any solution to bankruptcy's Article III problem must sound in formalist tones, and in a register that is distinctive to the specific goals and constraints that attend Congress's bankruptcy power. That said, our analysis suggests that the "integral to the debtor-creditor relationship" test,[46] properly understood, does not impose the costs that Breyer identified.[47] Absent the costs associated with formalism, the *Stern* dissenters may have some cause to reconsider their opposition to Article III formalism in the bankruptcy domain.

In addition—and critically for our analysis—the Court's Article III jurisprudence contains alternative formalist tests. Most importantly, the dispositive opinions in both *Northern Pipeline* and *Stern* draw on a distinction between "public rights" and "private rights" that can be traced back to the 1855 decision in *Murray's Lessee v Hoboken Land and Improvement Co*.[48] We are cognizant of the fact that this public rights/private rights distinction has a longer pedigree than the "integral to the debtor-creditor relationship" test. It throws deep roots into the American legal tradition.[49] Accordingly, in Part II we consider whether this distinction provides an alternative source of constraint on Congress in the bankruptcy context, concluding that it does not. Rather, the historical categories of public rights and private rights are either radically underinclusive or overinclusive *when applied to bankruptcy*. Even narrowly construed, the notion of public rights does not pick out any tractable and determinate class of claims as necessarily within the scope of bankruptcy

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45 On the other hand, it is fair to say that the majority opinion in *Wellness International* slices in a touch of pragmatic functionalism to its analysis of the consent question. *Wellness International*, 2015 WL 2456619 at *1–13. Sotomayor thus states that the consent issue must be decided "with an eye to the practical effect" of that resolution. Id at *9 (quotation marks omitted). It is hard to reconcile the formalism of *Stern* with the functionalism of *Wellness International* without positing a distinction between (1) the legal question of when an Article III problem is implicated (addressed in *Stern*), and (2) the array of procedural instruments available to resolve that problem (addressed in *Wellness International*). This Article concerns the former, not the latter—and hence assumes that *Stern*'s formalist approach applies.

46 See *Stern*, 131 S Ct at 2617, quoting *Langenkamp*, 498 US at 44.

47 *Stern*, 131 S Ct at 2629–30 (Breyer dissenting) (expressing concern that the majority opinion would instigate "jurisdictional ping-pong between courts").

48 59 US (18 How) 272, 284–85 (1855).

49 See Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum L Rev 559, 566–72 (2007) (advancing historical evidence concerning the relevancy of the public/private distinction in American separation of powers jurisprudence).

courts' power. Alternative doctrinal specifications that lower courts have drawn from *Stern* fare no better.

Competing doctrinal specifications may be irredeemably flawed, but of course our interpretation of *Stern*'s litmus test for "integral" bankruptcy matters can also be criticized. It would strain credulity, for example, to suggest that the creditors'-bargain theory, which was developed in the corporate-bankruptcy context, claims an originalist pedigree: the earliest bankruptcies under American law, for example, benefited individual merchants, not joint-stock companies.[50] Our bankruptcy-specific gloss on Article III, therefore, is better understood as consonant with the doctrinal approach adopted by the Rehnquist and Roberts Courts in other domains in which exogenous social change threatens to destabilize an ex ante equilibrium between different elements of government. That is, we offer a novel doctrinal specification that aims to maximize contemporary fidelity to a set of original aspirations and practices that are embodied in the constitutional text.

The most salient example of this way of drawing doctrine is the Commerce Clause, for which the Court has strived to identify limiting principles to prevent Congress's authority from becoming boundless.[51] Just as in the Commerce Clause context, a tractable limiting principle that accommodates the interplay between congressional choice and changed historical and social circumstances need not track an original understanding. It is perhaps enough, as Roberts recently suggested, that the proffered distinction "would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers."[52] We suggest that the creditors'-bargain account of the "integral to the

[50] See Act of Apr 4, 1800, 2 Stat 19, repealed by Act of Dec 19, 1803, 2 Stat 248. Indeed, one of the reasons for this statute's repeal was precisely that it benefited wealthy individual merchants such as Robert Morris. See Charles Warren, *Bankruptcy in United States History* 20 (Harvard 1935).

[51] See, for example, *NFIB*, 132 S Ct at 2587 (expressing concern that "[a]llowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation") (emphasis in original). See also *Gonzales v Raich*, 545 US 1, 17 (2005) ("[We have firmly established] Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce. . . . [But] [w]e have never required Congress to legislate with scientific exactitude."). For a cogent explanation of why this internal-limits principle might be flawed, see generally Richard Primus, *The Limits of Enumeration*, 124 Yale L J 576 (2014).

[52] *NFIB*, 132 S Ct at 2589, quoting *Industrial Union Dept, AFL–CIO v American Petroleum Institute*, 448 US 607, 673 (1980).

debtor-creditor relationship" test easily passes this litmus test and further is able to perform the restraining function that it is asked to play in relation to Congress.

Our argument proceeds in the following steps. Part I exposits on the historical roots of the Article III problem in bankruptcy and demonstrates that the current jurisprudence lacks a secure conceptual or historical foundation. Part II explains why the public rights analysis must fail and then offers an alternative conceptual foundation. Part III introduces the creditors'-bargain interpretation of *Stern* and defends that gloss as faithful to the constitutional text and structure, as well as to the Court's articulated ambitions. Finally, Part IV applies that interpretation to several categories of legal claims commonly encountered in bankruptcy.

I. CHOICE OF ADJUDICATOR IN BANKRUPTCY AND ARTICLE III

This Part summarizes the historical and precedential context of the Article III problem in bankruptcy. To that end, it explains the historical roots of non–Article III adjudicators, their emergence in American law at the end of the nineteenth century, and the late twentieth-century rise of judicial anxiety about such tribunals.

A. Non–Article III Adjudicators in Bankruptcy

The Article III problem in bankruptcy arises because Congress has chosen to allocate a measure of adjudicatory responsibility to non–Article III decisionmakers called bankruptcy judges.[53] The text of the Constitution's Bankruptcy Clause, however, is silent as to adjudicator choice.[54] A threshold constitutional justification for using non–Article III adjudicators in bankruptcy emerges not from the Constitution's text but rather from background understandings of English legal practice that informed the Constitution's drafting and ratification.[55]

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53 See 28 USC § 157(b)(1) (authorizing bankruptcy judges, on reference by a federal district court judge, to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11").

54 See US Const Art I, § 8, cl 4 ("Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

55 We advance here a claim about the legal permissibility of non–Article III adjudication within the bankruptcy context, not about the actual justifications relied on by Congress when enacting the various bankruptcy schemes installed throughout American history. The non–Article III status of bankruptcy judges, however, has been actively discussed by Congress at crucial junctures. See Susan Block-Lieb, *What Congress Had to*

English bankruptcy practice provided a backdrop against which debates over Congress's bankruptcy power unfolded.[56] During the 1787 Constitutional Convention, Charles Pinckney of South Carolina proposed a federal power to create "uniform laws upon the subject of bankruptcies" in the course of a debate concerning the states' full-faith-and-credit obligations.[57] The sole recorded debate on Pinckney's proposal concerns an objection voiced by Roger Sherman of Connecticut—and rebutted by Gouverneur Morris of Pennsylvania—to the effect that Congress might punish bankrupts with death.[58] On first reading, Sherman's concern might seem speculative at best. The concern, though, comes into sharper focus in the context of English bankruptcy law permitting capital punishment for certain debtors.[59] Sherman's concern thus implies that the Constitution's reference to bankruptcy was understood as a term of art that took its meaning from an English legal context familiar to the Framers.[60]

Say: Legislative History as a Rehearsal of Congressional Response to Stern v. Marshall, 86 Am Bankr L J 55, 81–86 (2012) (describing congressional hearings in 1977 on the question of Article I status for bankruptcy judges and noting Congress's concern about the political difficulty of confirming hundreds of new judicial appointees if bankruptcy judges were given Article III status); Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L Rev 941, 949 (1979) (discussing the legislative debate on the question prior to the Bankruptcy Reform Act of 1978). These accounts suggest that Congress was focused on legal (constitutional) questions and political difficulties rather than on any class of concerns unique to bankruptcy law.

56 States also had bankruptcy laws prior to 1787. See generally Peter J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy 1607–1900* (Hist Socy of Wis 1974) (detailing such laws on a state-by-state basis). But because it was the variance in those state rules that prompted the need for a distinct federal bankruptcy framework in the first instance, it is more difficult to infer constitutionally relevant understandings of bankruptcy from those regimes.

57 James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* 546–47 (Ohio 1966). See also Kurt H. Nadelmann, *On the Origins of the Bankruptcy Clause*, 1 Am J Legal Hist 215, 220 (1957) (suggesting that the bankruptcy power was proposed following a discussion of the Full Faith and Credit Clause's application to state insolvency statutes). At the time of the Constitutional Convention, states enacted "special act[s] of insolvency" discharging debtors, and doubt persisted as to the validity of the ensuing discharge in other jurisdictions. Id at 221.

58 See Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 489 (Yale 1966) (noting Morris's argument that Congress would not abuse its bankruptcy power in the fashion that Sherman suggested).

59 See Nadelmann, 1 Am J Legal Hist at 217 n 9 (cited in note 57).

60 See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am Bankr Inst L Rev 5, 6 (1995) (arguing that the "framers of the United States Constitution had the English bankruptcy system in mind"). In addition to Sherman's comment, it is worth noting that Sir William Blackstone includes an extensive discussion of the English bankruptcy statutes. William Blackstone, 2 *Commentaries on the Law of England* 471–88 (John Murray 3d ed 1862). For a discussion of the use of background technical conceptions to inform constitutional interpretation, see Caleb

English law had regulated debtor-creditor relations from the 1260s onward.[61] The "first bankruptcy act" was enacted in 1542 under King Henry VIII.[62] Enacted for the benefit of creditors, the law proved insufficient to deter fraudulent behavior and was superseded by Elizabethan legislation in 1570, which endured without substantial change for 150 years.[63] Under the Henrician dispensation, bankruptcy was handled by "specified great officials"—called commissioners—"one of whom was the lord chancellor."[64] These statutes nonetheless envisaged "severe penalties" for evasive or fraudulent bankrupts.[65] Subsequent parliaments "did not endow bankruptcy commissions with the attributes of a court."[66] Instead, a typical commission would include three barristers and four gentlemen or merchants.[67] Commissioners would exercise "substantial powers, originally somewhat akin to a combination of today's trustee and bankruptcy judge."[68] The notion that the bankruptcy process might be channeled through nonjudicial forums, in short, was built into the fabric of the institution before the Founding. Early disputes over the constitutional scope of bankruptcy questioned whether such power could extend to persons other than the class of merchants covered by English law,[69] whether the constitutional provision preempted

Nelson, *Originalism and Interpretive Conventions*, 70 U Chi L Rev 519, 549 (2003) (noting that "originalists seeking to identify the Constitution's meaning freely consult (and indeed consider themselves bound to use) . . . founding-era understandings of specialized legal constructions or terms of art").

61 See generally Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J Legal Hist 153, 154 (1982); R.H. Helmholz, *Bankruptcy and Probate Jurisdiction before 1571*, 48 Mo L Rev 415, 416 (1983).

62 Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 Tenn L Rev 487, 500 (1996). See also Statute of Bankrupts, 34 & 35 Hen VIII, ch 4 (1542), in 3 Statutes of the Realm 899, 899–901.

63 See Cohen, 3 J Legal Hist at 156 (cited in note 61).

64 Jones, 69 Trans Am Phil Socy at 10 (cited in note 2). See also id at 25 (explaining that the lord chancellor would appoint as commissioners "such wise and honest discreet persons as to him shall seem good") (quotation marks omitted). A lord chancellor "embod[ies] the judicial, executive, and legislative" powers, as well as some ecclesiastical functions. Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S Cal L Rev 597, 598 (1999).

65 Cohen, 3 J Legal Hist at 157 (cited in note 61).

66 Jones, 69 Trans Am Phil Socy at 10 (cited in note 2).

67 See id at 26–27 (noting that commissioners had to "prove the debtor's status and make a declaration of bankruptcy"). See also id at 29–30 (describing commissioners' powers).

68 Tabb, 3 Am Bankr Inst L Rev at 8 (cited in note 60). See also 13 Eliz, ch 5 (1571), in 4 Statutes of the Realm 537, 537–38 (setting out commissioners' powers).

69 See, for example, Warren, *Bankruptcy* at 24 (cited in note 50) ("[I]t was believed by most statesmen [in the 1810s] that Congress had no power to pass a bankrupt law

state insolvency laws even in the absence of federal legislation,[70] and whether the operation of bankruptcy laws conflicted with the constitutional protections of individual contract, property, and tort rights.[71] Article III, by contrast, was not among the grounds for early constitutional complaints against the federal bankruptcy power.[72]

For the first century and a half of the Republic, bankruptcy remained a fraught topic for national politicians. Congress enacted three briefly lived bankruptcy statutes, each of which failed for political rather than legal reasons.[73] Each contained an antecedent equivalent of today's bankruptcy judges. Under the 1800 Act, a district court appointed commissioners who would supervise the bankruptcy process while exercising powers similar to their English counterparts.[74] Under the 1841 Act, in contrast, the district court appointed assignees who would operate similarly to modern-day trustees, managing liquidations and distributions in lieu of commissioners.[75] And under the 1867 Act, district courts appointed "registers in bankruptcy, to assist the judge of the district court in the performance of his duties."[76] These registers were the most direct "predecessors of the twentieth century . . . bankruptcy judge."[77]

Only in 1898 did Congress finally settle on a stable statutory bankruptcy regime.[78] Once more, the 1898 Act designated

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except for traders."); Joseph Story, *Commentaries on the Constitution of the United States* § 1113 at 52–53 (Little, Brown 2d ed 1851) (offering a broad view of bankruptcy jurisdiction).

70 See, for example, *Sturges v Crowninshield*, 17 US (4 Wheat) 122, 124–31 (1819) (determining that there is no implied preemption merely by dint of the Bankruptcy Clause).

71 See, for example, id at 131–33 (concluding that New York's discharge provisions violated Article I, § 10 of the US Constitution); *Ogden v Saunders*, 25 US (12 Wheat) 213, 285 (1827) (determining that states could not discharge the debts due a citizen of another state).

72 See Plank, 63 Tenn L Rev at 533–40 (cited in note 62) (documenting constitutional challenges to nineteenth-century bankruptcy statutes and noting that voluntary proceedings for nonmerchants were beyond the bankruptcy power).

73 See Act of Apr 4, 1800, 2 Stat 19, repealed by Act of Dec 19, 1803, 2 Stat 248; Act of May 31, 1841, 5 Stat 440, repealed by Act of Mar 3, 1843, 5 Stat 614; Act of Mar 2, 1867, 14 Stat 517, repealed by Act of June 7, 1878, 20 Stat 99. All told, these statutes endured for sixteen years. See David A. Skeel Jr, *Debt's Dominion: A History of Bankruptcy Law in America* 25 (Princeton 2001).

74 Act of Apr 4, 1800 § 2, 2 Stat at 21–22.

75 Act of May 31, 1841 § 3, 5 Stat at 442–43.

76 Act of Mar 2, 1867 § 3, 14 Stat at 518.

77 Tabb, 3 Am Bankr Inst L Rev at 19 (cited in note 60).

78 See Act of July 1, 1898, 30 Stat 544, repealed by Bankruptcy Reform Act of 1978, Pub L No 95-598, 92 Stat 2549, codified as amended at 11 USC § 101 et seq. During the

federal district courts as "courts of bankruptcy" but allocated the body of adjudicative and administrative work to "referees in bankruptcy" who were appointed by district courts.[79] Opposition to the creation of a new federal bureaucracy led to referees being organized through a fee-based system.[80] In response to a perceived fault in the 1867 Act, the 1898 Act circumscribed referees' authority. The 1867 Act had been criticized for subjecting litigants to an inconvenient federal, rather than state, forum.[81] The 1898 Act responded to this criticism by ensuring that, at least under certain circumstances, jurisdiction would remain in state courts. First, it created concurrent jurisdiction in state courts.[82] Second, it drew a distinction between summary and plenary forms of jurisdiction.[83] Summary jurisdiction comprised proceedings involving administration of the bankruptcy estate and property in a bankruptcy court's possession, including all creditors' claims against the estate.[84] Plenary jurisdiction comprised disputes between the bankruptcy trustee or receiver and third parties concerning property not in the possession of the bankruptcy court.[85] The district court could not exercise

late nineteenth century, lawyers such as Robert Swaine also developed the equity receivership for railroad reorganizations, which is perhaps the most important precursor of corporate reorganizations. See Douglas G. Baird and Robert K. Rasmussen, Boyd*'s Legacy and Blackstone's Ghost*, 1999 S Ct Rev 393, 397 (tracing the "modern law of corporate reorganizations" back to a controversy that began in 1886 and was adjudicated in the railroad-receivership case *Northern Pacific Railway Co v Boyd*, 228 US 482 (1913)).

79 Tabb, 3 Am Bankr Inst L Rev at 25 (cited in note 60) (quotation marks and citations omitted). See also Act of 1898 § 2, 30 Stat at 545.

80 See Skeel, *Debt's Dominion* at 41 (cited in note 73). Referees would later be renamed "bankruptcy judges" in 1973. See Tabb, 3 Am Bankr Inst L Rev at 25 (cited in note 60).

81 See Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction after* Stern v. Marshall, 86 Am Bankr L J 121, 125 (2012). The division of labor between state and federal courts has been a perennial source of dispute in federal bankruptcy debates. See *Report of the Commission on the Bankruptcy Laws of the United States*, HR Rep No 93-137, 93d Cong, 1st Sess 91 (1973), reprinted in Lawrence P. King, et al, eds, *Collier on Bankruptcy* (Matthew Bender 16th ed 2011).

82 Act of 1898 § 23, 30 Stat at 552–53. See also Tabb, 3 Am Bankr Inst L Rev at 25 n 167 (cited in note 60). The 1898 Act also allowed debtors to claim (sometimes generous) state exemptions, a provision that was unsuccessfully challenged as a failure of uniformity. See *Hanover National Bank v Moyses*, 186 US 181, 188–90 (1902).

83 See Brubaker, 86 Am Bankr L J at 127–28 (cited in note 81).

84 See Tabb, 3 Am Bankr Inst L Rev at 25 n 167 (cited in note 60).

85 For judicial discussions of this distinction, see *Katchen v Landy*, 382 US 323, 329–30 (1966) ("[B]ankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession.") (quotation marks omitted); *Taubel-Scott-Kitzmiller Co v Fox*, 264 US 426, 430–34 (1924) (deciding whether "Congress conferred upon the bankruptcy court . . . jurisdiction to adjudicate the controverted rights

summary jurisdiction in the absence of an alternative, nonbankruptcy ground.[86] The 1898 Act anticipated that referees would exercise much the same jurisdiction as district courts had under the earlier bankruptcy statutes.[87] In 1920, the Supreme Court construed the language of the 1898 Act to mean that referees' authority reached matters within summary, but not plenary, jurisdiction.[88]

Throughout the eighty years of the 1898 Act's existence, the statutory distinction between summary and plenary jurisdiction remained "a point of enormous contention" that produced "frequent" litigation.[89] In time, the Court expressly recognized that the line had largely become "a matter to be determined by decisions of th[e] Court," given "the absence of congressional definition."[90] And only occasionally did Congress step in. One example of such legislative involvement focused on the treatment of fraudulent transfers, which had fallen within bankruptcy's scope since the Henrician legislation.[91] The 1898 Act seemed to allow avoidance actions against third parties to be filed in federal court.[92] After the Supreme Court narrowly construed summary jurisdiction to reach only prebankruptcy fraudulent conveyance actions,[93] however, Congress amended the statute to permit trustee suits to avoid liens and recover preferential and fraudulent transfers.[94] The summary/plenary distinction, in short, never generated predictability. Instead, it remained a work in progress with occasional clarifying contributions from both the Court and Congress.

[of a trustee] by summary proceedings"); *Mueller v Nugent*, 184 US 1, 13–14 (1905) (contrasting the jurisdiction of a bankruptcy court with the option to bring a "plenary suit" in federal or state court).

86 See Act of 1898 § 23b, 30 Stat at 552–53.

87 Act of 1898 § 22, 30 Stat at 552; Act of 1898 § 38, 30 Stat at 555. See also *White v Schloerb*, 178 US 542, 546 (1900) (noting that "referees in bankruptcy are appointed by the courts of bankruptcy, and take the same oath of office as judges of United States courts, . . . and . . . exercise[ ] much of the judicial authority of [the referring] court").

88 *Weidhorn v Levy*, 253 US 268, 274 (1920) (relying on "the language of the Bankruptcy Act" to reach this conclusion). Parties, however, could consent to the exercise of bankruptcy referees' adjudicatory authority with respect to matters falling within summary jurisdiction. See *MacDonald v Plymouth County Trust Co*, 286 US 263, 266–68 (1932).

89 Tabb, 3 Am Bankr Inst L Rev at 25 (cited in note 60).

90 *Katchen*, 382 US at 328.

91 See Stefan A. Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 Minn L Rev 401, 422 (1947).

92 See Brubaker, 86 Am Bankr L J at 128 (cited in note 81).

93 *Bardes v Hawarden Bank*, 178 US 524, 539 (1900).

94 See Brubaker, 86 Am Bankr L J at 128 n 34 (cited in note 81).

B. Constitutional Constraints on Non–Article III Bankruptcy Adjudication

For eighty years, no dispute under the 1898 Act produced Article III challenges to referees' (or later, bankruptcy judges') adjudicatory authority. Subsequent congressional iterations of federal bankruptcy statutes, by contrast, have engendered a plethora of challenges by assigning more-expansive adjudicatory power to non–Article III officials. In two key cases, the Court enunciated formal rules to constrain such congressional delegations.

The successor statute to the 1898 Act, the Bankruptcy Reform Act of 1978,[95] extended statutory bankruptcy jurisdiction to all matters "related to" a bankruptcy case and created a new non–Article III bankruptcy tribunal to exercise that authority.[96] The new bankruptcy judges were appointed by the president and made removable only "by the judicial council of the circuit or circuits in which the bankruptcy judge serves."[97] Four years later, the Supreme Court invalidated that scheme as a violation of Article III in *Northern Pipeline*.[98] Justice Brennan's plurality opinion in that case spun a straight line of reasoning from formal constitutional first principles to a rule of decision for limiting bankruptcy adjudication.[99] The first principle was that the Constitution's allocation of the "judicial Power" to Article III courts alone must be "jealously guarded" to maintain both interbranch "checks and balances" and judicial impartiality.[100] Consequently, Brennan explained, exceptions to the strong default rule of Article III adjudication were permissible solely in three "historically and constitutionally [ ] exceptional" pockets: territorial courts, military courts, and the adjudication of "public rights" that concern suits between the government and its citizens.[101] The Court held that bankruptcy does not fall into the

95 Pub L No 95-598, 92 Stat 2549, codified as amended at 11 USC § 101 et seq.

96 Bankruptcy Reform Act of 1978 §§ 201(a), 241(a), 92 Stat at 2657, 2668.

97 Bankruptcy Reform Act of 1978 § 201(a), 92 Stat at 2657–58.

98 *Northern Pipeline*, 458 US at 87 (Brennan) (plurality) (holding that the jurisdictional scheme in the Bankruptcy Reform Act of 1978 "cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts").

99 Id at 57–63 (Brennan) (plurality). Justice William Rehnquist, joined by Justice Sandra Day O'Connor, filed a brief concurrence in the judgment, insisting on a minimalist approach and suggesting that claims that "are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" must be adjudicated in an Article III forum. Id at 90 (Rehnquist concurring).

100 Id at 57–60 (Brennan) (plurality).

101 Id at 63–68 (Brennan) (plurality).

third exception, since it does not concern a set of questions that "may be, and at times has been, committed exclusively to executive officers."[102]

On the one hand, this logic implies that bankruptcy can never fall outside an Article III forum—all bankruptcy matters, on this view, would have to be resolved by a federal district court. But Brennan added a further complication. He distinguished "the restructuring of debtor-creditor relations, which is at the *core* of the federal bankruptcy power," from the "adjudication of state-created private rights" and implied that the former, but not the latter, could be assigned to a non–Article III adjudicator.[103]

Responding eventually to *Northern Pipeline*, Congress picked up on the opinion's reference to "core" matters in the Bankruptcy Amendments and Federal Judgment Act of 1984[104] (BAFJA). Pursuant to BAFJA, bankruptcy judges could, on reference by a district court, hear and decide one of an open-ended enumeration of sixteen "core" matters, while issuing proposed findings of fact and conclusions of law in noncore matters.[105] The list of core matters reflected Congress's effort to apply the "extremely opaque" constitutional distinction offered in *Northern Pipeline*.[106]

Almost thirty years after BAFJA's enactment, the Court once more revisited the Article III question in bankruptcy. It again issued a divided opinion, this time invalidating one of the sixteen heads of "core" bankruptcy court adjudicatory power created in that statute.[107] In a formalist opinion by Chief Justice Roberts, the Court in *Stern* determined a state law tort "counterclaim[ ] by the estate against persons filing claims against the estate"[108] to be beyond the permissible scope of adjudicatory

102 *Northern Pipeline*, 458 US at 69 (Brennan) (plurality), quoting *Ex Parte Bakelite Corp*, 279 US 438, 458 (1929) (emphasis omitted).

103 *Northern Pipeline*, 458 US at 71 (Brennan) (plurality) (emphasis added).

104 Pub L No 98-353, 98 Stat 333, codified in various sections of Title 28.

105 BAFJA § 157(b)(1)–(2), (c)(1), 98 Stat at 340–41, codified as amended at 28 USC § 157(b)(1)–(2), (c)(1).

106 Brubaker, 86 Am Bankr L J at 135 (cited in note 81). See also Block-Lieb, 86 Am Bankr L J at 59, 112–14 (cited in note 55) (noting the divergence of views within Congress after *Northern Pipeline* about what judicial structure was constitutionally permitted and concluding that the Congress that enacted BAFJA had "no clearer direction from the Court than when it first enacted the now invalidated legislation").

107 *Stern*, 131 S Ct at 2620.

108 28 USC § 157(b)(2)(C).

delegation under Article III.[109] It is worth noting here that the *Stern* Court also cited and distinguished two earlier cases in which voidable preference actions had been found to be within the scope of a bankruptcy referee's powers to adjudicate when the preferred creditor had already filed a proof of claim.[110] The Court did not suggest that these cases had been overruled and hence seemed to preserve bankruptcy judges' power to adjudicate voidable preference actions to final judgment.

Stern's logic tracked *Northern Pipeline*'s formalist structure but elaborated on both the constitutional first principles at stake and the specific application of those rules to the bankruptcy context. First, in addition to revisiting Brennan's libertarian account of the separation of powers, Roberts gestured at a federalism concern by noting the possibility that bankruptcy judges would have to decide novel questions of state law.[111] Second, the *Stern* majority again relied on the public rights/private rights distinction.[112] But echoing *Northern Pipeline*, the *Stern* majority also suggested another distinction applicable only within the bankruptcy context: the possibility that such issues "integral to the restructuring of the debtor-creditor relationship" fall within the scope of permissible adjudicatory delegations beyond Article III.[113] In other parts of the opinion the Court employed a different terminology, speaking of "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[114] As we shall see, this "stems from" language, along with other elements of the *Stern* opinion, has proved a particularly potent source of heat, rather than light, in the lower federal courts.[115]

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109 *Stern*, 131 S Ct at 2609 ("Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges.").

110 Id at 2616–17, citing *Katchen*, 382 US at 325, 327–28, and *Langenkamp v Culp*, 498 US 42, 44–45 (1990) (per curiam).

111 For the libertarian element of *Stern*, see *Stern*, 131 S Ct at 2609 (describing how Article III protects liberty by delineating the powers of Article III judges). For the federalism element, see id at 2617 (noting the questions of state law that would have had to be resolved in the case at bar).

112 Id at 2611–13 (discussing the public rights precedent).

113 Id at 2617, quoting *Langenkamp*, 498 US at 44.

114 *Stern*, 131 S Ct at 2618.

115 See notes 124–26 and accompanying text.

C. The Current State of Article III in Bankruptcy

Stern fostered uncertainty about other elements of core adjudicatory power under BAFJA[116] and about the treatment of cases that once fell within core statutory adjudicatory bounds but no longer fall within constitutional boundaries.[117] It also left unanswered questions about the substantive values animating Article III jurisprudence. Lower courts have demonstrated that they remain unclear as to what justifies the formalist rule of decision that the *Stern* Court has lighted upon as a means to realize those values. These courts are consequently uncertain how that rule should be extended beyond the facts of *Stern*.

1. Doctrinal uncertainty after *Stern* in the lower courts.

As one bankruptcy judge dryly observed, "*Stern* has been viewed as incredibly ambiguous by nearly every bankruptcy professional—scholars, counsel for parties, and judges—who has reviewed it and attempted to apply its determination to address a bankruptcy court's final judgment authority in a number of different circumstances."[118] Somewhat ironically, the result is uncertainty that is anathema to the constraining function of formalist rulemaking.[119] Uncertainty arises in the first place because there are "several inconsistent" rules available to lower courts seeking to apply *Stern*.[120] In addition to focusing on the "stems from" language, some lower courts have stressed the presence of state law issues as a trigger for an Article III problem,[121] or alternatively looked for some sort of functional nexus to the bankruptcy at bar,[122] or for some sort of theoretical

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116 See Brubaker, 86 Am Bankr L J at 147 (cited in note 81); Brook Gotberg, *Preferences Are Public Rights*, 2013 Wis L Rev 1355, 1357 n 8.

117 See generally Crist, 86 Am Bankr L J 627 (cited in note 24) (canvassing immediate lower court responses to *Stern*).

118 *In re Merrillville Surgery Center, LLC*, 474 Bankr 618, 620 (Bankr ND Ind 2012) (emphasis omitted).

119 See Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U Chi L Rev 636, 638–39 (1999) (noting that formalism strives to "constrain[ ] the discretion of judges in deciding cases").

120 Jonathan C. Lipson and Jennifer L. Vandermeuse, Stern*, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 Wis L Rev 1161, 1189.

121 See, for example, *Waldman v Stone*, 698 F3d 910, 919 (6th Cir 2012) (stating that Article III concerns attach "when a debtor pleads an action arising only under state-law").

122 See, for example, *In re Pulaski*, 475 Bankr 681, 688 (Bankr WD Wis 2012) ("Because the defendant seeks to have the claim treated as a secured claim and paid through

connection between bankruptcy and a given claim[123] to vindicate the bankruptcy judge's power. All of these tests draw on different textual elements of the *Stern* majority opinion. None provides particularly satisfying or stable guidance.

Consider first the most influential of the post-*Stern* tests, which focuses on whether an action "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[124] The United States Court of Appeals for the Seventh Circuit, in addition to many lower courts, has homed in on this phrase.[125] One lower court, for example, has distilled a two-prong litmus test from *Stern*, asking whether a claim either stems from bankruptcy or would necessarily be resolved in the claims-allowance process and finding power in the bankruptcy court if either is satisfied.[126]

Even aside from whether the *Stern* Court intended this language to be a talismanic *ratio decidendi*, neither the "stems from" language nor the "would necessarily be resolved" terminology turns out to be illuminating. The "stems from" language is at war with earlier bankruptcy precedent, is inconsistent with *Stern* itself, and is incapable of generating stable limits on non–Article III adjudication. The "would necessarily be resolved" language is question-begging or hollow without a substantive account of which categories of claims are necessarily implicated in the resolution of a bankruptcy estate.

Consider first the "stems from" test, which asks judges to determine whether an asserted right exists only by virtue of the bankruptcy code or the bankruptcy filing, or whether the dispute would not have arisen in the absence of a bankruptcy filing. Understood in this light, the "stems from" test does not cohere with

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the debtors' plan, the issues raised by the debtors are now 'integral to the restructuring of the debtor-creditor relationship.'"), quoting *Ortiz v Aurora Health Care, Inc*, 665 F3d 906, 914 (7th Cir 2011).

123 See, for example, *In re CCI Funding I, LLC*, 2012 WL 3421173, *6 (Bankr D Colo) (inquiring whether the action "stems from" the bankruptcy).

124 *Stern*, 131 S Ct at 2618.

125 See, for example, *Wellness International*, 727 F3d at 765 (focusing on the "stems from" language as a test for adjudicatory power); *In re McCrory*, 2011 WL 4005455, *1 (Bankr ND Ohio) ("The matter at issue is one that 'stems from the bankruptcy itself' that is within this court's jurisdiction to decide."); *In re Pali Holdings, Inc*, 488 Bankr 841, 851 (Bankr SDNY 2013) (noting approvingly "[t]he many cases recognizing the power of bankruptcy judges constitutionally to enter final judgments in turnover actions[, and] repeatedly observing that turnover actions 'stem[ ] from the bankruptcy itself'").

126 See *In re Southeastern Materials, Inc*, 467 Bankr 337, 348 (Bankr MD NC 2012). For a further example of a lower court's adoption of a similar two-pronged test based on the *Stern* language, see *Dietz v Spangenberg*, 2013 WL 883464, *4 (D Minn).

the balance of the Court's constitutional jurisprudence on bankruptcy. In an earlier case, the Court had ruled that the Seventh Amendment's jury trial requirement applied to a fraudulent conveyance action against a party that had filed no proof of claim.[127] While that ruling was analytically distinct from the Article III holdings of *Northern Pipeline* and *Stern*, the Court's reasoning supports the inference that such claims would also fall outside the permissible adjudicatory power of the bankruptcy court.[128] The "stems from" test, on the other hand, generates a different outcome.

The present substantive regime for such claims was established in the (now-canonical) 1931 Supreme Court case *Moore v Bay*,[129] which holds that a transfer invalid against one creditor is invalid against all creditors in a bankruptcy.[130] This rule fundamentally changes the operation of fraudulent transfer law when the issue moves from ordinary adjudication to bankruptcy. The resulting claim exists in an entirely different form—and for the benefit of different creditors—once a petition has been filed. Application of the "stems from" test therefore suggests that all fraudulent transfers fall within the bankruptcy power. Yet, in the very passage in *Stern* in which that phrase is found, the Court was comparing tort claims to fraudulent transfer claims and drawing a distinction between claims (like fraudulent transfers and counterclaims) that are merely "'to augment the bankruptcy estate' and those that seek 'a pro rata share of the bankruptcy res.'"[131] This distinction, which echoes an in rem conception of bankruptcy, is hard to square with a "stems from" test.[132] Indeed, the distinction is hard to understand even on its own terms. Because many claims that stem from a bankruptcy do nothing more than augment the estate, the distinction has little or no resolving power.

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127 *Granfinanciera, SA v Nordberg*, 492 US 33, 35 (1989).

128 Compare Douglas A. Baird, *The Seventh Amendment and Jury Trials in Bankruptcy*, 1989 S Ct Rev 261, 280–81 ("[T]he Court did not rule that conducting a jury trial is itself an exercise of the judicial power."), with Gotberg, 2013 Wis L Rev at 1358–59 & n 21 (cited in note 116) (suggesting that the holding of *Granfinanciera* has Article III implications).

129 284 US 4 (1931).

130 Id at 5 ("[C]laims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.").

131 *Stern*, 131 S Ct at 2618, quoting *Granfinanciera*, 492 US at 56.

132 For an extended critical examination of the use of in rem framing, see notes 329–30 and accompanying text.

The "stems from" test is also inconsistent with the Court's analysis within the *Stern* opinion. In *Stern*, the Court suggested that a preference action against a creditor who had not filed a proof of claim would not be within a bankruptcy court's adjudicatory power.[133] In the absence of a bankruptcy filing, these preference actions do not exist. They are uniquely creatures of federal law as articulated in the Bankruptcy Code. Indeed, a preference action is the prototype of a right created by the Bankruptcy Code to alter state law rights: a legal transfer under a state law contract is voided because it prefers one creditor over others in anticipation of bankruptcy.[134] Application of a "stems from" test for adjudicative delegations, therefore, would permit a class of claims that the *Stern* Court itself identified as lying outside the bankruptcy judge's power.[135] Although it is possible for a doctrinal test to repudiate earlier precedent by implication, we think it unlikely that the *Stern* Court meant to establish a test that was incompatible with its own analysis.

Finally, the "stems from" test generates no tractable limit on Congress's ability to delegate matters to the bankruptcy courts. At bottom, the notion that an action "stems from" the bankruptcy is similar to the idea that an action is *caused* by the bankruptcy. Indeed, justices often use the phrase to mean simply but-for causation.[136] But, as judges and scholars have long recognized in the tort context, to rely on but-for causation alone is to abandon any effort to employ a limiting principle.[137]

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[133] *Stern*, 131 S Ct at 2616–17.

[134] See id at 2616:

> A voidable preference claim asserts that a debtor made a payment to a particular creditor in anticipation of bankruptcy, to in effect increase that creditor's proportionate share of the estate. The preferred creditor's claim in bankruptcy can be disallowed as a result of the preference, and the amounts paid to that creditor can be recovered by the trustee.

[135] There are other problems with excluding preference actions from the power of the court, which we discuss below. See text accompanying notes 335–41. Namely, the Court's assumption that such actions do not have a role in determining claims against the estate ignores 11 USC § 502(d) and (h), which provides that a creditor's claim arising from the return of a preferential payment will be determined as if it existed prior to the bankruptcy filing.

[136] See, for example, *Sorrell v IMS Health Inc*, 131 S Ct 2653, 2678 (2011) (Breyer dissenting) ("Any statutory initiative stems from a legislative agenda. . . . Any administrative initiative stems from a regulatory agenda.").

[137] See *Anderson v Minneapolis, St. P. & S. S. M. Ry. Co*, 179 NW 45, 46–47 (Minn 1920) (holding sufficient for a finding of liability a jury determination that the defendant's conduct had been a "substantial factor" in bringing about the injury to the plaintiff);

Similarly, to rely on a but-for test alone to determine the necessary linkage between bankruptcy and a claim would be to invite long and unpredictable chains of justificatory reasoning. We think it unlikely that the *Stern* Court meant to introduce this kind of open-ended analysis given its otherwise clearly expressed commitment to limiting the scope of the adjudicatory power of bankruptcy courts. Reading a single phrase wrenched from context without accounting for the aims or tenor of the balance of the overall opinion is, we think, to disregard the clear intent of the *Stern* Court.

In contrast, the "would necessarily be resolved" language from *Stern* can be addressed more tersely. Courts invoking this language have not provided a cogent explanation of why a given species of claim is necessary to the resolution of the bankruptcy process.[138] Such an explanation would require some account of bankruptcy's functional scope. Absent such an explanation, it is not possible to answer whether a claim will "necessarily" be resolved. Neither *Stern* nor any of its lower court progeny, however, contains such a theory. Hence, the "would necessarily be resolved by" language cannot, standing alone, provide any clarity to the analysis.[139]

Lower courts' construal of *Stern*'s "stems from" language, in short, relies on cherry-picking from the opinion's text, reflects conceptual confusion, and fails to promote stable, coherent outcomes. Such a status quo is unlikely to prove enduring or attractive. And to the extent that the "would necessarily be resolved by" language might provide a starting point for analysis, post-*Stern* jurisprudence to date offers no cogent account of how to determine when a species of claim is "necessary"

Daniel B. Dobbs, *The Law of Torts* § 171 at 415 (West 2000) (providing examples of cases that have "put the simple but-for test in doubt").

138 See, for example, *In re McElwee*, 469 Bankr 566, 576 (Bankr MD Pa 2012) (applying the "necessarily resolved by" language to a counterclaim and finding that standard satisfied in part because of "a common nucleus of law and fact"). The "common nucleus" language was originally used in an entirely different jurisdictional context in *United Mine Workers of America v Gibbs*, 383 US 715, 725 (1966).

139 In addition, lower courts have applied the "necessarily resolved by" language at the incorrect level of generality. The analysis in *McElwee*, for example, focuses on a specific counterclaim—a reduction in the amount owed to the claimant by the debtors, based on the course of dealings between them. *McElwee*, 469 Bankr at 569–70. In contrast to this form of retail, case-by-case analysis, cases such as *Northern Pipeline* and *Stern* have focused on general categories of claims. See *In re Olde Prairie Block Owner, LLC*, 457 Bankr 692, 698 (Bankr ND Ill 2011) (noting that *Stern* "limited the holding to the debtor's counterclaim and others substantially like it").

to the bankruptcy process. A theory grounded in the creditors' bargain, by contrast, promises a way to fill this lacuna. In that sense, the theory, as laid out below, may be understood as a gloss on this second element of *Stern*'s text.

2. Doctrinal uncertainty after *Stern* in the Supreme Court.

Given this uncertainty in the lower courts, it is perhaps unsurprising that, within two years, the Article III question in bankruptcy was back in front of the high court. In *Executive Benefits Insurance Agency v Arkison*,[140] a unanimous Court construed the Bankruptcy Code to allow bankruptcy judges to enter proposed findings of fact and conclusions of law for so-called *Stern* claims.[141] The unanimous ruling in *Arkison*, however, belied the depth of lower courts' discord that persists after *Stern*. Disagreement still obtains, for example, as to whether fraudulent conveyance actions can be adjudicated to finality by bankruptcy judges.[142] Other courts have flagged the question of how *Stern* affects cases involving a mix of core and noncore claims.[143] *Stern* may also have implications for substantive consolidation, in which "the liabilities and assets of the various entities are put into the same pot, and the assets are distributed ratably among the general creditors."[144]

A year after *Arkison* was handed down, the Court decided a second post-*Stern* case about whether litigants can consent to a bankruptcy judge's adjudication of a claim that otherwise requires Article III review in the wake of a circuit split arising on that issue.[145] The Court's decision in *Wellness International*

140 134 S Ct 2165 (2014).

141 Id at 2170.

142 See *In re Bellingham Insurance Agency*, 702 F3d 553, 561 (9th Cir 2012) (finding that "fraudulent conveyance claims, because they do not fall within the public rights exception, cannot be adjudicated by non-Article III judges"); *Rosenberg v Harvey A. Bookstein*, 479 Bankr 584, 588 (D Nev 2012) (same); *In re Heller Ehrman LLP*, 464 Bankr 348, 350 (ND Cal 2011) (same). But see *In re Global Technovations Inc*, 694 F3d 705, 722 (6th Cir 2012) (finding fraudulent conveyance claims to be within the bankruptcy courts' remit); *In re Vista Bella, Inc*, 2012 WL 3778956, *4 (Bankr SD Ala) (same); *In re Appalachian Fuels, LLC*, 472 Bankr 731, 739 (ED Ky 2012) (same); *In re Safety Harbor Resort and Spa*, 456 Bankr 703, 714–18 (Bankr MD Fla 2011) (same).

143 See, for example, *In re Appleseed's Intermediate Holdings, LLC*, 2011 WL 6293251, *3 (D Del).

144 Douglas G. Baird, *Substantive Consolidation Today*, 47 BC L Rev 5, 6 (2005).

145 See generally *Wellness International Network, Ltd v Sharif*, 2015 WL 2456619 (US). Regarding the circuit split, compare *In re Bellingham*, 702 F3d at 572–73 ("Article III bars bankruptcy courts from entering final judgments in such actions brought by a noncreditor absent the parties' consent."), with *Waldman*, 698 F3d at 921 (concluding

Network, Ltd v Sharif[146] addressed the question whether a so-called *Stern* claim could be adjudicated with consent from all parties, rather than the question of when an Article III problem arises in the first instance.[147] Drawing on precedent from the administrative agency context,[148] the *Wellness International* Court framed the issue in functionalist terms as a question whether "allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims . . . usurp[s] the constitutional prerogatives of Article III courts."[149] Emphasizing bankruptcy judges' limited mandates and the extent of Article III control, the Court answered in the negative.[150]

The clear tension between the functionalist approach of *Wellness International* and *Stern*'s formalist analysis raises obvious puzzles about the methodological equilibrium (or lack thereof) in separation of powers jurisprudence.[151] We put those concerns aside here. What matters for our purposes is that the *Wellness International* Court expressly bracketed the question whether the claims at issue in that case raised a so-called *Stern* problem.[152] In effect, the Court's ruling continues to leave open the question whether there is a limitation on bankruptcy courts' power based on the presence of state law issues, a limitation that could raise the possibility of a far larger category of legal questions pertaining to the size of the estate—questions that fall outside the purview of the bankruptcy court. The possibility of arbitraging the residual ambiguity in the *Northern Pipeline–Stern–Wellness International* line of cases, we suspect, will not necessarily go unnoticed. Rather, it is all too possible for an

that a bankruptcy court's entry of final judgment on a state law claim was in violation of Article III, regardless of agreement between the parties on that court's ability to enter a final judgment).

146 2015 WL 2456619 (US).

147 Id at *6.

148 Id at *7, citing *Commodity Futures Trading Commission v Schor*, 478 US 833 (1986).

149 *Wellness International*, 2015 WL 2456619 at *9.

150 Id at *10. Justice Sotomayor's logic is expressly functionalist in character. Id at *8 n 9 (chastising Roberts in dissent for his "insistence on formalism").

151 To the extent one eschews legal realism and views methodological oscillation as a puzzle, the decisions of Justices Anthony Kennedy and Samuel Alito joining both the *Stern* and *Wellness International* opinions in relevant part require explaining. It is certainly possible to imagine a justification for treating (a) the threshold question of when an Article III problem arises differently from (b) the remedial question of how such Article III defects can be cured. Justice Clarence Thomas's analysis in his dissent, however, explores ways in which that distinction might be dissolved. Id at *33 (Thomas dissenting).

152 Id at *6 n 7 (majority).

enterprising creditor to resist the *Wellness International* consent route and to force these issues to new litigation.

D. The Missing Constitutional First Principles

The depth of discord engendered by *Stern*'s rejection of BAFJA's core/noncore distinction is not merely a result of the opacity of the Court's decisional rule. The Supreme Court routinely employs open-textured standards as rules of decision in constitutional matters.[153] The fact that a constitutional principle is distilled into a standard rather than a rule need not entail confusion or incoherence.[154] The formalist rules offered by *Northern Pipeline* and *Stern*, however, are ambiguous because the Court has not explained their justification. Those rules were not compelled mechanically by the text of the Constitution.[155] Instead, both the *Northern Pipeline* and the *Stern* Courts identified structural principles embedded in the Constitution and then sought to craft a rule of decision that faithfully honored those principles.[156] But what precisely is the constitutional principle at stake? That turns out to be less clear. And it is the ensuing lack of clarity that renders the Article III problem in bankruptcy so nettlesome.

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153 For example, the recent reinvigoration of substantive constraints on conditional-spending programs announced in another opinion by Roberts employs a standard rather than a rule. See *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2604–07 (2012) (analyzing a financial "inducement" to determine if it is sufficiently "encourag[ing]" as to be "coercive").

154 See generally Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557 (1992) (developing efficiency-based principles for the use of standards as opposed to rules).

155 Such an argument has been derived from the Vesting Clause of Article III. See Steven G. Calabresi and Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum L Rev 1002, 1006 (2007) (arguing that the "Vesting Clause . . . vests the federal judiciary with *all* of the federal judicial power, and by designating the Supreme Court as 'Supreme' and other federal tribunals as 'inferior to' the Supreme Court, the Constitution requires the Supreme Court to have supervisory power over all subordinates within its department"). Notably, neither *Northern Pipeline* nor *Stern* offers extensive textual arguments of this kind. Instead, they invoke general structural principles that are infused with particular normative concerns—especially separation of powers. See *Northern Pipeline*, 458 US at 83–87 (Brennan) (plurality).

156 See Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 Mich L Rev 952, 954 (2003) (describing formalism as "the model . . . of deducing legal outcomes from a major premise consisting of a rule of law laid down by a legislature and a minor premise consisting of the facts of the particular case").

In both *Northern Pipeline* and *Stern*, the Court leaned first and foremost on the notion that clear divisions between the three distinct branches of government have a checking function, promoting liberty and limiting "abuses" of governmental power.[157] In *Stern*, the Court also gestured toward a federalism problem, noting with apparent concern the possibility that bankruptcy judges would be called on to decide questions of state law.[158] Bankruptcy legislation has long raised federalism concerns, so the return of these concerns here should perhaps be unsurprising.[159] The Court has not, however, crisply explained how either separation of powers or federalism concerns of these sorts are at stake in the bankruptcy context. Consequently, it has furnished no guidance to lower courts seeking to understand how to apply the nebulous rules offered in *Northern Pipeline* and *Stern* to new situations.

Any separation of powers account of *Northern Pipeline* and *Stern* must reckon first with the fact that Article III involvement in bankruptcy is plainly contingent on congressional choice. The Constitution, rather famously, requires the creation of a single Supreme Court and does not compel the creation of any lower courts.[160] Exercise of any enumerated power, moreover, lies within Congress's untrammeled discretion. As the sporadic early history of federal bankruptcy law demonstrates,[161] it is well within Congress's discretion not to create a federal bankruptcy system.[162] Consistent with this discretion, federal bankruptcy was the exception, not the rule, during the Republic's first century.[163] In the absence of a federal bankruptcy system, the most common form of Article III involvement in debtor-creditor disputes would arise through Supreme Court review of state supreme court

[157] *Northern Pipeline*, 458 US at 57–60 (Brennan) (plurality); *Stern*, 131 S Ct at 2608–09.

[158] *Stern*, 131 S Ct at 2617.

[159] See notes 69–72 and accompanying text.

[160] See Daniel J. Meltzer, *The History and Structure of Article III*, 138 U Pa L Rev 1569, 1620 (1990) (recognizing the canonical view of the "congressional prerogative to create lower federal courts").

[161] See notes 73–78 and accompanying text.

[162] Indeed, Congress might have selected other instruments to resolve the conflict-of-laws problem that initially motivated inclusion of the bankruptcy power. For example, Congress could use its authority under the Full Faith and Credit Clause to enact a statute that regulates the interjurisdictional effects of state bankruptcy laws. See US Const Art IV, § 1. See also Nadelmann, 1 Am J Legal Hist at 220 (cited in note 57).

[163] See text accompanying note 78.

judgments.[164] Such review, however, is categorically unavailable if the sole error identified in a state supreme court judgment concerns state law.[165] Moreover, as a historical matter, review was even further constrained to pure errors of law and instances in which a state court had rejected or denied a federal law claim.[166] In the absence of a correctly framed constitutional issue, therefore, federal court review simply did not obtain in bankruptcies that occurred outside the sixteen years before 1898 when federal bankruptcy laws were on the books. The legal and historical contingency of Article III involvement in bankruptcy undermines any argument that Article III courts are a necessary "guardian of individual liberty and separation of powers" in this distinct fashion.[167]

Perhaps, though, this misunderstands the nub of the Article III concern in *Northern Pipeline* and *Stern*. The "greater-includes-the-lesser" argument sketched above might simply "not work."[168] When the federal government takes a role in a domain in which individual property and contract entitlements are at stake, the argument might be, its institutional options for allocating responsibility among the three branches are constrained by the separation of powers. Thus, just as Congress can enact criminal sanctions but cannot pick out the specific persons to whom such sanctions will attach,[169] so too Congress can enact a bankruptcy system but cannot assign certain elements of that

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164 Article III district courts could become involved in many debtor-creditor disputes through diversity jurisdiction (albeit applying state bankruptcy laws). This happens, we believe, with far less frequency than the invocation of bankruptcy jurisdiction.

165 See *Murdock v City of Memphis*, 87 US (20 Wall) 590, 631 (1874) (stating that the Supreme Court's appellate jurisdiction over state courts is limited to "questions of a Federal character").

166 See Judiciary Act of 1789, 1 Stat 73, 85–86. See also Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U Chi L Rev 1335, 1345 (2010) (discussing early limits on Supreme Court review of state court judgments).

167 *Stern*, 131 S Ct at 2615.

168 Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 Duke L J 197, 212–13. Professor Martin H. Redish relies on the idea of "unconstitutional conditions" to reject the argument from plenary congressional power. Id. This argument is unconvincing. Redish does not point to a baseline institution or an entitlement protected by the Constitution that is being waived; nor does he explain why the condition is so onerous as to be considered impermissible. To the extent that his claim is that Article III courts have an institutional interest, he ignores a rich history of institutional innovation and hybridity within structural constitutionalism. See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 Colum L Rev 1595, 1618–46 (2014).

169 See US Const Art I, § 9, cl 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

system outside Article III.[170] An argument of this kind would have to explain how certain allocations of authority are either impermissible as a matter of constitutional text (analogous, that is, to the Bill of Attainder Clause in the criminal context) or because they undermine a liberty or institutional good promoted by the Constitution. An argument along these lines also requires some explanation of why certain institutional allocations undermine liberty or promote abuse, since it is by no means obvious that strict separation between governmental functions is categorically necessary for that goal.[171]

Stern alludes to one possible explanation when it conjures the risk of impermissible sharing of functions between branches.[172] Similarly, *Northern Pipeline* articulates a concern about the impermissible "encroachment or aggrandizement of one branch at the expense of the other."[173] This is the idea that a separation of powers concern arises most acutely when there is an aggregation of different governmental functions (say, executive and judicial) within one branch.[174] Aggrandizement undermines the possibility of a branch being a check or a counterbalance on the others. Further, aggrandizement provides analytic traction even assuming that the federal government need not undertake a given policy function, such as bankruptcy management: it concerns the manner in which that policy is executed, not the mere fact of policy execution itself.

The aggrandizement concern might have applied to the Bankruptcy Act of 1978 (invalidated in *Northern Pipeline*), which provided for bankruptcy judges nominated by the president

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170 See *Wellness International*, 2015 WL 2456619 at *27 (Thomas dissenting) (offering this same sort of argument).

171 See Aziz Z. Huq, *Libertarian Separation of Powers*, 8 NYU J L & Liberty 1006, 1012 (2014) (expressing skepticism about the necessary connection between the functional separation of different elements of governmental power and the promotion of liberty).

172 *Stern*, 131 S Ct at 2608.

173 *Northern Pipeline*, 458 US at 57–58 (Brennan) (plurality), quoting *Buckley v Valeo*, 424 US 1, 122 (1976) (per curiam). The concern with self-aggrandizement is often invoked to resist institutional innovation in the separation of powers context. See, for example, *National Labor Relations Board v Noel Canning*, 134 S Ct 2550, 2594 (2014) (Scalia dissenting) (expressing skepticism about "a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court"). See also *Mistretta v United States*, 488 US 361, 382 (1989); *Morrison v Olson*, 487 US 654, 694 (1988).

174 See *Buckley*, 424 US at 121–23 (noting that, while the Framers did not intend the three branches to be "hermetic[ally] seal[ed] off from one another," the commingling of various functions in one branch was constitutionally impermissible).

and confirmed by the Senate.[175] By the time that *Stern* was decided, however, bankruptcy judges were appointed by the courts of appeals for the circuits in which their districts were located.[176] The *Stern* Court flagged this difference but found it insignificant.[177]

Exacerbating this refusal to account for legislative change in response to *Northern Pipeline* is the tension between the Court's approach to adjudicative delegations to agencies and its approach to adjudicative delegations to bankruptcy judges. If self-aggrandizement were the institutional-design margin implicated in Article III cases, then the Court should engage in more searching scrutiny when the delegatee in question is a political-branch actor, such as an executive agency, as opposed to an appointee of the Article III judiciary. But the opposite is currently the case.[178] Article III's bailiwick is vigorously defended in the bankruptcy context—in which no adjudicative power is transferred to the political branches—and only weakly enforced in the administrative agency context, in which another branch's (the executive's) gains are commensurate to the judiciary's loss.[179] The anti-aggrandizement principle, in short, cannot serve as a constitutional first principle to explain *Stern*, even if it could have done so in *Northern Pipeline*.

Perhaps, in the alternative, the shadow over liberty arises on a more retail basis. The *Stern* Court alluded to the comparative expertise of Article III judges in resolving state law issues.[180] It also conjured the specter of "judicial abuses" that might result from the absence of tenure and salary protections.[181] There are a number of problems, however, with this retail account of the Article III principle as it bears on bankruptcy. To begin with, the

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175 28 USC §§ 152, 153(a) (1976 & Supp 1980).

176 See 28 USC § 152(a)(1).

177 *Stern*, 131 S Ct at 2619 ("[I]t does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings."). Hence, the commentator who observed that "[t]he *Stern* Court's failure to notice these differences is striking" does not quite capture the gap between *Northern Pipeline* and *Stern*. McKenzie, 86 Am Bankr L J at 35 (cited in note 26).

178 See Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 Geo Wash L Rev 1293, 1338–39 (2012) (noting "*Stern*'s repeated carve-outs" for federal administrative agencies). See also Rafael I. Pardo and Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L Rev 384, 417–18, 452–60 (2012) (proposing the creation of a bankruptcy agency).

179 See note 173.

180 *Stern*, 131 S Ct at 2615.

181 Id at 2609.

default locus for the adjudication of state law claims is *state* court, not a federal district court.[182] Absent bankruptcy jurisdiction, an individual bankruptcy implicating less than $75,000 would find no berth under federal diversity jurisdiction.[183] At least 15 percent of Chapter 7 bankruptcy cases in which a trustee was appointed between 2000 and 2011 would have fallen outside diversity jurisdiction for this reason.[184] (Trustees, moreover, are not appointed in the many more cases in which no assets are at issue.) The relevant comparator for bankruptcy cases, therefore, is often not an Article III court but a state court. State judges, however, often lack tenure and salary protections[185]—and, arguably worse, face elections largely funded by a small pool of big donors[186]—in ways that render them on par with or inferior to bankruptcy judges. Even with respect to Article III courts, moreover, one commentator has argued that post-*Erie* bankruptcy judges may be better than their counterparts in the district courts at resolving state law claims because they have greater familiarity with state property and contract law.[187] *Stern*'s federalism-based concern about distortions in state law, therefore, has yet to receive an adequate theoretical justification.[188]

The Court's concern with preserving federal court jurisdiction, moreover, is at odds with another deep strain of Article III jurisprudence that recognizes the bilateral nature of threats to

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182 See Erwin Chemerinsky, *Formalism without a Foundation:* Stern v Marshall, 2011 S Ct Rev 183, 189.

183 See 28 USC § 1332 (imposing the amount in controversy requirement, as well as diversity requirements).

184 This calculation draws on nationwide data from the Executive Office for US Trustees and excludes North Carolina and Alabama. See Ed Flynn, *Chapter 7 Asset Cases and Trustee Compensation*, 33 Am Bankr Inst J 6, 48 (June 2014).

185 See Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 Georgetown L J 607, 664 (2002) (noting that many "[s]tate judges . . . live without life tenure and salary protection").

186 For nationwide data on the use of judicial elections and the rates of campaign contributions, see generally Adam Skaggs, et al, *The New Politics of Judicial Elections, 2009–10* (Brennan Center for Justice, 2010), archived at http://perma.cc/6SSZ-TPZP.

187 See McKenzie, 86 Am Bankr L J at 43–44 (cited in note 26). In addition, the worry about distortions in state law does not lead to a preference for Article III adjudicators. That logic is hard to square with the Court's federalism-based enthusiasm for certifying state law questions to state high courts. See, for example, *Arizonans for Official English v Arizona*, 520 US 43, 77 (1997) ("Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'") (citation omitted) (brackets in original).

188 We offer such a justification in Part III.B.

judicial integrity. The late nineteenth-century Court developed a theory of appellate review of agency action, not as a means of controlling agency adjudication but to head off a flood of "petty"[189] cases that would swamp district court dockets.[190] That is, the White and Taft Courts recognized that Congress could undermine the effectual independence of the judiciary not only by eliminating jurisdiction, but also by expanding the adjudicative obligations of the federal courts in ways that diluted their prestige and their ability to provide quality adjudication on a per capita basis. No less than in the late nineteenth century, federal dockets today are often described as overloaded.[191] Recent empirical work, moreover, identifies a decline in the quality of judicial attention when dockets become overloaded.[192] Paradoxically, the road to quality adjudication of state law questions seems to involve anything but Article III tribunals in the first instance.

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In summary, the *Northern Pipeline–Stern* line of Article III jurisprudence presents a puzzle not only because of ambiguity in the verbal formulation of doctrine. Courts routinely employ open-textured standards. Rather, the problem resides in the absence of any colorable account of *why* Article III values are imperiled when a bankruptcy judge enters judgment on a state law claim. It will not do to merely gesture toward vague threats of

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189 Felix Frankfurter and Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv L Rev 917, 980–82 (1926) (arguing that the Constitution does not require Article III judges or juries to determine "petty" criminal cases).

190 See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum L Rev 939, 944, 990 (2011) (describing the federal judiciary's "fear of contamination" by involvement in administration). See also *Interstate Commerce Commission v Brimson*, 154 US 447, 472–74 (1894) (invalidating statutory jurisdiction that required courts to engage in "administrative" rather than judicial functions).

191 See Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time across Cases in the Federal Courts of Appeals*, 81 Geo Wash L Rev 401, 402–03 & nn 1–4 (2013) (collecting statements by judges in addition to numerical evidence of increasing caseload pressures).

192 See, for example, Bert I. Huang, *Lightened Scrutiny*, 124 Harv L Rev 1109, 1115 (2011) (finding that, "when flooded by [administrative] agency cases, . . . circuit courts began to reverse district court rulings less often [ ] in the civil cases") (emphasis omitted). See also Eric Helland and Jonathan Klick, *The Effect of Judicial Expediency on Attorney Fees in Class Actions*, 36 J Legal Stud 171, 186 (2007) (suggesting the effort aversion among federal judges as one explanation for their findings regarding the collection of high attorney's fees).

liberty lost and tyranny courted—rarely is there an obvious and mechanical connection between the discrete elements of constitutional structural design and such outcomes.[193] Reconstructing the Article III principle in bankruptcy, therefore, entails an account of what first principles are at stake when a non–Article III adjudicator not beholden to another branch is asked to resolve a state law question of contract or property. It is to this task that we now turn.

II. THE ARTICLE III PRINCIPLE IN BANKRUPTCY REDUX

This Part offers a reconstruction of the Article III principle of bankruptcy that illuminates a connection between the structural constitutional values that the Supreme Court has invoked and the actual rules of decision employed in case law. Many accounts of the jurisprudence open with the distinction between public and private rights.[194] We therefore begin by explaining why that distinction does not provide a plausible foundation for limiting bankruptcy judges' powers. Having cleared the analytic slate, we then offer an alternative account of the Article III stakes in bankruptcy.

A. The False Promise of the Public Rights/Private Rights Distinction

We begin by exploring the possibility that the Article III principle in bankruptcy derives from the deeply rooted historical distinction between "public rights" and "private rights."[195] Many scholarly accounts have focused on this language,[196]

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[193] See Aziz Z. Huq, *Standing for the Structural Constitution*, 99 Va L Rev 1435, 1442 (2013) (arguing that, "for the purposes of crafting federal court jurisdiction, . . . a chasm [ ] opens between the vindication of structural constitutional values and of individual rights"); Huq, 8 NYU J L & Liberty at 1013–30 (cited in note 171) (proposing that the presumed connection between the functional separation of different elements of governmental power and the promotion of liberty is not as clear as many suppose).

[194] This distinction loomed large in both the principal dissent and Justice Thomas's dissent in *Wellness International*. *Wellness International*, 2015 WL 2456619 at *15 (Roberts dissenting); id at *29, 30–32 (Thomas dissenting).

[195] Stern, 131 S Ct at 2609–10, quoting *Northern Pipeline*, 458 US at 90 (Rehnquist concurring).

[196] See, for example, Gotberg, 2013 Wis L Rev at 1360 (cited in note 116) (defending the ongoing relevance of the public rights doctrine); Lipson and Vandermeuse, 2013 Wis L Rev at 1166 (cited in note 120) (noting the significance of the public rights exception). See also Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 Nw U L Rev 1569, 1594 n 143 (2013) (noting that some scholars have understood *Stern* to mean that Congress will be afforded greater leeway in the design of agency

notwithstanding the fact that the *Stern* Court explicitly declined to analyze the precise relationship between the public rights doctrine and bankruptcy.[197] Undertaking the inquiry that the *Stern* Court bracketed, however, suggests that the historical division of claims into matters concerning public rights and private rights cannot generate a workable Article III jurisprudence *for bankruptcy*—a domain in which the public rights/private rights distinction proves hopelessly incoherent—regardless of how well it might function as a touchstone in the agency adjudication context.

The distinction between public and private rights derives initially from the early nineteenth-century tax-administration context.[198] Dicta in a pivotal decision on administrative agencies recognized the distinction's salience for parsing permissible and impermissible forms of agency adjudication.[199] In the late twentieth century, the distinction was applied as a holding in the context of a Seventh Amendment challenge to agency adjudication.[200] It then migrated from the context of administrative regulation to bankruptcy in *Northern Pipeline*.[201] The plurality in that case calibrated the mandatory boundaries of Article III by identifying "historically and constitutionally [ ] exceptional" domains in which no federal court involvement was required.[202] Public rights, on this logic, are a residual category

adjudication than in the design of bankruptcy courts, even if the Court persists in employing a private rights framework).

197 *Stern*, 131 S Ct at 2614 n 7, quoting *Granfinanciera, SA v Nordberg*, 492 US 33, 56 n 11 (1989).

198 See *Murray's Lessee*, 58 US at 284–85 (noting the similarities and differences between redress for public and private wrongs).

199 See *Crowell v Benson*, 285 US 22, 50–51 (1932) (describing the public rights concept and its application in earlier cases but noting that "[t]he present case does not fall within the categories just described, but is one of private right"). Because *Crowell* may have undermined the distinction by reducing the gap between Article III's treatment of public and private rights, the case cannot be invoked for the proposition that the distinction has canonical and irreducible significance. See Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *through* Crowell *to* Schor, 35 Buff L Rev 765, 773 (1986).

200 See *Atlas Roofing Co v Occupational Safety and Health Review Commission*, 430 US 442, 449–57 (1977) (using the concept of public rights to elucidate the difference between law and equity). See also *Granfinanciera*, 492 US at 35 (reiterating the public rights framing in a Seventh Amendment challenge in bankruptcy). It is not clear that the distinction between law and equity analyzed in *Atlas Roofing* and *Granfinanciera* illuminates the historical division of labor in bankruptcy. See Baird, 1989 S Ct Rev at 267 (cited in note 128).

201 *Northern Pipeline*, 458 US at 64–68 (Brennan) (plurality).

202 Id at 64, 70 n 25 (Brennan) (plurality).

that supplements specific congressional powers respecting the territories and the military.[203] The *Northern Pipeline* plurality did not, however, inquire whether a specific historical tradition of non–Article III adjudication existed in bankruptcy just as it existed in the territorial and military contexts. The use of nonjudicial commissioners in bankruptcy, however, has at least as long and as deeply rooted a history and pedigree as the use of territorial courts or military commissions.[204] Moreover, given the express invocation of English bankruptcy statutes as background context during the Constitutional Convention,[205] the practice of using nonjudicial agents in bankruptcy adjudication has an especially strong warrant under the Constitution. History therefore suggests that the Court should not employ the general, residual category of public rights to analyze bankruptcy, because a more specific historical tradition—with clear relevance to constitutional interpretation—exists.

Indeed, the public rights doctrine is patently ill-suited to the bankruptcy context given its origins in early administrative law. It cannot, as a result of its origin, furnish on its own a tractable constraint on adjudicative delegations for the bankruptcy context. At its historical origin, the distinction cuts between the "'core' private rights" of personal security, personal liberty, and personal property on the one hand and legislatively created privileges and franchises on the other.[206] The key teaching of early Republican material is simple: "when the government wanted to act authoritatively upon core private rights that had vested in a particular individual, courts and commentators alike agreed that an exercise of 'judicial' power was usually indispensable."[207] If the touchstone of private rights analysis is the presence of core private rights, then it is hard to see how even the central restructuring functions of bankruptcy are not about private rights. As the Court has long recognized (albeit not in a case raising Article III questions), bankruptcy is centrally about

203 See id at 64–66 (Brennan) (plurality).

204 See Part I.A. By definition, the use of territorial courts can go back only to the Northwest Ordinance of 1787. Nonjudicial bankruptcy adjudication has two hundred years' more history.

205 See notes 57–59 and accompanying text.

206 Nelson, 107 Colum L Rev at 567–68 (cited in note 49).

207 Id at 569.

"[p]roperty interests [ ] created and defined by state law."[208] Private rights are thus "in the balance"[209] not only for the contract action at issue in *Northern Pipeline*,[210] the fraudulent conveyance claims in *Arkison*,[211] and the tort claim in *Stern*,[212] but also in the overwhelming majority of bankruptcy adjudications.[213] It is (almost) all private law (almost) all the way down.

The effect of bankruptcy's involvement with state-created rights, moreover, depends on what temporal benchmark is used.[214] Assessed against the state of the world prior to the initiation of a bankruptcy, there may indeed be good reason to think that the federal proceeding has extinguished state-created rights. But assessed against the (hypothetical) ex post state of the world in the absence of bankruptcy, the federal proceeding may well have preserved state-created rights that would otherwise have been destroyed by wasteful collective action dynamics. The canonical public rights framework generates no principled way of distinguishing between these two benchmarks. Rather, its overinclusiveness yields an all-or-nothing quality that is inconsistent with the more granular distinction implicit in both *Northern Pipeline* and *Stern*. To the extent that the Court invokes the "public rights" label, therefore, the actual analytic work must be performed elsewhere.

It is for this reason that another recent strand of the Court's public rights jurisprudence—a set of cases pertaining to agency adjudication—does not provide effective guidance in the bankruptcy context. In these cases, the Court has suggested that adjudication can be moved outside the federal courts when the right at issue is "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with

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208 *Butner v United States*, 440 US 48, 54–55 (1979). See also *Northern Pipeline*, 458 US at 84 (Brennan) (plurality) (noting the presence of state law issues in the case at hand).

209 Nelson, 107 Colum L Rev at 583 (cited in note 49) ("[A]uthoritative adjudication did not require 'judicial' power unless core private rights hung in the balance.").

210 *Northern Pipeline*, 458 US at 71–72 (Brennan) (plurality).

211 *Arkison*, 134 S Ct at 2171–72 & n 7.

212 *Stern*, 131 S Ct at 2612–14.

213 See *Nelson*, 107 Colum L Rev at 606 (cited in note 44) (critiquing the private rights analysis in *Northern Pipeline*).

214 Interestingly, Thomas recognizes this baseline problem in the formalist analysis of his *Wellness International* dissent. *Wellness International*, 2015 WL 2456619 at *33 (Thomas dissenting).

limited involvement by the Article III judiciary."[215] The central regulatory function of bankruptcy, unlike the agency-managed regulatory schemes at issue in these cases, focuses on the preservation of state law–created interests. It is impossible to disentangle a distinctly federal "public regulatory scheme" that can stand independent of the state law–related functions of bankruptcy.[216]

Bankruptcy's proper goal is rather best understood as one of limiting certain private rights to protect others. This lays bare the incoherence of the public rights/private rights framework of the Court's bankruptcy jurisprudence. As we explore further in Parts III and IV, there is nothing in any hypothetical bargain of creditors or any other theory of bankruptcy that would prioritize public rights. True enough, some contracts do exist between the debtor and the government. But there is no hint in Article III bankruptcy jurisprudence that the power of bankruptcy courts expands when the government is a creditor. Indeed, the Bankruptcy Code's power is significantly limited in the context of dealings with governments. For instance, the automatic stay has a significantly diluted effect on actions by governments.[217]

The only plausible quasi-public right at play is the general public desire to maximize the value of creditors' collective private rights. With that in mind, one might posit bankruptcy's global purpose, in some sense, as a public right. The Court toyed with this idea in footnotes in *Stern*.[218] But the idea is too abstract to generate analytic traction in the context of bankruptcy's Article III problem. To define "public rights" that way is to say that the bankruptcy court has power to adjudicate any private rights conflicts that protect the collective private rights of

[215] *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 594 (1985). See also *Commodity Futures Trading Commission v Schor*, 478 US 833, 855 (1986) ("When Congress authorized the CFTC to adjudicate counterclaims, its primary focus was on making effective a specific and limited federal regulatory scheme.").

[216] *Union Carbide*, 473 US at 593–94.

[217] See, for example, 11 USC § 362(b)(4) (declaring that the automatic stay does not apply to government actions to enforce police or regulatory powers).

[218] See, for example, *Stern*, 131 S Ct at 2614 n 7, quoting *Granfinanciera*, 492 US at 56 n 11. See also *In re Reeves*, 509 Bankr 35, 58 (Bankr SD Tex 2014), quoting *Central Virginia Community College v Katz*, 546 US 356, 363–64 (2006):

> The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including "the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts."

the debtor and its creditors but not to adjudicate other private rights conflicts that arise in the bankruptcy. This definitional sleight of hand—if it means anything—means that the creditors'-bargain analysis that we put forward below will do all the work, and the public rights exception is merely a label for the results produced.[219] The analysis is better developed without resort to that misleading label.

B. The Article III Stakes in Bankruptcy: A Reconsideration

There are two reasons grounded in constitutional text and structure to impose an Article III constraint on adjudicatory delegations: the preservation of limited government and the need to ensure Article III control when a bankruptcy adjudication risks the distortion of states' lawmaking and adjudicative autonomy.

1. The constitutional need for a limiting principle.

In recent cases about the scope of congressional power, the Court has repeatedly underscored what it calls a "background principle of enumerated (and hence limited) federal power": the idea that there exists a separate and distinct internal constraint on federal power that applies independently of constraints inferred directly from ideas of state sovereignty.[220] In recent Commerce Clause cases, for example, the Court has reiterated a worry about not just the effects of a regulation at bar but also the risk of bringing decisions that an individual "could *potentially* make within the scope of federal regulation."[221] This demand for

[219] It also renders meaningless Justice Brennan's distinction between "restructuring of debtor-creditor relations" and "adjudication of state-created private rights," showing that the former is simply a subset of the latter. *Northern Pipeline*, 458 US at 71–72 (Brennan) (plurality).

[220] *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2646 (2012) (Scalia dissenting). See also, for example, *Sabri v United States*, 541 US 600, 611 (2004) (noting "the Framers' purpose of establishing a National Government of limited and enumerated powers").

[221] *NFIB*, 132 S Ct at 2587. See also *United States v Lopez*, 514 US 549, 564 (1995) ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *United States v Morrison*, 529 US 598, 615–16 (2000):

> If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. . . . Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of

a limiting principle on congressional power is not confined to one ideological side of the Court; it has been expressed in some form by all nine justices in Commerce Clause cases.[222] Similarly, in a recent challenge to constraints on presidential removal power, the same five-justice majority that converged behind *Stern* expressed concern about any rule of decision that left Congress the option of incrementally wearing down presidential authority through legislative attrition.[223] And in the Article III context, the Court has installed a categorical rule against congressional interference in final judgments.[224] Structural constitutional jurisprudence, in short, is characterized by a demand for formal, generally applicable, and broadly applicable rules apparently animated by a concern not just about imminent harms but also about projected, future actions.

This demand for such safeguards against imagined future misrules is hard to explain with empirical evidence of rampant interbranch encroachment. Rather, the demand is better understood as underwritten by the theoretical account of ambition pitched against ambition, famously offered by James Madison.[225] The Court's concern with clear, ex ante specifications of branch boundaries might also resonate with an older, civic-republican theory of liberty, which focused not only on realized impediments to action but also on the mere *potential* for binding commands.[226] Consistent with this republican conception of liberty, the Constitution has been read in recent jurisprudence with potential as well as actual abuses of governmental authority in mind. An account of the Article III principle in bankruptcy that appeals to the current Supreme Court, therefore, will accept future, as well as present, misuse of congressional power.

traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.

222 See Mark D. Rosen and Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L Rev 66, 75–77 (2013) (canvassing demands for a limiting principle from all nine justices in *NFIB*).

223 See *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 497 (2010) (expressing the concern that "[i]f Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?").

224 See *Plaut v Spendthrift Farm, Inc*, 514 US 211, 240 (1995).

225 Federalist 51 (Madison), in *The Federalist* 347, 349 (Wesleyan 1961) (Jacob E. Cooke, ed) (predicting that "[a]mbition [would] counteract ambition"). Of course, that prediction has not generally been vindicated.

226 See Quentin Skinner, *Hobbes and Republican Liberty* x–xiii (Cambridge 2008). For a discussion of the role of republican theory at the Founding, see Gordon S. Wood, *The Creation of the American Republic 1776–1787* 467 (North Carolina 1969).

2. The distortion of state lawmaking and adjudicative autonomy.

The second, and more important, Article III concern in bankruptcy is that the mere presence of federal bankruptcy law can distort the operation of state law outside bankruptcy. This concern with distortion sounds in the first instance in a federalism register but also has separation of powers implications. To the extent that distortions of state law might ensue from the operation of bankruptcy jurisdiction, an Article III judge who (by dint of her institutional locus) is stipulated to be sensitive to federalism concerns must be at the tiller, whenever possible, rather than a nonjudicial agent.

As an initial matter, it is worth pointing out that Congress plainly has the power to alter state law rights when doing so serves a constitutional purpose.[227] Generally speaking, however, it cannot do so without subjecting itself to the review of Article III courts. Similarly, federal courts may rule in ways that alter state law rights—and, indeed, routinely do so in diversity cases. But Congress generally has the power to legislate in response to those rulings by altering the jurisdictional ambit or the rules of decision for federal judges.[228] Alterations to state law entitlements generally involve two separate branches.

Bankruptcy courts pose a threat to this system of bilateral safeguards. The operation of bankruptcy can distort state-created contract, property, or tort rights. Bankruptcy law provides a distinctive set of rules for *mitigating* wealth-destroying collective action dynamics among creditors.[229] But value (as well as certain state-created rights) is preserved by *altering* rights that threaten the value of the estate and by centralizing procedures that could destroy value if adjudicated in a dispersed manner. Centralizing claims within the bankruptcy jurisdiction

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[227] Consider the effects of preemption doctrine on state tort claims. See, for example, *Maryland v Louisiana*, 451 US 725, 746 (1981) (noting that a state law that is preempted is "without effect").

[228] See, for example, Federal Courts Improvement Act of 1996 § 205(a), Pub L No 104-317, 110 Stat 3847, 3850, codified at 28 USC § 1332 (increasing the amount in controversy requirement for diversity jurisdiction from $50,000 to $75,000).

[229] See Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of* Gibbons *and* Marathon, 1982 S Ct Rev 25, 34–35 ("[F]ederal bankruptcy law is largely procedural, rather than substantive, as far as the creditors are concerned."). See also Charles W. Mooney Jr, *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 Wash & Lee L Rev 931, 935 (2004) (describing bankruptcy law as "a procedural system for maximizing recoveries").

therefore requires some justification to offset the risk to such state-created rights. As we show at greater length in Part III, such a justification indeed exists. Some matters must be litigated before a centralized tribunal because a critical benefit of bankruptcy derives from the procedural aggregation of claims into a single forum as a way to mitigate perverse and destructive collective action problems.[230] But when such procedural aggregation occurs, the ensuing resolutions may also be unreviewable because of the compressed time frame in which bankruptcies often occur.[231] Matters that are included within the core of a bankruptcy court's adjudicatory power can be wrapped in a massive restructuring that is impossible to unwind without Herculean effort.

Bankruptcy, in short, may have spillover effects on the substance and procedures of state-created contract, property, and tort rights.[232] Even if bankruptcy judges are infallible, the substantive consequences of bankruptcy rules mean that excessive invocation of bankruptcy can cast a shadow on state-court adjudication of state-created rights. It is this spillover effect—not the bankruptcy judges' adjudication of state-created rights per se—that implicates perhaps the most serious structural constitutional concerns.

The necessary scope of bankruptcy's procedural domain—the class of claims to which bankruptcy power must extend—depends on the ex ante deal that creditors would strike in anticipation of financial distress.[233] Within this domain, the exercise

[230] See text accompanying notes 260–63 (outlining these collective action problems and discussing how aggregation offers a solution).

[231] See Douglas G. Baird and Anthony J. Casey, *Bankruptcy Step Zero*, 2012 S Ct Rev 203, 205.

[232] Bankruptcy also impacts rights created by Congress, such as patents and trademarks. See, for example, *Sunbeam Products, Inc v Chicago American Manufacturing, LLC*, 686 F3d 372, 374–75 (7th Cir 2012). We focus on state-created rights here in light of the *Northern Pipeline–Stern* analysis.

[233] An additional reason for the narrow construction of nonjudicial bankruptcy is worth noting here. Nineteenth-century understandings of due process proscribed any law that "declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B." *Davidson v New Orleans*, 96 US 97, 102 (1878). See also *Wilkinson v Leland*, 27 US (2 Pet) 627, 658 (1829) (Story) ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union."). To the extent that due process requires not merely political-branch action but also judicial involvement to legitimate such transfers, it generates a reason for carefully cabining bankruptcy jurisdiction to those instances in which participants would have acquiesced ex ante.

of the bankruptcy mechanism is unlikely to influence the private ordering of state-created rights. But if the procedural scope of bankruptcy is extended beyond that domain, it risks the distortion of state-created rights and state judicial proceedings.

Assets have different values inside and outside bankruptcy. This difference matters because the presence of a bankruptcy system does not entail its use in any or even all cases.[234] Creditors almost always have procedural options outside the federal bankruptcy system, such as the use of state law liens on debtors' property.[235] The rules of federal bankruptcy "set the stage against which consensual collective proceedings will be negotiated," and those rules will cast a distorting show unless "drawn in a fashion that is likely to minimize incentives for inefficient recourse."[236]

In this way, when Congress designates matters for adjudication in the bankruptcy court, it delegates the power to distort state rights to an institutional actor that often cannot be reviewed. The need to limit that power derives most obviously from federalism concerns. This is because a federal procedural forum potentially influences the way in which state-created rights are raised and vindicated. To the extent that federalism reflects the authority of states to create their own tribunals, which can then make and adjudicate their own autochthonous law, federal bankruptcy's spillover effects may have a constitutional dimension.

There is some precedent in another line of jurisdictional doctrine that suggests a concern with this sort of distortion. A famous line of cases starting with *Erie Railroad Co v Tompkins*[237] set forth choice-of-law rules for diversity actions in federal court. A touchstone of the *Erie* analysis is a concern about federal court distortion of state court proceedings due to

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[234] See Jackson, 91 Yale L J at 867 (cited in note 27). A canonical example is the distribution rule of *Moore v Bay*, 284 US at 5 ("[C]laims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."). As a result of *Moore v Bay*, a transfer that is invalid against one creditor is invalid against all in bankruptcy. Id.

[235] See Robert Kenneth Rasmussen, *Bankruptcy and the Administrative State*, 42 Hastings L J 1567, 1571–72 (1991).

[236] Jackson, 91 Yale L J at 867–68 (cited in note 27). Recent empirical work demonstrates that substantive consolidations of large corporate groups are often influenced by the specific doctrinal choices embedded within bankruptcy jurisprudence. See, for example, William H. Widen, *The Reality of Substantive Consolidation: Results from an ABI-Funded Empirical Study*, 26 Am Bankr Inst J 14, 60 (July/Aug 2007).

[237] 304 US 64 (1938).

"forum-shopping."[238] Although the Court has not yet spoken clearly to whether *Erie* rests on constitutional foundations,[239] some post-*Erie* cases have identified a constitutional problem if diversity jurisdiction "would invade the local law field."[240] The parallel with the Article III problem in bankruptcy is this: When the bankruptcy process is available for interests that fall outside the space of interests that creditors would ex ante assign to that process, there is a risk of arbitrage. Even without the federal government acting, those in possession of state-created rights will alter their arrangements to exploit the arbitrage opportunities created by the bankruptcy mechanism. The distortion in state legal orders, that is, occurs in a subtle and far-from-obvious fashion.

This federalism concern, in turn, has a separation of powers dimension. One way of vindicating constitutional federalism concerns is by limiting the domain of specialist bankruptcy judges and requiring the involvement of Article III judges when distortive effects are likely to arise. Federalism values, that is, are promoted through a horizontal shift in decisionmakers. On the one hand, bankruptcy judges are often viewed not as "beholden to the political interests that act as gatekeepers to the offices of federal district or circuit judge" but instead as intimately tied to the local bankruptcy bar.[241] However skilled they

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238 *Hanna v Plumer*, 380 US 460, 468 (1965). See also *Shady Grove Orthopedic Associates, PA v Allstate Insurance Co*, 559 US 393, 416 (2010) (noting that, while forum shopping may be undesirable, it is the "inevitable . . . result of a uniform system of federal procedure").

239 Commentators have sharply divided on this question. Compare John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv L Rev 693, 701–04 (1974) (concluding that *Erie* does not rest on constitutional foundations), with Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 NYU L Rev 383, 385–86 (1964) (concluding that it does). We take no position here on *Erie*'s constitutional status.

240 *Bernhardt v Polygraphic Company of America, Inc*, 350 US 198, 202 (1956).

241 McKenzie, 62 Stan L Rev at 793–807 (cited in note 4). See also David A. Skeel Jr, *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 Fordham L Rev 497, 498 n 8 (1998) ("[B]ankruptcy judges are drawn from the ranks of bankruptcy lawyers, and their interests continue to parallel those of the bar in most respects."). This point may be overstated. The immunity of bankruptcy judges to political influence assumes away some aspiration for higher office and the depths of political influence. The recent proceedings in *In re Fisker Automotive Holdings, Inc*, 510 Bankr 55 (Bankr D Del 2014), provide a stark example of how parties can attempt to use political influence and impose the views of the "gatekeepers to the offices" of Article III judges on bankruptcy judges. McKenzie, 62 Stan L Rev at 793 (cited in note 4). In that case, the court faced a decision on a legal issue that would impact the potential closing of a large production facility in Delaware. *In re Fisker*, 501 Bankr at 56–59. That facility employed a large number of Delaware citizens. While the issue was under consideration, a public development group filed a statement with the bankruptcy court, referring the court to the

might be in discerning the going-concern value of an entity,[242] there is no ex ante *structural* reason to expect bankruptcy judges to show sensitivity to federalism concerns. On the other hand, federal judges are not only screened by the president and the Senate but also explicitly tasked with the enforcement of constitutional federalism values. Although federal judges tend to be sensitive to federalism values in correlation with the preferences of appointing politicians,[243] it is precisely this entangled sensitivity to both partisan preferences and federalism values that renders these Article III judges, in this regard, superior to the more technocratic and narrowly focused bankruptcy bench. Absent the need for centralized resolution, therefore, the logic of Article III's design implies that bankruptcy judges' authority should not extend to adjudications that might distort parallel state processes.

The latter argument rests on a *theoretical* claim that Article III judges are more likely to be sensitive to federalism considerations than bankruptcy judges. It is not an *empirical* claim about judicial behavior. It is an argument that the logic of the Constitution impels or prohibits certain institutional arrangements as a matter of a priori theory. This theoretical claim, however, invites theoretical rejoinders. It could be argued that federal courts are not sufficiently sensitive to federalism considerations, or that their sensitivity to such concerns fluctuates in line with prevailing political attitudes.[244] There is, of course, a

press releases by the State of Delaware's governor, one of its senators, and its representative. See generally Statement of the Delaware Economic Development Authority, *In re Fisker Automotive Holdings, Inc*, Case No 13-13087 (Bankr D Del filed Jan 9, 2014) ("DEDA Statement"). Those press releases noted the public officials' approval of actions that would keep the plant open. Id at *2–4. The governor's statement concluded by noting that "[w]e hope the Court sees it that way too." Id at *7. The congressmen's joint statement noted their intent to "do what we can" to keep the plant open. Id at *9. The bankruptcy judge decided the case in a manner consistent with the public officials' desires. See *In re Fisker*, 501 Bankr at 61 (ruling to cap a creditor's bid to allow an open auction process, which would benefit a different bidder that sought to keep the plant open). That does not mean, of course, that the judge was actually swayed by those desires. But the intent of the statement filed with the court cannot be seriously doubted.

242 For an empirical analysis of such skill, see Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J L & Econ 381, 406–11 (2007) (finding, based on an empirical study, that bankruptcy judges perform well in differentiating between companies warranting liquidation and those amenable to restructuring or sale).

243 See J. Mitchell Pickerill and Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 Persp on Polit 233, 240–43 (2004).

244 For evidence of courts' (lagged) responsiveness to congressional attitudes toward federalism, see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 Stan L Rev 217, 295–98 (2014).

lively debate on the correct form and strength of judicially enforced federalism.[245] Absent resolution of that debate, how can federal judges be anointed the necessary and proper guardians of federalism? It could also be argued that bankruptcy judges will be sensitive to federalism considerations by dint of the fact that they are appointed by the (presumptively sensitized) corpus of federal judges.

Such rejoinders, we think, do not diminish the Supreme Court's linkage of Article III and federalism concerns in this context. That linkage, significantly, is endorsed not just in the context of more-formalist analysis of the kind used in *Stern* but also in functionalist arguments in cases such as *Commodity Futures Trading Commission v Schor*.[246] Justice O'Connor's majority opinion in that case registers the constitutional linkage between Article III forums and the adjudication of state-created private rights.[247] The axial role of federal court adjudication in vindicating state-created rights is thus largely uncontested across the Court, even if some justices conclude that this role can be abrogated based on a powerful functional showing. Indeed, while the justices may disagree about the extent to which state interests should be vindicated via litigation, there is no disagreement as to the fact that state interests should be justiciable.[248]

Nor is the special role accorded to Article III judges in the federalism context in comparison to non–Article III adjudicators bereft of sense. Article III judges necessarily benefit from tenure and salary protections that are above and beyond what is required by the Due Process Clause; these protections are a way of shoring up Article III judges' independence from the other two branches and thus enabling them to promote constitutional fidelity to structural constitutional values beyond due process.[249] Because bankruptcy judges do not have these protections, there is less reason to predict that they would resist congressional

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[245] See id at 225–40 (summarizing diverse positions).

[246] 478 US 833 (1986).

[247] Id at 853 (recognizing the importance of the public rights/private rights distinction).

[248] See *Bond v United States*, 131 S Ct 2355, 2364 (2011). For criticism of *Bond*'s logic and holding, see Huq, 99 Va L Rev at 1435 (cited in note 193).

[249] See Federalist 78 (Hamilton), in *The Federalist* 521, 522 (cited in note 225) (describing life tenure as "the best expedient, which can be devised in any government, to secure a steady, upright and impartial administration of the laws"). See also Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Georgetown L J 965, 973 (2007) (discussing reasons for tenure and salary protections).

incursions on states' prerogatives if or when those incursions are garbed in bankruptcy justifications.

To the contrary, there arguably is reason for concern that bankruptcy judges will be systematically less sympathetic to diffuse federalism concerns than to the interests of concentrated interest groups that engage repeatedly with bankruptcy law. One sample-based survey of bankruptcy judges found that more than 80 percent of them had been bankruptcy practitioners before joining the bench.[250] It seems very unlikely that a sample drawn from this pool will be equally attuned to federalism-related concerns as a sample drawn from the somewhat more diverse pool of plausible candidates for Article III judgeships.[251] Rather, it seems more likely that those selected from the limited pool of the bankruptcy bar will inevitably tend to give more weight—perhaps excessive weight—to the parochial concerns of that bar and comparatively less weight to more-diffuse federalism concerns.

To be clear, it is not that we should be worried that the bankruptcy court might function as an arm of Congress, as the *Northern Pipeline* plurality might have supposed.[252] Rather, the substantial concern is that the bankruptcy court is not a sufficient protector of federalism values. That is not a task for which the Court elsewhere deems bankruptcy judges to be well suited.[253] Federalism interests, in short, can be accommodated in the bankruptcy context by adjusting the choice of adjudicator—as distinct from the *Erie* context, in which choice-of-law rules provide the safety valve. With that in mind, in the absence of any need to centralize claims resolution in a single forum (historically the bankruptcy commissioner, and now the bankruptcy judges), any state law matter must be resolved by an Article III judge.

This is not the sole context in which the Court has intimated that federalism concerns are accommodated by changing the relevant decisionmaker. In the administrative law context, the Court has also promoted federalism values by "denying

[250] Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 BC L Rev 105, 123 (2005).

[251] We do not mean to suggest here that the degree of professional diversity within the federal bench is either optimal or sufficient.

[252] See *Northern Pipeline*, 458 US at 70–74 (Brennan) (plurality) (reasoning that the recognition of bankruptcy courts as validly constituted legislative courts would allow Congress to transgress the limits of Article III and subvert the separation of powers).

[253] See Baird and Casey, 2012 S Ct Rev at 205 (cited in note 231).

Chevron deference to an agency interpretation that alters the federal-state balance of power."[254] In *Gonzales v Oregon*,[255] for example, the Court seemed to account for the states' regulatory autonomy by narrowly construing statutory delegation.[256] More tentatively, it has also suggested (albeit not in a consistent fashion) that the "agencies have no special authority to pronounce on preemption [of state law] absent delegation by Congress."[257] This idea of limited deference to non–Article III adjudicators when a federalism issue is in play has special relevance in bankruptcy law. At its heart, after all, bankruptcy law is all about altering state law and procedure to align with federal policy concerns. So it should not be surprising that this federalism concern pervades bankruptcy jurisprudence.

At the same time, it is important to emphasize that the Court's uneasiness with delegation and its federalism concerns need not preclude any and all bankruptcy adjudication outside Article III. If Congress is to provide for a meaningful bankruptcy system, it must serve the purposes of the hypothetical creditors' bargain or some other theory of bankruptcy law. Given entrenched historical practice running back to 1571,[258] it is too late to insist that every bankruptcy-related adjudication that Congress might provide for must take place in an Article III tribunal.

Instead, the adjudicatory power of a non–Article III tribunal can be defined in terms of the necessary scope of the bankruptcy. Such power extends to categories of claims that must be aggregated in a single forum if destructive collective action dynamics (and concomitant waste of state-created rights) are to be avoided. Such power should not extend to categories of claims

[254] Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S Cal L Rev 45, 67 (2008).

[255] 546 US 243 (2006).

[256] Id at 267. See also Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 Duke L J 2023, 2032–36 (2008) (discussing the federalism aspect of *Gonzales*).

[257] *Wyeth v Levine*, 555 US 555, 577 (2009). For criticism of the Court's inconsistent approach to agency preemption, see David S. Rubenstein, *Delegating Supremacy?*, 65 Vand L Rev 1125, 1126 (2012). A particularly thorny preemption issue has arisen in the bankruptcy context through 11 USC § 546(e), which prohibits recovery of fraudulent transfers that are part of certain financial transactions. Courts have struggled over whether this preempts state law fraudulent transfer actions outside of bankruptcy. See, for example, *In re Tribune Company Fraudulent Conveyance Litigation*, 499 Bankr 310, 316–20 (SDNY 2013). In the *Tribune* litigation, the bankruptcy court lifted the automatic stay to allow the actions to be filed in state and Article III courts; this functionally pushed the preemption question out of the bankruptcy court. Id at 320. That outcome is consistent with the administrative-law jurisprudence that we reference here.

[258] See notes 1–3 and accompanying text.

when doing so would cast the shadow of bankruptcy power so broadly as to generate needless and socially costly distortions in private ordering and state adjudications. In this way, the boundaries of bankruptcy power align with other recent jurisprudence that emphasizes Congress's limited power to unsettle private ordering.[259]

To summarize, a cogent justification for an Article III role in bankruptcy can be developed from two strands of recent jurisprudence concerning different elements of the Constitution's structure. The first is the demand for limiting principles on congressional authority independent of empirical estimates of the threat of congressional excess. Most sympathetically glossed, this can be understood as an element of a deeply engrained demand for limited government at the national level. The second, and perhaps more forceful, argument builds on a concern with the autonomy of state law and state courts. This line of thought implies a need to identify a doctrinal test that distinguishes between the necessary aggregation of claims on the one hand, and federal adjudication that risks distortive spillover effects on state law and state courts on the other.

The creditors'-bargain model provides a formal rule for identifying those categories of claims and thereby for defining the scope of Article III's shadow in bankruptcy. It is to that model that we therefore now turn.

III. THE CREDITORS' BARGAIN AND ARTICLE III

In this Part, we elaborate on our proposal that the creditors'-bargain theory provides a useful guide for navigating bankruptcy's Article III problem. Specifically, we examine the guidance that the creditors'-bargain theory offers. We start by playing out the contours of the bargain. Central to our argument is the observation that the creditors'-bargain theory implies substantive and procedural rules for resolving disputes—the centralized resolution of some but not all claims is a necessary feature of bankruptcy, not a contingent aspect. Once this centralization function is isolated and explained, it becomes clear that the source of a legal right is not the dispositive factor for determining

[259] In recent cases interpreting the Necessary and Proper Clause, the Court has suggested that Congress lacks any "great" powers not listed in Article I, including the authority to require individuals to enter contracts. See, for example, *NFIB*, 132 S Ct at 2591. The account of the Bankruptcy Clause offered here is in harmony with this effort to delimit congressional power in ways that respect state law ordering.

the proper forum for adjudication, as the "stems from" test implies.[260] Some claims that arise only by virtue of a bankruptcy filing can nonetheless be adjudicated independent of the central reorganization.[261] Other disputes, either arising from bankruptcy law or from preexisting state law rights, cannot be adjudicated without having dynamic and deleterious effects on the balance of the creditors' collective rights. Those claims must be adjudicated by one central tribunal in order to advance the central aim of bankruptcy law as identified by the creditors'-bargain theory.

Under that theory, the most easily assigned categories of disputes are those that concern claims against the estate. More difficult are actions that the estate holds against outsiders. For resolution of those actions that are tied to the determination of the set of claims against the estate, the bankruptcy courts' adjudicatory power is on solid footing. In the sections that follow, we explain this distinction in terms of the creditors' bargain. We then apply our model to categories of claims around which debate currently rages.

It is worth underscoring again that our analysis takes as a given that a non–Article III tribunal will determine some subset of claims. In theory, Congress could make all these questions disappear by either transforming bankruptcy courts into Article III courts or simply placing *all* bankruptcy matters exclusively before district court judges.[262] There are no signs that Congress is inclined to do so, or that the judiciary will be pushing for such a resolution. There is also no indication that a majority of the Court will go so far as to require that solution. Hence, we turn to the alternate task of fashioning a workable formal rule for determining which claims must be channeled into an Article I bankruptcy court and which ones must perforce stay out.

A. The Creditors' Bargain Properly Understood

At its theoretical heart, bankruptcy is a process of limiting or extinguishing certain nonbankruptcy rights to protect other

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260 See text accompanying notes 113–14.

261 For these disputes, there is no bankruptcy purpose that requires them to be adjudicated before a centralized bankruptcy tribunal and the countervailing spillover and federalism concerns dictate that the Article III baseline should be applied.

262 See, for example, Latoya C. Brown, *No More Ping-Pong: The Need for Article III Status in Bankruptcy after* Stern v. Marshall, 8 FIU L Rev 559, 585–90 (2013) (advocating Article III status for bankruptcy judges).

nonbankruptcy rights, thereby maximizing net social welfare.[263] Often the interests that are limited are rights to enforcement procedures. Rights to take lawful actions to enforce an interest in property, for example, are often suspended by the automatic stay of actions related to an estate that becomes effective at the outset of bankruptcy proceedings.[264] As a consequence of the automatic stay, secured creditors cannot foreclose on assets,[265] potential claimants cannot file lawsuits,[266] and even third parties who have outright ownership interests in property that the debtor possesses lose the right to take immediate repossession of that property.[267] Bankruptcy law also alters purely substantive, nonbankruptcy rights. In bankruptcy, for example, a defaulted contract or lease can be assumed and a loan reinstated if certain conditions are met.[268] Contract provisions triggered by the insolvency of the debtor are rendered null for some purposes.[269]

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[263] These nonbankruptcy rights are provided by other sources of law, which may be state or federal. We focus primarily on the interaction of bankruptcy with state law rights, as that interaction is the source of the federalism concerns discussed above. See Part II.B.2. Additionally, while important nonbankruptcy federal issues such as environmental protection rules and spectrum licensing often arise and present thorny issues for bankruptcy, it is still the case that reconciliation of conflicting state law rights is the dominant function of bankruptcy law and bankruptcy courts.

[264] See 11 USC § 362(a) (authorizing an automatic stay that prohibits the beginning or continuing of lawsuits or other collection efforts involving claims that arose prior to a debtor filing its bankruptcy case).

[265] See 11 USC § 362(a)(4).

[266] See 11 USC § 362(a)(1).

[267] See 11 USC § 362(a)(3) (staying actions "to obtain possession of property of the estate"); 11 USC § 541(a)(1) (defining "[p]roperty of the estate" to include "all legal or equitable interests of the debtor in property"). See also *In re Plastech Engineered Products, Inc*, 382 Bankr 90, 106 (Bankr ED Mich 2008) ("Even assuming that the Debtor has only a possessory interest in the [property], . . . that is a sufficient interest by itself to cause the application of the automatic stay.").

[268] See 11 USC § 365; 11 USC § 1124(2) (setting forth requirements for reinstatement). Some courts have even suggested that the Bankruptcy Code allows a debtor to entirely avoid state law obligations by rejecting a contract. See, for example, *In re HQ Global Holdings, Inc*, 290 Bankr 507, 513 (Bankr D Del 2003) ("As a result of the rejection, that affirmative obligation of the Debtors to allow the Franchisees to use the marks is excused."). This is an erroneous reading of the Bankruptcy Code. See *Sunbeam Products, Inc v Chicago American Manufacturing, LLC*, 686 F3d 372, 377 (7th Cir 2012) ("[N]othing about this process implies that any rights of the other contracting party have been vaporized."). But this reading stems from the uncontroversial principle that bankruptcy law can and does extinguish some nonbankruptcy rights. See id ("Bankruptcy law does provide means for eliminating rights under some contracts."). The error is simply in the impulse of some courts to expand that nullification beyond the specific language of the Bankruptcy Code.

[269] See, for example, 11 USC § 365(b)(2)(A). See also 11 USC §§ 363(l), 365(e), 541(c). The same is true of provisions triggered by the filing of a bankruptcy petition. See 11 USC § 365(b)(2)(B). But there is a circularity in suggesting that bankruptcy nullifies

The Bankruptcy Code hence eliminates a creditor's claims of constructive fraud against charitable organizations[270] and caps the damages that a landlord can claim for termination of a lease.[271]

The creditors'-bargain framework provides a normative justification for aggregating and altering these state-created interests in bankruptcy.[272] In the absence of a coherent bankruptcy procedure, the set of rights that one creditor has contracted for will come into conflict with the set that another has contracted for. This can lead to the debtor firm being torn apart. Collectively, the creditors will all do better if they agree to preserve and capture the firm's going-concern value.[273] Without that agreement, each creditor will attempt to maximize her individual recovery. But negotiating such an agreement as the firm enters distress will often be impossible in the face of massive free rider problems and creditors jockeying to "beat out" other creditors.[274]

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state law as the provisions would, of course, not exist in the absence of the bankruptcy process. However, some courts have read the prohibition of such clauses broadly enough to include the use of at-will termination provisions if their exercise might be impacted by the bankruptcy filing. See, for example, *In re Ernie Haire Ford, Inc*, 403 Bankr 750, 759–60 (Bankr MD Fla 2009) (concluding that an at-will termination was invalid because it violated the clear policy of the Bankruptcy Code). Courts are split on the exact scope of the Bankruptcy Code's ban on enforcement of these ipso facto clauses. Compare *In re AMR Corp*, 730 F3d 88, 107 (2d Cir 2013) (concluding that ipso facto clauses are not broadly or categorically unenforceable), with *In re Dumont*, 581 F3d 1104, 1115 (9th Cir 2009) (noting that 11 USC § 365(e)(i)(B) "generally renders unenforceable" ipso facto clauses).

270 See 11 USC § 544(b)(2).

271 See 11 USC § 502(b)(6). See also *In re Integrated Telecom Express, Inc*, 384 F3d 108, 127 (3d Cir 2004) (noting that it was not bad faith for a debtor to file a bankruptcy petition to take advantage of the cap on lease damages).

272 We have provided here examples of Bankruptcy Code provisions that are generally thought to alter nonbankruptcy rights consistent with the hypothetical creditors' bargain. That is not to say that the Bankruptcy Code is at all times consistent with the goals of the creditors' bargain. Nor is it required to be. Congress may include provisions in the Bankruptcy Code that further other constitutional interests, such as the regulation of interstate commerce. For example, the Bankruptcy Code currently provides special treatment for aircraft financing. See 11 USC § 1110. It is difficult to explain this provision in creditors'-bargain terms. But it is perfectly consistent with understandings of the commerce power for Congress to regulate the terms of aircraft financing. Congress's decision to include that regulation in Title 11 of the legislative code rather than another part is of no consequence. See *United States v Lopez*, 514 US 549, 558 (1995) (defining aircraft as "instrumentalities of interstate commerce" subject to congressional regulation under the Commerce Clause).

273 See Jackson, 91 Yale L J at 865 (cited in note 27) ("[O]ne would expect [creditors] to agree to a collective system that deterred the sub-optimal behavior . . . and allowed [them] to capture and share the 'going concern' value of [the debtor's] business.").

274 Id.

The optimal solution is, therefore, for all creditors to enter an ex ante agreement to suspend, forgo, or restructure certain rights and act for the collective good should the firm enter distress.[275] It is generally assumed, however, that transaction costs are too high for all creditors to effectively come together to negotiate this agreement ex ante.[276] The goal of bankruptcy law is to mimic the welfare-maximizing agreement that *would have been* reached by creditors if transaction costs had been low enough and the bargain had occurred. That hypothetical deal would maximize value—and hence minimize the destruction or distortion of state-created rights either prior to or during bankruptcy. It is here that the creditors' bargain harmonizes most closely with the constitutional concerns articulated in Part II.

To see how the creditors' bargain can guide analysis for the Article III inquiry, we must examine its content in more detail. The hypothetical creditors' bargain has two essential terms. *First*, because they want to maximize the expected value of the bankruptcy estate, creditors will agree to suspend enforcement rights that could destroy the firm if exercised independently. The automatic stay is the primary tool to accomplish that end. *Second*, the creditors will agree to a process for restructuring their claims against the firm in a way that allows them to collectively realize its going-concern value. To this end, they will agree to a process to overcome what is called the debt-overhang problem, a process that necessarily entails some restructuring of existing claims. "Debt overhang" describes the phenomenon by which a firm cannot undertake profitable projects because of its legacy liabilities.[277] Imagine a firm that has ten creditors, each of whom is owed $1. The firm also has $1 in assets. As it stands, it could be liquidated and each creditor would receive $0.10. Now, imagine that if the firm were able to borrow an additional dollar, it could invest its $2 and produce revenue of $6 (that is, $4 in

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275 See id.

276 The existence of the current Bankruptcy Code implies acceptance of this assumption as true. If, on the other hand, such an agreement could be bargained for, bankruptcy law would be largely unnecessary. See Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 Yale L J 1807, 1807–08 (1998). Some scholars have suggested mechanisms to facilitate the bargain as an alternative to a mandatory bankruptcy law. See, for example, Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 Tex L Rev 51, 53–55 (1992) (suggesting a menu-like bankruptcy system that allows firms to select their preferred regime upon formation).

277 See Ayotte and Skeel, 80 U Chi L Rev at 1570–72 (cited in note 32).

profit). In that state of the world, the debtor firm could pay each of its existing creditors $0.50 and pay back the $1 in new debt.

The first thing that bankruptcy law needs to do is prevent the creditors from racing to recover the $1 of existing assets—it needs to stop any run on the debtor's assets. The next thing that bankruptcy law needs to do is provide a mechanism for the debtor to borrow the additional $1 so that all parties can increase their recovery.[278] This cannot be achieved outside of bankruptcy because of debt overhang.[279] If the debtor goes to a new lender and asks for a loan of $1, the new lender will balk. The debtor has $1 in assets, $10 in liabilities, and a business plan that will produce $4 in additional revenue. This means that the new lender can expect to put $1 into the investment and get only about $0.55 back.[280] No lender will make an investment with an expected loss of $0.45 on every dollar.

Under these hypothetical circumstances, an effective bankruptcy process will allow—and in some instances, force—the existing creditors to agree to reduce their claims from $1 to something less than $0.50 (or to convert those claims to equity, which has the same effect) to eliminate debt overhang and allow the new lender to receive a positive return on investment. The firm can be sold to an outsider for $5, allowing the prior creditors to divide the proceeds, or it can be restructured, with each prior creditor taking a 10 percent equity stake in the new firm. The buyer or the restructured firm then goes to the market and takes on $1 in debt to proceed with the project. All parties are better off because the value of the old claims has multiplied by almost five times. To reach that outcome, however, the bankruptcy process must finally and fully resolve the claims that each creditor has against the estate. It must establish the facts that we have so far assumed—namely that there are, in fact, ten creditors, each of whom is owed $1.

At the same time, there is no need to resolve questions of how much *outsiders* owe the estate. Adjudicating claims that the estate has on outsiders is not an essential element of bankruptcy's procedural aggregation. To see this, imagine that the project in

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[278] See id at 1571 (describing illiquidity problems).

[279] See id at 1572–79 (outlining five possible solutions to the debt-overhang problem and noting that these solutions either "require substantive departures from nonbankruptcy rights" or are frequently vitiated by coordination problems).

[280] The firm takes in $1 and now has liabilities of $11. It then proceeds with the project and has $6 in assets. The creditors, including the new lender, each get one-eleventh of that pie (assuming that none holds security interests).

the above example is the prosecution of a tort or contract claim. The firm has the same ten creditors, \$1 in cash, and \$10 in liabilities. It also has a contingent claim against a third party that will cost \$2 to finance. That claim has a 50 percent chance of producing a \$12 judgment award and a 50 percent chance of producing no award. The firm can invest \$2 to return an expected reward of \$6, resulting in an expected profit of \$4. The tort or contract litigation, however, need not be concluded in order to restructure the firm in a way that eliminates the collective action and debt-overhang problems. That claim can remain contingent while the bankruptcy process works through the aggregation and resolution of claims necessary to mitigate the destructive potential of creditor collective action.

This example also hints at a second justification for the limitation on bankruptcy's scope. It is not merely that adjudication of the claim is nonessential but also that creditors may affirmatively desire the claim to be litigated outside the bankruptcy tribunal. The claim is an asset of the firm and a liability of an outsider. If we assume that bankruptcy courts will be more favorable to the debtor than to the potential defendant, then the defendant will do everything that it can to avoid litigation in the bankruptcy forum. In contrast, the plaintiff-debtor will do everything that it can to promote litigation in the bankruptcy forum. If adjudication of these matters is centralized in the bankruptcy forum for all bankrupt debtors, then these incentives will lead the debtor to a premature bankruptcy filing and cause the potential defendant to engage in strategic maneuvering to make that filing costly or to expedite litigation processes on the eve of bankruptcy. If bankruptcy courts are more favorable to the defendant, by contrast, then the defendant has incentives to push the debtor into involuntary bankruptcy. The value of the nonbankruptcy rights in either scenario will be significantly altered as the likelihood of bankruptcy increases or decreases. In the federalism terms identified in Part II.B.2, this means that state rights and state procedures are being changed and distorted by strategic action in anticipation of federal bankruptcy. The gravitational field of federal bankruptcy, so to speak, twists state law out of joint. The hypothetical creditors will seek to avoid this kind of distortion of nonbankruptcy private ordering when defining the terms of the ex ante bargain.

This example underscores a central tension that bankruptcy must navigate. On the one hand, the substantive goal of bankruptcy law is to *alter* rights that are inconsistent with the ex ante agreement to maximize the value of the estate.[281] To be more precise, bankruptcy theoretically assumes that parties would seek to maximize the value of assets in all states of the world and then strives to implement that aspiration.[282] On the other hand, in the nondistressed world, the contracts of individual creditors do not conflict with one another in a way that triggers this common-pool problem.[283] Interference with those contracts in the absence of financial distress risks costly strategic action and forum shopping by parties.[284] The avoidance of these costs is the root of the idea of scrupulously respecting nonbankruptcy rights.[285] In navigating between these two risks to state-created rights, bankruptcy law will alter nonbankruptcy rights only when necessary to preserve the collective value of the creditors' other rights. Thus, even though bankruptcy's central function is the transformation of state rights, its core purpose is preservative and therefore in harmony with federalism values.

B. The Creditors' Bargain as an Article III Touchstone

So understood, the hypothetical creditors' bargain has consequences for the choice of forum and therefore can generate guidance as to the necessary metes and bounds of the bankruptcy mechanism.[286] As long as we accept—as the Supreme Court

[281] See Schwartz, 107 Yale L J at 1807–09 (cited in note 276) (characterizing bankruptcy law as a departure from nonbankruptcy rights that is aimed at maximizing the value of estates by preventing debtors and creditors from engaging in self-interested behavior that decreases the value of estates).

[282] See id.

[283] See Anthony J. Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11*, 78 U Chi L Rev 759, 773 n 53 (2011).

[284] See Ayotte and Skeel, 80 U Chi L Rev at 1565–66 (cited in note 32).

[285] It is assumed that these contracts are products of an efficient market. As one of the authors of this Article has suggested elsewhere, this point is controversial—one might certainly think that Article 9 of the Uniform Commercial Code constrains the ability of private parties to contract for the most efficient outcome. See Casey, 78 U Chi L Rev at 771 n 43 (cited in 283). But, as noted there, the solution to that problem is for states to amend their nonbankruptcy laws. See id at 771 n 43, 774 & n 57. Bankruptcy law must, for better or worse, take those laws as a given and alter some of them only when the collective action problems inherent in financial distress threaten the overall package of rights.

[286] The creditors' bargain, at least in its role as a criterion of normative (welfarist) evaluation, also has consequences for the substantive content of bankruptcy law. Substantive elements of the Bankruptcy Code may be at war with the creditors' bargain for a variety of reasons, including poor draftsmanship and legislative efforts to pursue nonwelfare-maximizing goals through the Bankruptcy Code. See note 272. See also note 253 and accompanying text.

appears to have done[287]—that adjudication by an Article I bankruptcy judge is a relatively weaker safeguard of the primacy of state law in a federal system, it follows that hypothetical creditors wishing to maximize the vindication of state-created rights would place limitations on the adjudicatory power of a bankruptcy court. The hypothetical creditors would insist that a bankruptcy court exercise adjudicatory power only when necessary to mitigate collective action problems and only when the benefits are sufficiently high to outweigh the costs. The hypothetical creditors would accordingly distinguish instances in which bankruptcy adjudication is *preservative* of state-created rights from instances in which bankruptcy adjudication risks *distortion* of those rights. Again, we emphasize that for self-regarding reasons, the creditors' bargain thereby tracks federalism concerns about the distorting effect of federal bankruptcy.

As a general matter, resolving claims against the estate is the procedural core of any bankruptcy law based on the creditors' bargain. Claims against the estate must be stayed and then restructured for a firm to preserve its going-concern value.[288] Proper bankruptcy procedure will be designed to coordinate action on those claims. When the risk of distorting state law and state judicial process increases, however, this rough cost-benefit calculation points toward the need for Article III adjudication. Adjudication of other matters, therefore, would lie mostly outside the necessary reach of bankruptcy.

It is important to underscore that the creditors'-bargain theory of bankruptcy does not sort among categories of claims based on the underlying source of law. Recall that, at its origin, bankruptcy arose from the Constitutional Convention's concern about the potential for conflict between state insolvency regimes and the correlative need for a uniform federal law applied in a single federal forum.[289] The idea that Illinois could invalidate certain contracts in the name of the creditors' bargain while Indiana respected those contracts and invalidated others violates the hypothetical creditors' bargain. The forum shopping inherent in such a proposal would cause a race among creditors to be

[287] See note 253 and accompanying text.

[288] See *Bank of America National Trust and Savings Association v 203 North LaSalle Street Partnership*, 526 US 434, 453 (1999) (describing the "two recognized policies underlying Chapter 11" as "preserving going concerns" and "maximizing property available to satisfy creditors").

[289] See text accompanying notes 57–58.

the first to push a debtor into bankruptcy in a favored forum.[290] The parties to the hypothetical bargain would, no doubt, include a term providing one uniform set of rules rather than an ex post choice among fifty sets of rules to address the collective action problem. In that sense, bankruptcy is exactly the kind of public good a rational constitutional designer might assign to a national, as opposed to a subnational, level of government.

The need for uniform law, however, does not necessarily imply a need for a central tribunal. For some relationships and disputes, it is necessary that the governing rules form a uniform bankruptcy code to be efficient—defined here as promoting the hypothetical creditors' bargain—even if it is not necessary that those relationships and disputes be adjudicated by the central tribunal that oversees a debtor's bankruptcy. For other relationships and disputes, it is necessary not only that the law governing them be uniform but also that those claims be aggregated in a centralized bankruptcy tribunal. Choice of law, that is, is distinct from choice of forum in bankruptcy. Just because a right or procedure is created by the uniform bankruptcy law does not mean that it is integral for the right or procedure to be adjudicated by the central bankruptcy tribunal. Conversely, just because a right remains governed by a nonbankruptcy law does not mean that it is not integral for the right to be adjudicated by the central bankruptcy tribunal. Determining whether resolution of a claim is "integral to the restructuring of the debtor-creditor relationship"[291] cannot be done by merely looking to the source of that claim.

Instead of operating on choice-of-law grounds, the creditors'-bargain theory suggests that bankruptcy should maximize the ex ante expected value of the assets in bankruptcy while respecting nonbankruptcy rights as much as possible. At first blush, this might suggest that, as long as bankruptcy courts follow state

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[290] This problem is not fully solved by a uniform federal system. Differing applications of federal law by bankruptcy judges, as well as their varying biases and levels of expertise, undoubtedly lead to some forum shopping. See Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 Vand L Rev 381, 382–84 (2015). Increasingly, there is also the problem of international bankruptcy. The Bankruptcy Code attempts to deal with this to some degree in Chapter 15. See 11 USC § 1501 et seq. But there are obvious limits on any attempt to create uniform international laws and procedure, and so there is no reason to discuss here (for example) the question whether the Foreign Commerce Clause might influence the nature of the scope of Congress's power over international bankruptcy proceedings.

[291] *Stern*, 131 S Ct at 2617, quoting *Langenkamp v Culp*, 498 US 42, 44 (1990) (per curiam).

law, nonbankruptcy rights that are not integral to the restructuring could easily be brought along for the ride through bankruptcy. This would not be cause for concern if there were no reason to think that bankruptcy courts are any worse at respecting nonbankruptcy rights than the various state courts that might otherwise hear the ancillary disputes. But there is reason for some concern. Our hypothetical creditors worry about federalism values as much as the Supreme Court, albeit for different reasons. Their concern does not arise from some inherent loyalty to constitutional principles. Instead, it is a product of a self-interested desire to preserve the value of private state law ordering whenever possible. The federalism concerns set forth above then come into play in a way that harmonizes with the creditors'-bargain theory.[292]

The Article III judiciary has federalism protections built in through both the doctrinal limitations of *Erie* and the general structure of the judiciary as a coequal branch in the federal system. Bankruptcy judges, on the other hand, do not have (or at least are presumed not to have) the same selection and decisional constraints to channel their discretion. Indeed, one of the authors of this Article has suggested elsewhere that much of the Court's bankruptcy jurisprudence—including both constitutional and statutory interpretation cases—can be explained by the Court's heightened concern about those instances in which non–Article III bankruptcy judges are granted discretion over nonbankruptcy rights.[293]

On this view, Congress lacks power to delegate to the bankruptcy court the ability to reconfigure nonbankruptcy rights as the bankruptcy court sees fit. Bankruptcy judges are not permitted to exercise judicial power over matters when that power might be misused to reconfigure rights that are not central to effectuating the creditors' bargain. Further animating that concern is the fact that the decisions of a bankruptcy judge—when they are wrapped into her core rulings—are often de facto unreviewable.[294] Legislators must therefore identify with some

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292 The argument we present here is the rare instance of an "invisible hand" mechanism with robust motivational microfoundations. Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 Harv L Rev 4, 9–10 (2009) (describing invisible hand mechanisms).

293 See Baird and Casey, 2012 S Ct Rev at 205 (cited in note 231).

294 See id at 218–20.

specificity the categories of claims that are to be altered in order to effectuate the hypothetical creditors' bargain.

As a result, our theory carefully bounds the domain of legislative choice with respect to bankruptcy adjudication in a way that is sensitive to the risk of spillover distortions affecting state adjudication of state-created rights. As a consequence, our theory is consistent with the Court's recent suggestion that Article I enumerated powers must be delimited to exclude any "great substantive and independent power," such as the power to require the creation of a contractual relationship.[295] This new gloss on the Necessary and Proper Clause of Article I is controversial.[296] We do not join that debate here. Rather, we simply observe that our account of Congress's Article I authority to create non–Article III bankruptcy tribunals is consistent with both broad and narrow accounts of the national legislature's power.

These feared, unreviewable expansions of bankruptcy power over nonbankruptcy law can be limited if the final judgments of the bankruptcy court are limited to those matters that must be adjudicated to effectuate the hypothetical creditors' bargain. Centralizing the adjudication of state law rights has a cost. The creditors in the hypothetical bargain, by assumption, accept that cost only when it brings with it the clear benefit of preserving the value of the estate. Other matters are ancillary regardless of the source of law and must go to the district court before judgment is entered. Viewed in this light, the Article III rule that we propose can be crisply stated: if an issue to be decided does not alter the creditors' collective relationship, then its adjudication is not integral to the restructuring of the general debtor-creditor relationship. As a result, it would be wrong to assume that the hypothetical creditors would demand that this issue be decided by the central bankruptcy tribunal.

In summary, we offer two limiting principles for solving the Article III problem in bankruptcy: (1) issues that must, by virtue of the hypothetical creditors' bargain, be determined by a central bankruptcy tribunal are within the adjudicatory power of the

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[295] *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2593 (2012) (quotation marks omitted).

[296] For criticism of this gloss, see, for example, John F. Manning, *Foreword: The Means of Constitutional Power*, 128 Harv L Rev 1, 41–42 (2014) (stating that the concept of federalism implicit in the new gloss is "too abstract to bear the weight placed on it"). See also Aziz Z. Huq, *Federalism, Liberty, and Risk in* NFIB v. Sebelius, in Anup Malani and Michael H. Schill, eds, *The Future of Healthcare Reform in the U.S.* (Chicago, forthcoming 2015), archived at http://perma.cc/K76L-Y3SB.

bankruptcy court; and conversely, (2) issues that need not be decided in that way must, to minimize spillover distortions and in the interest of federalism and other constitutional considerations, be reserved for Article III or state courts.[297] These principles are consistent with a key strand of reasoning in *Stern*: the notion that Article III questions can be answered by looking at those claims whose adjudication is integral to the restructuring at the heart of bankruptcy, which we can now define in terms of the creditors' bargain.

IV. THE CREDITORS' BARGAIN AS AN ARTICLE III RULE: APPLICATIONS

This Part applies our Article III analysis grounded on the creditors'-bargain theory to several questions that may be expected to arise in bankruptcy with some frequency. Claims against the estate generally raise few doubts under any analytic rubric. We focus here on the set of hard cases, which is comprised largely of the estate's claims against outsiders. Most claims of the estate against third parties need not be adjudicated as part of the bankruptcy. Nevertheless, there are exceptions that we must address here. In particular, when resolution of a claim against an outsider will change the nature of that outsider's or other parties' claims against the estate, the creditors'-bargain theory implies that such claims should be within the aggregated bankruptcy procedure. The statutory classification of core and noncore claims in BAFJA,[298] however, does not adequately distinguish between the debtor's claims that are merely claims against outsiders and those that are essential to determining the claims against the estate.

For the sake of analytic clarity, we consider claims in broad conceptual categories. We assume, that is, that the Article III analysis proceeds at a wholesale, rather than a retail, level. Case-by-case determination of whether a specific claim in a specific case triggers an Article III concern would generate uncertainty and needless litigation costs. It would also be inconsistent with the approach taken in *Stern* itself. That case focused on the category of "state law counterclaim[s] . . . not resolved in the process of ruling on a creditor's proof of claim."[299] We think it

[297] We are not suggesting that the bankruptcy court would not maintain its noncore power to make proposed findings.

[298] See 28 USC § 157(b) (enumerating core claims).

[299] *Stern*, 131 S Ct at 2620.

highly unlikely that the Court meant to invite case-by-case litigation of the boundaries of this ruling, as opposed to speaking directly to sets that contained all analogue state law claims.[300]

With this background in mind, several items on the core list of claims continue to raise the Article III problem.[301] Here, we focus on the following provisions: 28 USC § 157(b)(2)(C), which was the provision at issue in *Stern* and which classifies counterclaims against parties that have filed claims against the estate as core; 28 USC § 157(b)(2)(F) and (H), which covers voidable preferences and fraudulent transfers; 28 USC § 157(b)(2)(E), which covers orders to turn over property of the estate; and, finally, the question of consent addressed in *Wellness International*.

A. Debtor's Conventional Tort Claims, Contract Claims, and Counterclaims

In general, a tort or contract claim for damages will not be a core claim pursuant to our analytic framework. Such claims are merely contingent assets of the estate. The rights to those assets can be allocated to the creditors of the asset long before the assets are liquidated. These actions, therefore, have very little to do with the hypothetical creditors' bargain. Bankruptcy estates can be restructured without any determination of the exact liabilities that outsiders have to the estate. Indeed, as a practical matter, many Chapter 11 reorganization plans are confirmed long before these ancillary cases are resolved.

For example, one common way to achieve this end in a plan of reorganization is through the creation of a litigation trust.[302] This entails vesting in the trust the right to pursue claims that the debtor has against a third party. Various creditors are then awarded rights in the trust in exchange for the claims that they have against the estate.[303] The litigation trust is a particularly

300 A corollary to this point is that bankruptcy courts possess no special expertise in determining which types of cases fall within these boundaries. This determination requires not a special knowledge of the facts of a particular case but rather a general knowledge of how certain legal claims affect the general rights of creditors.

301 The provisions most likely to raise these issues are 28 USC § 157(b)(2)(C), (E), (F), and (H).

302 See Andrew J. Morris, *Clarifying the Authority of Litigation Trusts: Why Post-confirmation Trustees Cannot Assert* Creditors' *Claims against Third Parties*, 20 Am Bankr Inst L Rev 589, 600–09 (2012) (discussing the postconfirmation operation of litigation trusts).

303 For an overview of litigation trusts, see Paige Holden Montgomery and Casey A. Burton, *An Introduction to Litigation Trusts* (ABA, May 30, 2013), archived at http://perma.cc/VF5R-KTFQ.

useful settlement mechanism when certain creditors have different risk or liquidity preferences and when value can be created by separating the contingent (or risky) assets from the more certain assets.

Close examination of an example of how a litigation trust operates reveals why claims against third parties need not be resolved within the bankruptcy procedure. Consider a debtor that has a potential $20 billion fraud claim against an outsider.[304] Assume that the chance of the debtor winning that claim is 25 percent. One class of creditors might receive the right to any payout from the trust in exchange for approving the plan of reorganization. Because the lawsuit is worth $5 billion in expected value, giving creditors that right is equivalent to giving them $5 billion in cash or equity.[305] Thus, the plan of reorganization can be proposed and confirmed without ever resolving the fraud litigation. Its resolution is plainly not critical to the restructuring.

The law could require that a bankruptcy court postpone confirmation until it is known whether the tort litigation is worth $0 or $20 billion. But there is no reason to take this precaution, because a contingent asset is still an asset. Any assertion that there might be some windfall if the asset is incorrectly valued is simply false. All that matters for the purpose of the creditors' bargain is that an *expected* value can be assigned to the asset. The same point emerges if one considers how things would look in the absence of bankruptcy. If the debtor had attempted to reorganize its debts in a private transaction, it certainly could have offered any creditor the rights to future litigation proceeds, and those rights would have been valued as best as the market could determine. Now imagine what the creditors' hypothetical ex ante bargain would have looked like. Would creditors demand that the value of the litigation claim be determined with certainty? Or would they instead agree to distribute the asset like all other assets in the estate—based on known values at the time of

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304 This example is a stylized version of the facts in *In re Tronox, Inc*, 464 Bankr 606 (Bankr SDNY 2012). While *In re Tronox* was a fraudulent transfer case, many fraudulent transfers are no different from run-of-the-mill tort claims. There is a class of cases in which this is not true. We discuss those cases below in the main text. See text accompanying notes 320–22.

305 Critically, this class of creditors must be able to collect the full $20 billion if they are successful in prosecuting the litigation. The contrary outcome would ignore the risk of failure and reduce the value of the litigation trust. See *In re Tronox*, 464 Bankr at 617 (asserting that a "creditor who has taken a litigation risk" must be afforded "a prospect of a possible recovery beyond that creditor's individual damages").

the reorganization? We do not require that contingent value in other operating assets be realized before they are distributed. And there is no reason to think that parties would treat assets arising from litigation claims any differently.

In this way, claims that the estate has on assets or property outside the estate will not *generally* be subject to the power of a bankruptcy court. But that is not always the case. In some instances, the viability of the estate cannot be determined without resolving certain claims that the estate has on outside assets. Perhaps a debtor will collapse if it cannot recover cash owed from a tortfeasor or contract counterparty. Should the court resolve those claims rather than shut down the firm? In most cases, the answer is no.

A claim against a third party is a contingent asset. Nothing in the operation of bankruptcy procedure or the unfurling of the creditors' bargain changes the value of that asset. The role of bankruptcy is to implement a process for orderly reorganization. Once in place, the bankruptcy process facilitates the debtor's attempts to obtain financing to operate. With the problem of debt overhang mitigated, the debtor should be able to go to the capital markets and obtain financing secured by its assets, including contingent assets in the form of litigation claims. If that financing is available, the claim can be pursued once the reorganization is complete. If that financing is not forthcoming—for example, because capital markets identify insufficient value in the bankrupt's contingent claims and other assets—then it is unlikely that the claims are of much value. Under these circumstances, there is scant reason for a bankruptcy judge to second-guess the capital markets.[306]

Counterclaims, however, were treated differently under BAFJA's statutory structure in 1984, at least prior to *Stern*. Under § 157(b)(2)(C), a counterclaim against a creditor was ranked as core and hence could be resolved to finality by a bankruptcy court.[307] The *Stern* Court (correctly, according to our theory) held

306 When financing is unobtainable for other reasons, a liquidity problem exists. Professors Kenneth Ayotte and David Skeel have pointed out that bankruptcy can serve as a liquidity provider in service to the grander goal of the creditors' bargain. See Ayotte and Skeel, 80 U Chi L Rev at 1559–63 (cited in note 32). But rushing the resolution of a claim against a third party is not a necessary or even viable means of supporting liquidity.

307 There is an ancillary question about claim preclusion tied to labeling a counterclaim core or noncore. On the one hand, if a bankruptcy court does not have the power to finally decide a counterclaim, then the party holding the claim cannot be required to assert it before the bankruptcy court, even when doing so would otherwise be compulsory.

this to be unconstitutional.[308] The inclusion of counterclaims in the core of the bankruptcy courts' adjudicatory power implies that the rights of a claimant cannot be adequately determined until the bankruptcy court determines the liabilities that run in both directions. But this is not so.

To see why, consider the difference between a counterclaim and a recoupment defense.[309] A counterclaim merely creates a liability that transforms into a separate debt of the creditor (an asset of the debtor). At the end of the day, that debt *can* be netted against the debt of the estate. But that is not legally necessary. Nothing in the creditors'-bargain theory changes that; the two separate claims are not inextricably linked. This was true on the facts of *Stern*.[310] Vickie Marshall's tortious interference claim against Pierce Marshall in *Stern* was in no sense inextricably linked with Pierce's defamation claim against Vickie. The

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On the other hand, a claim brought before a bankruptcy court will ultimately find its way to a district court that can adjudicate the claim and enter final judgment; therefore, the party with the claim should be required to assert it. Prior to the Court's decision in *Stern*, there was a circuit split on whether claim preclusion applied to unasserted noncore claims. Compare *Howell Hydrocarbons, Inc v Adams*, 897 F2d 183, 189–90 (5th Cir 1990) (determining that claims were not precluded because they were noncore), and *Barnett v Stern*, 909 F2d 973, 980 (7th Cir 1990) (accepting the *Howell* analysis but distinguishing the claims at bar as constituting a core proceeding), with *CoreStates Bank, NA v Huls America, Inc*, 176 F3d 187, 197 (3d Cir 1999) (determining that certain claims that could have been brought as noncore claims were precluded), *In re International Nutronics, Inc*, 28 F3d 965, 969–70 (9th Cir 1994) (same), *Sanders Confectionery Products, Inc v Heller Financial, Inc*, 973 F2d 474, 482–83 (6th Cir 1992) (same), and *Sure–Snap Corp v State Street Bank and Trust Co*, 948 F2d 869, 873 (2d Cir 1991) (announcing that "core" status has no bearing on claim preclusion). In a case decided after *Stern*, the Seventh Circuit noted this split and the impact that *Stern* may have on the analysis while declining to decide the issue, which turns largely on what it means to have the opportunity to fully litigate a claim. See generally *Matrix IV, Inc v American National Bank and Trust Co of Chicago*, 649 F3d 539 (7th Cir 2011). We take no position on the question here.

308 *Stern*, 131 S Ct at 2608–15.

309 As one court put it:

> Although related concepts, set offs and counterclaims are distinguishable from recoupment. A set off or counterclaim is a demand which the defendant has against the plaintiff arising out of a transaction extrinsic to the plaintiff's cause of action, whereas a recoupment is a reduction by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction.

Newbery Corp v Fireman's Fund Insurance Co, 95 F3d 1392, 1398 n 9 (9th Cir 1996) (quotation marks omitted), quoting *Morris v Achen Construction Co*, 747 P2d 1206, 1209 (Ariz App 1986).

310 See *Marshall v Marshall*, 547 US 293, 300–05 (2006) (setting forth the factual and procedural background of the claims and counterclaims leading to *Stern*); *Stern*, 131 S Ct at 2598.

liability of Vickie's estate for defamation could be determined independently of the tortious interference claims.[311] The interference claim was a singular asset of the estate, while the other was a singular liability. Had the interference claim been against a party other than Pierce, the statute would have treated it as noncore. From the perspective of a hypothetical creditors' bargain, nothing turns on the identity of the defendant in the interference claims.[312]

Recoupment defenses are different and distinct from counterclaims. For certain claims, state law establishes recoupment as an affirmative defense or a factor in calculating damages.[313] Unlike a counterclaim, recoupment must be ascertained prior to determining the amount of liability; it is not an asset to be netted against a liability. Rather, it is an equitable defense that reduces a liability.[314] If a debtor argues that a claim against it should be reduced by an amount that the debtor is owed by the claimant on the same transaction, that dispute is part and parcel of the claim against the estate.

The idea behind recoupment is that, if offsetting liabilities arise from the same transaction, they are not separate claims but instead factors determining damages.[315] Imagine that a contractor goes into bankruptcy. A subcontractor makes a claim against the contractor for missed payments under their contract. The contractor defends by arguing that the subcontractor destroyed property while performing and claims that it can subtract the damages from the amount it owes under the contract. If state law makes this a valid affirmative defense on damages, recoupment is allowed. Because a debtor's recoupment claim determines the amount of the claim against the estate and is an

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311 See *Stern*, 131 S Ct at 2611.

312 To be sure, some moderate administrative costs are saved when claims and counterclaims are litigated together. But the creditors'-bargain theory is not one that aims at minimizing adjudicative costs; nor does Article III aim at such judicial economies. As a result, that sort of argument does not supply the integral necessity that would justify the federalism concerns raised by encroaching on state law.

313 See, for example, *First National Bank v Master Auto Service Corp*, 693 F2d 308, 310 n 1 (4th Cir 1982) ("Recoupment is the right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very contract giving rise to the plaintiff's claim.").

314 For more on the equitable nature of recoupment, see Craig H. Averch and Blake L. Berryman, *Getting Out of the Code: When Equitable Remedies Obtain Priority over General Unsecured Claims*, 5 J Bankr L & Prac 285, 286 (1996).

315 See *In re Sigman*, 270 Bankr 858, 860–61 (Bankr SD Ohio 2001) ("[R]ecoupment involves offsetting claims of the creditor and the debtors that arise from the *same* transaction.").

integral part of that claim, it must be adjudicated within a bankruptcy. The same does not hold true for most other debtor counterclaims.

In practice, recoupment claims generally run in the other direction. The debtor makes a claim against an outside party, which raises a defense of recoupment rather than filing a claim against the estate. In the previous example, imagine that the subcontractor is in bankruptcy. The subcontractor then makes a claim against the contractor, which then offers recoupment as an affirmative defense. This is not a core bankruptcy claim under any reading. Now the contractor has a choice: either make a claim against the estate for damages to its property or raise a recoupment defense. The second option is more attractive for the contractor because a solvent outsider pays full price on claims that the estate brings against it (whereas a creditor generally gets paid only cents on the dollar on claims against the estate). Imagine that the subcontractor has a $10 claim against the contractor. The contractor also has a $15 claim that it could bring as an independent claim or as a recoupment defense. Now imagine that the subcontractor has $1 in assets and hundreds of dollars of other liabilities. Brought independently, the $15 claim is worth cents on the dollar (that is, a pro rata share of the subcontractor's assets). But if it is raised as a recoupment defense, the claim is worth $10—because it lowers the contractor's liability from $10 to $0.

Note that recoupment is limited to the amount of the subcontractor's claim. The defendant cannot recoup more than it owes—only a counterclaim would allow recovery beyond that. This means that a creditor's recoupment defense does not create any claims on the estate; it just changes the value of the estate's claim against the outsider.

B. Fraudulent Transfers

In principle, fraudulent transfer claims are simply another flavor of claims against third parties. *Moore v Bay*'s longstanding rule changes the contours of the state law right by allowing all creditors to benefit from the action, which was not the case under state law.[316] Outside of bankruptcy, a fraudulent transfer claim does not belong to the debtor but rather to particular

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316 *Moore*, 284 US at 5.

creditors that were affected by the transfer.[317] In bankruptcy, however, the rule of *Moore v Bay* provides that those claims benefit the estate as a whole.

Similarly, the Bankruptcy Code provides its own substantive supplement to state law fraudulent transfer actions. Thus, by operation of 11 USC § 548, the estate has broader authority to recover transfers than it would otherwise have in the absence of a bankruptcy filing. Conversely, other provisions of the Bankruptcy Code narrow the scope of actionable transfers.[318] But this operation of bankruptcy's substantive provisions has no impact on whether the claim must—from the perspective of the hypothetical creditors' bargain—be adjudicated by the central bankruptcy tribunal. Viewed through that lens, most (but not all) fraudulent transfer actions turn out to be merely tort actions to augment the estate, which can be deferred until after a reorganization is complete—just as Vickie's tort suit should have been in *Stern*.[319]

There is, however, a subset of highly litigated fraudulent transfer actions that go to the very heart of determining the claims against the estate. Specifically, while the property transferred from an estate may take the form of cash or other property, it can also be an interest in the estate that becomes a claim upon filing bankruptcy in the form of either a debt claim or a security interest. In such cases, resolution of the fraudulent transfer action is a condition precedent to resolution of the estate. The creditors'-bargain theory would encompass the resolution of such claims.

For example, one common form of fraudulent transfer is a guarantee of another entity's debts.[320] That is, one debtor entity might guarantee the debts of an affiliate entity, in practice often within the same corporate group.[321] If that guarantee were made without full compensation and at a time when the guarantor was insolvent, it would rank as a fraudulent transfer.[322]

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317 See *In re Gentek Inc*, 328 Bankr 423, 429 (Bankr D Del 2005).

318 See, for example, 11 USC §§ 544, 546.

319 See *Stern*, 131 S Ct at 2616 (characterizing Vickie's tortious interference counterclaim as "one that simply attempts to augment the bankruptcy estate").

320 For a recent high-profile example, see generally *In re TOUSA, Inc*, 422 Bankr 783 (Bankr SD Fla 2009). The bankruptcy estate in that case brought an action to recover a guarantee and security interest that an entity transferred to a bank to secure debts of that entity's corporate parent. Id at 786–87. See also 11 USC § 548(a)(1)(B).

321 See Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors' Selective Enforcement*, 125 Yale L J 2680, 2689–92 (2015).

322 See 11 USC § 548(a)(1)(B).

An action to recover the property transferred would then be an action to void the guarantee.[323] In such cases, the claim against the estate is valid unless the fraudulent transfer action is successful, so the latter action is integral to the restructuring as viewed from the creditors'-bargain perspective. In this limited class of cases, therefore, the fraudulent transfer claim properly falls within the bankruptcy courts' power.

C. Turnover of Property

Bankruptcy law allows the trustee to bring motions to compel third parties in possession of property belonging to the estate to turn that property over.[324] The ownership of the property must be beyond dispute, or else the action is simply a state law contract, property, or tort dispute. These motions are reserved for attempts to regain possession, and Congress has deemed them to be core.[325] Courts dealing with these claims have almost universally held that demarcation to be constitutionally sound.[326] The rationale offered for this result has generally been that these actions stem from the bankruptcy, coupled with the principle that "bankruptcy jurisdiction, at its core, is *in rem*."[327] The idea is that bankruptcy courts exercise broad power over the property of the estate.[328] Because turnover motions are concerned with property for which there is no dispute

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[323] The estate might also seek to recover the value of the guarantee from the transferee or the party for whose benefit the transfer was made. See *In re TOUSA*, 422 Bankr at 857–58. See also Douglas G. Baird, *Beyond Formalism: The Reach of Fraudulent Conveyance Law*, in *Fraudulent Transfer Issues* 227–28 (American Bankruptcy Institute, 2013), archived at http://perma.cc/Y48Z-R5F2. The action to recover the value of the transfer is akin to a traditional tort claim. It is only the action to recover (that is, void) the guarantee that is integral to the restructuring.

[324] See 11 USC § 542. See also 11 USC §§ 541, 704(a)(1).

[325] See 28 USC § 157(b)(2)(E).

[326] See, for example, *In re Pali Holdings, Inc*, 488 Bankr 841, 850–51 (Bankr SDNY 2013) (stating that "the reported post-*Stern* decisions have overwhelmingly held that bankruptcy judges can constitutionally enter final judgments in turnover actions" and collecting cases); *In re Falzerano*, 686 F3d 885, 887 (8th Cir 2012); *In re McCrory*, 2011 WL 4005455, *1 (Bankr ND Ohio).

[327] *In re Pali Holdings*, 488 Bankr at 851, quoting *Central Virginia Community College v Katz*, 546 US 356, 362 (2006). See also *Wellness International*, 2015 WL 2456619 at *16 (Roberts dissenting), quoting *Katchen v Landy*, 382 US 323, 329 (1966) ("At its most basic level, bankruptcy is 'an adjudication of interests claimed in a *res*.'").

[328] See, for example, *Wellness International*, 2015 WL 2456619 at *17 (Roberts dissenting) ("Identifying property that constitutes the estate has long been a central feature of bankruptcy adjudication.").

over ownership, the argument goes, the court is merely exercising its power over the bankruptcy estate.

This reasoning is questionable for several reasons. First, the Article III question in bankruptcy is not "jurisdictional" in the strict sense in which the Court has employed that term. That term applies only to prescriptions delineating "the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)" that Article III courts can reach.[329] Bankruptcy courts unquestionably have both subject-matter and personal jurisdiction to *hear* disputes about the property of the estate.[330] Any defect in either subject-matter or personal jurisdiction would also apply to the district court. None of the Court's Article III cases concerning bankruptcy, however, has suggested that district courts also lack the authority to proceed to resolve state law questions for want of subject-matter or personal jurisdiction. Therefore, the Article III question is one not of jurisdiction but of whether the bankruptcy judge has the constitutional *power* to enter judgments concerning those disputes.[331]

Second, the in rem–jurisdiction rationale proves too much. If the adjudicatory power of the court turns on the in rem nature of the bankruptcy, one would expect that litigation to establish

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[329] *Reed Elsevier, Inc v Muchnick*, 559 US 154, 160–61 (2010), quoting *Kontrick v Ryan*, 540 US 443, 445 (2004).

[330] See 28 USC § 1334(e)(1) (granting subject-matter jurisdiction to district courts and, by reference to 28 USC § 157, bankruptcy courts); FRBP 7004(f) (permitting the exercise of personal jurisdiction to the extent that it "is consistent with the Constitution and laws of the United States").

[331] The Court, by contrast, has both employed jurisdictional terminology and relied on the idea of in rem jurisdiction when the question presented was one not of power but rather of subject-matter or personal jurisdiction. Hence, in *Marshall*, the probate exception to federal court jurisdiction was limited in terms of the res subject to state court probate action. *Marshall*, 547 US at 312. Further, in a pair of cases interrogating the ability of bankruptcy courts to entertain claims against state entities possessing state sovereign immunity, the Court has employed the conceptual tools of in rem adjudication to ascertain what was plainly a question of *jurisdiction* and not of power. See *Central Virginia Community College*, 546 US at 370 ("[C]ourts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications."); *Tennessee Student Assistance Corporation v Hood*, 541 US 440, 444–45 (2004). It is a categorical mistake to import the jurisdictional concept of authority over the res to the distinct Article III question whether a non–Article III court has power to enter a final judgment. The two questions are quite separate and demand different treatment. We therefore disagree with Professor Ralph Brubaker's suggestion that *Stern* be read to lend a constitutional imprimatur to the 1898 Act's "in rem principle" for identifying the scope of bankruptcy courts' power. See Brubaker, 86 Am Bankr L J at 173–74 (cited in note 81). Although we agree with Brubaker that parts of *Stern* can be read in this light, we are not persuaded that this is the most principled or coherent account of the Article III problem in bankruptcy.

title to property would fall within the court's remit. But actions to establish ownership of property in possession of others fall plainly outside the adjudicatory power of the courts. The Court has found that actions to "augment" the property of the estate are exactly the type over which bankruptcy courts lack adjudicatory power.[332] Focusing on the *in rem* nature of the estate begs the question of how far the bankruptcy courts' power goes in managing the *res*. In a real sense, a turnover motion is just a claim that is simply more ripe than others. The substantive claim has been resolved but the possessory interest remains unresolved.[333]

Third, and relatedly, it is insufficient to say that Congress created the turnover right as part of the Bankruptcy Code.[334] The animating concern behind the Court's bankruptcy jurisprudence is the concern that Congress will delegate an unreviewable power to non–Article III courts to alter state law rights. This is precisely what happens in a turnover motion. It would be wrong to think of a turnover motion as leaving state rights intact. They alter the status quo and extinguish a state law possessory interest.

Our theory of Article III as informed by the creditors' bargain, in contrast, provides a more nuanced and at the same time more clear-cut view of turnover motions. As an initial matter, there is nothing intrinsic to a turnover claim that implies any special need for adjudication by the centralized bankruptcy tribunal. In many cases, rather, it will be mere fortuity that a

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[332] *Stern*, 131 S Ct at 2616, quoting *Granfinanciera SA v Nordberg*, 492 US 33, 56 (1989). See also *Wellness International*, 2015 WL 2456619 at *18 (Roberts dissenting) (noting that fraudulent conveyance actions are outside the bankruptcy courts' adjudicatory power because they "depriv[e] third parties of property within their otherwise lawful possession and control").

[333] Although the majority in *Wellness International* did not address these questions, Chief Justice Roberts's dissent suggests that possession by a third party weighs heavily against bankruptcy courts' adjudicatory power. *Wellness International*, 2015 WL 2456619 at *18 (Roberts dissenting). Roberts draws a distinction between a "fraudulent conveyance claim [that] seeks assets in the hands of a third party" and "an alter ego claim [that] targets only the debtor's 'second self,'" and argues that the latter claim raises distinctive constitutional concerns because it implicates the property rights of third parties. Id (Roberts dissenting). However, Roberts does not explain why the power to find that a third party is, in fact, an alter ego raises distinct constitutional implications from the power to undo a fraudulent conveyance or to assign ownership of property. Although we agree with Roberts's focus on potential distortions of state law property interests, we diverge from his approach because we analyze the potential for distortion from the ex ante perspective of the hypothetical creditors' bargain.

[334] For a discussion of the policy aims underlying such an emphasis on the turnover right, see text accompanying note 289.

claim is one for turnover rather than one that sounds in breach of contract, trespass, or negligence. Perhaps the substance of the claim was undisputed or litigated to its completion shortly before the bankruptcy. But nothing about that fortuity makes the federalism concerns weaker or the coordination claims greater.

There will, of course, be times when property is essential to the functioning of the estate. This would not be an issue if bankruptcy could be accomplished instantaneously. But the bankruptcy process can take time. Part of bankruptcy's purpose is to prevent the push toward reorganization from destroying the debtor. But this concern is not unique to turnover motions. It may be necessary to determine title to other property that is in dispute or rule on specific performance claims under a contract to keep a debtor afloat during the pendency of the bankruptcy. The driving force behind these cases is not the source of the dispute or its ripeness but rather the need for quick resolution. Beyond that, disputes about property outside the debtor's possession, ripe or unripe, would not fall within what is integral to the restructuring of the debtor.

D. Voidable Preferences

Our theory suggests that preference actions[335] fall within the adjudicatory power of the estate in bankruptcy court. When a creditor has filed a claim, the amount of that claim cannot be known and therefore the pro rata claims on the estate simply cannot be restructured until that preference has been adjudicated and the true extent of the estate has been determined.[336]

The Court has long recognized this.[337] But at the same time, it has suggested an exception for cases in which the creditor has not filed a claim against the estate.[338] At first blush, this seems consistent with our account of bankruptcy courts' power. The

[335] See Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand L Rev 713, 713 (1985) (describing preference actions as one of the trustee's "powers to avoid prebankruptcy transfers made by the now bankrupt debtor").

[336] See *Katchen v Landy*, 382 US 323, 330–31 (1966) (stating that, where a bankruptcy trustee has raised a preference objection to a creditor's claim, that claim, "[u]navoidably and by the very terms of the [Bankruptcy] Act . . . can neither be allowed nor disallowed until the preference matter is adjudicated").

[337] See, for example, id at 333–34 (noting that, as a matter of statutory construction, "the issue of preference may be summarily adjudicated absent an affirmative demand for surrender of the preference, [and] it can hardly be doubted that there is also summary jurisdiction to order the return of the preference").

[338] See *Stern*, 131 S Ct at 2616. See also *Granfinanciera*, 492 US at 58 (relying on the same distinction for Seventh Amendment purposes).

Court's distinction, however, ignores the implications of a preference action and, as such, is unfounded. If the debtor makes a payment to a creditor on the eve of bankruptcy, that payment is a voidable preference if it allows the creditor a better recovery than she would have received in a liquidation.[339] If the estate prevails on the preference action, the creditor must return the eve-of-bankruptcy payment. But, without other evidence of bad faith, that creditor now has a claim against the estate as if the preferential payment had never been made.[340] Thus, a creditor who has never filed a claim against the estate could, upon losing a preference action, file a claim. If the preferential transfer were for the full amount owed to the creditor, there would be no reason for the creditor to file a claim in the first place. Short of a commitment by that creditor not to file a claim even if she were to lose the preference action, it is hard to see how a preference action, even against a creditor that has not filed a claim, can be viewed as one *not* impacting the restructuring of the pro rata claims against the estate. The Court's exception to bankruptcy court adjudication of voidable preference actions is therefore without justification.

The justification for the Court's view of these preference claims in *Stern* and earlier cases[341] may be animated by the notion of in rem power as the source of the bankruptcy courts' adjudicatory authority. As we have suggested above,[342] defining the constitutional boundaries of non–Article III tribunals by reference to property before the tribunal lacks both a principled foundation and workable boundaries. Moreover, the conflict between the in rem view of these claims and the results that arise from the Court's "stems from" test further highlights the need for developing a single workable model for defining the adjudicatory power of the bankruptcy courts—one that is consistent with both federalism-minded constitutional concerns and also the core principles animating the creation of the bankruptcy system in the first place.

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339 See 11 USC § 547.

340 See 11 USC § 502(h).

341 See, for example, *Granfinanciera*, 492 US at 58; *Schoenthal v Irving Trust Co*, 287 US 92, 97 (1932).

342 See text accompanying notes 329–32.

E. Consent

The implications of our analysis on the question whether parties can consent to the adjudicatory power of the court should be fairly obvious at this point, as well as consonant with the Court's holding in *Wellness International*. The key point is that an adjudication in a non–Article III court by consent of the relevant rights holders poses no threat of distorting state law rights in the way that other excessive exercises of bankruptcy power might. Nor is there any categorical reason to view the private exercise of an option to exit Article III with suspicion.[343] In the absence of bankruptcy, parties are of course always free to consent to have disputes adjudicated by binding arbitration.[344] Moreover, as the *Wellness International* Court emphasized, parties in the administrative agency context have the ability to waive Article III objections under many circumstances.[345] The preservation of that right in the bankruptcy proceeding disrupts no state law rights and creates no threat to the preservation of going-concern value.

The creditors'-bargain theory provides no reason to distinguish between waiver and forfeiture. Prior to the 2015 *Wellness International* opinion, the United States Court of Appeals for the Seventh Circuit had reached contrary rulings regarding the validity of express consent and forfeiture.[346] But there is no reason

[343] We recognize that parties might deploy consent strategically, but we suggest that consent must be mutual. The party who will benefit from access to an Article III court can thus veto the change of venue.

[344] See 9 USC § 2 (making agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). The Court has repeatedly expressed its strong approval of arbitration, even in the teeth of state law resistance. See, for example, *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740, 1747 (2011) (determining that Congress intended to broadly preempt state law rules limiting arbitration).

[345] *Wellness International*, 2015 WL 2456619 at *7–8. The leading case here is *Schor*, which holds that a litigant can both waive and forfeit its entitlement to Article III review. *Schor*, 478 US at 849. However, the *Schor* Court also identified a distinct interest in federal courts' role in "preventing the encroachment or aggrandizement of one branch at the expense of the other." Id at 850 (quotation marks omitted). This anti-aggrandizement interest and the concomitant compulsion to protect "the institutional integrity of the Judicial Branch" were not subject to waiver. Id at 851–53. Applying that reasoning in the context of a proceeding in bankruptcy court generates the same result as that reached in the main text: resolution of a claim by mutual consent of the parties generates neither risk of distortion to state court process nor inconsistency with the preservation of state-created interests.

[346] Compare *Wellness International*, 727 F3d at 771 (concluding that a litigant may not waive a constitutional objection to a bankruptcy judge's authority to enter final judgment in a core proceeding), with *Peterson v Somers Dublin Ltd*, 729 F3d 741, 746–47

that the creditors would have hypothetically bargained ex ante for differential treatment of express and implied (let alone negligent) waivers of access to Article III.[347] To the contrary, a rule that treats both express and implied waivers of Article III adjudication as valid and binding may be preferable because it reduces litigation friction by demanding a clear statement that one party objects to the bankruptcy forum before unraveling the outcomes generated by that tribunal. The reasons for this preference, nevertheless, are not unique to the creditors' bargain but are instead implicit in any system of optional jurisdiction.[348]

We can imagine an objection to our analysis of consent. Some circuit courts have suggested that it is always improper for private parties to convey by consent not only a power of adjudication but also the power to enter an enforceable judgment to a non–Article III judge.[349] Even if arbitrators exercise the first authority, they lack the second power to impose final judgment, which is limited to Article III actors. The account of Article III concerns that we have developed based on the creditors' bargain, however, implies that the presence of party consent mitigates the federalism and separation of powers concerns that animated the Court in *Northern Pipeline* and *Stern*. Simply put, the ability of all parties to consent after the fact to bankruptcy procedure does not create a risk of distorting state-created rights or state

(7th Cir 2013) (clarifying that *Wellness International* involved a forfeiture rather than "express and mutual waiver" and finding that adjudication by the bankruptcy judge was permissible in the case of such a waiver).

347 The Court in *Wellness International* reached an outcome consistent with this analysis, albeit for different reasons, when it reasoned that consent could be implied. *Wellness International*, 2015 WL 2456619 at *12 ("Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express.").

348 By contrast, a rule that waivers are not valid in the absence of express consent might generate wasteful strategic behavior by parties that entered bankruptcy adjudication without clearly objecting and then proceeded to contest jurisdiction only once their opponents had prevailed. A similar dynamic of wasteful strategic action occurred in *Schor* and may have influenced the Court's decision to allow both implied and express waivers of Article III adjudication in the administrative-law context. *Schor*, 478 US at 849. In its analysis of consent to adjudication before a magistrate judge, the Court has also declined to distinguish between waiver and forfeiture out of concern over strategic behavior by litigants. See *Roell v Withrow*, 538 US 580, 590 (2003):

> We think the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared. . . . Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority.

349 See, for example, *Waldman v Stone*, 698 F3d 910, 917, 921 (6th Cir 2012), cert denied, 133 S Ct 1604 (2013).

procedures via arbitrage. Attention to the creditors' bargain suggests that there is no reason to believe that ex post consent induces other parties to reallocate state law rights or otherwise act strategically. In the absence of any potential for interjurisdictional distortion, there is no cause for mandating Article III involvement.[350]

F. Individual Bankruptcy

The above analysis has been presented in the context of corporate reorganization, as opposed to individual bankruptcy. We have proceeded in that manner because that is the environment in which the creditors'-bargain theory has had the most influence and development. Our analysis is not, however, limited to that context.[351]

In its pure form, the creditors'-bargain theory is not directly applicable to individual bankruptcy. The substantive policy of discharging individual debt is driven by larger concerns of general social welfare.[352] Creditors would not necessarily agree ex ante to the concept of discharge. Rather, the discharge stems from a broader view of stakeholders and considers society's interest in maintaining the productive capacity of its members. At the same time, creditors in the individual-bankruptcy context still face potential common-pool and coordination problems stemming from their overlapping claims to the same assets. And the threat of conflicting judgments from different jurisdictions remains. That is, the procedural concerns at the heart of a corporate reorganization are equally present when an individual debtor enters bankruptcy with multiple creditors. These

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350 This analysis of consent has limitations for Article III purposes. There are two characteristics of the delegation of adjudicatory power here that avoid potentially thorny problems. First, consent does not implicate separation of powers concerns by empowering another branch of government. See text accompanying notes 175–77. If the delegation is to a tribunal appointed by the legislative or executive branch—as was the case under the Bankruptcy Act of 1978, invalidated in *Northern Pipeline*—these concerns might merit a different outcome. Second, the possibility of consent here does not introduce distortions of the parties' incentives. Imagine a legislative scheme that gave asymmetrical tax breaks to parties that consented to non–Article III adjudication; such a scheme might pose a risk of distorting state law, thereby implicating Article III concerns.

351 Although the individual right of discharge is a substantive policy that distinguishes corporate reorganizations from individual bankruptcies, the majority of bankruptcy law is, as Professor Jackson notes, "concerned with . . . providing a compulsory and collective forum for satisfying the claims of creditors"—a forum that is as relevant for individuals as it is for corporations. Jackson, *Logic and Limits* at 225–26 (cited in note 27).

352 See Jackson, 98 Harv L Rev at 1395 n 5 (cited in note 36).

concerns drive the need for a centralized bankruptcy tribunal and should be the centerpiece for resolving the Article III problem.

At least to the extent that the question concerns the procedural bounds of bankruptcy, there is no reason to limit the resolving power of the creditors'-bargain theory of bankruptcy power to the mercantile, corporate context in which it originated. The theory works equally well as an effectual limiting principle in the individual-bankruptcy context.

CONCLUSION

This Article offers a new theoretical foundation for understanding the Article III problem in bankruptcy. To date, that problem has been the object of ample litigation but has not yet received any cogent theoretical resolution. The relevant opinions have what one circuit court, in a nice euphemism, has called "a potluck quality."[353] Lacking any foundational account of precisely why bankruptcy adjudication offends Article III, that is, the Supreme Court skitters hither and thither unpredictably.

To mitigate the unstable and unpredictable jurisdiction that has ensued, this Article proposes that the metes and bounds of bankruptcy power should be identified by taking the ex ante perspective of creditors seeking to maximize their returns and correspondingly minimize the wasteful dissipation of private rights. This creditors'-bargain theory—in addition to being efficient and broadly accepted among bankruptcy scholars—has the singular advantage of cohering with the precise set of harms to rights and interests that the Court has identified as raising Article III concerns. We suggest that, in the first instance, these concerns sound in a federalism register but are best resolved through the separation of powers doctrine. In particular, we suggest that centralized bankruptcy adjudication brings with it both the promise of preserving state law rights and the risk of distorting those rights. Recognizing Article III tribunals as a safeguard against state law distortion, we advocate a rule that delegates cases to Article III tribunals unless the interest of preserving value dictates otherwise. The cases that fall into the preservative carve out for bankruptcy court adjudication will, consistent with the creditors' bargain, be those necessary to resolve and coordinate the collective claims that the creditors have

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[353] *Waldman v Stone*, 698 F3d 910, 918 (6th Cir 2012).

against the estate. The result is a coherent account of Article III's operation in bankruptcy that not only promotes constitutional goals but also resonates with commonly held understandings of efficiency and social welfare.